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THEORETICAL AND PRACTICAL ASPECTS REGARDING THE JUSTIFICATORY CAUSE OF SELF-DEFENSE

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Abstract: *Self-defense is a fundamental institution of general criminal law, framed as a justification intended to remove the criminal character of an act committed for the purpose of repelling an unjust attack. Through practical examples and recent case law solutions, the study highlights the interpretative difficulties generated by assessing the proportionality and necessity of defense, as well as how the particularities of concrete situations influence the legal classification of the act. The work conveys the need for a consistent application of legal criteria, emphasizing the importance of evaluating the factual context in each case. The main conclusion highlights that a balanced and unified approach to the conditions of self-defense contributes to ensuring the effective protection of social values and avoiding unjust criminal liability.*

Keywords: *self-defense; justificatory cause; attack; defense*

Self- defense is a justificatory cause that removes the criminal nature of an act when it is committed to repel an unjust, direct, and immediate attack directed against a person or property. In this regard, self- defense plays an essential role in delineating the boundary between lawful and unlawful acts, allowing a person to resort to force to protect themselves against an attack without their action being considered a crime.

In criminal law doctrine, self- defense is analyzed from several aspects. Only by examining these can we understand the complexity of this criminal law institution and the importance of interpreting it, solely in relation to each case in which it may be invoked. This requires the cumulative fulfillment of several conditions regarding the two actions it involves, without which its existence can no longer be recognized in the criminal process.

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The Conditions of Self-Defense

1. Conditions regarding the Attack

In practice, it has been established that as long as there has been no actual attack initiated by the victim, any subjective assessment of the defendant that the victim might launch an attack against them does not justify invoking self- defense, and the assumption that an attack will occur or the fear of a possible attack are not enough to justify its application[1]. Vintilă Dongoroz supports the argument that an unlawful attack is any illicit action that jeopardizes the values protected by criminal law[2]. In this regard, the judicial practice has established that a justified attack, such as the lawful action of a police officer in the exercise of his duties, cannot constitute grounds for self- defense. Likewise, an attack coming from a person whose act does not have legal significance cannot be considered just or unjust[3].

According to an important opinion in doctrine, the attack must be immediate, must create no doubt about the aggressor's intention, and be clearly perceived by the person defending themselves[4]. It has been also argued that the existence of a distance and an obstacle - which, although not insurmountable, was difficult to overcome, given the characteristics and the victim's physical stature - excludes the fulfillment of the condition that the attack must have been direct, and consequently also excludes the justification of self- defense. For the attack to be direct, it is necessary that there is no obstacle between the attacker and the threatened value, otherwise the attack is no longer direct, except in cases where the obstacle is ineffective in relation to the attack[5]. Similarly, the attack is not direct if there is a significant distance in space between the aggressor and the protected value[6]. It has been also argued that there is a direct attack even in cases where the attack produces effects after a certain period of time, for example, poisoning a drink or food that is to be consumed later by the victim[7].

In the legal literature, it has been pointed out that inaction also constitutes an attack against which one can legitimately retaliate, provided that the attack implies an obligation to act and that the agent does not step out of the passivity[8].

A frequently debated question in doctrine is whether psychological attacks (serious threats, extreme intimidation, etc.) can be considered direct. It is emphasized that the attack must be material, yet in certain circumstances, psychological aggression can have an impact similar to

[1] https://www.juridice.ro/360350/legitima-aparare-in-optica-noului-cod-penal-r.html, last accessed on 11.11.2025.
[2] V. Dongoroz (2000), Criminal Law (reprint of the 1939 edition), Romanian Association of Criminal Sciences and Tempus Society Publishing House, Bucharest, p. 184 - quoted by C. Mitrache (2023) in Romanian Criminal Law. General Part, 5th edition, Universul Juridic, p. 184.
[3] M.A. Hotca (2024), Penal Law. General Part. 4th edition, Universul Juridic, p. 247.
[4] C. Mitrache (2022), Romanian Criminal Law, General Part, Universul Juridic, p. 315.
[5] Decision 170 of 03.02.2022, Court of Appeal Galati, https://lege5.ro , last accessed on 01.11.2025.
[6] For example, an attack unleashed from a distance of 100 m with an axe is not a direct attack. In this regard, see C. Mitrache (2023), Romanian Criminal Law. General Part, Fifth Edition, Universul Juridic, p. 181.
[7] I. Tănăsescu, C. Tănăsescu, G. Tănăsescu (2003), General Criminal Law, 2nd edition, ALL BECK, Bucharest, p. 552.
[8] C. Mitrache, op.cit., p. 181.

a physical attack[1]. However, in national case law, it has been claimed[2] that the existence of tensions and verbal insults cannot justify a subsequent physical attack, as the condition of a direct attack is not met and, in this situations, it is considered that one could at most invoke provocation as a legal mitigating circumstance or a judicial mitigating circumstance.

An attack that generates a danger that is imminent, imminent, occurring, ongoing or current is considered immediate.[3] The immediate nature of the attack is illustrated by the short interval between the beginning of the attack and the moment the danger arises, and it determines its unfolding over time, fitting within a certain time frame in which self- defense may intervene. When the interval is long and there is the possibility of averting the danger by other means, the attack is no longer immediate and the commission of an act provided for by criminal law is no longer justified[4]. In the case of Makaratzis v. Greece[5], the European Court of Human Rights established that the use of force, including lethal force, must be proportional to the real danger of the attack. The Greek police fired a shot at a suspect who did not pose an immediate threat, which led to the conclusion that it was not a case of self-defense. At the same time, there may be situations where the immediate threat involves an ongoing danger, given that the possibility of a renewed attack is not eliminated. In this regard, the High Court of Cassation and Justice ruled that *repeatedly striking, with fatal consequences, a person who entered the perpetrator's home at night by climbing and breaking in, and who struck the occupant in the head with a stick, constitutes an act of self-defense. The fact that the victim was also struck while attempting to retreat and after having dropped the stick from their hand is irrelevant, as the danger had not ceased, and they could have armed themselves again with one of the available sticks nearby*[6].

In doctrine, there is also highlighted the opinion that the condition for the attack to be direct is not necessary as long as the requirement for the aggression to be immediate exists[7].

2. Conditions Regarding the Defense

For an act of self-defense to be justified, the law requires that the attack be capable of causing harm that is irreparable or difficult to remedy to important social values (the human person, their rights, or a public interest)[8].

[1] D. Nițu, F. Streteanu (2018), Criminal Law, General Part, Universul Juridic Publishing House, p. 377.
[2] High Court of Cassation and Justice - Jurisprudence Bulletin, Collection of decisions for the year 2020, p. 828, https://www.iccj.ro/biblioteca-digitala/publicatii-iccj/buletinul-jurisprudentei/ , last accessed on 20.11.2025.
[3] I.A. Barbu (2025), Penal Law. General Part. 3rd edition, added and revised, Universul Juridic Publishing House, p. 177.
[4] Vintilă Dongoroz, op.cit., p. 352 - quoted by C. Mitrache, op.cit., p. 185.
[5]Case of Makaratzis v. Greece, European Court of Human Rights, 20.12.2004,https://hudoc.echr.coe.int/eng?i=001-69630, last accessed on 18.11.2025.
[6] High Court of Cassation and Justice, Decision no. 429 of 3 November 2003, https://lege5.ro , last accessed on 13.11.2025.
[7] M.A.Hotca, op.cit., p. 244,.
[8] G. Antoniu (1968), The Causal Report in Criminal Law, Scientific Publishing House, Bucharest, p. 184 - quoted by Norel Neagu (2024) in Criminal Law. General Part, 3rd, Universul Juridic Publishing House, p. 120.

Only in the face of a serious danger can it be considered that the person being attacked, being deprived of the possibility to freely determine their will, acted under the pressure of compulsion caused by the serious danger, and the condition that the response must be necessary for the institution of self- defense to function must be related to the possibility that the attacked person would have had to avoid the attack, so that the defense remains within the limits of self- defense[1]. The necessity of defense is analyzed based on the specific relationship between aggression and the defensive reaction, taking into account the intensity, the means used, and effects produced[2]. If the means used for defense exceed what is necessary to counter the attack, this results in excessive defense, the act no longer being justified. Regarding the subject of defense, according to legal provisions, both the victim of the aggression and any other person present during the attack can respond to a dangerous attack, regardless of whether the victim could have repelled the attack alone or not[3].

The European Court of Human Rights emphasized that the use of firearms must be a last resort and it can only be justified in situations of imminent danger[4].

Regarding the proportionality of defense in relation to attack, the specialized literature has noted that there is no need for an exact identity between the two actions, nor for mathematical precision, or even similarity, but rather an approximate proportionality. It is argued that, as a rule, the person defending themselves uses the means at their disposal to remove the aggression, while respecting the condition of proportionality[5], meaning that the action taken should correspond to the need for defense created by the attack. Proportionality should reflect the relationship of severity between the consequences caused or likely to be caused by the defensive act and the consequences that resulted from the attacker's action[6].

This proportionality must be assessed in relation to the intensity of the attack and the danger it poses, but not exclusively based on these factors. Thus, the conformity of defensive action with the severity of the attack must be evaluated holistically, taking into account all the circumstances of the acts, and not solely through the lens of the harm caused. A practical reasoning in this regard within a case under judicial review emphasizes: *Thus, the respondent – a 16-year-old student against whom his aggressor was carrying out a physical attack with punches – could not be held accountable for an improper adjustment of the intensity of the blows applied in self-defense or for a failure to precisely determine the effects produced on the aggressor's physical integrity, since such control exceeds the real capabilities of a person in the category of someone trying to repel a physical attack aimed at them*[7].

[1] Criminal sentence 270/D of 16.09.2010, Bacău Court, https://lege5.ro , last accessed on 01.11.2025.
[2] D. Nițu, F. Strețeanu (2018), Criminal Law, General Part, Universul Juridic, p. 385.
[3] Decision 203/a of 05.06.2009, Mureș Tribunal, https://lege5.ro, last accessed on 19.11.2025.
[4] Nachova and Others v. Bulgaria (Applications nos. 43577/98 and 43579/98), European Court of Human Rights, 12 April 2012, https://hudoc.echr.coe.int/eng?i=001-69630, last accessed on 18.11.2025.
[5] Decision 99 of 09.05.2017, Olt Court, https://lege5.ro, last accessed on 01.11.2025.
[6] L. V. Lefterache (2018), Criminal Law. General Part, Course for second-year students, 2nd edition added and revised, Hamangiu, Bucharest, p. 191.
[7] Arad Local Court, Decision no. F. N./2015, https://lege5.ro, last accessed on 19.11.2025.

Another matter of interest regarding the presumption of proportionality of lawful defense exercised by police authorities, the European jurisprudence has established that law enforcement officers are not excluded from benefiting from exceeding the limits of self-defense, but that their status or function constitutes elements that can be taken into account in the examination of the case[1].

The analysis of this proportionality is more essential since exceeding its limits can lead to the recognition of the non-imputable excess or the mitigating circumstance provided by Article 75 paragraph (1) letter b of the Penal Code, being impossible to recognize both simultaneously[2], for the following reasons: The recognition of the mitigating circumstance regulated by Article 75 paragraph 1 letter b) of the Penal Code presupposes the existence of a crime, with all its essential characteristics (including imputability), yet, due to the circumstances in which it is committed, the act presents a lower degree of danger. In other words, in the case of recognizing this mitigating circumstance, the perpetrator is not under the influence of any disturbances or fears, by exceeding the limits of a defense proportionate to the severity of the danger and the circumstances in which the material, direct, immediate, and unjust attack occurred; otherwise, the non-imputable excess is recognized. More clearly, exceeding the limits of self-defense begins where non-imputable excess ends.

Moreover, the notion of exceeding the limits of self- defense, which corresponds to the concept of 'justified excess' in Romanian law, is not unknown in European criminal law[3].

In the national jurisprudence, it was established the importance of analyzing the specific circumstances in which both the aggressor and the one defending themselves acted, as well as the way they perceived the acts. In the case of self-defense, there is no condition that the danger could not have been otherwise averted except through the commission of an act provided by criminal law, meaning that the person defending themselves could benefit from self-defense, even if they used more dangerous means, although they could have also used other, less dangerous means to repel the aggression[4].

The importance of analyzing the circumstances of the case lies in the fact that they lead to the recognition of other factual situations compared to those that appear on the surface. An example in this regard is the decision of the Galați Court of Appeal concerning an attack initiated by the 32-year-old victim against the 71-year-old defendant, who, under the influence of alcohol, used a scythe to kill the injured party. The basis for establishing self-defense on the part of the defendant was the blatant imbalance of forces between the two, considering that the defendant could not act with fists and feet since he was under the influence of alcohol. At the same time, it was concluded that the execution of movements with the blunt object aimed

[1] Case of Grămadă v. Romania, ECHR Judgment of 11.02.2014, ECHR 040 (2014), https://ier.gov.ro/traduceri/drepturile-omului/jurisprudenta-cedo/ , last accessed on 21.11.2025.
[2] Decision 297/A of 03.05.2016, Court of Appeal of Târgu Mureș, https://lege5.ro, last accessed on 01.11.2025.
[3] Case of Grămadă v. Romania, ECHR Judgment of 11.02.2014, ECHR 040 (2014), https://ier.gov.ro/traduceri/drepturile-omului/jurisprudenta-cedo/, last accessed on 21.11.2025.
[4] Decision 99 of 09.05.2017, Olt Court, https://lege5.ro,last accessed on 01.11.2025.

to repel the victim, and, given that the victim continued the attack, the victim practically entered the path of the scythe the defendant was swinging[1].

Another example of giving legal value to a relational circumstance between the victim and the defendant, is that the nature of the pre-existing relationship between them represents an important reference point in assessing the degree of disturbance and fear of the defendant[2]. *Thus, the fact that the victim and the defendant were raised together until the age of 14 (the victim's father also raising the defendant until that age), as well as the fact that they have the same ethnicity, living in the same community, constitutes a reality that cannot be ignored, leading to the conclusion that the defendant did not act in self-defense.*

As it has been shown in legal literature, if the aggressor cannot invoke the state of self-defense in the case of a proportional defense, because they are not facing an unjustified attack, in the situation of a response made by exceeding the limits of self- defense, the aggressor finds himself exposed to an unjust attack, which legitimizes the act of defense. In other words, the initial state of self- defense is overlapped by a second state of the same nature, in which the positions of the subjects are reversed: correlative attacks[3].

By recognizing this justifying cause, criminal law not only ensures the protection of the individual, but also balances fundamental principles of law, such as necessity and proportionality in relation to imminent danger.

This legal institution is of particular interest, as it reflects the need for individual protection within a clear and fair legal framework, with its author no longer being held criminally liable, because the existence of such a cause prevents the act provided by criminal law from acquiring criminal character.

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