СУПРОТСТАВЉАЊЕ САВРЕМЕНОМ ОРГАНИЗОВАНОМ КРИМИНАЛУ И ТЕРОРИЗМУ

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САДРЖАЈ

СТАНДАРДИ У СУПРОТСТАВЉАЊУ ОРГАНИЗОВАНОМ КРИМИНАЛУ И ТЕРОРИЗМУ

ИНСТИТУЦИОНАЛНИ КАПАЦИТЕТИ ЗА СУПРОТСТАВЉАЊЕ ОРГАНИЗОВАНОМ КРИМИНАЛУ И ТЕРОРИЗМУ

ПРОЦЕДУРЕ У СУПРОТСТАВЉАЊУ ОРГАНИЗОВАНОМ КРИМИНАЛУ И ТЕРОРИЗМУ

ФЕНОМЕНОЛОГИЈА И НАУЧНО ИСТРАЖИВАЊЕ САВРЕМЕНОГ ОРГАНИЗОВАНОГ КРИМИНАЛА И ТЕРОРИЗМА

EUROPEAN STANDARDS ON COMBATING TERRORISM AND THE CRIMINAL CODE OF THE REPUBLIC OF SERBIA
Current Situation and Perspectives

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Abstract: The Criminal Code of the Republic of Serbia still makes distinction between the criminal offence of terrorism (Article 312) and the criminal offence of international terrorism (Article 391). The former is included among criminal offences compromising the constitutional order or security of the Republic of Serbia, and the latter refers to the Chapter XXXIV of the Criminal Code including criminal offences against humanity and other rights guaranteed by the international law. The existance of two distinct criminal offences is controversial. In preliminary considerations yet, the author indicates that the globalization of violence has resulted in the fact that terrorism is seen as "equal evil" by the whole international community and therefore the duality of two distinct criminal offences in respect to object of protection under criminal law has to be abandoned. In the second part of this paper, the author indicates to European standards on combating terrorism and to what extent criminal legislations of some states on the territory of the former SFRY is harmonized with them. In the third, central part, the author deals with the disadvantages of the Criminal Code of the Republic of Serbia and indicates the steps to be undertaken in order to harmonize it with the most significant European sources aimed at combating terrorism. Terrorism has proven to be a complex issue both by international organizations and national criminal legislations. Therefore, any suggestion in which direction the Criminal Code of the Republic Serbia has to be directed in the field of fight against terrorism is not an easy task.
Key words: terrorism, the Framework Decision, the Council of the European Union, the Council of Europe Convention on the Prevention of Terrorism, the Criminal Code of the Republic of Serbia, criminal offence.

Introductory notes

Ever since the terrorist incidents have been escalating all around the world, the international community is more focused on the implementation of idea that the national criminal legislations should be well prepared to solve this complex phenomenon. There is no doubt that terrorism today represents one of the most serious problems of a society. This is also indicated by many activities undertaken at the international level the goal of which is to prevent and suppress the criminal offence of terrorism. National criminal legislations are harmonized by introducing new criminal offences or expanding the criminal scopes of the existing ones. There is a question of whether the international sources and internal law harmonized with international documents by new antiterrorist legislation show authoritative trend which represents negation of legal state since it encroaches on the essential human rights guaranteed by the most significant international sources.

The theory even points out that counter terrorist incriminations represent a part of the terrorist logic itself and that the perpetrators of criminal offences thus seek the purpose and justification for their behaviour (Lamarca Perez, C., Alonso de Escamilla, A., Gordillo Alvarez-Valdes, I., Mestre Delgado, E., & Rodriguez Nunez, A, 2005: 707). Despite the readiness and ever increasing consensus among the states regarding the reform and further development of legal solutions, this process faces many challenges. The incrimination of terrorism and terrorism-related criminal offences represents a special challenge for democratic societies, since some legal provisions that would provide for criminal justice response may endanger the basic rights of citizens. On the other hand, a mild legal approach to the problem such as the criminal act of terrorism, which protects the citizens' rights firmly, can represent a risk for the security of a society. Terrorism has appeared to be a complex issue both for international organizations and national criminal legislations.

Reviewing the latest international measures in combat against terrorism (*Council Framework Decision on Combating Terrorism, 2002/475/JHA and Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism*[1]*; Council of Europe Convention on the Prevention of Terrorism CETS No. 196*[2]*),* we come to the conclusion that there must be a balance between the principles of legal state and the need to prevent terrorist acts, i.e. the protection of civil society and security, which implies partial encroachment on some fundamental rights such as freedom of collaboration, the freedom of expression, the freedom of religion...

The Criminal Code of the Republic of Serbia still makes a distinction between the criminal act of terrorism (Article 312 of the Criminal Code) and the criminal act of international terrorism (Article 391 of the Criminal Code). The first criminal offence has been classified into the group of criminal offences against constitutional order and the security of the Republic of Serbia, while the other one is classified in Chapter XXXIV of the Criminal Code, which refers to criminal offences against humanity and other right protected by the international law. The justification of the

1 For Serbia aspiring to become a full EU member as soon as possible, it of utmost importance to monitor the EU activities and its member states in the field of combat against terrorism. The most useful for any state is to revise some incrimination in its national legislation and thus cover the areas which the international documents consider worth including in the provision of terrorism and those crimes related to it.

2 The Convention was adopted in Warsaw on May 16, 2005, and became effective on June 01, 2007. Our country ratified the Convention – *The Official Gazette of the Republic of Serbia – International Agreements*, No. 19/2009.

existence of two incriminations is disputable. Taking into account the globalization of violence, which has primarily political goals, it is clear that terrorism is equally evil to all, the entire international community and therefore the erstwhile duality of terrorist incriminations should be abandoned considering the object of protection (against the constitutional order and security of the Republic of Serbia – against the state and against the humanity and other right protected by the international law – international terrorism).

National criminal legislations are crucial when we talk about combating terrorism. This is why it is necessary to harmonize them with international sources which are not suitable for direct application as soon as possible. Although the Constitution of the Republic of Serbia in its Article 16 points out that the rules of international law are generally accepted and that the acknowledged international agreements make constitutional part of our legal system and are applied directly, with the limitation that the international agreements must be in accordance with the Constitutions, when the material criminal law is concerned, primarily because of the principle of legality, it is mostly not possible to apply directly still undeveloped and rudimentary standards of international agreements.

They do not determine the elements of criminal offence in a sufficiently precise manner and they do not prescribe punishment for the behaviour which is considered a criminal offence (Стојановић, 2007: 20). This is why the central place is taken by those national legal systems which following the ratification of international agreements are obliged to carry out harmonization with these sources and implement relevant provisions into their respective national criminal legislations. Naturally, it is important at that to take care of coherence of national legal system, criminal justice terminology, as well as the institutes and principles of general part of criminal law.

Standards by International Documents

Constant efforts to build international legal framework to define rules and standards undertaken in the direction of combat against terrorism are one of the important aspects following the development of terrorism. Manifesting forms of terrorism, as well as the means for their prevention and control have long been a subject of consideration by the United Nations (Гаћиновић, 2006: 31), as well as some regional organizations. Several important documents have been adopted at the international level with the aim to precisely define the notion of terrorism, as well as measures and procedures which are undertaken to combat it. We shall analyse two international documents of recent date, which are of particular importance for the reform of Serbian criminal legislation. These are the *Council Framework Decision on Combating Terrorism, 2002/475/JHA dated June 13, 2002, with the amendments made in 2008* and the *Council of Europe Convention on the Prevention of Terrorism CETS No. 196*.

The EU Council, as one of the most important decision-making bodies of the EU adopted the Council Framework Decision on Combating Terrorism on June 13, 2002. This decision is aimed at harmonizing legislations of the member-countries. They oblige the countries with regards to the results they are to achieve but leave to the countries to choose the form and method to achieve the set goal. It is clear, therefore, that they are applied only after the implementation into national legislation.

The Council Framework Decision on Combating Terrorism has thirteen articles. For national criminal legislations the most important are the following: Article 1, which defines terrorism in a unique manner for the entire EU territory, Article 2, which defines a terrorist group and Article 3, which defines the criminal offences related to terrorism.

Criminal offence of terrorism (or terrorist offence) is defined as an act which, considering its nature or context, may seriously damage a country or an international organization committed with the intent of seriously intimidating a population, or unduly compelling a Government or international organisation to perform or abstain from performing any act, or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation. A terrorist act itself is carried out by committing some of the usual criminal offences prescribed by Criminal Codes of each respective country, to which exactly this specific intent or the goal which is desired to achieve give the possibility to qualify them as criminal offences of terrorism.[3] A criminal offence of terrorism, to that effect, is committed by 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 to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss; seizure of aircraft, ships or other means of public or goods transport; manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons; release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life; interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life; threatening to commit any of the acts listed hereinabove (Article 1 of the Framework Decision).

The Framework Decision lists the following as terrorism-related criminal acts: aggravated theft, extortion and drawing up false administrative documents (Article 3 of the Framework Decision). This provision was subsequently amended in 2008[4], so that in addition to the mentioned crimes, the crimes linked with terrorism are deemed the following: public provocation to commit a terrorist offence, recruitment for terrorism and training for terrorism. Public provocation to commit a terrorist offence means distribution, or putting at disposal public messages in any other way with the intent to instigate committing of criminal offense of terrorism, regardless of whether the act will be committed or not. Recruitment for terrorism means seeking other people who will commit any of the acts mentioned in Article 1 of the Framework decision. Training for terrorism means offering instructions in making or using explosives, fire or other arms or harmful and dangerous materials, or related to other specific methods or techniques aimed at committing one of the acts mentioned in Article 1 of the Framework decision, knowing that these skills are intended for this purpose.

3 An intent represents such a course of action of a perpetrator where guided by the achievement of a goal he undertakes an activity to achieve this goal. Therefore, the intent and the goal are closely related.

4 *Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism.*

Terrorist group is defined as a structured group which consists of more than two persons, established over a period of time and acting in concert to commit terrorist offences. 'Structured group' means 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. Within a terrorist group, the difference is made between persons directing a terrorist group and those participating in the activities of a terrorist group (Article 2 of the Framework Decision).

The Council of Europe, the guardian of human rights, democracy and rule of law in Europe has dedicated attention to problems of terrorism for a long time.[5] Special attention should be given to the *Council of Europe Convention on the Prevention of Terrorism CETS No. 196*. It was adopted in Warsaw on May 16, 2005, and became effective on June 1, 2007. The new Convention was adopted in order to increase the efficiency of the existing international instruments. Its goal is to strengthen the efforts by member states in preventing terrorism and sets two ways to achieve this goal. The first one is to incriminate certain behaviour: public provocation to commit a terrorist offense, recruitment for terrorism and training for terrorism. The second is to strengthen the preventive measures at both national and international levels (modification of the existing regulations on extradition and mutual assistance).

The provisions of Article 5 through 7 of the Convention are of particular importance for implementation into national criminal legislation (public provocation to commit a terrorist offence, recruitment for terrorism and training for terrorism). Public provocation to commit a terrorist offence means the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed. Each Party shall adopt such measures as may be necessary to establish public provocation to commit a terrorist offence, when committed unlawfully and intentionally, as a criminal offence under its domestic law (Article 5 of the Convention).

The Convention requires the signatory countries to incriminate recruitment for terrorism as well, which actually means hiring the possible future terrorists. The offence covers solicitation of another person to commit or participate in the commission of a terrorist offence, or to join an association or group, for the purpose of contributing to the commission of one or more terrorist offences by the association or the group (Article 6 of the Convention). Recruitment may be carried out in various manners and using various means, for instance via the Internet or directly contacting these persons. In order for the criminal offense to be completed, it is sufficient that the recruitment has been completed successfully, whereas it is not important that the recruit participates in the commission of a terrorist offence. The attempt of this criminal offence is also possible, if the activity on recruitment has been initiated but not completed (for instance, the perpetrator has not managed to

5 Namely, as late as 1977, the European Convention on the Suppression of Terrorism ETS No. 90 was adopted in Strasbourg. But, wishing to strengthen the fight against terrorism the Council of Europe adopted the Protocol Amending the European Convention on the Suppression of Terrorism ETS No. 190 to that effect. The work was done by Multidisciplinary Group on International Action against Terrorism, GMT, which gathered the experts from 45 member countries and quite a number of observing countries and organizations. The Protocol which amended the Strasbourg Convention was adopted in 2003. The other group of experts CODEXTER devised a new instrument in the fight against terrorism, and this is the Council of Europe Convention on the Prevention of Terrorism CETS No. 196.

convince a person to be recruited).[6] The Convention requires that there exists intent of a perpetrator that a person he/she recruits commits or contributes to committing a criminal offence of terrorism or to join an association or a group for that purpose.

Training for terrorism is a criminal offence which consists of providing instructions 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 carrying out or contributing to the commission of a terrorist offence, knowing that the skills provided are intended to be used for this purpose (Article 7).

As a result of harmonization with the most important international sources in the field of combat against terrorism, all countries of the former SFRY have revised their respective criminal legislations.

Macedonia[7] adapted twice its Criminal Code in the direction of making the provisions of terrorism more precise (first in 2008, and then in 2009). The Criminal Code accentuates three incriminations in the combat against terrorism (terrorist organization, Article 394a, terrorism, Article 394b and financing terrorism, Article 394v).

As far as the criminal legislation in Bosnia and Herzegovina is concerned, we point out that it is mostly harmonized with the requirements of the international community. The Criminal Code of Bosnia and Herzegovina[8] introduced new incriminations in 2010, which refer to prevention and suppression of terrorist activities and their number increased. In the group of criminal offences against humanity and values protected by international law, the following criminal acts are included: terrorism (Article 201), financing terrorist activities (Article 202), public provocation to commit terrorist activities (Article 202a), solicitation for the purpose of terrorist activities (Article 202b), training for terrorist activities (Article 202c) and organizing a terrorist group (Article 202d).

In a Chapter dealing with criminal offences against humanity and other right protected by international law, Montenegro has made several amendments. The most important are those that start from a new concept of criminal offences of terrorism. The basic criminal offence of terrorism (regardless whether it is against Montenegro, a foreign country or international organization) is included in Article 447 with many forms of commission. This criminal offence, as well as new criminal offences of terrorism such as public provocation to commit terrorist offence (Article 447a), solicitation and training for commission of terrorist offences (Article 447b), the use of lethal devices (Article 447c), destruction and damaging of nuclear facility (Article 447d), as well as financing terrorism (Article 449) have been included and harmonized with a number of conventions the goal of which is to prevent terrorist acts.

The existing Criminal Code of the Republic of Croatia became effective on January 1, 1998. It has been adapted several times since then. The latest adaptations are the result of harmonization with international sources and European legal achievements.[9] Two new criminal offences were introduced, and they are: public provocation to terrorism (Article 169a) and recruitment and training for terrorism (Article 169b). Also, the definition of criminal offence of terrorism (Article 169)

6 *Council of Europe, Explanatory Report to the Council of Europe Convention on the Prevention of Terrorism CETS No. 196*

7 *The Official Gazette of the Republic of Macedonia*, No. 7/2008 and 114/2009

8 *The Official Gazette of Bosnia and Herzegovina*, No. 8/2010.

9 *Народне новине РХ*, бр. 152/08.

has been harmonized with the Council of EU Framework Decision on Combating Terrorism.

The Republic of Slovenia has also harmonized its criminal legislation with the relevant international documents in the field of combating terrorism. An entirely new Penal Code of the Republic of Slovenia was adopted, which became effective on November 1, 2008.[10] Article 108, which defines terrorism, has been expanded in accordance with *acquis communautaire*. Also, new criminal offences have been introduced: instigation and public glorification of terrorist acts (Article 110) and recruitment and training for terrorism (Article 111).

Introduction of new incriminations in order to protect society from terrorist activities represents a fulfilment of an obligation which the countries undertook by signing certain international conventions, particularly the 2005 Council of Europe Convention on the Prevention of Terrorism.

Criminal Code of the Republic of Serbia

The criminal law of the Republic of Serbia still does not know new criminal offences in the field of combating terrorism. We have already seen what the requirements of international sources are. It is necessary, following the ratification of the mentioned Conventions, to introduce new criminal offences into criminal legislation (public provocation, recruitment and training for terrorism). Despite the fact that criminal law is *ultima ratio*, the legislator shows tendency towards constant expansion of incriminations, not only in our country but in other European countries as well. Article 3 of the Criminal Code of Serbia represents a foundation as well as boundaries of criminal justice protection pointing out that the protection of man and other basic social values represents both a foundation and boundaries to determine criminal offences, prescribe criminal sanctions and their application to the extent required to suppress these offences. Therefore, the basic human values are primarily protected. Criminal justice protection of other general values is offered to the extent that these general values serve man.

The question is then asked if the tendency to expand criminal justice repression in the field of combating terrorism is justified. New facts, public provocation to commit terrorist offence, recruitment and training for terrorism, require previous evaluation by the legislator prior to introduction into criminal code. The first to evaluate is the importance of the object to which criminal justice protection is offered, and then the degree of social danger of such behaviours. Criminal justice standard is justified if there is a legitimate object of protection and if it is possible to refer to violation or endangerment of some legal good. It is necessary at that for the criminal offence to be precisely determined, which means that the legislator should set a legal standard in such a concrete manner that the area of its application results from the text or in any case can be determined by interpretation. Criminal law must take into account the complexity of life and thus terrorism as well. This is why criminal justice standards are sometimes abstract and it is therefore unavoidable that in some cases there is doubt if some behaviour may be interpreted as legal actual position or not (Bader, 2009: 2855). The request for determination of criminal justice standards does not exclude the use of notions in criminal law which need be interpreted by judges. Criminal offences of public provocation to commit terrorist act,

10 *Уредни лист РС*, бр. 55/2008.

recruitment and training for terrorism represent criminal offences of endangerment which include the preparation of terrorist acts. They initiate some questions which refer to legitimacy and boundaries of a new "preventive criminal law." The period between recognizable preparation and commission of criminal act is in many cases short. The security agencies are therefore left with a narrow time span to prevent attacks. With these new criminal offences introduced, the government bodies can respond in the stage of preparation of terrorist attacks already. Endangering, when serious criminal acts are concerned, requires timely intervention of criminal law. It would be unacceptable if the competent government bodies would have to desist from, for instance, arrest of a person who undertook certain preparations (established a centre for training of future terrorists) because it has not yet come to the stage of the attempted commission of criminal offense of terrorism.

It has been proven that people, but also state institutions, tend to react irrationally as far as rarely occurring great risks are concerned. An observation by an American theorist is rather interesting to this effect – he points out that people are ready to give up their basic freedoms and rights and to accept their limitations in fear from terrorist acts. Terrorism, which is classified as a serious crime, leads in a modern risky society to increased need for security of citizens which is favourable for creation of new criminal justice provisions and enables for the freedom to desist before security. Scientific analyses suggest, for instance, that following the attacks of September 11, 2001, many American citizens used cars instead of airplanes for security reasons. The increased traffic jams and car accidents following this event caused quite a large number of road traffic related deaths which exceeded the number of victims in hijacked airplanes. This example explains that irrational human reactions to great risks may lead to great damages. Do government institutions also tend towards irrational reactions when great risks are at stake which might lead to endangering of some human rights and freedoms? From the aspect of new risks, the legislator must avoid mistakes in the course of future development of law, which despite good intentions may yield more damage than benefit for a legal state (Sieber, 2009: 353).

There are two more questions which deserve attention when making decisions if to introduce new criminal acts into the Criminal Code of Serbia. The first one is actually a research whether the same goal may be achieved by preventive measures, i.e. the measures beyond criminal law. The second one tends to determine the legitimacy of prescribing preparatory activities as independent criminal offence, i.e. raise the preparatory activities to the rank of crime commission. To place a person under arrest in order to prevent initiation and completion of a criminal offense of terrorism is possible only following the complete criminal proceedings, after a legally binding sentence of imprisonment. Possible custody that can be determined according to the Law on Criminal Proceedings to a perpetrator of a criminal offence implies fulfilment of strict legal conditions and may last forever. It is not possible to seek help in any other legal field. Therefore the legislator, and quite correctly, should not tend towards alternative measures beyond criminal law against potential terrorist. This is a serious form of crime and in this case criminal law is *ultima ratio*, the last resort at the disposal to a society. Government institutions which are called to respond are left, between the moment when preparations become visible and the attack itself, with only a short period of time to prevent the damage intended for life, body or property. This gives the foundation to the state interest to intervene at

the stage of preparatory activities already by means of new criminal offences. As for legitimacy, it is clear that culpability cannot be justified only by the fact that the perpetrator looks dangerous. It is necessary that there exists an individual's guilt (*nulla poena sine culpa*). It has long since been clear that a person cannot be punished for his thoughts only and that it is only legitimate to punish those offences committed which enter the criminal scope. Culpability here is linked to a high degree of endangering certain values which are of great significance for the society. Naturally, it is particularly important not to resort too often to this possibility, but to limit this right only to serious criminal offences. It can be stated, in short, that potentially great danger from terrorist attacks justifies incrimination of certain behaviours as criminal offences in the stage of preparation already, if the guilt of a perpetrator is established. The perpetrator is sentenced to a punishment within limits prescribed by criminal code which prevents further activities by that person and possible completion of criminal offence of terrorism.

The current Criminal Code became effective on January 1, 2006, and has been updated twice since then.[11] We have already mentioned that taking into account the protecting object and direction of intent as a subjective part of criminal offence, it differentiates between terrorism and international terrorism. Criminal offence of terrorism exists when a perpetrator in his intention to endanger a constitutional order or security of Serbia causes explosion or fire or undertakes another generally dangerous activity or abducts a person, takes hostage(s) or deprives a person of freedom on his own will or commits any other act of violence or threatens to undertake a generally dangerous activity or use nuclear, chemical, bacteriological or some other generally dangerous substance and thus cause the feeling of terror or insecurity of citizens (Criminal offences against the constitutional order and security of the Republic of Serbia). Before the 2009 amendments of the Criminal Code only kidnapping was stated as a typical act of violence in the legal text. The legislator obviously thought that it was necessary to amend the existing legal description of criminal offence of terrorism in order to make a distinction in relation to the criminal offence of international terrorism. Moreover, except some questions, there is a tendency today that criminal justice response to terrorism is made equal regardless of whether it is directed towards a domestic country, foreign country or international organization (which is to a certain extent, at least when the basic form of commission is concerned, expressed in the original text of the Criminal Code of the Republic of Serbia from 2005) (Стојановић & Коларић, 2010: 75). International terrorism is committed by an individual who in his intent to harm a foreign country or international organization abducts a person or commits any other violence, causes explosion or fire or undertakes other generally dangerous activities or threatens to use nuclear, chemical, bacteriologial or other similar substance (Criminal offences against humanity and other right guaranteed by international law).

The Criminal Code, when a criminal offence of terrorism is concerned, stipulates that preparation of such an act is punishable. Preparation of a criminal offence of terrorism, or plotting, as well as other offences against the constitutional order and safety may consist of procurement and making usable means for committing of offence, removing obstacles for committing of offence, making arrangements, planning or organising with others commitment of the offence or other activities related to establishing prerequisites for direct commission of the offence (Article 320, para-

11 *The Official Gazette of the Republic of Serbia*, No. 85/2005, 72/2009 and 111/2009.

graph 2, of the Criminal Code). Plotting also includes the dispatch or transport to the territory of Serbia of persons or weapons, explosives, poisons, equipment, ammunition or other material for commission of one or more criminal offences from this group (Article 320, paragraph 3).

As far as international terrorism is concerned, the amendments to the Criminal Code of Serbia[12], include the provision according to which the preparation of international terrorism is punishable (Article 391, paragraph 4). The legislator is precise as to what this preparation consists of in the same manner as in Article 320, paragraph 2 of the Criminal Code (Article 391, paragraph 5). Therefore, it is only a framework definition which has already been quoted and which only partially includes the new criminal offences (public provocation to commit terrorist offence, recruitment for terrorism and training for terrorism). Preparation of terrorism and international terrorism, in the manner as formulated by the Criminal Code, opens even more dilemmas in the direction of reconsideration of legitimacy and specific quality of the standard, particularly when "other activities which create conditions for direct commission of a criminal offence" are concerned than the introduction of new criminal offences.

Practice of the European Court of Human Rights

Referring to the fact that new criminal offences encroach on the basic human rights such as freedom of expression and/or gathering cannot be accepted (particularly when the criminal offence of public provocation to commit a terrorist offence is concerned).

Freedom of expression is one of the important foundations of democratic societies. Article 10 of the European Convention on the Protection of Human Rights and Fundamental Freedoms is dedicated to the freedom of expression and the right to information. It points out that everyone has the right to freedom of expression. This right, according to the Convention, includes freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. However, as opposed to some other rights which are of absolute character and where none limitations are accepted, such as prohibition of torture and inhuman or degrading treatment or punishment, restrictions of freedom of expression may be allowed under specific circumstances. Article 10, paragraph 2, prescribes that since the exercise of these freedoms carries with it duties and responsibilities, it may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interest of national security, territorial or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. The right to liberty and security is of special importance in a democratic society which is characterized by the rule of law. This implies, among other things, the existence of the efficient judicature which offers efficacious protection in case of violation of the right to liberty and security. On the other hand, the rule of law means also the possibility of departure from the right to liberty and security (Илић, 2006: 536).

Therefore, according to the Convention, the freedom of expression is not absolute.

12 *The Official Gazette of the Republic of Serbia*, No. 72/2009.

The state may, under certain circumstances, interfere with this freedom. Namely, paragraph 2 of Article 10 states that every limitation of freedom of expression, in order to be acceptable, must be motivated by some of the goals acknowledged as legitimate (national security, territorial integrity, public security, etc.). However, the existence of a legitimate goal is not sufficient for the interference of the state to be proclaimed in accordance with the Convention. Every limitation of freedom of expression must also be necessary in a democratic society and prescribed by law. According to the judicial practice of the European Court of Human Rights, the adjective "necessary" means some imperative social need. In order to judge on the existence of such a need, member states are left certain space for free assessment. This space is, however, under certain control of European Court. In performing their control powers, the Court assesses the proportion of some limitation of freedom of expression and its goal. Any interference disproportionate to legitimate goal shall not be considered "necessary in a democratic society" and shall represent a violation of Article 10 of the Convention.

There is a rich court practice related to this Article. For example, in case of Hogefeld vs Germany[13] provocation to commit terrorist offence cannot be considered acceptable on grounds of the right to freedom of expression. The Court here was of the opinion that certain restrictions relating to the messages that might represent or even indirectly influence the commission of a criminal offence of terrorism were justifiable. Namely, in January 2000, the Court estimated as inadmissible the assumption related to the refusal of the Appeal Court to allow to the journalists to interview a former terrorist woman prior to completion of the trial. Although during the trial she criticized earlier activities of the organization she was a member of, she undoubtedly admitted that she believed in its ideology. The Court underlined that these statements *per se* did not represent provocation to commit a terrorist offence. However, considering her past, the supporters might interpret them as a call to continue terrorist combat. The Court was of the opinion that the restrictions represented a reasonable response to urgent social need and they were proportionate to the goals it was aspired to.

In case of Brannigan and McBride, the Court even thought that the action of the UK Government was justified by which they extended custody to those suspected of terrorist offences up to seven days without a court order. The Government was of the opinion that they were entitled to arrest and extend custody in their fight against terrorist threats, and the Court accepted it taking into account that the problem of terrorism represented without any doubt a serious issue and that the states were facing certain difficulties in undertaking efficient measures to suppress it (Дитертр, 2006: 347).

Concluding Notes

Faced with the threat of global terrorism, there is an increasingly highlighted fact that security represents a right and not only a precondition to exercise other rights. Security as a right of an individual must develop parallel to personal freedoms and must be understood as one of the goals of the state, but always in accordance with other rights guaranteed by the Constitution (Patané, 2008: 1179). As terrorism evolved over time, the international community changed its approach to it. The new

13 *Hogefeld* vs Germany (sentence), no. 35402/97, January 20, 2000.

relationship towards this problem is based on the protection of security which implies corresponding actions in the field of criminal law. This is exactly where there is justification for new and amended incriminations of terrorist acts. However, they must be neither too wide nor too rigid. If they are too wide within national criminal legislations, then they can easily endanger the fundamental freedoms and rights. Also, they are contrary to the basic principles of criminal law, and primarily the principle of legality and its *lex certa* part.

However, it is undisputed that it is necessary to bring about the Law on amendments of the Criminal Code of the Republic of Serbia. The most important reasons are: to harmonize it with those international agreements which are important for the field of criminal legislation that Serbia has signed in the meantime and to harmonize it with legal acts and *acquis communautaire* of the EU, which represents an expression of Serbia's aspiration towards European integrations. Good criminal legislation is a necessary assumption for more efficient suppression of crime and achievement of protective function of criminal law, although this depends on its application to the large extent.

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ЕВРОПСКИ СТАНДАРДИ У ОБЛАСТИ БОРБЕ ПРОТИВ ТЕРОРИЗМА И КРИВИЧНИ ЗАКОНИК РЕПУБЛИКЕ СРБИЈЕ
Стање и перспективе

Резиме

Кривични законик Републике Србије још прави дистинкцију између кривичног дела тероризма (члан 312. КЗ) и кривичног дела међународног тероризма (члан 391. КЗ). Прво кривично дело сврстано је у групу кривичних дела против уставног уређења и безбедности Републике Србије, а друго има своје место у глави XXXIV Кривичног законика која се односи на кривична дела против човечности и других добара заштићених међународним правом. Оправданост постојања двеју инкриминација спорна је. Аутор већ у уводним разматрањима указује на чињеницу да је глобализација насиља довела до тога да је тероризам једнако зло за све, целу међународну заједницу, стога треба напустити досадашњи дуалитет терористичких инкриминација с обзиром на објекат заштите. У другом делу рада аутор указује на европске стандарде у области борбе против тероризма и степен усаглашености појединих држава са простора бивше СФРЈ са њима. У трећем, централном, делу аутор се бави недостацима Кривичног законика Републике Србије и указује на кораке које треба предузети у циљу хармонизације са најзначајнијим европским изворима који су усмерени на сузбијање тероризма. Тероризам се показао као комплексно питање и за међународне организације и за национална кривична законодавства. Покушај предлагања концепта који Кривични законик Србије треба да заузме у области борбе против тероризма стога не представља нимало лак задатак.