A new legal framework for the opening of fire in the event of a murderous journey on national territory

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Self-defence and the state of necessity are two existing legal regimes that can justify the criminal irresponsibility of a soldier who opens fire during a terrorist attack on national territory. The author therefore questions the relevance of a new provision in the Criminal Code creating a specific legal framework for the opening of fire in the event of a deadly attack.

Act No. 2016-731 of 3 June 2016 strengthening the fight against organized crime, terrorism and their financing, and improving the effectiveness and guarantees of criminal procedure, contains numerous provisions giving judges and prosecutors new means of investigation, such as the use of ISMI-catchers[1] for example. This law also creates a new legal framework that will enable military personnel deployed on national territory to open fire to prevent the repetition of a deadly mass attack. As stated in the explanatory memorandum to the law: "The attacks that have painfully affected our country this year have strengthened the Government's conviction of the need to adapt our legislative framework for combating organized crime and terrorism".

Article 122-4-1 of the Criminal Code states that "A soldier deployed on national territory in the context of requisitions provided for in the Defence Code (...) shall not be criminally liable (...).) who makes an absolutely necessary and strictly proportionate use of his weapon for the sole purpose of preventing the repetition, in the near future, of one or more murders or attempted murders from being committed in the territory of the State, or of one or more persons who have been murdered or attempted murders from being committed in the territory of the State.(b) a murder or attempted murder committed when the officer has real and objective reasons to believe that such a repetition is probable on the basis of the information available to him at the time he uses his weapon. This article also applies to police officers, gendarmes and customs officers.

The effect of this provision is to create a new legal regime for the engagement of force by the military of Operation Sentinel, in addition to the existing ones.

A complement to the existing legal frameworks

The use of force by the soldiers of Operation Sentinel, outside the case covered by the new Article 122-4-1 of the Penal Code, and as for any other citizen, must be in self-defence or a state of necessity [2]. More exceptionally, weapons may be used to disperse a gathering.

The use of weapons is first of all permitted to military personnel in self-defence (Article 122-5 of the Penal Code). Self-defence may be retained if the soldier uses his weapon in the face of an unjust attack and if his response is necessary and is not disproportionate [3].

3] The state of necessity (Article 122-7 of the Criminal Code) then exonerates the soldier from criminal responsibility if he uses his weapon. For the state of necessity to be recognised, the danger may be constituted by a human threat or may come from material, external and insurmountable circumstances (comparable to force majeure).

Finally, Article 431-3 of the Criminal Code provides for the possibility, which is rarely used, of using weapons to disperse a crowd.

These regimes for the use of force by law enforcement agencies are restrictively regulated by the European Court of Human Rights, which imposes in particular a condition of absolute necessity for the injury to life and a condition of strict proportionality to the legitimate aims pursued[4].

A new strictly framed legal framework for the opening of fire

Article 122-4-1 of the Penal Code amounts to creating a new state of necessity justifying the opening of fire, for which the conditions of implementation are very strict. Thus, the soldier will not be criminally liable if the use of his weapon is carried out under the following conditions:

- in cases of absolute necessity and in strict proportion to the threat;
- for the sole purpose of preventing the repetition of one or more murders or attempted murders that have just been committed;
- in the immediate aftermath of the murder(s) or attempted murder(s);
- if the soldier has real and objective reasons to believe that such a repetition is probable in the light of the information available to him at the time he uses his weapon;
- in the context of a requisition provided for in Article L. 1321-1 of the Defence Code.

These conditions typically apply to the murderous journey of the attacks of the night of November 13, 2015. The soldier of Operation Sentinel (at the time engaged within the framework of a requisition legally taken by the prefect) who, having information on the multiplicity of the attacks in progress, would have used his weapon in a manner born of the desire to kill, would have used his weapon in a way that would have been impossible for him to do.The new Article 122-4-1 of the Penal Code does not provide for the criminal liability of a terrorist who has just committed several murders and is likely to commit others. But was an amendment to the penal code really necessary?

Political and emotional' or 'thoughtful legislative work'?

In its opinion on the bill containing the text of article 122-4-1 of the Criminal Code, the National Consultative Commission on Human Rights (CNCDH)[5] stated that: "Once again, the CNCDH can only deplore this proliferation of legislative texts, which is more a matter of a political and emotional approach than of thoughtful legislative work".

This observation applies directly to the new legal framework for the opening of fire established by the Act of 3 June 2016. Indeed, the legislator seems to be unaware of the jurisprudence of the Court of Cassation, which is very protective of law enforcement officers implicated in criminal proceedings due to the opening of fire. As mentioned in the report on the bill proposal to strengthen the criminal protection of security forces and the use of firearms [6]: "Case law has proved to be a flexible instrument, taking into account the constraints of law enforcement agencies". There are few cases in which officers or soldiers are implicated. Thus, even if the legal framework of self-defence or the legal framework of the state of necessity are not directly adapted to enable the forces of law and order to prevent one or more armed individuals, having already committed or attempted to commit one or more murders, from repeating their crimes, an interpretation of these texts in the sense of the protection of law enforcement agencies could perfectly justify the criminal irresponsibility of a soldier who would open fire on a terrorist. The relevance of article 122-4-1 of the Criminal Code is therefore called into question by the legal regimes of self-defence and the state of necessity, which are characterized by their flexibility and by their interpretation by the courts and tribunals often to the benefit of the forces of law and order, especially in the face of a terrorist attack.

Article 122-4-1 of the Criminal Code is also a source of legal uncertainty. The various conditions mentioned above may present difficulties of interpretation and assessment, as the Council of State stated in its opinion on the Law of 3 June 2016[7]. 7] Several questions may indeed be raised: can the "close time" extend over several hours (or even several days, in particular during a state of emergency) or does it refer to the immediate temporal proximity of the first attack? Would the mere information available to the soldier that a first attack had taken place be sufficient to justify opening fire on a person with all the characteristics of a suicide bomber?

Moreover, the strict interpretation of the text makes it applicable only against an individual or group of individuals who have committed a first lethal attack (or attempt). However, in the event of action by several groups, this legal framework will not protect a soldier who opens fire against a second group that has not committed a first attack, even though the soldier has information that enables him or her to estimate that an attack is about to be committed.

This new legislative provision could nevertheless make it possible to offer military personnel better legal protection in the event of the use of their weapons in the face of a criminal action on a scale that justifies opening fire in the hunt for a fleeing terrorist group, for example. However, this text, marked by the reactivity of its adoption by Parliament following the current circumstances linked to the terrorist threat, once again characterises the lack of global reflection on its usefulness and its inclusion in the European Union's legal framework.It is, however, marked by the responsiveness of its adoption by Parliament in the light of the current circumstances relating to the terrorist threat, and once again demonstrates the lack of overall reflection on its usefulness and its consistency with existing legal frameworks which, through their flexibility of interpretation, also make it possible to provide legal protection for the military in the event of an opening

of fire on a terrorist group preparing to commit multiple attacks. Legislators should be inspired by Cicero, who wrote in his "Thirty-ninth Address" of the Plea for T.A. Milon that "... every means is honest to save our days, when they are exposed to the attacks and daggers of a brigand and an enemy: for the laws are silent in the midst of arms; they do not order that one wait for them, when he who waits for them would be the victim of unjust violence before they could give him just assistance.

1] On the use of ISMI-catcher, see : "Law of June 3, 2016: use of ISMI-catchers authorized", V. Bensoussan,

http://www.alain-bensoussan.com/utilisation-imsi-catchers-autorisee/2016/07/21

2] See in particular the report to Parliament on the conditions of employment of the armed forces when they intervene on national territory to protect the population, presented to the Senate and the National Assembly on 15 and 16 March 2016,

http://www.assemblee-nationale.fr/14/seance/rapport_emploi_forces_armees.pdf

3] For the application of self-defence to law enforcement, see : CA Lyon, Nov. 28, 1962; Cass. crim. 28 Nov. 1972; Cass. crim. 16 Oct. 1979; Cass. crim. 16 July 1986.

4] ECHR, 27 Sept. 1995, No. 18984/91, Mc Cann, Farell and Sauvage v. United Kingdom; ECHR, Guerdner, 17 April 2014, No. 68780/10.

5] CNCDH, Opinion on the bill to strengthen the fight against organized crime, terrorism and their financing, and to improve the efficiency and guarantees of criminal procedure, 17 March 2016, http://www.cncdh.fr/sites/default/files/16.03.17_avis_pjl_criminalite_organisee.pdf.

6] Report No. 453 (2012 - 2013) by Mrs Virginie Klès on behalf of the Committee on Constitutional Laws, Legislation, Universal Suffrage, Rules of Procedure and General Administration on the proposal for a law by Mr. Klaus and Mr. Klaus Louis Nègre, Pierre Charon and several of their colleagues, aimed at strengthening the criminal-law protection of the security forces and the use of firearms, https://www.senat.fr/rap/l12-453/l12-4531.pdf.

7] EC, Opinion No 391004 on the law strengthening the fight against organised crime and its financing, the efficiency and guarantees of criminal procedure, 28 January 2016, http://www.conseil-etat.fr/content/download/54700/484379/version/1/file/391004%20EXTRAIT%20AG%20AVIS.pdf.

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