

LEGITIMATE DEFENSE AND THE MILITARY RULES OF ENGAGEMENT OF THE ARMED FORCES

M. –A LĂZĂU

Marin-Atanasie LĂZĂU

Military Justice Specialist

Ministry of Defense

Doctoral School of Law, The “Alexandru Ioan Cuza” Police Academy, Bucharest, Romania

*Correspondence:

E-mail: armyylaw@gmail.com

ABSTRACT

In a practical sense, we can say that legitimate defense is at the foundation of any military action or inaction, it is at the same time the legal basis for any decision made by military decision-makers. Of no lesser importance are those regarding the general public, society as a whole, given the situation in the current international context, when the right to free movement is already established, therefore any person may be directly or indirectly confronted with a limit-situation in which, one's instinct of self-preservation would require and result in an attitude of legitimate defense, when one's own life is endangered, as is the case more and more often nowadays.

For these reasons, the obligation to ensure public security, order and the safety of citizens through a solid cooperation in the civilian-military relationship has become a matter of major general concern, enshrined by the entire legislation applicable to the field.

Given these new features of the concept of legitimate defense, we will try, in this article, by using the comparison method, in addition to the general opinions expressed by the quoted authors, by the doctrinarians of the studies carried out, to include in its content elements of justification of a military nature, for the simple reason that this article is aimed at an audience segment that belongs both to civil society and to the military, with an emphasis on the latter, who are increasingly confronted with this concept of use of force.

KEYWORDS: *legitimate defense, R.O.E., military, criminal, penal.*

INTRODUCTION.

The concept according to which some causes make the criminal (penal) rule not result in its sanctioning effect was found in the provisions of the Criminal Code Carol II (of Romania), and has been adopted by the Romanian author in the doctrinal evolution under the generic name of *causes that remove the incidence of the criminal law*.

The terminology used by the lawmaker of 1936 does not count in a criminal offence for justifiable causes or is a person responsible for the offence in case of the appearance of causes of irresponsibility¹, instead, by *Law no. 286/2009 for the implementation of the Criminal Code*, there is a clear delineation between *justifiable causes* and *causes of impunity* which are presented in Title II. Thus, it is stated that “*the deed provided by the criminal law does not constitute a criminal offence, if any of the justifiable causes provided by the law is present*”².

Professor Vintilă Dongoroz approached these issues in a thorough manner, he divided the criminals into *criminals in fact*, i.e. persons who can only be physically blamed of the offence, and *punishable criminals*, i.e., persons capable of bearing the criminal sanction. In order for a person to be criminally liable, to be punishable, a number of positive conditions must be met, which relate to the presence of guilt, and no negative conditions should

¹The Criminal Code of 1936, Title VII, Chapter II - Causes that defend from or mitigate liability.

²Article 18 of the Criminal Code, General Provisions (relating to justifiable causes).

intervene in his/her favour, which would remove the enforcement of the criminal law, the lack of such conditions having to be established, and the same author generically calls them causes that remove the incidence of the criminal law, dividing them into three categories³:

- a) causes related to the *personcapacity*, meaning immunities (indemnity);
- b) causes related to the *person's ability*: disabilities determined by: mental alienation, drunkenness and other intoxications, passions, sleepwalking and hypnotism, suggestion, minority, infirmities;
- c) *cases of non-imputability*: ignorance, factual error, error of law, fortuitous case, physical constraint, moral constraint, state of necessity, legitimate defense, causes based on the motive of the fact – enforcement of law or of an order of authority, the exercise of a profession, art or craft, the ritual of recognized cults, sports, self-injury, the victim's consent.

I. LEGITIMATE DEFENSE.

The regulation of legitimate defense is one of the most important issues that need to be clarified, that the military deal with in the exercise of their functions, both in peacetime and, especially, during military warfare or military peacekeeping operations.

The legitimate defense, as a component of the legal category called “*justifiable causes*”, appears in the law next to the following concepts: *state of necessity, exercise of a right or fulfillment of an obligation, consent of the injured person*⁴.

Through Resolution no. 1368 of the Security Council, terrorist acts were classified as acts of direct armed aggression in the proper sense of the word, which gives, according to Art. 51 of the Charter of the United Nations, *a right to legitimate individual and collective defense*.

It should be reminded that such consensus has not existed within the Security Council since the Korean War and the Gulf War. This decision of the Security Council was to be expected, since, as early as 19th December 2000, it had adopted Resolution no. 1333 which reaffirmed and supplemented previous resolutions, in particular Resolution no. 1267 of 15th October 1999⁵.

Contemporary views expressed in the literature have shown that the new regulation brings another perspective to the explanations and understanding of legitimate defense, by *considering it as a justifiable cause*, not as a *cause for the removal of criminal liability*⁶. The author quoted also considers that, unlike the 1968 Criminal Code, wherein the act committed in legitimate defense does not constitute a criminal offence, in the new regulation it is only justified, preserving the characteristics of a crime.

However, we want to signal, as we did before, the fact that the text of Art. 18 para. (1) of the Criminal Code states that “*the offence provided by the criminal law does not constitute an offence, if any of the justifiable causes provided by the law*”, thus the expression *does not constitute an offence* is preserved, as in the case of the regulation contained in Art. 19 para. (1) of the 1968 Criminal Code.

³Dongoroz Vintilă, *Drept penal (Criminal Law)*, Bucharest, 1939, re-editing by the Romanian Association of Penal Sciences, Bucharest, 2000, pp. 305-306.

⁴Article 19 to Article 22 of the Criminal Code.

⁵Toma Gabriel, *Terorismul internațional. Reacțiile actorilor regionali și globali (International Terrorism. Reactions of Regional and Global Actors)*, Editura Institutul European (European Institute Publishing House), Iași (Jassy), 2013, p.154.

⁶Vlăsceanu Adina, Barbu Alina, *Noul cod de procedură penală comentat prin raportare la codul penal anterior (The New Criminal Procedure Code commented on by reference to the previous criminal code)*, Editura Hamangiu (Publishing House), Bucharest, 2014, pp. 481-482; Ionescu Victor, *Legitima apărare și starea de necesitate (Legitimate Defense and the State of Necessity)*, Ed. Științifică (Scientific Publishing House), Bucharest, 1972, pp. 37-45.

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It is unanimously accepted that no equivalence can be established between the legitimate defense and the right of the perpetrator to breach the criminal law, because the person in question acts in order to defend itself, or to defend a public interest, or another person.

In the doctrine, the legal foundation of legitimate defense is controversial⁷, and through the different regulatory regimes in certain evolutionary epochs, it can determine different meanings amongst people who find themselves more and more often in situations of this kind (*militaries in theatres of operations outside the national territory, militaries from the gendarmerie structures when intervening in the restoration of public order, specialized personnel destined for the destruction of explosive loads or improvised devices of the same type, militaries from fire-fighting structures, when in life-saving or goods-rescue missions*) within a time-limit range (even seconds) and are required by law to immediately manifest in each of these situations, or to fight back.

From the content of the text provided by Art. 19 of the Criminal Code which entered into force in 2014, it results that the attack must fulfill the following conditions⁸, therefore, by comparison to the wording in the Criminal Code in force, it is somewhat different from the previous one, thus the phrase *state of legitimate defense* has been replaced by the phrase *legitimate defense*.

The first paragraph of the provision states that the state in question is a justifiable cause, an aspect which did not exist in the previous law, and the next paragraph is reworded by inserting the *requirement of proportionality*⁹ in relation to the gravity of the attack, instead of “public interest” the phrase “general interest” has been used, as well as the text “excessive defense due to the disturbance or fear”, a situation regulated among the causes of impunity provided by the same code.

The material character of the attack is the first element of the legal, but especially the practical analysis, for the application of the compulsory rule on the military. It is supposed to emerge from a natural person who acts directly, by his/her physical force, either mediatory, through animals, things or technical means, we might add, on which he/she imposes his/her will, through action or inaction¹⁰.

And because we have approached the issue of the material character of the attack, its form and ways of transmission, it is very important for the military to act, beyond the rigors of the law, and another important thing is the way in which they act in relation to the concrete situation created.

In their support, the lawmaker comes up with and clarifies the notions specific to the terminology of invoking and using military force, but also with respect to preventing abuses or excesses even from those who manage the force element. Thus, the material attack, this time the armed one, cannot be appreciated by military commanders without identifying in its content hostile intent as an element of the will to materialize the attack.

The categories of military force through which decisions are considered and taken are: *minimum force* – is the force strictly necessary in terms of intensity and duration for the fulfillment of the mission; *lethal force* – is the force the use of which is likely to cause death or serious injury that may result in the death of a person; *hostile force* – is the force that manifests hostile intentions, commits a hostile act or has been declared hostile.

⁷Dongoroz Vintilă, *Drept penal (Criminal Law)*, Bucharest, 1939, re-editing, op.cit., p.360; Pașca Viorel, *Curs de drept penal. Parte generală (Criminal Law Course. The General Part)*, Editura Universul Juridic (Publishing house), Bucharest, 2010, p172; Ionescu, V., op.cit., pp. 38-44.

⁸There must be a *direct, immediate and unjust material attack, endangering one's or another's person, their rights or a general interest if the defense is proportionate to the seriousness of the attack.*

⁹Codiță Dumitru, collective of authors, *Manual pentru instruirea militarilor în dreptul internațional umanitar (Manual for the Training of the Military in International Humanitarian Law)*, Centrul tehnic editorial al armatei (Editorial Technical Centre of the Army), Ploiești, 2006, p.19.

¹⁰Antoniou George, *Vinovăți penală (Criminal Guilt)*, op.cit., p.276

For the purposes of *Law 122/2011 on the regime of arms, military devices and ammunition owned by M.Ap.N. (Ministry of National Defense) and by the foreign armed forces on the Romanian territory*, the following terms and expressions, with legal implications in determining justifiable causes and in the inquiry, have the following meanings¹¹, notions and principles found in the methodology of the development and implementation of the *rules of engagement of the military force*¹², as follows:

Hostile intent, expressed in synthetic form, is the imminent threat or use of force against the military personnel or against any other person, the Romanian armed forces or other persons, or the designated property, as well as against the members of the allied foreign military forces in the areas under force control.

The identification and determination of hostile intent is an obligation of the military commander on the ground for the sole reason that, on the basis of his general professional training, he has the power to appreciate and to discern situations in which we are facing a hostile intent or hostile act. In addition to these situations, in the case of individual missions, the determination of hostile intent is done by the mission executor, on the basis of the same elements.

Here is another argument why the collective and individual training, the thorough juridical knowledge of the law applicable to the military, moreover, their professionalization, have been and are continuously necessary.

From the discussions with the staff involved in such actions, in our opinion the factors that can be taken into account for determining hostile intention areas follows: firearms (whether they are present, what type?); the size of the adversary force; whether weapons are present, how they are handled; did the armed person take a firing position; whether the adversary force is acting against unarmed civilians; other aggressive actions.

On the basis of these situations, in order to prevent and avoid such acts, the military may detain persons who threaten serious injury or who oppose the fulfillment of the mission. Also, persons committing criminal acts in areas under force control may be detained, provided that detained persons are handed over to the superiors as soon as possible.

A hostile act is any action or use of force by a foreign military force or terrorist entity directed against the Romanian State, the Romanian armed forces or other persons, or against designated property, or which seeks to hijack or prevent the accomplishment of a military mission by the Romanian and/or allied armed forces.

The instructions consist in the general and specific duties of the personnel on a mission, we also find the legal term in the criminal law provisions in the legislation of the categories of crimes committed by the military¹³.

The military objective is the buildings, equipment, installations, such as barracks, camps or arrangement districts of one or more military units, warehouses, stations, ports, airports, military transports, owned or administered or assigned to the guard and defense of the Ministry of National Defense (M.Ap.N.).¹⁴

In the case of international operations provided by the Romanian legislation, the combat personnel or any good that, by its nature, location, destination or use, makes an effective contribution to the military action and whose partial or total destruction, capture or neutralization, under the concrete conditions, provides a reliable military advantage, is a military objective.

As far as a certain special capacity of the persons is concerned, the law contains the phrase “designated persons” – the persons established by mission instruction or order, for

¹¹Art.3 of Law 122/2011 on the regime of arms, military devices and ammunition owned by M.Ap.N. and by the foreign armed forces on the Romanian territory.

¹²Idem Art. 25-26.

¹³Art. 415 of the Criminal Code, the offence of “*Violation of instruction*”.

¹⁴Order of the Minister of National Defense no. M.97 of 2nd September 2014 for the approval of the Internal Service Regulation, published in the Official Journal no. 745 of 13th October 2014, Art. 15.

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whose protection the use of force, including lethal, is authorized, or the denomination “designated property” – the property for the protection of which force is used; lethal force is used only under circumstances established by mission instruction or order¹⁵.

By recognizing legitimate defense as a justifiable cause, operating *in rem*, the current Criminal Code has abandoned the concept of the previous code that justified legitimate defense on the basis of the notion of moral constraint and the impossibility of free determination of the will of the respondent. According to this conception, legitimate defense was a cause for the removal of guilt, and the deed continued to be an act provided by the criminal law, susceptible to security measures and civil liability; also legitimate defense operated *in personam*, being unable to expand on the participants¹⁶.

We believe that not every attack against the social values protected by the law presupposes legitimate defense, only a real concrete attack, i.e. an attack with a certain specificity that justifies the defense reaction and the removal of the danger. The elements characterizing the attack in relation to our current criminal law are the following: it should be material, direct, immediate and unjust.

The attack is direct when it is directed against and directly jeopardizes the social value protected by the criminal law. The direct nature of the attack does not imply the obligatory existence of a direct contact of the aggressor with the object that incorporates the protected social value. This condition displays the spatial relation between the attack and the value protected¹⁷.

*The unjust nature of the attack*¹⁸ implies its lack of legal legitimacy or its lack of authorization by the legal order, so that, when the act takes place under the law, one cannot speak of an unjust attack, so there is a lack of legal legitimacy of the attack.

Legitimate defense can also be concurrent with error when the person attacked is not aware, for instance, of the attacker’s state of irresponsibility. In such a situation, he/she will react in legitimate defense, not having the obligation to seek a less dangerous solution.

The attack should seriously jeopardize the values mentioned in Art. 19 para. (2) of the Criminal Code. Therefore, the outcome should be consequences that are irreparable or difficult to remedy had they not been defended, such as: a serious threat to a person’s safety, the rights of the person attacked, or the general interest, the seriousness of the danger being analyzed on a case-by-case basis, depending on the concrete conditions of the attack.

We consider that throwing pieces of wood and bricks onto the house of another person, thus causing unnecessary damage, does not constitute an attack that seriously jeopardizes the estate, nor does the appropriation by a warehouse operator of two liters of fuel he wished to use in his household in order to ignite a fire, the condition of serious danger not being met in these instances¹⁹.

Instead, we want to show how ungraspable reality is, where such small-sized materials, assembled into simple mechanisms, are used to make improvised devices containing explosive materials, which the often uninformed general public considers as non-dangerous, so its attitude is to ignore them or, even more, people have a tendency or even proceed to closely examine such materials.

¹⁵Idem, Law 122/2011 on the regime of arms, military devices and ammunition owned by M.Ap.N. and by foreign armed forces on the Romanian territory.

¹⁶Antoniu Ghe., coordinator; authors (Antoniu G., Bulai C., Duvac C., Griga Ion, Ivan Ghe., Mitrache C., Molnar I., Pascu I., Pasca V., Predescu O.), *Explicații preliminare ale noului Cod penal (Preliminary explanations of the new Criminal Code)*, Vol. I, Editura Universul Juridic (Publishing House), 2010., p.179.

¹⁷Antoniu George, *Vinovăția penală (Criminal Guilt)*, Editura Academiei Române (Publishing House of the Romanian Academy), 1995, p.276.

¹⁸Ibidem.

¹⁹Basarab Matei, *Drept penal. Partea generală (Criminal Law. The General Part)*, Editura Lumina Lex (Publishing House), 1997, p.128.

These situations fall within the scope and specificity of terrorist activity and anti-terrorist technical control activities are aimed at the early detection and investigation of suspicious objects in order to neutralize any improvised explosive or incendiary devices, as well as arms, ammunition, radioactive sources or substances, other technical means that can be used in extremist terrorist actions, actions of this kind, without a doubt, threaten the values defended by the criminal law²⁰.

For a good understanding, by *tactical comparison*, I would point out that in order for there to be a defense, there must be an attack, so *the defense ought to be preceded by an attack* concerning the person attacked or the general interest.

The conclusion we acquiesce in is that the defense may take place²¹ in the presence of the attack, with the fulfillment of all the above conditions and taking into account the circumstances in which it occurred, and that it must observe the principle of proportionality in relation to the attack.

In reality, when the exceeding of the limits of legitimate defense occurs as a result of disturbance or fear, there is only a diminution of the ability to predict, which must be real. If such exceeding is not due to the above causes, the circumstantial legal provisions shall apply.

We can also find ourselves in the face of a *putative or imperfect legitimate defense*, which exists when a person is convinced, on the basis of objective data and subjective conditions, that he/she is confronted with an attack that is not actually happening. In this case, the deed was committed without guilt, because of the error regarding the circumstances in which the defense took place. Putative legitimate defense is distinguished from the putative criminal offence, which exists when the criminal decision is followed by an action that has no criminal significance, in the case of putative legitimate defense, the decision is justified, and however, the defense action is unlawful²².

The attack is apparent (putative), but the actual defense is based on that attack. So there must be some real circumstances that create for the person who defends itself the certainty of being confronted with an attack. Therefore, the person who believes to be under attack or the intervening third party acts in good faith.

For example, a military from the Afghanistan operations theatre who participates in patrol missions and who has been confronted with real situations in which a disguised person attacked him, is always armed, according to the rules. A woman of Afghan origin who was traditionally dressed, with her face covered by a "burka" (a traditional garment covering the faces of Muslim women), originating from areas other than those of direct confrontations, during a visit to a relative, while in the street, being unaware of the situation, unwittingly and jokingly, made a gesture with her hand from under those garments that seemed to indicate that she was pointing an object of the size of an automatic weapon towards the military patrol. The military, believing he was being confronted with a real assault, of the kind he had previously encountered, shot her deadly.

II. RULES OF ENGAGEMENT – R.O.E.

The lawfulness of the operations deployed by the armed forces in order to carry out a mission is based on the domestic and international regulations under which they are created and act.

²⁰Counter-IED Smart Book for Pre-Deployment and Field Use, version 2, Kwikpoint, US DoD, 2006, pp. 141-145.

²¹Idem reference 19.

²²Ionescu Victor, *Legitima apărare și starea de necesitate (Legitimate defense and the state of necessity)*, Editura Științifică (Scientific Publishing House), Bucharest, 1972, p.128.

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The so-called Rules of Engagement (ROE²³) have an important role in ensuring the efficiency of the armed forces' action and in creating the feeling among the military personnel that they are acting in full compliance with the legal provisions.

The rules of engagement in conflict are instructions developed by the competent political or military authority, in order to define the circumstances and limits of the use of force by its armed forces to initiate and/or continue armed engagement when confronted with other forces.

They are in full compliance with the principles and rules of criminal law and of international humanitarian law with regard to the use of force and justifiable causes, specifically legitimate defense.

According to NATO's view²⁴, rules of engagement are defined as follows: "Directives issued by a competent military authority specifying the circumstances and limits under which forces will engage in and/or continue combat".

At a practical, operational/tactical level, they are the commander's rules regarding the use of force.

Rules of engagement do not limit the inherent right to self-defense of the individual or the unit/sub-unit.

For example, for the military actions in the Afghanistan Theatre of Operations, at one point there were:

1. NATIONAL LIMITATIONS:

- a) Romanian forces may be used throughout the territory of the Republic of Afghanistan only after obtaining national approval under the conditions of providing air transport and logistic support.
- b) Romanian forces may temporarily retain / detain suspects / insurgents / terrorists only during the execution of missions. Suspects / insurgents / terrorists will be handed over to the Afghan authorities as soon as possible.
- c) Persons detained in the situations referred to in letter (b) shall be disarmed if necessary and transferred as soon as possible to the competent Afghan authorities.
- d) The control of crowds can only be performed by military sub-units prepared, equipped and fitted appropriately.

²³For example, the following are presented synthetically: *SPECIFIC EMPLOYMENT RULES AUTHORIZED BY ISAF (International Security Assistance Force) ON THE TERRITORY OF THE ISLAMIC REPUBLIC OF AFGHANISTAN* (0 variant).

Scope of application:

1. 10-GEOGRAPHICAL POSITION OF OWN FORCES
2. 13-PREVENTION OF THE INSPECTION ON BOARD, ARREST OR SEIZURE OF CIVIL PROPERTY
3. 15-WARNINGS
4. 16-CHANGES OF THE TRAVEL ITINERARY
5. 17-INSPECTION ON BOARD
6. 18- ARREST OR SEIZURE OF PROPERTY
7. 22- INFRARED AND VISUAL ILLUMINATION
8. 23-IDENTIFICATION OF POTENTIAL TARGETS BEFORE ENGAGING THEM
9. 28-TARGET INDICATION
10. 32-MEANS TO BE USED FOR THE CONTROL OF CROWDS
11. 33-THE USE OF FORCE IN DESIGNATED OPERATIONS
12. 35-PROHIBITION OR RESTRICTION OF THE USE OF SPECIFIC ARMS IN DESIGNATED CIRCUMSTANCES.
13. 37-THE USE OF ELECTRONIC COUNTERMEASURES (ECM)
14. 42-THE ATTACK.

²⁴Center for Army Lessons Learned, *Tactical Commander's Handbook. Information Operations*, NATO, US Unclassified 2005.

- e) Entering and conducting searches in buildings or dwellings inhabited by civilians, searching civilians and goods in their possession are activities that fall within the competence of the host nation's authority.

2. NATIONAL RESTRICTIONS:

- a. The Romanian forces execute missions only on the territory of the Islamic Republic of Afghanistan. Operations beyond the borders of Afghanistan are not authorized.
- b. Lethal force shall not be used on areas inhabited by civilians, civilian buildings or houses, religious facilities, museums, and cultural or historical works that are not used for military purposes.
- c. Crowd control missions such as civil disturbance operations (CDO), and respectively, crowd and riot control (CRC), are prohibited.
- d. It is prohibited to register biometric data of the civilian population, except for detained persons and persons who request access to ISAF displacement bases.
- e. The use of close air support (CAS), as well as indirect fire on residential areas is prohibited.
- f. The use of incendiary weapons is prohibited.
- g. The use anti-personnel mines is prohibited.
- h. It is prohibited to destroy bridges, tunnels, dams that are not used for military purposes.
- i. The punitive use of force (reprisals) is prohibited.
- j. Actions that may cause collateral damage or injure the local population that does not pose a threat to ISAF (the military coalition force) are not allowed.
- k. It is forbidden to engage in counter-narcotics operations, without the prior consent of the competent national authorities.
- l. The participation of Romanian contingent personnel in the questioning/interrogation of detainees who are suspected of collaborating with insurgents or of committing offences under the criminal law, during the carrying out of missions or of military operations together with the local sub-units, is prohibited.
- m. Romanian forces will not use anti-personnel mines.

CONCLUSION

Conclusions, through and under the coverage of justifiable causes, in particular legitimate defense, *rules of engagement* (ROE) are the means by which an authority (political, military) controls the use of armed force in a given political and military context, taking into account certain factors that will be examined at a later stage, in the form of national limitations and restrictions.

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