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The unknowing self-defender – intuitions and theorization

1 Introduction

1.1 Preliminary Remarks

The Nordic legal systems have much in common and the same can be said of the main tenets of Nordic criminal justice policies – these are the preconditions for a smooth cooperation in criminal matters that has been one of the success stories of Nordic cooperation. But as Dan Frände has shown us,[1] the legal systems of the Nordic countries, surprisingly, do display some quite remarkable differences when it comes to their understandings of 'the concept of crime'[2]. Differences on the conceptual level lead seldom to differences in practical outcomes.[3] However, on one question concerning self-defence, the differences in the concept of crime have given rise to completely different results under Finnish and Swedish law, even though the respective provision on self-defence in these legal systems are on its face rather similar: this is the question of the 'unknowing self-defender', *i.e.* a person P who perpetrates a *prima facie* unlawful act against V, without knowing that, at the time of his/her act, V is about to attack P, and P would have been entitled to use force against V in self-defence. What is remarkable about this difference in outcomes is that, when the present author speaks to academic colleagues and practitioners in Finland and Sweden, they invariably come up with the answer which to them appear self-evident and are often quite surprised that the outcome is the opposite in the other legal system. This gives the present author a reason to investigate into the Finnish and Swedish law and see why these legal systems can produce so different results that both appear to be self-evident. This investigation has to be expanded soon after its start as it is not possible to understand the Finnish law without looking into the German law in this area. But one cannot stop at that, the research soon

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1 DAN FRÄNDE, 'Mot ett enhetligt nordiskt brottsbegrepp?', in *Festskrift till Suzanne Wennberg*, Stockholm: Norstedts 2009, 75–90, at 76

2 The 'concept of crime' (*cf.* Sw. *brottsbegrepp* and Ger. *Verbrechensbegriff*) is a technical term meaning the general structure defining what conditions must be satisfied before a person may be attributed criminal responsibility/liability. In this paper, 'responsibility' and 'liability' are used interchangeably.

3 This is not to say that different outcomes never arise, or that the differences are always small; see the illustrative example on a Nordic league of robbers of security transports in FRÄNDE 2009 (note 1 *supra*) 68.

reviews that the debate on this question is vibrant within the context of English law, and the English law cannot be ignored. In the end, this paper ends up examining the solution to the unknowing self-defender problem in Finnish, Swedish, German and English law. For each of these jurisdictions, the concept of crime will be examined as a preliminary to the discussion of the law of self-defence. After the examination of the different legal systems some concluding remarks will be offered that look at the findings against the background of our intuitions and the link between intuitions and theorization.

To animate the conflict between theory and intuition, an example that the present author has come by in the research process can be cited here. This is the real-life example of Motti Ashkenazi taken from the popular writing of Robinson.[4] Ashkenazi was walking on a crowded Tel Aviv beach when he saw an unattended backpack. He took the backpack when no one was watching, presumably with the intention to steal. He opened the backpack when he came to a run-down building and found a clock with wires connected to a cookie tin, with loose nails surrounding the contraption. Realizing that this was a terrorist bomb Ashkenazi called the police and the bomb was successfully neutralized. It was found out later that the bomb was packed with more than 3 kg of explosives and would have killed many in a major terrorist attack if it had exploded on the crowded beach. The question is whether one would convict Ashkenazi of theft, given that his act had most certainly prevented a major disaster involving the loss of life. We shall return to Ashkenazi in the concluding remarks to find out what actually happened to him and how 'ordinary' people think about the culpability of Ashkenazi.

1.2 A Standard Example

In order to compare how the problem of the unknowing self-defender is solved in the different legal systems examined in this paper, the presentation of each legal system will conclude with an application of the law to the same set of 'facts' presented in the standard example to follow. P (the perpetrator) is used to denote the person who has committed a *prima facie* unlawful act and may potentially be charged for that offence, and in which case P may potentially be exculpated if there is a legal rule on justified self-defence to permit the exculpation. P is the perpetrator in his capacity as the author of the *prima facie* unlawful act in question and P is called the 'self-defender' as a convenient shorthand in the sense described in subsection 1.1 above. V (the victim) is used to denote the person to whom P's unlawful

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[4] PAUL H. ROBINSON, *Would You Convict? Seventeen Cases that Challenged the Law*, New York: New York University Press 1999, 123–129. The example deals with an unknown necessity rather than an unknown self-defence situation, but the logic is the same. The Ashkenazi case could have been used as the standard example throughout this paper instead of the hypothetical one presented in sub-section 1.2. However, as the overwhelming part of the discussion in this area is concerned with self-defence rather than necessity, a standard example involving self-defence is deemed to be more appropriate.

act is directed, *i.e.* the victim of the *prima facie* unlawful act by P. In the example, this 'victim' V would be the attacker had he not been killed first by P.

Let V be someone who has seriously aggrieved P in some way. P is deeply hurt. P thoroughly hates V, and P has resolved to take revenge if the opportunity arises, using lethal force if need be. One evening P sees from his room that V is sitting in a car at the car park at the motel where P is staying. P has a rifle with him and not wanting to miss the chance to end V's life, P fires a shot at V from his room. V is killed instantly by P's single shot. Unbeknownst to P, a mafia boss has hired V to kill P. V is armed with guns and projectile weapons and has been following P. V has just worked out in which room P is staying and is about to launch a grenade into P's room which certainly would have resulted in P's death.

Let us assume that there is no doubt about P's intention to kill V at the time P pulls the trigger. Let us also assume that in all of the legal systems examined here, using lethal force to counter an imminent attack on one's own life is not manifestly disproportionate and had P known that V was about to kill him, he would have had the right to kill V in order to save his own life. The crucial point in this example is that P does not know what V is about to do.

2 Finnish law

The Finnish Penal Code (19.12.1889/39) (Sw. *strafflagen*, abbr. SL) underwent a major revision in the beginning of this millennium when many general principles of criminal law were codified,[5] with the result that Finland was then the Nordic country with the most sophisticated general part of the criminal law having a statutory basis[6]. But as Frände has pointed out, a penal code is not a textbook and each criminal law scholar must develop a structure to organize the different preconditions for crime.[7] In an overview of Finnish criminal law written in English, Utriainen describes the concept of crime as being analysed in Finnish law in terms of three levels: 'unlawfulness, correspondence with the statutory definition and guilt'.[8] There is no indication in this description whether these different levels are to be taken in order, and in the specific order as these levels are presented in the description. If this is the case, one would first determine the unlawfulness of an act, before continuing to examine the correspondence with a statutory definition and the question of guilt. But as the description is followed by the comment that '[w]here the act fulfils the essential elements set out in the statutory definition of an offence, its

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5 Through Act 13.6.2003/515, which entered into force on 1.1.2004.

6 Norway followed suit soon thereafter with its new Penal Code (20.5.2005 n° 28) also containing a sophisticated general part, but which, however, only entered into force on 1.10.2015.

7 FRÄNDE 2009 (note 1 *supra*) 76.

8 TERTTU UTRIAINEN, monograph entitled *Finland*, being part of the *International Encyclopaedia for Criminal Law*, F. Verbruggen & V. Franssen (eds.), Kluwer Law Online, updated as of May 2015, 205.

unlawfulness is presumed',[9] it is reasonable to assume that fulfilment of the statutory definition is considered at a more basic level than unlawfulness in this three-tiered conception of crime. This latter understanding is also in conformity with the description given by the Government in its legislative proposal on the reform of the general part of criminal law:

> The conditions for ascription of and exclusion from responsibility is often presented in the form of a three-tiered model: firstly, the question of correspondence with an offence definition [Sw. *brottsbeskrivningsenlighet*] is determined; secondly, the unlawfulness [Sw. *rättsstridighet*] of the conduct is examined; and thirdly, a position is taken on the guilt [Sw. *skuld*] of the perpetrator.[10]

The concept of crime as developed by Frände also follows this basic three-tiered model but Frände's categorisation is different from that given in SL,[11] and his concept of crime cannot directly be deduced from SL, the *travaux préliminaires* or the case law[12]. Frände has also put his readers on alert that although the order 'correspondence with offence definition—unlawfulness—guilt' in which the preconditions of crime is analysed is common ground in the criminal law discourse, there are differences in what exactly are to be placed in which tier of the three-tiered structure and that Frände's concept of crime differs in this respect from some of the models presented in Finnish doctrine.[13] In the description of Finnish law to follow, the point of departure will be Frände's concept of crime, which shows a great affinity with the German concept of crime to be dealt with in section 4 below.[14]

The first step in the determination of criminal responsibility is the examination whether a conduct corresponds with an offence definition. What is included in this examination is dependent on what elements there are in a specific offence definition, and these typically involve questions concerning the act or omission in question, causality, objective fault in risk-taking,[15] intention and negligence. This step comprises thus an examination of both the objective and the subjective elements of

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9 UTRIAINEN 2015 (*supra* note 8), 205.

10 RP 44/2002 rd Regeringens proposition till Riksdagen med förslag till revidering av lagstiftningen om straffrättens allmänna läror, at 9 (the author's own translation).

11 Frände mentions therefore that if SL were to follow the concept of crime he adopts, 'capacity for criminal responsibility' (Sw. *tillräknelighet*) would have been placed under ch. 4 SL on grounds for excluding criminal responsibility rather than under ch. 3 SL on the general preconditions for criminal responsibility. See DAN FRÄNDE, *Allmän straffrätt*, 4. uppl., Helsinki: Helsingin yliopiston oikeustieteellinen tiedekunta 2012, note 17 at 15.

12 FRÄNDE 2012 (note 11 *supra*) 7.

13 FRÄNDE 2012 (note 11 *supra*) 8.

14 The description is based on the text in FRÄNDE 2012 (note 11 *supra*) 7–11; no further references are given in the next paragraph of this paper.

15 It is very difficult to translate into English the Swedish term '*gärningsculpa*', which corresponds to the German '*objektive Zurechnung*'. For more on this concept, see DAN FRÄNDE, 'Gärningsculpa och "objektive Zurechnung" – några jämförelser', in *Flores juris et legum: Festskrift till Nils Jareborg*, Uppsala: Iustus förlag 2002, 237–250.

the conduct.[16] If the examination shows that there is a correspondence between the conduct and the offence definition, there is a *prima facie* unlawful act. The next step is to test whether there are grounds that would justify this *prima facie* unlawful conduct, thus rendering it lawful. According to Frände, Finnish law accepts self-defence[17] and necessity[18] as valid justifications. Lawful use of force is another justification provided for in SL.[19] The third step in the determination is concerned with the guilt of the perpetrator, *i.e.* whether he or she shall be blamed for the unlawful act in question. The most important excuses mentioned by Frände that would render the perpetrator not blameworthy are the lack of criminal capacity due to the perpetrator's age[20] or mental condition[21], some form of ignorance of law[22] and to some degree the excessive use of force in self-defence[23]. If no valid excuse can be found, the perpetrator can be held criminally responsible for the conduct. Whether he or she is also liable to be punished depends on the other preconditions for punishment that need not be discussed in the present context.

Self-defence is a general ground of justification under Finnish law and is now codified in ch. 4 sec. 4 SL. Para. 1 of this provision defines self-defence as follows:[24]

> 4 § Self-defence
> An act that is necessary to defend against an ongoing or imminent unlawful attack is lawful as self-defence, unless the act manifestly exceeds what in an overall assessment is to be deemed justifiable, taking into account the nature and strength of the attack, the identity of the defender and the attacker and the other circumstances.

The law states explicitly that an act of self-defence is lawful when certain conditions are met. Firstly, the act of self-defence must be necessary in order to defend against an ongoing or imminent unlawful attack. Secondly, the act of self-defence must not manifestly exceed what is justifiable. The legislation provides some indication of

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16 Frände points out that in earlier Finnish doctrine intention and negligence was treated under the heading of guilt rather than as part of the determination of the existence of an unlawful conduct – see FRÄNDE 2012 (note 11 *supra*) 10 and note 23 at 16.

17 Sw. *nödvärn*, ch. 4 sec. 4 SL.

18 Sw. *nödtillstånd*, ch. 4 sec. 5 SL.

19 See ch. 4 sec. 6 SL.

20 See ch. 3 sec. 4 para. 1 SL. The age of criminal capacity is 15.

21 See ch. 3 sec. 4 para. 2 SL.

22 Sw. *förbudsvillfarelse*, ch. 4 sec. 2 SL.

23 See ch. 4 sec. 4 para. 2 SL.

24 The English translation is taken from UTRIAINEN 2015 (note 8 *supra*) 76. The provision in Swedish reads as follows: 'En försvarshandling som är nödvändig för att avvärja ett påbörjat eller överhängande obehörigt angrepp är tillåten som nödvärn, om inte handlingen uppenbart överskrider det som utifrån en helhetsbedömning skall anses försvarligt. Vid bedömningen skall beaktas angreppets art och styrka, försvararens och angriparens person samt övriga omständigheter.'

what should be taken into account when assessing what force used is deemed justifiable, but the interpretation of the different concepts used in the provision are left to the courts and legal science.

There is a general provision in ch. 4 sec. 3 SL, which is applicable to cases of putative justifications. In the case of self-defence, the perpetrator who has acted in the *mistaken* belief that there is an ongoing or imminent unlawful attack cannot, pursuant to the said provision, be punished for an intentional offence. This provision does not, however, exclude responsibility for an offence that has negligence as its basis of criminal responsibility.[25] The SL does not, however, contain a provision that regulates the availability of self-defence justification when the 'self-defender' is not mistaken, but rather is actually ignorant or unaware of the self-defence situation altogether. This issue has, however, been discussed, albeit briefly, by Frände, who maintains that there is a requirement in ch. 4 sec. 4 SL that the act of self-defence be undertaken for the purpose of defending oneself.[26] A perpetrator who is not aware of the self-defence situation cannot possibly have acted for the purpose of defending him- or herself. Absence of this reason for action would set the self-defence justification out of play. However, Frände is critical of this requirement of a free-standing self-defence purpose. He argues that the absence of a self-defence purpose is practically impossible to prove and that it is more reasonable to require only awareness of the situation, leaving aside the perpetrator's reasons for action altogether.[27] Thus, whether one follows the view that a self-defence purpose is required, or Frände's suggestion that an awareness of the situation would suffice, the operation of the self-defence justification would require some form of awareness of the self-defence situation.

To re-connect to the standard example of this paper[28]: Under Finnish law, by shooting and killing V out of hatred, P satisfies the objective element of manslaughter or murder[29]. P carries out the shooting with full intention, thereby also fulfilling the subjective element of manslaughter or murder (intent). P has committed a *prima facie* unlawful act. But the act would not be unlawful if P has acted in self-defence. Finnish law requires that P be aware of the self-defence situation, which P is not, when self-defence is claimed as an exculpatory justification. P's act remains, therefore, unlawful. Whether P will be held criminally responsible depends on whether there exists excuses, which would render P's unlawful act not blameworthy.

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25 On putative justifications in general under Finnish law, see UTRIAINEN 2015 (note 8 *supra*) 78 and FRÄNDE 2012 (note 11 *supra*) 190–193.

26 FRÄNDE 2012 (note 11 *supra*) 157.

27 *ibid.*

28 See section 1.2 *supra*.

29 See ch. 21 sec. 1 SL for 'manslaughter' (Sw. *dråp*) and ch. 21 sec. 2 SL for 'murder' (Sw. *mord*).

3 Swedish law

Just like Finland, the concept of crime is not defined explicitly in the Swedish Penal Code (1962:700). Admittedly, some provisions deal with matters that belong to the general part of criminal law, but they are scattered throughout the Code[30] and the statutory text itself does not prescribe an exact order in which different elements of crimes are to be considered in the determination of criminal responsibility. So even in Sweden, the elaboration of the concept of crime is the task of the courts and legal science. In an article written in 2009,[31] Frände was able to discern two different schools in Sweden with regard to the construction of the concept of crime: (1) a basic division between objective and subjective elements of crime together with grounds for excluding criminal responsibility/liability that may either be justificatory or excusatory[32] and (2) a division between unlawful conduct (Sw. *otillåten gärning*) and personal guilt (Sw. *personlig culpa*) where justifications (Sw. *rättfärdigande omständigheter*) and excuses (Sw. *ursäktande omständigheter*) are treated as different types of grounds excluding criminal responsibility/liability[33]. With the passage of time, the differences between these two schools have diminished,[34] and with the use by the Supreme Court of a structure and terminology reflecting the latter school of concept of crime, it is safe to say that the predominant concept of crime in Swedish law is a model based on the distinction between unlawful conduct and personal guilt. But whereas Frände has described this model as comprising two groups with different parts, it may be more instructive to say – having regard to the

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30 These provisions can be found in the following chapters of the Penal Code:
ch. 1 – the requirement of intent unless other stated and the effect of voluntary intoxication (sec. 2) and the exclusion of punishment for offenders who committed the crime when under 15 years of age (sec. 6);
ch. 2 – the criminal jurisdiction of Swedish courts and related matters;
ch. 23 – on *inter alia* attempts (Sw. *försök*) (sec. 1), preparation (Sw. *förberedelse*) for and conspiracy (Sw. *stämpling*) to commit crime (sec. 2) and different modes of participation in crime (Sw. *medverkan*), e.g. as a perpetrator (Sw. *gärningsman*), co-perpetrator (Sw. *medgärningsman*), instigator (Sw. *anstiftare*) or an accomplice (Sw. *medhjälpare*) (sec. 4);
ch. 24 – on *inter alia* self-defence (Sw. *nödvärn*) (sec. 1), lawful arrest (sec. 2), military necessity to avoid mutiny etc. (sec. 3), necessity (Sw. *nöd*) (sec. 4), excessive self-defence *etc.* (Sw. *nödvärnsexcess m.m.*) (sec. 6), consent (sec. 7), superior order (sec. 8) and some mistake of law (Sw. *straffrättsvillfarelse*) (sec. 9)

31 FRÄNDE 2009 (note 7 *supra*) 77.

32 This school is attributed to Madeleine Leijonhufvud and Suzanne Wennberg, with reference to the then latest edition of MADELEINE LEIJONHUFVUD & SUZANNE WENNBERG, *Straffansvar*, 7. uppl., Stockholm: Norstedts 2005.

33 This school is attributed to Nils Jareborg, with reference to NILS JAREBORG, 'Der schwedische Verbrechensbegriff', in *Festschrift für Claus Roxin*, Berlin: Walter de Gruyter 2001, 1447–1455. At the time of Frände's writing, the fullest exposition of Jareborg's theory was available in NILS JAREBORG, *Allmän kriminalrätt*, Uppsala: Iustus 2001.

34 See, in particular, the latest edition of Leijonhufvud & Wennberg's textbook: MADELEINE LEIJONHUFVUD, SUZANNE WENNBERG & JACK ÅGREN, Straffansvar, 9. uppl., Stockholm: Wolters Kluwer 2015.

steps gone through in the typical reasoning given by the Supreme Court – that the model comprises four parts, which may be put into two groups.[35] The reason why it is more instructive to say that the model comprises four parts is, as will be shown later, that these parts are to be assessed in a particular order – the non-fulfilment of the conditions required at one level would lead to the conclusion that no criminal responsibility/liability arises, without one having the need to consider the next level(s). This is also the way in which this model is presented in the latest edition of the standard textbook on the general part of criminal law to which the courts frequently refer.[36] Two of the authors of this textbook have conveniently presented the model in a contribution written in English, as follows:

> A. An unlawful act
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> I. Criminalised act (or omission); the perpetrator must have performed an act which falls within the definition of an offence described in law …
>
> II. The act must not be justified; a justificatory defence that makes the act lawful (for example self-defence, necessity, consent etc.) cannot be applicable.
>
> B. Personal responsibility for the unlawful act
>
> III. Fault element; the perpetrator must have committed the act intentionally or, in cases where negligence is explicitly criminalised, in a negligent manner according to the relevant description.
>
> IV. The person should not have an excusatory defence (for example an excusable mistake of law).[37]

Self-defence appears, then, as a justification at level II, as part of the determination whether an unlawful conduct exists and before considerations are given to the personal guilt of the perpetrator. The statutory basis for the justification of self-defence is found in ch. 24 sec. 1 of the Penal Code, which reads as follows:

> Sec. 1. An act committed by a person in self-defence constitutes a crime only if, having regard to the nature of the aggression, the importance of its object and the circumstances in general, it is clearly unjustifiable.
>
> [para. 2] A right to act in self-defence exists against,
>
> 1. an initiated or imminent criminal attack on a person or property,
> 2. a person who violently or by the threat of violence or in some other way obstructs the repossession of property when caught in the act,

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35 There is no need to discuss here a possible third group comprising preconditions for punishment (Sw. *straffbarhetsbetingelser*) as opposed to criminal responsibility/liability.

36 PETTER ASP, MAGNUS ULVÄNG & NILS JAREBORG, *Kriminalrättens grunder*, 2. uppl., Uppsala: Iustus 2013.

37 PETTER ASP & MAGNUS ULVÄNG, chapter on Sweden in *General Defences in Criminal Law: Domestic and Comparative Perspectives*, Alan Reed & Michael Bohlander (eds.), Farnham, Surrey: Ashgate 2014, 301–314, at 301. This four-tiered model is used in the Supreme Court's decision in NJA 2012 s. 45; but in a more recent case (NJA 2016 s. 763) the steps followed in the Supreme Court's reasoning are different in that the Court examined the issues in the order I–III–II–IV.

> 3. a person who has unlawfully forced or is attempting to force entry into a room, house, yard or vessel, or
> 4. a person who refuses to leave a dwelling when ordered to do so.[38]

It is initiated or imminent criminal attack under point 1 under para. 2 that is the most frequently argued for in practice and therefore also most discussed, but point 2 is the situation actualized in a case from the Supreme Court, which will be discussed presently. The right to exercise self-defence is triggered by the existence of a self-defence situation enumerated in sec. 1 para. 2. It is the objective factual circumstances that are at issue here, *e.g.* that there actually is an ongoing or imminent criminal attack. The next step is to assess whether the force used in self-defence is clearly unjustifiable, which is also an objective test and the statutory provision has pointed specifically to the nature of the aggression, the importance of its object and the circumstances in general as factors that the courts should take into consideration. Factors relating to the personal circumstances of the perpetrator are left out at this stage of the assessment. Following this structure, if it can be shown that a self-defence situation exists objectively, and the force used to avert the attack is not manifestly unjustifiable, then the act on the part of the (albeit unknowing) self-defender is not unlawful; no further consideration of personal guilt is necessary.

In a case decided by the Supreme Court,[39] V had stolen some CDs from P's car and was on his way from the crime scene when he was caught up by P, who tackled V and forced him to the ground and caused thereby injuries to V. If P had pursued V while V was caught *in flagrante delicto* or if P had tackled V in the course of repossessing stolen property, P would surely be justified to use a certain amount of force pursuant to ch. 24 sec. 1 para. 2 point 2 of the Penal Code. But in this case, when P started to pursue and tackle V, he did not know that V had stolen property from his car. So, the first question for the Supreme Court to answer is whether the fact that P is unaware of the self-defence situation precludes self-defence as a justification for P's act of injuring V. The Supreme Court answered the question and did it as if it were so self-evident that no elaboration was needed. The Supreme Court's 'reasoning' is limited to the following declaration:

> Since self-defence pursuant to the Penal Code is an objective ground for excluding criminal responsibility, P's subjective belief or understanding has no

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[38] English translation taken from ASP & ULVÄNG 2014 (note 37 *supra*) 304. The Swedish text reads as follows:
1 § En gärning som någon begår i nödvärn utgör brott endast om den med hänsyn till angreppets beskaffenhet, det angripnas betydelse och omständigheterna i övrigt är uppenbart oförsvarlig.
II Rätt till nödvärn föreligger mot
1. ett påbörjat eller överhängande brottsligt angrepp på person eller egendom,
2. den som med våld eller hot om våld eller på annat sätt hindrar att egendom återtas på bar gärning,
3. den som olovligen trängt in i eller försöker tränga in i rum, hus, gård eller fartyg, eller
4. den som vägrar att lämna en bostad efter tillsägelse.

[39] NJA 1994 s. 48.

> relevance in the present context; what is significant is that V … has taken property from P's car and that V actually was in possession of such property, namely the CD discs.[40]

This is also the position taken by Asp and Ulväng, when they wrote that 'as regards justification, there is no subjective requirement whatsoever'.[41] They continue:

> Also a person who is unaware of the presence of justifying circumstances at the time of his or her act may invoke such circumstances at a later point (and even if they are not invoked by the defendant, such circumstances should be considered by the prosecutor if the preliminary investigation shows that such circumstances may have applied). For example, if A throws a stone at a window in an act of vandalism and thereby happens to rescue B who is on the other side of the window and just about to be poisoned by a gas leak in the room, then A's act can (or rather will) be justified with reference to the rules on necessity…[42]

Unlike the Supreme Court in its judgment mentioned above, Asp and Ulväng have provided some explanation as to why the unknowing self-defender should not be held criminally responsible:

> The reason for accepting that justification exists in such cases has nothing to do with A acting for the right reason (in the above example [*i.e.* the stone-throwing example] it is obvious that A was not acting for the right reason). The idea is rather that if there is a justification (in reality, objectively) then there is insufficient reason for the state to invoke the criminal justice system. The harm or the negative value brought about by the act is, on balance, not such as is required to trigger criminal law. In a sense one can more or less say that the presence of a justification is on the same footing as the absence of a prerequisite required under the relevant specific offence description.[43]

The reasons offered by Asp and Ulväng ought to be taken seriously but the terse declaration offered in the judgment of the Supreme Court mentioned above suggests that one only follows a template and there is no indication that judicial practice has been based on reflections on the nature of criminal responsibility; perhaps future judgments, if the question arises, may be more pedagogical in this respect, as the Supreme Court seems to have adopted a new approach in the writing-style of their opinions.

To re-connect to the example in section 1.2 above: By shooting and killing V out of hatred, P satisfies the objective element of murder[44]. P carries out the shooting with full intention, thereby fulfilling the subjective element of murder (intent). P

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40 NJA 1994 s. 48, at p. 57, translation into English by the author, names substituted.

41 ASP & ULVÄNG 2014 (note 37 *supra*) 302.

42 *ibid.*

43 *ibid.*

44 For Sweden: 'murder' (Sw. *mord*) ch. 3 sec. 1 BrB, or at least 'manslaughter' (Sw. *dråp*) ch. 3 sec. 2 BrB.

has committed a *prima facie* unlawful act. But the act would not be unlawful if P has acted in self-defence. Swedish law requires that a self-defence situation exists in the objective sense. If the force used in self-defence is not manifestly unjustified, a justification exists rendering P's act not unlawful. Since an unlawful act is a prerequisite for criminal responsibility, P cannot be held criminally responsible. P's non-awareness of the self-defence situation is totally irrelevant.

4 German Law

As mentioned above, the Finnish concept of crime is based very much on German criminal law theory, so a Finnish criminal law scholar should find him- or herself at home in the German concept of crime. This concept is not formally defined in the German Penal Code (Ger. *Strafgesetzbuch*, abbr. StGB), but it is common ground that crime is defined through a tripartite structure[45] comprising (i) a conduct that satisfies both the objective and subjective elements of an offence (Ger. *Tatbestand*), (ii) a general element of unlawfulness (Ger. *Rechtswidrigkeit*) and (iii) a general element of guilt or blameworthiness (Ger. *Schuld*). At the level of the fulfilment of the elements of the *Tatbestand*, the objective requirements are fulfilled when the elements in the offence definition are established while the subjective requirement is fulfilled when it is shown that the perpetrator has acted (or omitted to act) with the intent or negligence specified[46] in the offence definition. The existence of a *Tatbestand* means that a *prima facie* wrongful conduct is at hand. But this conduct will not be unlawful if there is a justification for it. The most important general grounds of justification in German law are self-defence, necessity, duress, consent, superior orders and citizen's arrest.[47] These justifications are general in the sense that they are not connected to the offence in question, nor are these justifications related to the person of the perpetrator; in other words, the general justifications are applicable to all types of offences and to a 'normal' perpetrator. Circumstances that pertain specifically to the person of the perpetrator may, however, count as excuses from criminal responsibility in that a valid excuse would render the perpetrator's unlawful

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45 A presentation of the tripartite concept of crime is given in every textbook and commentary of the general part of criminal law, with authors giving different nuances. In this paper, the description of the German law in force is, as a starting point, based on the view presented in the multi-volume *Münchener Kommentar zum StGB*, available at <http://beck-online.de>, containing numerous references to other German sources. The primary textbook used for this paper is CLAUS ROXIN, *Strafrecht Allgemeiner Teil Band I: Grundlagen. Der Aufbau der Verbrechenslehre*, 4. Aufl., München: C.H. Beck 2006. For an exposition in the English language of the general part of German criminal law, see MICHAEL BOHLANDER, *Principles of German Criminal Law*, Oxford & Portland, Oregon: Hart Publishing 2009.

46 Unless provided for specifically, the subjective element required is intent. See § 15 StGB on criminal responsibility based on negligence.

47 See ROXIN 2006 (note 45 *supra*) §§ 15–18.

conduct 'not blameworthy', or at least not sufficiently blameworthy to hold the perpetrator criminally responsible for the conduct in question. The most important excuses recognized in German law are insanity, mistake of law and excessive self-defence.[48]

Self-defence is a general ground of justification in German law, as defined in § 32 StGB:[49]

> § 32 Self-Defence
> (1) A person who commits an act in self-defence does not act unlawfully.
> (2) Self-defence means any defensive action that is necessary to avert an imminent unlawful attack on oneself or another.

As is usual with general provisions of this kind, § 32 StGB does not spell out the details of this ground of justification. It merely provides in (1) the statutory basis for the exculpatory effect of an act of self-defence at the *Rechtswidrigkeit* level of the tripartite structure of crime, and in (2) a highly abstract definition of 'self-defence'. It is for the courts and legal science to elaborate on the precise conditions and boundaries for the application of self-defence as a justification, but what is apparent already from the plain wording of § 32(2) StGB is that it presupposes a distinction between a self-defence situation (Ger. *Notwehrlage*) and an act of self-defence (Ger. *Notwehrhandlung*) undertaken in the context of a self-defence situation. In a case of standard self-defence,[50] the existence of a self-defence situation is thus a necessary – but not sufficient – condition for the exercise of self-defence. A valid justification requires furthermore that the act of self-defence is necessary to avert an imminent unlawful attack. It is easy to see that, on the objective side, the law lays down here a limit to what can be done in self-defence, namely what is necessary. The wording of § 32(2) StGB is however silent on the subjective element of an act of self-defence and there are divergent opinions on this question concerning the subjective element of a justification.

One controversy is centred on the question whether 'awareness of the defence situation is sufficient or if the agent must have acted with the desire to exercise the defence, for example, with the will to defend himself'.[51] Ambos and Bock describe

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[48] See ROXIN 2006 (note 45 *supra*) §§ 19–22.

[49] Translation from BOHLANDER 2009, 99. The provision in German reads as follows:
§ 32 Notwehr
(1) Wer eine Tat begeht, die durch Notwehr geboten ist, handelt nicht rechtswidrig.
(2) Notwehr ist die Verteidigung, die erforderlich ist, um einen gegenwärtigen rechtswidrigen Angriff von sich oder einem anderen abzuwenden.

[50] As in the previous sections, putative self-defence is not discussed in this paper. For references to the German discussion on *Putativnotwehr* see ERB, *Münchener Kommentar* (2. Aufl., 2011), specifically Rn 244–251.

[51] KAI AMBOS & STEFANIE BOCK, chapter on Germany in *General Defences in Criminal Law – Domestic and Comparative Perspectives*, A. Reed & M. Bohlander (eds.), Farnham, Surrey & Burlington, Vermont: Ashgate Publishing 2014, 228. See also ROXIN 2006 (note 45 *supra*) Rn 90–93.

the situation as one where German case law and doctrine favour the interpretation requiring a specific desire to exercise the defence.[52] For self-defence, the generally accepted view seems to be that, in order for it to function as a fully exculpatory justification, the perpetrator must have acted with the purpose to defend him- or herself against an attack (Ger. *Verteidigungswille*); a mere awareness of the self-defence situation will not suffice.[53] This position is also stated by Ambos and Bock, who wrote that '[i]f the subjective elements of a justificatory defence are missing, the respective conduct is wrongful since the defendant acted only on the occasion of a defence situation' and then cited a number of cases of the BGH in support of this view.[54] Bohlander appears to differ and claims that the majority view in the literature permits that 'the mere awareness, as opposed to the actual desire to act in exercise of the defence, is seen as sufficient'.[55] This disagreement may have arisen from a potential difference in the interpretation of the requirement of a *Verteidigungswille*; i.e. whether the perpetrator acted solely and exclusively for the purpose of self-defence. But as there seems to be no suggestion that the act of self-defence must have been performed solely and exclusively for that reason, Bohlander's understanding of the literature does not really contradict what Ambos and Bock represent as the predominant view in the case law and doctrine. Combining these points of view it may be put that the justification is not excluded even if the self-defender has acted *also* for other reasons such as hatred, anger or revenge, so long as self-defence is one of the reasons for the action.[56] We are reminded by Ambos and Bock, however, that the predominant view presented above has increasingly been criticized 'for being incompatible with the subjective elements of the offence which only require that the defendant acts with intent; possible motives, that is, the reasons why he performed the act, are irrelevant'.[57] To this criticism it can be said that, at a general level of determining the subjective element of a *Tatbestand*, motives are of course irrelevant. However, the *Verteidigungswille* may be part of the objective elements of the *Tatbestand*, in which case the whole issue of subjective coverage of the objective elements will not arise at all. Instead, the *Verteidigungswille* will in that case simply be an objective element concerning the perpetrator's reason for action that has to be demonstrated in the usual way that such 'facts' about a person are proved in a court of law.

The above discussion of the German doctrine on *Verteidigungswille* does not provide a *direct* answer to the question whether a person who is not aware of a self-defence situation may avail him- or herself of the justification of self-defence, but

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52 AMBOS & BOCK 2014 (note 51 *supra*) 228, with references to a decision of the German Supreme Court (*Bundesgerichtshof*, abbr. BGH) and various authors of legal literature.

53 ERB 2011 (note 50 *supra*) Rn 239–240.

54 AMBOS & BOCK 2014 (note 51 *supra*) 228. The BGH cases cited are: BGHSt 2, 111, 114; BGH NStZ 2005, 332, 334 and BGHSt 38, 144, 155.

55 BOHLANDER 2009 (note 45 *supra*) 80.

56 See ERB 2011 (note 50 *supra*) Rn 240 for examples of the others reasons for action.

57 AMBOS & BOCK 2014 (note 51 *supra*) notes 9 and 11 at 228. The criticism is mainly attributed to Roxin, who discusses the issue in ROXIN (note 47 *supra*) Rn 90–93.

it is plain that the answer is a resounding no. The whole debate in German doctrine is about whether a *Verteidigungswille* is required or if mere awareness of the self-defence situation suffices. Awareness is always the minimum requirement. Admittedly, it has been discussed whether awareness means certainty or a 'quasi-possible assumption' of the self-defence situation,[58] it is a requirement of awareness nonetheless.

To re-connect to the running example of this paper: By shooting and killing V out of hatred, P satisfies the objective element of murder[59]. P carries out the shooting with full intention, thereby fulfilling the subjective element of murder (intent). P has committed a *prima facie* unlawful act. But the act would not be unlawful if P has acted in self-defence. German law requires that P be aware of the self-defence situation, which P is not, when self-defence is claimed as an exculpatory justification. P's act remains, therefore, unlawful. Whether P will be held criminally responsible depends on whether there exists excuses, which would render P's unlawful act not blameworthy.

5 English Law

While it is possible to approach the Finnish, Swedish and German law on self-defence following more or less the same pattern, the same cannot be done regarding English law. It is difficult to identify a succinct statement of *the* concept of crime in English law; different textbooks authors tend rather to explicate the different components such as *actus reus* and *mens rea*, the correspondence of *actus reus* and *mens rea* and different defences available to avoid criminal responsibility, without providing a formula stating exactly what conditions must exist, and/or be absent, before criminal responsibility can be attributed to someone.[60] This is perhaps a reflection of the pragmatism of English law, against the background of which an abstract overriding structuring – that the concept of crime is – will likely prove to be unhelpful. Nevertheless, it is not controversial to say that English criminal law does operate with three elements: *actus reus*, *mens rea* and defences. The distinction of these three elements is often attributed to a dictum of Lord Wilberforce in *Lynch* (a Northern Irish case), in which he stated with regard to 'duress', that this defence is

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58 ERB 2011 (note 50 *supra*) Rn 241.

59 For Germany: 'murder' (Ger. *Mord*) § 211 StGB, or at least 'manslaughter' (Ger. *Totschlag*) § 212 StGB.

60 For an example of discussions that eschew a statement, in a concise formula, of the concept of crime, see the chapter entitled 'The Criminal Act' in the classic – albeit now rather dated – textbook by Glanville Williams: GLANVILLE WILLIAMS, *Criminal Law: The General Part*, 2nd edn., London: Stevens & Sons 1961, 1–29. This can be compared with a recent treatment in which the author has basically touched upon all the elements of the concept of crime, but falling short of providing a definition of the concept: see the discussion on the general part of criminal law in JEREMY HORDER, *Ashworth's Principles of Criminal Law*, 8th edn., Oxford: Oxford University Press 2016, 101–103.

> something which is superimposed on the other ingredients which by themselves would make up an offence, i.e. on the act and the intention. *Coactus volui* sums up the combination: the victim completes the act and knows that he is doing so; but the addition of the element of duress prevents the law from treating what he has done as a crime.[61]

The identification of the three elements does not, however, constitute a definition of the concept of law because there exist great uncertainties as to what factors are to be considered under each of these elements. Furthermore, the term 'defences' is used so nebulously that it can hardly be used as a cogent category to define an essential element in a concept of crime. Writing in an American perspective, Robinson provides a systematic analysis of what are called 'defences' and shows that they denote so disparate claims as the denial of an *actus reus* or *mens rea* element on account of failure of proof, the modification of the offence definition itself, justifications, excuses and non-exculpatory public policy defences that nonetheless would preclude punishment.[62]

The indiscriminate use of the term 'defences' may however be a problem of language with no or little legal significance. It is, after all, possible to sort out which claims are relevant to the exclusion of criminal responsibility/liability[63] and which ones are irrelevant for the assessment of culpability and blameworthiness, which all are the central tenets of responsibility and liability. In modern English law, focus has been put on justifications and excuses. Much scholarship has been devoted to the meaning of and differences between justifications and excuses; there is no need for this paper to dwell on these questions. It suffices to note that – in the most general terms – when an act is justified, it is not unlawful and this would apply to any acts by any agent that are performed in the same circumstances, while an act is merely excused if some circumstances surrounding the agent render him or her not blameworthy for acting in the way he or she has.[64] Different authors may add or take away different elements in the definition of justifications and excuses, but this

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61 *DPP for Northern Ireland* v. *Lynch* [1975] AC 653, 679–680. The exploration in the chapter with the heading 'Criminal Law: Definition and Ambit' in A.P. SIMESTER, J.R. SPENCER, F. STARK, G.R. SULLIVAN & G.J. VIRGO, *Simester and Sullivan's Criminal Law—Theory and Doctrine*, 6th edn., Oxford & Portland, Oregon: Hart Publishing 2016, 1–20, also identifies the three elements of *actus reus*, *mens rea* and *defences*, and refers in that connection to Lord Wilberforce's statement.

62 PAUL H. ROBINSON, 'Criminal Law Defenses: A Systematic Analysis', 82 *Columbia Law Review* (1982) 199–291.

63 Such relevant claims have been described as 'supervening defences', see *e.g.* ANDREW SIMESTER, 'Mistakes in Defence', 12 *Oxford Journal of Legal Studies* (2012) 295–310, at 296 and WILLIAM WILSON, 'How Criminal Defences Work' in *General Defences in Criminal Law: Domestic and Comparative Perspectives*, Alan Reed & Michael Bohlander (eds.), Farnham, Surrey: Ashgate 2014, 7–22, at 8.

64 For a detailed overview of the literature and debate in this area, see KIMBERLY KESSLER FERZAN, 'Justification and Excuse', *The Oxford Handbook of Philosophy of Criminal Law*, John Deigh & David Dolinko (eds.), Oxford: Oxford University Press 2011, 239–263.

need not concern us as it appears that contemporary discussions in English criminal law have moved away from the debate on the justification/excuse-divide and organized different defences horizontally, so to speak, without the overarching categories of justification and excuse: in one leading textbook the supervening defences are grouped under the headings 'mental condition defences', 'defences of circumstantial pressure' and 'defences of permissible conduct'.[65] An overall explication of defences can also be found in relatively recent literature, where a 'template' has been offered comprising 'the trigger', 'the reaction' and considerations that 'the reaction must not manifest an antisocial or otherwise dangerous disposition' and 'proportionality'.[66] The 'self-defence' that is the topic of this paper is a 'defence of permissible conduct' under this categorisation, to which our attention will now turn.

Self-defence is a complex area in English law. As explained by Ormerod & Laird,

> [d]efence of the person, whether one's own or that of another, is still regulated by the common law … as 'clarified' in s 76 of the Criminal Justice and Immigration Act 2008; defence of property by the Criminal Damage Act 1971; and arrest and the prevention of crime by s 3 of the Criminal Law Act 1967 to be read in light of s 76.
>
> Because of its haphazard growth, the law contains some inconsistencies and anomalies.[67]

One cannot agree more with these authors about the inconsistencies and anomalies in this area of the English law. Nevertheless these authors are also confident in stating that a clear general principle does exist and they have conveniently described the principle in terms of 'trigger' and 'response':

- the trigger being D's belief that the circumstances as he understands them render it reasonable or necessary for him to use force; and
- the response being the use of a proportionate amount of force to the threat that D believes he faces.[68]

And the general principle,[69] according to Ormerod and Laird, is that

> the law allows such force to be used as is objectively reasonable in the circumstances as D genuinely believed them to be. The trigger is assessed subjectively (what did D genuinely believe); the response objectively (would a reasonable

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65 See SIMESTER ET AL. 2016 (note 61 *supra*) 692–693. Another example is DAVID ORMEROD & KARL LAIRD, *Smith and Hogan's Criminal Law*, 14th edn., Oxford: Oxford University Press 2015, 384–456 where the defences are 'infancy', 'duress', 'necessity', 'superior orders', 'public and private defence' (under which what is called 'self-defence' in this paper), 'entrapment' and 'impossibility'.

66 See WILSON 2014 (note 63 *supra*).

67 ORMEROD & LAIRD 2015 (note 65 *supra*) 428.

68 ORMEROD & LAIRD 2015 (note 65 *supra*) 429, notes omitted.

69 This principle is derived from the common law but is confirmed in sec. 76 of the Criminal Justice and Immigration Act 2008.

> person have used that much force in the circumstances as D believed them to be).[70]

In this construction of self-defence, the exculpatory element is 'triggered' not by the objective facts of a self-defence situation, but rather the subjective understanding, of the self-defender. The most controversial aspect of the trigger is the requirement (merely) of genuine belief[71] on the part of the self-defender and not that of a reasonable belief,[72] but this controversy does not affect the main topic in this paper as there is common ground that the trigger is the self-defender's belief and not the factual circumstances of the situation. The response element, on the hand, is assessed using an objective standard of what a reasonable person would do under the circumstances believed to be at hand. There appears to be no debate in English law whether an additional purpose element – i.e. in order to exercise self-defence – is required for the response.

In a case where a person does not believe – because he or she is unaware – that a self-defence situation is at hand, the defence of self-defence is never triggered. This is the outcome in *Dadson*,[73] which is universally referred to in all discussions of an unknowing self-defender. Dadson, a constable, was accused of shooting V with intent to do V grievous bodily harm. It appeared that Dadson was guarding a copse from which wood had been stolen. On seeing V coming out of the copse carrying wood which V was stealing, Dadson called to stop V but V ran away, whereupon Dadson fired a shot injuring V. The crucial question here is whether Dadson is justified in using such force in order to carry out an arrest. The law at the time was that such force was permissible in cases of felonies. It happened that V was in fact committing a felony since V had previously been convicted of two summary offences of stealing and this latest theft would be a felony pursuant to a statute in force at the time. The fact that V was committing a felony was unknown to Dadson when he acted. Dadson was convicted at the Court of Assizes after instructions to the jury that the alleged felony of V, being unknown to Dadson, would not constitute justification for his shooting. On appeal to the Court for Crown Cases Reserved, the conviction was upheld with – for a case meant to sustain an important general principle – the flimsiest of reasoning:

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70 *ibid.* notes omitted.

71 This, incidentally, means that there is no need to elaborate a separate doctrine of putative self-defence in case of mistaken belief.

72 For an overview of the arguments on the belief status of the (self-)defender and a plea for requiring a reasonable belief standard, see Claire de Than & Jesse Elvin, 'Mistaken Private Defence: The Case for Reform' in *General Defences in Criminal Law: Domestic and Comparative Perspectives*, Alan Reed & Michael Bohlander (eds.), Farnham, Surrey: Ashgate 2014, 133–144.

73 *R* v. *Dadson*, 169 E.R. 407 (1850), (1850) 2 Denison 35, (1850) 4 Cox CC 358.

> [Dadson] was not justified in firing at [V], because the fact that [V] was committing a felony was not known to [Dadson] at the time. He was therefore liable to be convicted…[74]

The outcome in *Dadson* may well be settled law, but the case has attracted much criticism. Glanville Williams, for instance, has remarked that 'the judgment in [*Dadson*] is laconically reported and its soundness is contestable',[75] and argued that

> [t]he point of interest here is that the rule hardly accords with the requirement of an *actus reus*. In *Dadson* the arrester had *mens rea*, for he intended to arrest the other and on the facts as he knew them the arrest was unlawful. But common sense would suggest that the arrest was nevertheless not criminal, because there was no *actus reus*.[76]

In this view, Dadson had indeed a *mens rea*, but it is the *mens rea* for another *actus reus*, the *actus reus* of 'wounding someone for the purpose of arresting someone who is *not* a felon'. But this *actus reus* does not exist since V is in fact a felon. On this account, the issue of defence never arises as there is no unlawful act with matching *actus reus* and *mens rea* from which to exculpate. Williams is one of the earlier writers to criticize *Dadson*, but there are plenty more who have done so, as well as writers who support the outcome in *Dadson*, often when they discuss issues in a wider context of defences. In an article dealing specifically with unknowing justification, Christopher argues for the logical necessity of a requirement of belief or knowledge in self-defence.[77] In the same article, he also provides an inventory of views both for and against the *Dadson* principle that range from the argument that beneficial acts (i.e. outcomes) should be encouraged, that bad motives or purposes should bar an actor's force from being justified, that the unknowing self-defence does not produce actual harms that the criminal law seeks to protect, that there is a distinction between 'just events' and 'justified acts', that unknowing self-defence should be punished on a similar basis as impossible attempts to the removal of the offence–defence distinction altogether.[78] To discuss the divergent views expressed in the debate on this issue will mean that the section on English law will be disproportionately long, which is not the purpose of the present paper. Suffice it to say that the discussion of the issue is vibrant and the law of self-defence, despite being 'clarified' through statute is amenable to further development in case law and in legal science.

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74 *Dadson*, (1850) 2 Denison 35, 36 (names substituted).

75 WILLIAMS 1961(note 60 *supra*) 24.

76 *ibid.*

77 RUSSELL L. CHRISTOPHER, 'Unknowing Justification and the Logical Necessity of the *Dadson* Principle in Self-Defence', 15 *Oxford Journal of Legal Studies* (1995) 229–251.

78 For attributions to different writers and full references to their work see CHRISTOPHER 1995 (note 77 *supra*).

To re-connect to the standard example given in section 1.2 above: By shooting and killing V out of hatred, P satisfies the objective element (*actus reus*) of intentional homicide[79]. P carries out the shooting with full intention, thereby fulfilling the subjective element of murder (*mens rea*). P has committed a *prima facie* unlawful act. But the act would not be unlawful if P has acted in self-defence. English law requires that P be aware of the self-defence situation, which P is not, when self-defence is claimed as an exculpatory justification. P's act remains, therefore, unlawful. Whether P will be held criminally responsible depends on whether there exist excuses, which would render P's unlawful act not blameworthy. This is of course simply the application of the outcome of English law to the template used to compare the treatment of unknowing self-defence in different legal systems; the above steps are never meant to represent how English lawyers really think when they analyse the issues.

6 Concluding Remarks

The survey above has shown that in each of the jurisdictions examined there is, as a matter of positive law, a given answer to the unknowing self-defender problem. Whereas under Finnish, German and English law, there is no justification unless one is at least aware of the self-defence situation; under Swedish law, the justification is dependent on the objective existence of the self-defence situation and the use of force that is not manifestly unreasonable, with the presumptive self-defender's actual awareness of the situation being irrelevant. Under Finnish, Swedish and German law, the requirement or the irrelevance of the awareness of the self-defence situation is a consequence of the structure of the concept of crime in these legal systems, while under English law, which does not have a stringent concept of crime as such, the requirement of awareness is grounded in the common law rule on self-defence (the *Dadson* principle), which has subsequently been 'clarified' through statute. One cannot but notice that it is within legal science in the English context that discussions of the unknowing self-defender have been most vibrant while the same problem has been discussed only to a very limited extent in Finnish, German and Swedish literature. In the last-mentioned legal systems the different elements of the concept of crimes are more or less precisely defined and the concept of crime is used to structure legal thinking and problem-solving. Within such systems it is perhaps easy to come up with and to accept (for systemic reasons) self-evident solutions that fit neatly into the categories established by the concept of crime. There is no need of further theorization. The debate in the English context, on the other hand, is a sign that the solution to the problem cannot be based solely on the much more loosely defined relationship between *actus reus*, *mens rea* and defences; substantive reasons for preferring one solution to another (like the ones offered by Asp

[79] It suffices here to refer to intentional homicide in general rather than to a specific form of homicide.

and Ulväng as mentioned above) are more likely to be given than reasons that only have to do with categories and classifications. As the central principle in the area of unknowing self-defence is so sparsely motivated (if that), the field is open to further theorization and with it also comes the possibility of different solutions. In a sense, there is therefore greater legal certainty in the Finnish, German and Swedish legal systems compared to the English one. This is reflected in the certainty demonstrated by both academics and practitioners when asked by the present author about the status of the law, in Finland and Sweden, respectively, on unknowing self-defence. This certainty is, however, only a certainty on a point of law. Admittedly, the present author has not actually conducted any experiment, but it may be conjectured that the same clear answers will not be forthcoming if these academics and practitioners has been asked whether the unknowing self-defender is blameworthy *morally*. The same is also very likely to be true if the question is addressed to groups who are not indoctrinated into 'thinking like a lawyer'.

This brings us back to Ashkenazi mentioned in sub-section 0 above. In the end, the police decided to drop the charges for the theft of the backpack, and on top of this Ashkenazi also got a very generous plea bargain for other charges of theft that he had committed in other connections.[80] According to Israeli law, Ashkenazi could have been prosecuted for the attempt to commit theft; but in a survey conducted by Robinson, it was found that 23 % would not find Ashkenazi liable at attempt and 47 % would find him liable but impose no punishment, while only 9 % would sentence him for more than two weeks' imprisonment.[81] This shows that our intuitions and moral sentiment may come into conflict with the correct legal solution.[82] In Ashkenazi, the conflict is at least partly resolved by the exercise of discretion on the part of the police. But this alternative is not always available, nor is the reliance on prosecutorial discretion a hallmark of legal certainty. It may also be noted that the generous plea bargain offered to Ashkenazi had nothing to do with his responsibility or culpability in respect of those other thefts committed in totally different circumstances than the theft of the backpack. Whether to punish or not – and how much – may be dependent on factors outside the frame of the concept of law.

While reading some of the Finnish, Swedish and German literature and case law during the research, the present author is often struck by the feeling that when the reality of uncomfortable intuitions comes up against the theoretic concept of crime, it is always the theory that wins – this must be the case because the system is structured that way! In the opinion of the present author, uncomfortable intuitions may be seen as anomalies in the system. Anomalies are, as such, neither good nor bad. It is the way in which the system handles anomalies that show the strength or

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80 ROBINSON 1999 (note 4 *supra*) 128.

81 ROBINSON 1999 (note 4 *supra*) 127.

82 The 'correct legal solution', if Ashkenazi is to be judged according to Swedish law, is that he should be acquitted because there is no unlawful act, which is in line with the intuitions shown by Robinson's survey. However, there will surely be scenario where theory and intuition do not match. The question then is the following: when theory and reality do not match, should we correct the theory or rather provide an alternative account of reality?

weakness of the system. Intuitions may be useful tools for testing the system, offering us the opportunity to consider basic assumptions and fundamental values inherent in the system.

From a comparative point of view, the present limited study of four jurisdictions, the Swedish law is the odd man out. As explained above, the Swedish solution is firmly anchored in the concept of crime accepted both in the case law and in legal science. Nevertheless the purely objective considerations for the justification runs counter to the intuitions of many and is an anomaly when compared to some of the more closely-related legal systems. In the opinion of the present author, the anomaly of the unknowing self-defender may very well be used to test the Swedish concept of law and when this test is carried out more substantive reasons should be given when arguing for one position or another. Asp and Ulväng, as mentioned earlier, have already presented some reasons indicating possible lines for further theorization,[83] counter-arguments are needed if the system is to be vigorously tested.

[83] ASP & ULVÄNG 2014 (note 37 *supra*) 302.