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CRIMINAL LAW PROTECTION AGAINST TERRORISM IN THE CZECH REPUBLIC

КРИМІНАЛЬНЕ ПРАВО ЗАХИСТУ ПРОТИ ТЕРОРИЗМУ У ЧЕХІЇ

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Terrorist attacks, which occurred in January 2015 in Paris, as well as other terrorist activities in Europe and elsewhere, have revived the interest in means of legal protection against terrorism. It appears that international terrorism is an example of transnational crime in our times; it is a global problem and a threat to humanity. It presents one of the most serious attacks on democracy and the rule of law, the values shared by all members of the European Union. The article introduces a definition of the term "terrorism", analyses the distinction between terrorism and organized crime, activities of the European Union in combating terrorism, as well as legal definitions of the crimes of "terror" and "terrorist attack" in the Czech Republic. In conclusion, the author recommends alterations in the currently valid Czech law.

Key words: terrorism, terrorist attack, organized crime, international terrorism, combating terrorism.

Теракти, які відбулися в січні 2015 року в Парижі, а також інші терористичні акти в Європі і в інших країнах, відродили інтерес до засобів правового захисту від тероризму. Звісно ж, що міжнародний тероризм є прикладом транснаціональної злочинності в наш час; це глобальна проблема і загроза для людства. Вона являє собою одну з найсерйозніших нападів на демократію і верховенства закону, цінностей, поділюваних усіма членами Європейського Союзу. У статті вводиться визначення терміна «тероризм», аналізує відмінності між тероризмом і організованою злочинністю, діяльність Європейського Союзу в боротьбі з тероризмом, а також юридичні визначення злочинів "терору" і "теракт" у Чехії Республіка. На закінчення автор рекомендує зміни в нині чинному чеським законодавством.

Ключові слова: тероризм, терористична атака, організована злочинність, міжнародний тероризм, боротьба з тероризмом.

Теракты, которые произошли в январе 2015 года в Париже, а также другие террористические акты в Европе и в других странах, возродили интерес к средствам правовой защиты от терроризма. Представляется, что международный терроризм является примером транснациональной преступности в наше время; это глобальная проблема и угроза для человечества. Она представляет собой одну из самых серьезных нападений на демократии и верховенства закона, ценностей, разделяемых всеми членами Европейского Союза. В статье вводится определение термина «терроризм», анализирует различия между терроризмом и организованной преступностью, деятельность Европейского Союза в борьбе с терроризмом, а также юридические определения преступлений "террора" и "терракт" в Чехии Республіка. В заключение автор рекомендует изменения в ныне действующем чешском законодательству.

Ключевые слова: терроризм, террористическая атака, организованная преступность, международный терроризм, борьба с терроризмом.

Introduction. The January 2015 terrorist attacks in the headquarters of the satirical magazine "Charlie Hebdo" and in a kosher supermarket in Paris, in which the gunmen killed 17 victims in total, and the March attack in the Bardo museum in Tunisia, with the death toll at 21 and dozens wounded, including many foreign tourists, together with the many like killings and other terrorists attacks in Europe and elsewhere have revived the interest in means of legal protection against terrorism. It appears that the phenomenon of terrorism is not limited by the boundaries of national states, nor by time and means. It crosses borders and gains transnational dimensions. Hence the terms "international" or "transnational terrorism". It appears that international terrorism is an example of transnational crime in our times; it is a glob-

al problem and a threat to humanity. It presents one of the most serious attacks on democracy and the rule of law, the values shared by all members of the European Union.

The dangerousness of transnational terrorism is apparently growing and it is necessary that states take counter-terrorist measures in order to diminish the threat. Terrorism cannot be considered solely as a problem of states that it directly affects.

The fact that there has not been an incident of terrorism in the Czech Republic, either from within or from abroad, so far, does not relieve the country from the responsibility to combat it. The Czech Republic bears responsibility both, towards its own citizens, to whom it guarantees security within the country, and towards oth-

er countries, to which it guarantees that neither its territory nor its inhabitants would be misused for a terrorist cause, or, even more seriously, would break the law by actively supporting terrorist causes.

The state must possess effective legal tools for combating terrorism in both, substantive criminal law (criminalization of terrorist acts and their punishment, crime prevention) and procedural criminal law (means enabling detection, investigation and proof of terrorist acts in criminal proceedings) The legal tools must be understood as only a part of the whole counter-terrorist legislation.

Definition of the term “terrorism” and “combating terrorism”

There is no single and generally accepted definition of terrorism, as this term itself is multivocal, vague, difficult to grasp, and also used in many fields of human activity and social sciences – in law and security science, as well as in politics, culture, public opinion and journalism.

A large volume of academic literature has been dealing with the definition of the term terrorism and it is useful to make a reference to these sources [1].

It is perhaps due to ambiguity of the term that the most recent edition of the major Czech handbook of criminology only mentions terrorism very briefly in relation with organized crime, lacking the ambition to set a definition of this crime and provide a deeper analysis of this phenomenon [2, p. 400].

Czech criminal legislation does not provide a definition of terrorism, yet the Criminal Code (Act No 40/2009 Coll.) recognizes two key offences for the punishment of terrorist acts – “terrorist attack” (Section 311) and “terror” (Section 312), which will be discussed in more detail further.

Although the term itself is questionable, or, rather, more difficult to delineate, it is nevertheless absolutely necessary to define it in the law in order to comply with the maxim *nullum crimen sine lege* as a basis for criminal responsibility. The exact definition is also required from the international, as well as European perspective, in support of international cooperation in combating terrorism.

The term “terrorism” contains a variety of forms and types of terrorism. Concrete forms of terrorism can be established according to various criteria that take in account different aims, means and targets of terrorist activity. Furthermore, a common definition of terrorism is undergoing diversification, especially based on the aims the temporary terrorism tries to accomplish.

Siegel defines the following forms of terrorism: revolutionary terrorism, political terrorism, eco-terrorism, nationalist terrorism, retributive terrorism, state-sponsored terrorism, cult terrorism and criminal terrorism [3, p. 350].

Terrorism, akin any other broad, boundless term of global character, may be examined from various perspectives, such as:

1. Definition of term terrorism and its distinguishing from organized crime.
2. Causes of terrorism, its various types, displays and forms.

3. Legal tools for combating terrorism, including the regular and requisite tools of criminal law and criminal procedural law.

4. Means for terrorism prevention, especially the issue of terrorism financing as a possible material base for terrorism.

5. Modus operandi of terrorist attacks.

6. Treatment of offenders of terrorist attacks, the issues of sentencing and serving the sentence, work with convicts.

7. Protections of victims of terrorist attacks.

The term terrorism is closely related to the term “combating terrorism”. This term can be defined as a set of measures, adopted on national or international level to prevent terrorist attacks, as well as to deal with the aftermath, if such occur, or the measures that can support this aim. Compared to the definition itself, more controversial appears to be the choice of strategy (paradigm, model) of combating terrorism by the counter-terrorist/law enforcement actors.

A number of such strategies exist, yet the main distinction lies between the military strategy and the criminal law strategy, the latter being supplemented with the human rights strategy. Different states and international organizations opt for different strategies, or combine their aspects. As Bílková [4, p. 286] argues, this choice determines which legal regime will be applicable to counter-terrorist operations.

Terrorism and human rights

Terrorism and combating terrorism have a direct impact on human rights and basic freedoms. A terrorist attack itself is a direct attack against basic human rights, such as life, health, freedom, property etc. This, on the other hand, invokes a reaction by subjects combating terrorism, which, by the course of their actions, also interfere with basic human rights and liberties of both, terrorists and also completely uninvolved persons. It can be said that terrorist attacks cause a double infringement of human rights, by a terrorist attack itself on one hand, and by the reaction of society (the state) to the attack on the other.

The contemporary problem of combating terrorism is striking a certain balance between the seriousness of terrorism and its displays, and the seriousness of crossing the boundaries of the guaranteed human rights and freedoms while combating terrorism.

It is of utmost importance that the attempts to diminish terrorism do not lead to unacceptable suppression of human rights and freedoms, or, in other words, an acceptable compromise is established between the legitimate efforts to diminish terrorism and the legitimate interest in sustaining the already reached level of protection of human rights and freedoms as expressed in constitutional and international standards of human rights and freedoms of persons subjected to criminal proceedings. It is nevertheless complicated to establish a general rule applicable to all cases. It can only be stated that in every case, following certain public interest as an aim that renders the restriction of basic rights and freedoms legitimate aim must fulfil the condition of proportionality, i.e. balancing between an interference with

or a restriction of a right of certain person and the seriousness of crime dealt with in criminal proceedings. In this sense, a concrete interference with or a restriction of a right must not exceed the boundaries of immediate necessity in achieving the stated goal.

The literature distinguishes among four different dimensions of human rights protection in combating terrorism. These are not wholly separate and mutually independent. To the contrary, they are closely intertwined and influence each other, in both, the real world (e.g. programmes aimed at care for victims diminish the risk that victimization becomes a cause of terrorism), and in normative meaning (e.g. establishing whether a terrorist act constitutes a breach of human rights may influence the regime, in which the victims of such act may obtain redress and receive compensation) [4, p. 286].

The first dimension focuses on the question to what extent are the breaches of human rights themselves, or in combination with other factors, one of the causes of terrorism. The second dimension of human rights protection in combating terrorism deals with the question whether, and under what conditions, do terrorist acts constitute a breach of human rights. The third dimension of human rights protection in combating terrorism aims at infringements of human rights caused by counter-terrorist measures. Lastly, the fourth dimension concerns with the protection of human rights of victims of terrorism [4, p. 288–290].

The European Union and terrorism

Following the aim of effective diminishment of terrorism, the European Union has issued a large number of recommendations, strategies, common positions, conventions, framework decisions and other documents, in which it explains that combating terrorism is one of its key goals and provides and recommends to the member states the means for combating terrorism with regard to basic human rights guaranteed to citizens, and in which it harmonizes the definition of terrorist offences in all member states of the European Union [5].

Among the most important milestones in this regard, which has to be explicitly mentioned, belongs Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism, which contains the definition of terrorist criminal offences, understood as a list of criminal offences, which, in substance or in context, have the potential to seriously endanger the functioning of particular state or international organization, and which are defined as criminal offences in national legislations [6].

This common position was followed up with Council Framework Decision 2002/475 on Combating Terrorism, adopted by the Council of the EU on 13 June 2002, which also contributes to defining the term “terrorist act”. This decision was amended later by Council Framework Decision 2008/919/JHA of 28 November 2008.

The 2002 Council Framework Decision states in the preamble that all member states should approximate the definition of terrorist criminal offences, including offences relating to terrorist groups. Furthermore, the decision calls for provisions on penalties and sanctions

for natural and legal persons having committed or being liable for terrorist offences, which should reflect the seriousness of such offences (Preamble, point 6).

The Decision harmonizes the definition of terrorist criminal offences in all member states of the EU by introducing a specific and common definition, which contains both basic elements of crime – objective element (*actus reus*) and subjective element (*mens rea*). The definition contains a list of instances of serious criminal undertaking (attacks upon a person's life, which may cause death, attacks upon the physical integrity of a person, kidnapping or hostage taking, causing extensive destruction, seizure of means of transport, manufacture, possession, acquisition, transport, supply or use of weapons and explosives, threatening to commit such acts, etc.) and these are deemed to be terrorist offences when committed with the aim of seriously intimidating a population, or unduly compelling a government or an international organization to perform or abstain from performing any act, or seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization.

The Decision further defines a “terrorist group” as “a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist offences”. “Structured group” shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure” (Article 2, Section 1). Furthermore, the Decision stipulates the duty of member states to take necessary measures to ensure that intentional directing of a terrorist group and intentional participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group are punishable (Article 2, Section 2).

The EU member states are further required to ensure that certain intentional acts related to terrorist activities punishable even in situation when no terrorist act is committed. These include:

- public incitement to commit a terrorist criminal offence;
- terrorist recruitment and training;
- aggravated theft, extortion and drawing up false administrative documents with a view to committing a terrorist act (Article 3).

Member states shall take the necessary measures to ensure that terrorist offences are punishable by effective, proportionate and dissuasive criminal penalties, which may entail extradition (Article 5, Section 1). Furthermore, the states shall ensure that legal persons can be held liable for terrorist offences committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person (Article 7). They are also required to establish their jurisdiction over terrorist criminal offences and to provide protection of, and assistance to, victims of terrorist offences (Articles 9 and 10).

A terrorist offence is defined by the Decision upon two objective criteria, which are criminal liability according to national criminal legislation and potential consequences of a terrorist attack.

Regarding the subjective criterion, the Decision emphasizes the intention to intimidate a population, unduly compel a government or an international organization to perform or abstain from performing any act, or seriously destabilise or destroy the fundamental political, constitutional, economic or social structures of a country or an international organization.

The 2008 Council Framework Decision is important for amending the former 2002 Decision and establishing the duty of member states to criminalize offences linked to terrorist activities including the following intentional acts:

- public provocation to commit a terrorist offence;
- recruitment for terrorism;
- training for terrorism, whereas it defines these acts in Article 1, which amends the Article 3 of the 2002 Council Framework Decision.

The Decision defines the offences linked to terrorist activities as following: “public provocation to commit a terrorist offence” shall mean the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of one of the offences listed in Article 1(1)(a) to (h), where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed; “recruitment for terrorism” shall mean soliciting another person to commit one of the offences listed in Article 1(1) (a) to (h), or in Article 2(2); “training for terrorism” shall mean providing instruction in the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or in other specific methods or techniques, for the purpose of committing one of the offences listed in Article 1(1)(a) to (h), knowing that the skills provided are intended to be used for this purpose”.

The 2008 Decision further stipulated a duty to criminalize aggravated theft, extortion and drawing up false administrative documents with a view to committing a terrorist act, where criminal liability shall not require a terrorist act being committed. This EU criminal law obligation for the Czech Republic is met in the Criminal Code. Cf the provisions on Theft – Section 205 Subsection 5 Point b), Extortion – Section 175 Subsection 3 Point b).

Member states were left to decide whether to make attempts to recruit or provide training for terrorism punishable (Article 1, which amends the Article 4 of the 2002 Council Framework Decision).

Member States were required to take the necessary measures to comply with the 2008 Council Framework Decision by 9 December 2010 and to forward to the General Secretariat of the Council and to the Commission the text of the provisions transposing into their national law the obligations imposed on them under the Decision. The Council then had one year to assess whether member states had taken the necessary measures to comply with the Decision on the basis of a report drawn up

from the information acquired from the submitted text of the transporting provisions and a report from the Commission.

The Report from the Commission to the European Parliament and the Council on the implementation of Council Framework Decision 2008/919/JHA amending Framework Decision 2002/475/JHA on Combating Terrorism was released in Brussels on 5. September 2014 [7]. It is based on the information about implemented measures provided by the member states, supplemented by publicly available information and findings of an external study.

The report evaluates whether the objectives set in the 2008 Framework Decision, have been accomplished within the specified date (by 9. December 2010), and whether the implemented measures that introduced new criminal offences, including the related ancillary offences, and the respective penal sanctions, have fulfilled the requirements of clarity of legislation and legal certainty.

The report mentions the Czech Republic on various instances. Notably, it states that the Czech Republic did not introduce new measures in the set time frame, i.e. by 9. December 2010, but later – in the end of the year 2011. This was accomplished by enacting the Act No. 330/2011 Coll., which came in force on 1. December 2011.

This Act supplemented then existing wording of the Section 311 Subsection 2 of the Criminal Code in a way the legislator had thought would comply with the requirements of the 2008 Decision. Both, the original and the amended version of the Section 311 Subsection 2 of the Criminal Code are provided here for the comparative reason:

Original version (valid until 30 November 2011):

Section 311 Subsection 2

The same sentence shall be imposed to anyone who threatens with conduct referred to in Subsection 1, or whoever financially or otherwise supports such conduct, a terrorist or a member of a terrorist group.

Amended version (valid since 1 December 2011):

Section 311 Subsection 2

*The same sentence shall be imposed to anyone who threatens with conduct referred to in Subsection 1, **whoever publically instigates commission of such conduct, or whoever financially, materially or otherwise supports such conduct, a terrorist or a member of a terrorist group.***

In relation to the Czech Republic, the report also refers to claimed deficiencies of the state legislation regarding recruitment of terrorists. The Czech legislation only invokes general provisions covering various forms of participation in a terrorist offence and support to a terrorist group. This creates a potential risk that “provisions relating to the support of terrorist organizations or the participation in a conspiracy do not capture recruitment of “lone actors” <...> This may become a concern if no other provision criminalises this behaviour. The reliance on general provisions may also raise doubts as to whether inchoate offences are actually criminalised. This will depend on the interpretation and application of concepts such as the

facilitation of or preparatory acts to terrorist offences". The report also criticizes that criminalization of training for terrorism relies on existing general provisions on participation, preparation, facilitation or support of terrorist offences. Hence, "it is unclear whether national law criminalises the provision of training in cases in which no terrorist offence has been committed or attempted. This will ultimately depend on the interpretation and application of these concepts in national law".

Czech criminal law provisions on combating terrorism

The core of the Czech criminal law legislation on terrorism lies in Criminal Code [if we disregard the already mentioned crimes of aggravated theft, extortion and drawing up false administrative documents with a view to committing an offence of terrorist attack (Section 311) or terror (Section 312)] provisions in Section 311 (Offence of Terrorist Attack) and Section 312 (Offence of Terror). Both offences are listed in the ninth chapter of the special part of the Criminal Code (Criminal offences against the Czech Republic, foreign states and international organizations) in its first division titled Criminal Offences against the Foundations of the Czech Republic, Foreign States and International Organizations. The wording of both offences is provided:

Section 311

Terrorist Attack

(1) *Whoever with the intention to impair the constitutional system or defence capabilities of the Czech Republic, disrupt or destroy the base political, economic or social structure of the Czech Republic or an international organization, seriously terrify the population or illegally make the government or another public authority or an international organization to act, omit or tolerate something,*

a) performs an attack threatening human life or health with the intention to cause death or grievous bodily harm,

b) seizes hostages or commits kidnapping,

c) destroys or damages in larger extent a public facility, transportation or communication system including an information system, a fixed platform on continental shelf, energetic, water-work, medical or other important facility, public area or property with the intention to jeopardise human lives, security of such a facility, system or area or to expose property to risk of extensive damage,

d) disrupts or interrupts supply of water, electricity or other fundamental natural resource with the intention to jeopardise human lives or to expose property to risk of extensive damage,

e) hijacks an aircraft, ship or another means of personal or cargo transportation or exercises control over it, or destroys or seriously damages navigation device or in larger extent interferes with its operation or communicate a false important information by which he/she jeopardises life or health of people, security of such means of transportation, or exposes property to risk of extensive damage,

f) wrongfully manufactures or otherwise obtains, handles, imports, transports, exports or otherwise sup-

plies or uses explosives, nuclear, biological, chemical or other weapon or means of combat or explosives prohibited by law or international treaty, or

g) exposes people to general risk of death or grievous bodily harm or property of another to risk of extensive damage by causing fire or flood or detrimental effect of explosives, gas, electricity or other similarly dangerous substances or powers or commits other similarly dangerous conduct, or increases such a risk or aggravates its aversion or mitigation,

shall be punished by imprisonment for five to fifteen years, eventually in parallel to this sentence also to confiscation of property.

(2) *The same sentence shall be imposed to anyone who threatens with conduct referred to in Subsection 1, whoever publicly instigates commission of such conduct or whoever financially, materially or otherwise supports a terrorist or a member of a terrorist group.*

(3) *An offender shall be punished by imprisonment for twelve to twenty years, eventually in parallel to this sentence also to confiscation of property, or to an exceptional sentence of imprisonment, if he/she*

a) commits the act referred to in Subsection 1 as a member of an organised group,

b) causes grievous bodily harm or death by such an act,

c) causes that a larger amount of people remained without shelter by such an act,

d) causes disruption of transportation in larger extent by such an act,

e) causes extensive damage by such an act,

f) gains for him/herself or for another extensive profit by such an act,

g) by such an act seriously jeopardises the international position of the Czech Republic or position of an international organization which the Czech Republic is a member of, or

h) commits such an act in a state of national peril or state of war.

(4) *Preparation is criminal.*

Section 312

Terror

(1) *Whoever kills another person with the intention to harm the constitutional order of the Czech Republic, shall be sentenced to imprisonment for fifteen to twenty years, eventually in parallel to this sentence also to confiscation of property, or to an exceptional sentence of imprisonment.*

(2) *Preparation is criminal.*

The objective element (*actus reus*) of the offence of terrorist attack (Section 311 of the Criminal Code) consists of two basic modes (Subsection 1 and 2) and one aggravated mode (Subsection 3), which is related to both basic acts.

The first basic mode (Subsection 1) contents a long enumeration of acts that can be generally characterized as violent acts causing death or grievous bodily harm, serious damages on public and private property, public facilities, transportation, communication and information systems, infrastructure or environment.

The offender acts with "terrorist intention", i. e. with the intention to impair the constitutional system or de-

fense capabilities of the Czech Republic, disrupt or destroy the base political, economic or social structure of the Czech Republic or an international organization, seriously terrify the population or illegally make the government or another public authority or an international organization to act, omit or tolerate something.

The second basic mode (Subsection 2) criminalizes those, who threaten with conduct referred to in Subsection 1, publically instigate commission of such conduct or financially, materially or otherwise support a terrorist or a member of a terrorist group.

The offence of terror (Section 312 of the Criminal Code) is subsidiary to the offence of terrorist attack (Section 311 of the Criminal Code). It is because the offence of terror criminalizes the killing with the intention to harm the constitutional order of the Czech Republic (for instance murders a person holding a constitutional office). Such killing or an attempted killing does not necessarily have to be a terrorist attack according to Section 311.

Contrary to the offence of terrorist attack (Section 311), the offence of terror (Section 312) contains merely two basic elements – the intention to harm the constitutional order of the Czech Republic and the intentional killing of another person.

Corporate entities may be liable for the offence of terrorist attack (Section 311), as this offence falls within the list of offences in Section 7 of the Act No. 418/2011 Coll. on Criminal Liability of Legal Persons and the Proceedings against Them.

Both offences fall within the category of especially serious crimes, preparation of them is criminalized according to Section 20 of the Criminal Code and they are both governed by the principle of universality, which states that the law of the Czech Republic assesses the culpability of these offences even when they were committed abroad by a foreign national or a person with no nationality to whom permanent residence in the territory of the Czech Republic was not granted (Section 7 Subsection 1 of the Criminal Code).

Protection under both provisions (Sections 311 and 312) is explicitly provided to foreign states under Section 313 of the Criminal Code. This provision was included in the Criminal Code with the aim to strengthen the efficiency of combating international (especially organized) crime in general, and terrorism, as its most serious form, in particular.

If the prosecution fails to prove the intention to damage the constitutional order of the Czech Republic (or other elements of the offence under Section 311), it is possible to hold the defendant responsible for other crimes enlisted in the Criminal Code, which do not fully fall within the meaning of terrorism. These could be the offence of Murder (Section 140), Torture and other Cruel and Inhumane Treatment (Section 149), Kidnapping (Section 172), Hostage Taking (Section 174), Extortion (Section 175), generally dangerous criminal offences (Chapter VII) and certain criminal offences against property (Chapter V) and economic criminal offences (Chapter VI).

The offence of terrorist attack (Section 311) and terror (Section 312) share some other commonalities. Of-

fences of Favouritism [(Section 366 Subsection 2 Point a)], Failure to Prevent a Criminal Offence (Section 367 Subsection 1) and Failure to Report a Criminal Offence (Section 368 Subsection 1) can be committed in relation to these terrorist offences. The intention to assist a familiar person who committed one of the terrorist offences does not exculpate from liability for the offence of favouritism (helping the offender with the intention to facilitate their escape from criminal prosecution, punishment or protective measures, or their enforcement).

Both offences are enlisted in Section 35 of the Criminal Code (Exclusions from Limitation), which provides that the lapse of the period of limitation shall not cause criminal liability to expire for the offences of terrorist attack (Section 311) and terror (Section 312) where they were committed under circumstances so that they constitute war crimes or crimes against humanity as specified under the regulations of international law [cf Section 35 Subsection 2 Point b) of the Criminal Code].

The offence of terrorist attack (Section 311) in its aggravated modes is punishable by imprisonment for 12 to 20 years or by exceptional punishment (imprisonment for 20 to 30 years or life imprisonment – Section 54). The offence of terror (Section 312) is punishable by imprisonment for 15 to 20 years or by exceptional punishment (imprisonment for 20 to 30 years or life imprisonment). Punishment of forfeiture of property can also be applied for both offences.

Suggestions de lege ferenda for amendments of Czech legislation in the context of combating terrorism in Europe

1. Supplementing the interpretative provisions in the General Part of the Criminal Code with a new term “terrorist group”.

Unlike Slovak legislation (cf Section 129 Subsection 5 of the Slovak Criminal Code), the Czech Criminal Code does not contain a definition of terrorist group, although it recognizes and works with the term in Section 311 Subsection 2 of the Criminal Code, which has legal ramifications.

The mentioned provision of the Slovak Criminal Code defines terrorist group as a structured group of at least three people that exists in certain period of time for the purpose of committing an offence of terror or an offence of terrorism (cf Section 129 Subsection 5 of the Slovak Criminal Code).

This definition in the Slovak Criminal Code wholly corresponds with the definition of terrorist group in the Council Framework Decision 2002/475 on Combating Terrorism, which defines “terrorist group” as “a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist offences. “Structured group” shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure” (Article 2 Section 1 of the Decision).

Although the Czech Criminal Code does recognize the term “terrorist group”, it does not define it and uses the supplementary term “organized criminal group” in-

stead. This term (accidentally also defined in Section 129 of the Czech Criminal Code) is defined as following:

Section 129

Organized criminal group

An organized criminal group is a community of several persons with an internal organization structure with a division of functions and designation of activities and which is focused on the systematic commission of intentional criminal activities.

The provision requires fulfilment of five elements – community of several persons, internal organization structure, division of functions, designation of activities, and focus on the systematic commission of intentional criminal activities – for a group to be designated an organized criminal group – and this provision needs to be distinguished from the term “organized group” as a general aggravating factor applicable to every offence [Section 42 Point o) of the Criminal Code], or, eventually, as a special aggravating factor attached to certain particular offences in the Criminal Code. The commission of certain offence for the benefit of an organized criminal group has legal ramifications – confer Section 108 of the Criminal Code on sentencing (the upper limit of the sentence of imprisonment is increased in 1/3 and the sentence is given in the upper half of such established range, which can also, as an extraordinary circumstance, extend the limits up to 30 years of imprisonment, and the defendant shall be placed in a high security prison).

Taking part in an organized criminal group is in itself a criminal offence under Section 361 of the Criminal Code.

I think that for the purposes of sanctioning terrorist attacks, it would be preferable to simplify the already “sophisticated” definition of organized criminal group and create an additional, simpler definition of “terrorist group”, corresponding to the definition in 2002 Council Framework Decision, which would better reflect the fact, that such term is already mentioned in the Section 311 Subsection 2 of the Criminal Code, yet it is not defined in the interpretative provisions of the Criminal Code. Such definition would be special to the definition of organized criminal group. The literal wording can be adopted from the Slovak Criminal Code.

2. Merging the two provisions of Sections 311 (offence of terrorist attack) and 312 (offence of terror) into one provision of Section 311 titled Terrorist attack.

The Czech Criminal Code recognizes two criminal offences (terrorist attack and terror), which, on the national level, define and criminalize particular incidents of terrorism. The offence of terror according to Section 312 is subsidiary to the offence of terrorist attack according to Section 311. The crime of terror according to Section 312 is, in fact, a murder committed with a specific intention, i.e. ‘the intention to harm the constitutional order’. It is a special case of the offence of aggravated murder ... corresponding with its gravity to the offence murder committed under aggravating circumstances (Section 140 Subsection 3 of the Criminal Code), with which it also shares the same punishment (the sentence of imprisonment for 15 to 20 years or exceptional sentence).

Offences of terror and terrorist attack have many traits in common (they both fall within the category of especially serious crimes, preparation of them is criminalized, they

both can be punished by exceptional sentence, legal persons are liable for both offences etc.).

The previous Criminal Code from the year 1961 originally contained only one crime of terror (Section 93 of the Criminal Code 1961), which corresponded with the currently valid provision of Section 312 of the Criminal Code. The duplicity in terrorism criminalization occurred when the previous code was amended by the Act No. 537/2004 Coll., coming in force on 29. 7. 2004, which introduced a new offence of terrorist attack (Section 95 of the Criminal Code 1961). This duplicity was later incorporated in the new Criminal Code 2009 (Act No. 40/2009 Coll.).

Given the similar character and traits of the criminal offences of terrorist attack and terror, as well as legislative tradition in combating terrorism with the means of criminal law, I suggest the provision of Section 312 were incorporated as a Subsection 3 of the Section 311 of the Criminal Code.

3. Criminalization of so-called foreign fighters, i.e. the persons that travel abroad with the intention to prepare terrorist attacks and participate in them.

It appears as a growing contemporary problem that a number of EU citizens migrate to conflicting zones in the world and take part in service, terrorist training or terrorist operations within armed entities that are not state armies. Hence there is an increase in the number of persons, who travel, or attempt to travel, to foreign countries, whose citizenship of permanent residency they do not hold, and engage in planning of terrorist activities, prepare terrorist attacks or even take part in actual combat operations, in these countries. These persons, often called “foreign terrorist fighters”, poses a serious threat to internal security of EU member states upon their return, from both, the perspective of organizing the recruitment of others, and the possibility to use battle skills in committing terrorist acts or joining the structures of organized crime [8, p. 435].

The dangerousness of such activities lies in the fact that these persons are often not organized in conventional terrorist structures, but only follow the common purpose and ideology (when leaving, they often might even be unaware of the country they are about to travel to, or the terrorist organization they are about to join), as well as they might create connections with other people engaged in terrorism upon their return. A voluntary participation in an armed conflict, regardless how far it is taking place, is often a beginning of a much more serious terrorist career. Although this problem does not concern the Czech Republic in larger scale at the moment, as most of such foreign fighters are recruited from among members of Muslim communities in Western countries, Czech law must be prepared for a situation, when a Czech citizen or permanent resident (without Czech citizenship) engages in such conduct.

Therefore, in some countries, such as in the neighboring Germany, legislative amendments are being prepared that enable criminalization of activities oriented towards participation in terrorist training or spending time in terrorist camps, as well as financing of such activities, and also introduce measures prohibiting the individuals to travel to conflicting regions.

I consider appropriate that Czech law reacts to this actual threat of international terrorism also by means of

criminal law. The aim should be the criminalization of individuals, who intend to engage in terrorist activities abroad, plan then, prepare them, take part in terrorist movements, terrorist training etc.

Czech legislation is far from perfect at the moment. As long as it cannot be proven that a foreign fighter actually committed the offence of terrorist attack according to Section 311 of the Criminal Code, it is impossible to sanction him or her solely for taking part in an armed conflict abroad. I see the problem with criminalization of such fighters under Section 311 of the Criminal Code in the fact that for them, the world as a whole is a global battlefield, the borders of the states do not play significant role for them, and hence it is difficult to prove that their activities damage certain state or international organization. In other words, it would be difficult to prove all the elements of the offence of terrorist attack according to Section 311 of the Criminal Code have been fulfilled.

Czech criminal law recognizes the criminal offence of serving in foreign armed forces. The Criminal Code enables punishment of citizens of the Czech Republic, who, contrary to another legal regulation, serve in the army or armed forces of another state under Section 321. The application of this provision is constrained by two restrictions: the first one is that the offender is a "special subject", in this case he or she must be the citizen of the Czech Republic, yet people, who leave the country in order to support terrorist activities abroad do not necessarily have to be Czech citizens. The second one is the fact that, often, those who leave the Czech Republic in order to take part in combat operations, join armed groups that are not commanded by particular states, but operate within certain terrorist movement or organization that do not bear attributes of a state.

The imperfections of the criminalization of recruitment for terrorism are also criticized in the Report from the Commission to the European Parliament and the Council from 5 September 2014 [2]. Czech legislation only invokes general provisions covering various forms

of participation in a terrorist offence and support to a terrorist group. This creates a potential risk that "provisions relating to the support of terrorist organizations or the participation in a conspiracy do not capture recruitment of "lone actors" <...> This may become a concern if no other provision criminalises this behaviour". The report also criticizes that criminalization of training for terrorism relies on existing general provisions on participation, preparation, facilitation or support of terrorist offences. Hence, "it is unclear whether national law criminalises the provision of training in cases in which no terrorist offence has been committed or attempted".

Slovak criminal law can again serve as a source of inspiration. Section 297 of the Slovak Criminal Code defines the criminal offence Establishment, formation and support of a terrorist group, which also criminalize membership in, participation in or providing support to such groups. It is important to note in this context that the Slovak Criminal Code also contains definitions of "terrorist group" (Section 129 Subsection 5), "activity for terrorist group" (Section 129 Subsection 6) and 'supporting terrorist group' (Section 129 Subsection 7). Hence participation in a terrorist offence is not criminalized on the basis on general provisions covering various forms of participation, but as a specific mode of the offence of terrorism and some other forms of participation in terrorism in Section 419 Subsection 2 of the Slovak Criminal Code.

In Czech criminal law, it could be possible de lege ferenda to address these concerns in the following way. The currently valid provision of Section 321 of the Criminal law on service in foreign armed forces would remain as an alternative basic mode of this crime in Subsection 1 and a new Subsection would be adopted with the second alternative mode that would criminalize the above described conduct of participation in non-state terrorist armed groups, which it is currently impossible to sanction for committing the offence according to Section 321. It is of course possible to adopt a new special criminal offence.

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