ISSN 2785-5228

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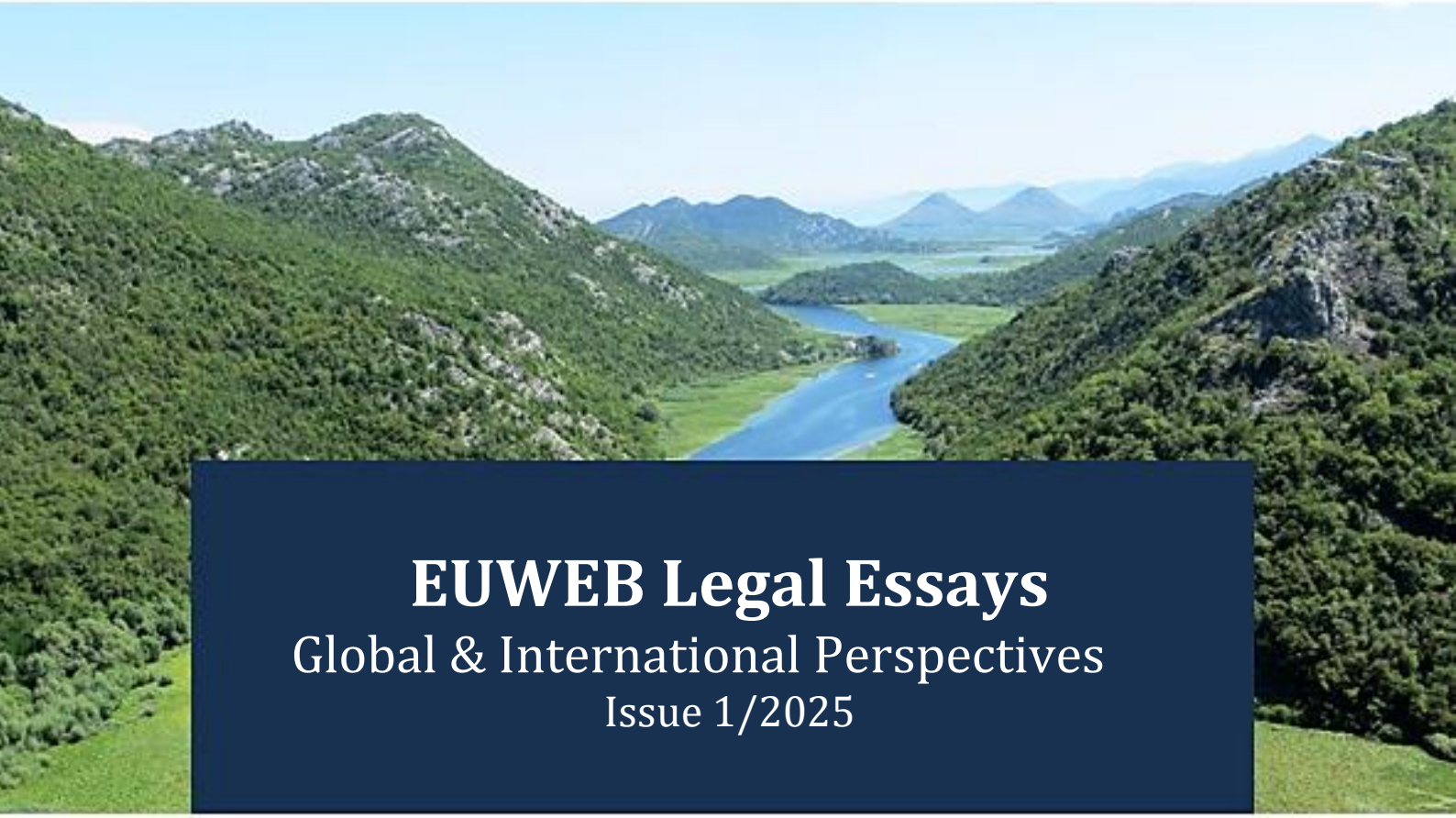
Cooperation on Justice and Home Affairs



EUWEB Legal Essays

Global & International Perspectives

Issue 1/2025

EDITORIALE SCIENTIFICA ES

Rivista semestrale on line EUWEB Legal Essays. Global & International Perspectives
www.euweb.org
Editoriale Scientifica, Via San Biagio dei Librai, 39 – Napoli
Registrazione presso il Tribunale di Nocera Inferiore n° 5 del 23 marzo 2022
ISSN 2785-5228

Index
2025, No. 1
Special Issue

Promoting Public Awareness on the Fight Against Transnational Crimes, the Role of Police and Judicial Cooperation and Respect for Fundamental Rights in the Prospect of the EU Enlargement (EUVALWEB 2nd Edition Final Conference)

May 30, 2024

Institute of Criminological and Sociological Research

Belgrade (Serbia)

COMMENTS

PROBLEMATIC ISSUES IN CRIMINALIZATION OF TRANSNATIONAL CRIMES AT EU AND NATIONAL LEVEL. TERRORISM RELATED OFFENCES IN CRIMINAL LEGISLATION OF SERBIA

by Ivana P. Bodrožić[*]

1. Instead of introduction: About the Notion of Transnational Crimes

In the part of the phrase "transnational crimes" the notion of transnational, especially the first part of that complex word *trans*[1], means that something is on the other side or that something is over the border, mostly. The term *national* (*the latin)* means that someone or something belongs to a nation, paternal, native and in a wider political and law sense it refers to the borders of some concrete state and that something is defined by the state borders. The word *crime* means the unlawful action that is forbidden by the state's authorities or by the law, for which the sentence or the punishment is defined[2].

Definition of transnational crimes has been given by many academicians and the relevant international bodies and organizations. Some of them will be listed in order to provide an analysis of the definitions of this term relevant to some problematic issues of their criminalization as the main part of this article.

Transnational crimes are violations of law that involve more than one country in their planning, execution, or impact. Transnational crimes can be grouped into three broad categories involving provision of illicit goods (drug trafficking, trafficking in stolen property, weapons trafficking, and counterfeiting), illicit services (commercial sex and human trafficking), and infiltration of business and government (fraud, racketeering, money laundering, and corruption) affecting multiple countries. Transnational crimes are

DOUBLE BLIND PEER REVIEWED ARTICLE

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[1] Trans (*the latin*) means over or on the other side. I. KLAJN, M. ŠIPKA, *Veliki rečnik stranih reči i izraza,* Novi Sad, 2006, p.1274.

[2] *The Oxford English Dictionary* defines crime as: "*An action or omission which constitutes an offence and is punishable by law*". *The Oxford Dictionary of Law* defines crime as being: "*An act (or sometimes a failure to act) that is deemed by statute or by the common law to be a public wrong and is therefore punishable by the state in criminal proceedings*". *The Oxford Dictionary of Sociology* defines crime as: "*An offence which goes beyond the personal and into the public sphere, breaking prohibitory rules or laws, to which legitimate punishment or sanction are attached, and which requires the intervention of a public authority*", http://www.oed.com; E.A. MARTIN, J.LAW, *Oxford Dictionary of Law,* Oxford, 2006; J.SCOTT, G.MASHALL, *Oxford Dictionary of Sociology,* Oxford, 2015.

ISSN 2785-5228
DOI: 10.1400/299539

distinct from international crime, which involves crimes against humanity that may or may not involve multiple countries, such as the genocide and war crimes[3].

As Z. Stojanović considers the overall concept of an international criminal offense essentially determines the concept of international criminal law, which in the broadest sense can be defined as international legal aspects of criminal law, but also as criminal aspects of international public law[4]. Consequently, the international criminal offense can be understood in a narrower and broader sense. In the broader sense, these are all those behaviors that the international community is interested in suppressing because of their international character. According to the same author, under international crimes, in the narrower sense, should be considered all those crimes that were judged after the end of the *Second World War,* and which were confirmed by the adoption of the Geneva Conventions and the Convention on the Prevention and Punishment of the Crime of Genocide: war crimes, crimes against peace, crimes against humanity and crimes of genocide[5].

Some authors distinguish between international criminal acts *stricto sensu* (genocide, war crimes, crimes against humanity, aggression) and others, which they call transnational (cross-border), noting that the distinction is based on intermediate mechanism. The first category of crimes, which are also called *core crimes* are under the jurisdiction of international criminal tribunals and of the *International Criminal Court (ICC),* while national jurisdiction is directed on the fight against transnational crimes, through the conclusion of conventions on their suppression and international cooperation based on the principle of *aut dedere aut punire.* So, here it is only a matter of slightly different terminology, while essentially it is a matter of equal division[6].

N. Boister considers transnational crimes as crimes that have actual or potential effect across national borders and crimes that are intrastate but offend fundamental values of the international community[7].

The word *transnational* describes crimes that are not only international (that is, crimes that cross borders between countries), but crimes that by their nature involve cross-border transference as an essential part of the criminal activity. Transnational crimes also include crimes that take place in one country, but their consequences significantly affect another country and transit countries may also be involved[8]. Examples of transnational crimes include: human trafficking, people smuggling, smuggling/trafficking of goods (such as arms trafficking and drug trafficking and illegal animal and plant products and

[3] J.S. ALBANESE, *Transnational Crime*, in *Oxford Bibliographies*, 14 December 2009, available at https://www.oxfordbibliographies.com/display/document/obo-9780195396607/obo-9780195396607-0024.xml.

[4] Z. STOJANOVIĆ, *Međunarodno krivično pravo*, Beograd, 2017, pp. 14-17.

[5] *Ibid.*

[6] B. KRIVOKAPIĆ, *O razlikovanju između međunarodnih krivičnih dela u užem i širem smislu,* in *Strani pravni život*, n. 2, 2018, pp. 7-27.

[7] N. BOISTER, *Transnational Criminal Law?* in *European Journal of International Law*, Vol. 14, Issue 5, 2003, p. 953 ff., pp. 967-977.

[8] N. Boister considers national borders as geographical boundaries, but certainly not the boundaries for criminals to cross them and to use them as the impunity from the criminal jurisdiction of concrete national jurisdiction. National borders are absorptive to all types of illicit criminal behaviors and criminals use them to manipulate with the different markets in illicit goods, so the transnational crimes must be under the international jurisdiction at least through the criminal law documents on the international level, as the way of suppressing criminal activity. This suppression is of the highest importance and a major global problem and concern. States therefore must respond to all those types of criminality through common and harmonized criminal law reaction, firstly through the criminalization in international treaty obligations and consequently through national criminal laws. N. BOISTER, *An Introduction to Transnational Criminal Law*, Oxford, 2018.

other goods prohibited on environmental grounds (e.g. banned ozone depleting substances), sex slavery, terrorism offences, torture and apartheid[9].

There has been great overlap between term transnational and international crime(s). What should be considered as the main difference between transnational crimes and international crimes? A transnational crime must involve more than one country. While an international crime may only involve one country, it must be a matter of grave concern to other countries.

Some distinctions are highlighted by S. Chokprajakchat and they are seen in the following context: "*Although transnational crimes have dimensions of offenses in foreign countries which makes it sound like an international crime. But transnational crime and international crime are different. In other words, international crime is clearly defined under the Rome Statute of the International Criminal Court as a crime against humanity, primarily involving grave violation of human rights, which acts within a country without the need to act in a country in another country but has implications for the security and order of the international community. Therefore, the difference between transnational crime and international crime is that international crime focuses on the type and nature of crime, whereas transnational crimes are territorial-focused offenses viewed as offenses or plots that cross borders?*".[10]

The term transnational means those criminal acts that are transnational in nature. This notion is defined in the *UN Convention against Transnational Organized Crime* and it means that the crime is:

1. committed in more than one state,
2. committed in one State but the substantial part of its preparation, planning direction or control takes place in another State;
3. committed in one State but involves an organized criminal group that engages in criminal activities in more than one State;

or

4. committed in one State but has substantial effects in another State[11].

What forms the backbone of the distinction between the concepts of an international criminal offense and a transnational criminal offense is that the former seek to be prosecuted by the *ICC*, while the latter are prosecuted before the national courts of the state whose jurisdiction appears to be dominant.

Therefore, the issues of their legal formation and standardization appear suitable for scientific treatment. How and in what way, and to what degree harmonized, these criminal acts will be defined, i.e. incriminated, appears as a question of successful international criminal cooperation.

Representative examples of transnational crimes include terrorism, human trafficking, drug trafficking, organ trafficking, hijacking of airplanes, and environmental crimes.

The ways of criminal law formulation of these criminal acts at the level of international criminal documents would have to meet the high standards of legal dogmatic solutions from which national criminal legislation is based[12].

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[9] See https://en.wikipedia.org/wiki/Transnational_crime#cite_note-1.

[10] S. CHOKPRAJAKCHAT, *Review Mechanism UNTOC: Definition of Transnational Crime*, available at https://www.unodc.org/documents/organized-crime/reviewmechanism/CDICTA_SS.pdf.

[11]United Nations Convention against Transnational Organized Crime, available at https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html.

[12] In diverse areas addressing questions of human rights, financial regulation, counterterrorism, immigration control, narcotics control, and environmental regulation, the processes of constructing criminal prohibitions can no longer be viewed through a purely or predominantly national lens. That's why the criminalization

At the basis of efficient international criminal law cooperation is a high level of abstraction of existing forms of wrongdoing in the provisions of national criminal legislation, in order to maintain a relatively harmonized system of regulations that, by their similarity, facilitate the cooperation of law enforcement services.

2. Some General Issues in Processes of Criminalization. Overall Perspective in a Contemporary Substantive Criminal Law

In a wider context of the European integration processes there are a lot of problematic legal questions both on the side of member states' legal systems and legal systems of the candidates' countries.

One of those questions is certainly the question of what the scopes and limits of a criminal law reaction in a field of contemporary forms of crimes are.

All countries in the liberal democracies have similar principles in the field of substantive criminal law, such as the principles of legality and legitimacy.

In accordance with its core principles the main goal of this paper will be focused on the ground, quantity and quality of the criminal law provisions that are named to be the so-called *last resort* of the state reaction on criminality in general – especially transnational crimes.

In the further accordance with this way defined goal there will be applied the theoretical and critical approach about the definition of transnational crimes and a quality of the criminal law documents at the EU level in a process of their constant and further criminalization.

The main approach in this part of the paper is the dogmatic one, especially the normative method. The main hypothesis is that the contemporary trends of continuous widening and strengthening of criminal law repression on EU and national levels is not the one that goes in a good direction.

Core criminal law principles in general but also in a process of criminalization of particular offences are:

1. principle of legality,
2. principle of legitimacy,
3. principle of guilty or principle of subjective and individual responsibility,
4. principle of humanity and
5. principle of proportionality[13].

"*One of the main questions any legislator (be it national or supra-national) has to address prior to reaching for the criminal law and ensuring its overall consistency is*

processes have to be *transnational by their nature and to* involve interactions between actors operating beyond and across national boundaries. E. AARONSON, G. SHAFFER, *Defining Crimes in a Global Age: Criminalization as a Transnational Legal Process, in Law & Social Inquiry,* Vol. 46, Issue 2, 2021, pp. 455-456.

[13] About the main criminal law principles in Serbian criminal law there is a similar situation. They are a combination of core values that need to be respected in order to achieve the main goal and function of criminal law- its protective function. The tendencies that are not in accordance with those main principles are quite badly directed. That kind of direction is wrong one and moves criminal law in a wrong way of its security or overprotective function which is not in line with the principle criminal law as an *ultima ratio societatis*. Z. STOJANOVIĆ, *Krivično pravo-Opšti deo,* Novi Sad, 2024.

what sorts of conduct it is legitimate to criminalize. In other words, the legislator has to decide on the substantive principle(s) of criminalization"[14].

Main standards of criminalization are the high level of social dangerousness of a behavior, criminal law as the last instrument of the state policy in solving and proving criminal offences. Need for the cooperation between the states generated by the existence of the transnational crimes pushes the cooperation within the states both on international and regional level. The most relevant cooperation on the regional level is the cooperation within the member states of the European Union. If we start from the point of view that the EU cannot adopt a general EU criminal code, the European Commission is convinced that "*EU criminal legislation can add, within the limits of EU competence, important value to the existing national criminal law systems*"[15].

Question of the chosen criminalization principles should be looked firstly through the prism of criminal substantive law. The best way is to choose some of the transnational criminal offences on national and EU level and to examine which approach of criminalization is applied.

Art. 83 of the Treaty on the Functioning of the European Union (TFEU) lists terrorism among the serious crimes with a cross-border dimension and provides for the possibility of establishing common minimum rules. However, the EU's competence is limited by art. 4 par. 2 of the *Treaty on European Union* (TEU), which states that "*national security remains the sole responsibility of each Member State*" and by art. 72 TFEU, which confirms national prerogatives for maintaining law.

That's why terrorism will be analyzed in the following sections as an example of the criminalization of transnational crime.

3. Criminalization Tendencies of Terrorism as a Transnational Criminal Offence in the European Criminal Law Documents

The Council of Europe, in the process of strengthening the European states to oppose terrorism, adopted a series of documents, the most important of which are the Warsaw Convention on the Prevention of Terrorism and the Additional Protocol to the Convention on the Prevention of Terrorism Manifest forms of terrorism are incriminated in these two documents, so that they correspond to registered terrorist activities, as special forms of criminal law. Apart from the casuistically enumerated acts of execution, they also include the criminalization of terrorist association, as a special form of criminal offenses with elements of organization, as well as training for terrorism, organizing travel abroad and traveling abroad for the purpose of committing terrorist acts, as well as financing terrorism.

The mentioned documents represent the framework of national policies for the prevention of terrorism, the role and importance of international cooperation in prevention and criminal matters, as well as the standards of responsibility of legal entities and the problems of criminal sanctions

Apart from these two international agreements, numerous other documents in the form of recommendations and guidelines were adopted at the level of the Council of Europe. They mainly relate to the connection between theorizing and organized crime, as

[14] N. PERŠAK, *EU Criminalization, Its Normative Justifications, and Criminological Considerations for EU Criminal Policy and Justice*, in J. OUWERKERK, J. ALTENA, J. ÖBERG, S. MIETTINEN (eds.), *The Future of EU Criminal Justice Policy and Practice. Legal and Criminological Perspectives*, 2019, pp. 15-36.

[15] European Commission, *Criminal Law Policy*, available at http://ec.europa.eu/justice/criminal/criminal-law-policy/ index_ en.htm.

serious forms of criminality and have binding and non-binding significance, and their totality forms a part of the strategic documents The first *Counter-Terrorism Strategy* was adopted in 2018 for the period of five years. It has recently been superseded with the second Counter-Terrorism Strategy to be implemented from 2023 to 2027[16].

The political and economic connection of European states, with the idea of creating a supranational organization of states, characterized by a partial renunciation of the national sovereignty of its members, was formalized by the *Treaty on European Union* (TEU), signed in Maastricht on February 7, 1992. With this treaty, the European Union became an indispensable factor in the political life of Europe and its main pivot.

With a specific shape, reminiscent of a temple, the pillars of which are the European Communities, the Common Foreign and Security Policy and the Police and Judicial Cooperation in Criminal Matters, the EU represents a supranational organization of states.

Within its framework, the *acquis communautaire was* built as a common set of legal regulations that includes valid contracts and other legal acts, which make up the legal acquis and the legal system of the member states, but also the basic condition, the full acceptance of which is an obligation for all potential candidate states for admission to full-fledged EU membership.

The third pillar of cooperation involves strengthening the cooperation of police, judicial and customs authorities in combating transnational organized crime and strengthening the competences of the European Police Service (Europol)[17] and the European Office for Judicial Cooperation (Eurojust)[18].

The main goals of the third pillar of cooperation are the achievement of a high level of security and the fight against racism and intolerance towards foreigners, terrorism, human trafficking, crimes involving children as passive subjects, drug and weapon trafficking, corruption and fraud.

The above indicates the importance given to terrorism within the EU and this is the reason why the documents of this supranational organization of the states are extremely important for all legislation on this continent.

The activity of the EU in terms of preventing and suppressing terrorism as a criminal offense did not start recently[19]. The formation of the TREVI Group (Group to Combat International Terrorism, Radicalism and Extremism) in 1975 marked the beginning of institutionalized activity aimed at exchanging information on terrorist activities, improving air traffic safety, as well as issues related to nuclear materials and other problematic issues.

[16] Even though the Council of Europe established key criminal law standards in the field of combating terrorism, the document needs to respect both dogmatic standards of criminalization processes in general, both the fundamental human rights principles, in order not to turn the criminal law to its opposite, *Enemy Criminal Law* concept. As it's stated: "*Poorly implemented or overly Draconian counter-terrorism measures can be counterproductive. While law enforcement operations aimed at terrorists are necessary and justified, counter-terrorism measures should not go beyond what is necessary to maintain peace and security, nor should they subvert the rule of law and democracy in the cause of trying to save it*". https://www.coe.int/en/web/counter-terrorism

[17] See http:// https://www.europol.europa.eu/.

[18] See https://www.eurojust.europa.eu/.

[19] It should not only be linked to the attacks on the United States of America (USA) on September 11, 2001. Nevertheless, since then, and especially after the bombings in Madrid in 2004, the EU leaders have started an increased cooperation with the aim of adopting a general definition of terrorism, harmonizing the catalog of incriminations in national legislations, harmonizing the penal policy, determining the list of terrorist organizations, creating a common arrest warrant and strengthening cooperation between police and judicial institutions of the EU.

The aforementioned issues from the mandate of this forum for the cooperation of police services were later extended to other serious crimes, so that after the Maastricht Treaty they would be incorporated within the third pillar of cooperation.

Numerous legal instruments have been adopted by the Council of the EU, but for the purposes of this paper, the most significant is the Council Framework Decision on Combating terrorism (2002/475/JHA)[20], adopted on June 13, 2002[21].

In this legal act, the position on the need to unify the provisions of national criminal justice systems came to the fore, for the sake of a more effective fight against terrorism.

Its main goal was to uniquely define terrorism as a criminal legal category and other acts related to it, to harmonize the penal policy in connection with criminal acts of terrorism and to introduce, in addition to the responsibility of individuals, the responsibility of legal entities for criminal acts of terrorism.

In the introduction of this decision, it was emphasized that the European Union is based on the universal values of human dignity, freedom, equality and solidarity, respect for human rights and fundamental freedoms, on the principle of democracy and the rule of law.

Taking into account the knowledge that combating terrorism implies certain deviations from basic human rights and freedoms, especially in relation to some derogating provisions, in connection with the Framework Decision, the question arises as to how to establish a balance between its provisions and the basic freedoms and rights of individuals.

This determined the creators of the Decision to emphasize in its preamble that no provision of the Decision should be interpreted in such a way as to reduce or limit basic human rights.

The framework decision had 13 articles and it defined terrorism and related crimes in a unique way for the entire EU area, which aims to harmonize the national legislation of the member states.

In addition to the basic criminal offense of terrorism, the provisions of the Framework Decision also defined other criminal offenses related to terrorism, terrorist group, complicity and attempt to commit the criminal offense of terrorism.

In art. 1, the criminal offense of terrorism, i.e. terrorist act, is defined as an act which, considering its nature and context, can seriously harm the state or international organization[22] and which was done with the intention of: seriously intimidating the

[20] Council Framework Decision 2002/475/JHA, *on combating terrorism*, of 13 June 2002, in OJ L 164, of 22 June 2002.

[21] No longer in force. Date of end of validity: 19/04/2017; Repealed and replaced by Directive (EU) 2017/541 of the European Parliament and of the Council, *on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA*, of 15 March 2017, in OJ L 88, of 31 March 2017.

[22] A strict linguistic interpretation of the concept of an act that can seriously harm the State or an international organization narrows the concept of the criminal act of terrorism to only those cases where serious damage is involved. On the other hand, there remain, for example, cases of "ordinary" placement of explosives that can be interpreted so that they do not fall under the scope of incrimination, because they fail to obtain the necessary quality of seriousness of the attack as determined by the definition of this criminal offense at the European level.

Will each placement of explosives be enough to be marked as fundamental in terms of serious harm to a particular state?

T. Weigend expresses doubt whether numerous acts of terrorism will be able to meet the strict requirement of serious harm to a state or international organization. This doubt is also extended in relation to the part of the provision that implies the success of the perpetrator of the crime of terrorism in relation to the intimidation of the population, especially if this term is understood as the totality of the inhabitants of a

population, applying coercion to a government or an international organization with the aim of making it do or not do something, seriously destabilizing or destroying the basic political, constitutional, economic or social structures of a country or an international organization

The execution of a terrorist act implied the execution of one of the classical criminal acts, with the existence of intent, as a differential category, which gives the aforementioned criminal act a terrorist qualification. This is how the crime of terrorism was accomplished:

(a) attacks upon a person's life which may cause death;

(b) attacks upon the physical integrity of a person;

(c) kidnapping or hostage taking;

(d) 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;

(e) seizure of aircraft, ships or other means of public or goods transport;

(f) 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;

(g) release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life;

(h) interfering with or disrupting the supply of water, power or any other fundamental natural resource the effect of which is to endanger human life;

(i) threatening to commit any of the acts listed in (a) to (h).

In addition to the definition of the criminal offense of terrorism, very important provisions appeared in art.2, which defined the terrorist group and art. 3, which enumerated crimes related to terrorism.

The terrorist group was, according to art. 2, defined as a structured group consisting of more than two persons, which was established for a certain period of time and which acts by agreement in order to commit the crime of terrorism.

A structured group should be considered a group that was not created accidentally for the purpose of committing a criminal act, that does not have to have a developed structure, continuity of membership, or formally defined roles of members. It is important to point out that there was a difference between leading a terrorist group and participating in the activities of a terrorist group, The catalog of crimes related to terrorism first included serious theft, falsification of documents and extortion, and was later supplemented with the crimes of public incitement to commit terrorist acts, recruitment and training for terrorism, which is done through Amendments in connection with the Framework Decision of the Council on combating terrorism of November 28, 2008 (Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism)[23].

In terms of the aforementioned changes, the distribution or otherwise making available of messages to the public, with the intention of encouraging the commission of the crime of terrorism, was defined as public incitement to commit terrorist acts, and it was not important whether the act will be committed or not.

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certain state. T. WEIGEND, *The Universal Terrorist: The International Community Grappling with Definition*, in *Journal of International Criminal Justice*, Vol. 4, Issue 5, 2006, pp. 912-932.

[23] Council Framework Decision 2008/919/JHA, *amending Framework Decision 2002/475/JHA on combating terrorism*, of 28 November 2008, in OJ L 330, of 9 December 2008. No longer in force. Date of end of validity: 19/04/2017; Implicitly repealed by aforementioned Directive (EU) 2017/541.

Recruiting for terrorism meant looking for other persons who will perform some of the actions provided for in art. 1. Framework Decisions.

Terrorism training included the provision of instructions in the manufacture or use of explosives, firearms or other weapons, or harmful or dangerous substances or some other specific method or technique, with the intention of committing one of the acts listed in art. 1 of Framework Decisions.

In art. 4, the Framework Decisions required member states to provide for inciting, aiding and abetting terrorism as punishable.

The part of the Framework Decision that referred to the harmonization of criminal provisions of national criminal justice systems was found in art. 5 and art. 6. Namely, the Framework Decision introduced a unique system of punishments, which were required to be effective, commensurate with the gravity of the crime committed, and deterrent.

They were classified into three different categories. The first category meant leading a terrorist group and it was stipulated that the sentence must not be less than 15 years in prison. Participating in a terrorist group is another category and it was stipulated that the punishment cannot be less than 8 years in prison, while other crimes related to terrorism are punishable by punishments that are more severe than the punishments for ordinary forms of such crimes.

In relation to sentencing, the Framework Decision contained provisions that foresee the possibility of mitigating the sentence in the case of providing information that the competent authorities could not otherwise obtain, as well as in the case of preventing or mitigating the consequences of a terrorist act, as well as in the case of identifying, surrender of other perpetrators and prevention execution of new criminal acts.

4. Criminalization Tendencies of Terrorism as a Transnational Criminal Offence in Serbian Criminal Legislation

Transformation of Serbian national legislation in the process of a country's accession to the European Union is a complex phenomenon and its scope and depth can significantly vary in different fields.

Following long term isolation, the country has been greatly behind other countries in transition, and ever since then, has been striving to become involved in European integration, fulfill commitments of international agreements and continue to develop its own national framework within the wider context of European integration.

In 2006, New Criminal Code has been enacted and has been amended for the seven times, last time in December 2019.

Criminal law as a system of legal norms must constantly adapt to the conditions of modern criminality, within the framework of the rapid and dynamic development of society and social relations, which is manifested through the interventions of legislators, as a part of political power. It also must be a firm and relatively conservative system of regulations, because on the basis of its coherence and stability, the character of the society's democracy can be seen.

Although the Republic of Serbia received a modern, codified, systemic law in the field of substantive criminal law by adopting the Criminal Code in 2006 (CC), it was amended and supplemented several times, as many as seven times so far[24].

[24] I. BODROŽIĆ, *Kontinuirani krivičnopravni intervencionizam- na raskršću politike i prava,* in *Srpska politička misao*, n. 2, 2020, pp. 381-396.

The most valuable hypothesis is that national system of criminal law provisions has to be and to stand in its traditional way and path and that all the changes that need to be done should respect law and cultural tradition and as the more important to be in a relationship to the accepted criminal policy and dogmatic standards[25].

A. Eser once said that: "*Anyone with a historical sense for the constancy of change may well take a view that law, like society, is ever destined for a status semper reformandus*".

By their nature changes can be:

1. part of adapting to modern, forms of criminality,
2. part of raising the efficiency of criminal justice,
3. as well as part of the alignment with the internationally adopted obligations or
4. fulfilling populist tendencies towards "*as much criminal law and punishment as possible*" in order to achieve short-term political goals?

The third in order of the Law on amendments to the Criminal Code from 2012, which appeared to the largest to adapt the normative criminal law framework in the Republic of Serbia with the assumed obligations from international agreements, specially within the European obligations, but also to correct the listed omissions, content and nomotechnical deficiencies made with amendments from 2009.

Main characteristics were the changes within the criminal offences that stipulates terrorism and terrorism related offences, and Serbian legislator made several deep legal changes in forming legal norms of terrorism.

Depoliticization of criminal acts of terrorism and their systematization into a group of crimes against humanity and international law in Serbian criminal legislation marks the beginning of the observation of these crimes as international by character. It is related to the adoption of a common position on the international (priority regional) level on the international dimension of the social danger of the delict of terrorism.

The new approach in defining terrorist offenses is dominated by three features: the first relates to the prediction of a single criminal notion of terrorism regardless of its orientation against a domestic state, foreign state or international organization, the second relates to the formal deprivation of a criminal offense the character of a political offense, by changing the chapter in which it is systematized within a special part of the Criminal Code, and the third, which involves the provision of as many as five new crimes in accordance with the solutions accepted in international documents and in comparative law.

The unification of the provisions of national legislation with the normative framework set at the European level is considered to be extremely important, but it should be emphasized that the legislative and technical approach to determining the criminal offense of terrorism and related crimes has certain shortcomings. The most important disadvantage is the selected mode of modeling the criminal offense of terrorism characterized by a pronounced casuistry[26]. We believe that at the level of the legislative

[25] I. BODROŽIĆ, *Terorizam kao kategorija nacionalnog i međunarodnog krivičnog prava*, Beograd, 2022, p.109.

[26]Terrorism is defined in Article 391 of CC: (1) Whoever with intent to seriously intimidate the population or to coerce Serbia, a foreign state or an international organization to do or not to do something, or to seriously harm or violate the main constitutional, political, economic or social structures of Serbia, a foreign country or an international organization: 1) attacks a life, body or liberty of another; 2) commits abduction or takes hostages; 3) destroys a state or a public object, traffic system, infrastructure, including information systems, an immovable platform in a continental shelf, a public good or private property in a manner that can jeopardize the lives of people or causes considerable damage to the economy; 4) abducts an aircraft, a ship or other means of public transport or goods transport: 5) produces, owns, acquires, transports, supplies or uses nuclear, biological, chemical or other weapon, explosive, nuclear or radioactive material or device,

formulation of the criminal norm of terrorism, a more widely accepted model, would be the model which, based on the large number of singulars, so far registered forms of terrorism, uses the methods of generalizing abstraction, creating the norm that is formed by enumerating certain representative actions of execution, and by setting up a general caution, which gives a norm a higher degree of adaptability[27].

Although it is considered that the legislative and technical approach to modeling criminal justice protection in the criminal act of terrorism is not such that it cannot be criticized (which at the same time refer to regional documents and national criminal law), it is far better than abandoning the state from legal protection mechanisms and going to the "war on terrorism". It can be stated that, it is most appropriate to remain on the principles of a traditional criminal-law response to terrorism, which, although limited, is the only one with full legitimacy, and always when is possible to avoid a legal fiction.

Overcriminalization is not only a feature of the national legislature, but occurs in all European legislation, as well as in the legislation of the USA. In order for the expansion of the number of criminal offenses to be justified, the state's interest in enacting new incriminations must be clearly expressed, and the incrimination itself must directly advance that interest[28].

In 2019 The Republic of Serbia was placed on the so-called "grey list" of the Financial Action Task Force (FATF), because it was estimated that there are shortcomings in the system of preventing money laundering and terrorist financing[29].

Interventions within the legal expression of the criminal offense of terrorist financing, are first of all, a reflection of the need to harmonize documents with relevant EU

including research and development of nuclear, biological or chemical weapon; 6) releases dangerous matters or causes fire, explosion or flood or commits other generally dangerous acts that may jeopardize human life: 7) disturbs or interrupts the supply of water, electric energy or other basic natural resource that may jeopardize human life, shall be punished with imprisonment of five to fifteen years.

(2) Whoever threatens to commit the offence specified in paragraph 1 of this Article, shall be punished with imprisonment of six months to five years.

(3) If the offence specified in paragraph 1 of this Article resulted in death of one or more persons or if it resulted in considerable devastation, the offender shall be punished with imprisonment of at least ten years.

(4) If in commission of the offence specified in paragraph 1 of this Article the offender kills one or more persons with intent, the offender shall be punished with imprisonment of minimum twelve years or life sentence.

(5) Whoever procures or reconditions the means for committing the criminal offence specified in paragraph 1 of this Article or removes obstacles for committing thereof or with another person agrees, plans or organizes committing thereof or takes any other action whereby conditions are created for direct commission thereof, shall be punished with imprisonment of one to five years.

(6) Whoever, for the purpose of committing the offence specified in paragraph 1 of this Article, forwards or transports to the territory of Serbia any persons or weapons, explosive, poisons, equipment, ammunition or other materials, shall be punished with imprisonment of two to ten years.

Published in the Službeni glasnik RS, Nos. 85/05 of 6 October 2005, 88/05 of 14 October 2005 (Corrigendum), 107/05 of 2 December 2005 (Corrigendum), 72/09 of 3 September 2009, 111/09 of 29 December 2009, 121/12 of 24 December 2012, 104/13 of 27 November 2013, 108/14 of 10 October 2014, 94/16 of 24 November 2016 and 35/19 of 21 May 2019. The latest changes are given in italic.

[27] I. BODROŽIĆ, *Terorizam kao kategorija nacionalnog i međunarodnog krivičnog prava*, cit., pp. 60-61.

[28] D. HUSAK, *Reservations About Overcriminalization,* in *New Criminal Law Review,* Vol. 14, 2011, p. 106.

[29]European Parliament, *Understanding EU counter-terrorism policy*, available at https://www.europarl.europa.eu/RegData/etudes/BRIE/2023/739395/EPRS_BRI(2023)739395_EN.pdf.

regulations, the Directive (EU) 2015/849[30], and the latest Directive 2018/843[31]. Countering the financing of terrorism is a key component of the EU strategy in the fight against terrorism. As terrorists and their supporters are constantly changing the ways of collecting, moving and accessing funds, the EU adapts its instruments and measures to deprive them of the possibility of engaging in criminal activities. The European Commission is a member of the Financial Action Task Force and actively contributes to its work as well as the implementation of FATF recommendations in the EU.

As the adopted amendments and additions to the CC from 2019 were harmonized with the aforementioned recommendations, Serbia is no longer under FATF monitoring in the future compliance with standards in the field of prevention of money laundering and financing of terrorism, because it was assessed that there is political commitment at the highest level, as well as institutional capacities for continuing the implementation of reforms in the area of prevention of money laundering and financing of terrorism, with a recommendation to Serbia to continue to improve through cooperation with Moneyval mechanisms in this area.

The last updated version of a general criminal law document at the EU level in preventing and suppressing terrorism as a criminal offence was adopted in 2017. Precisely, in March 2017, the Parliament and the Council (in their role as co-legislators) adopted the Directive on Combating Terrorism[32], with a view to updating the 2002 framework and implementing new international standards. The directive criminalizes a wide range of terrorist activities, including travelling for terrorist purposes and receiving terrorist training. It also adds cyber-attacks to the definition of terrorist offences, allowing for prosecution of cyber-terrorism.

General characteristics of constant, continuous changes of the criminal law provisions in the Republic of Serbia are:

1. changes are useful and necessary, but with respect for traditional criminal law principles,
2. repression on the normative level is getting tougher,
3. too high expectations from criminal law - it is not a magic wand,
4. an increasing number of criminal acts, although even the existing ones are insufficiently applied,
5. populism and meeting the wishes of the public, which is not an expert public,
6. changes are mainly political and less essential and
7. too much criminalization, not enough decriminalization.

[30] Directive (EU) 2015/849 of the European Parliament and of the Council, *on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC*, of 20 May 2015, in OJ L 141, of 5 June 2015.

[31] Directive (EU) 2018/843 of the European Parliament and of the Council, *amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU*, of 30 May 2018, in OJ L 156, of 19 June 2018.

[32] Directive (EU) 2017/541 of the European Parliament and of the Council, *on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA*, of 15 March 2017, in OJ L 88, of 31 March 2017.

5. Conclusion

The European Union and the Council of Europe, through their two most important documents, have established the criminal law concept of terrorism and the most important concepts, which are important for substantive criminal law, so that member countries, as well as countries that are candidates for full membership, can start from a common criminal law system of the criminal law concept of terrorism.
The aforementioned is the result of recognizing the fact that only uniform criminal law regulations enable effective opposition to terrorism as transnational crime. This, first of all, because it reduces to a minimum the possibility of the perpetrators of these criminal acts going to a country where it does not exist at all or is defined in a different way. On the other hand, it facilitates international legal assistance in criminal matters, but also provides support to national criminal justice systems.
The aforementioned is done in such a way that in this very sensitive field, which involves establishing a balance between basic human rights and freedoms, on the one hand, and the need to establish and preserve security, on the other, it ensures a uniform position on terrorism as a criminal legal category, which does not destroy the concept of constitutional order modern democratic states.
The majority of European criminal law legislation decided to strengthen and develop a legal, first of all criminal law, response to the challenges of terrorism and in this sense prioritized the development of measures of criminal law legislation in relation to the military response, which is propagated by the United States of America[33].
The European criminal law concept of terrorism and related criminal acts is the bearer of expansionist tendencies in terms of criminal law opposition to terrorism. These tendencies, which are characterized by the expansion of the catalog of incriminations and the tightening of penal policy at the legislative level, serve to achieve the so-called "preventive paradigms".
It shifts the focus of the criminal law reaction to the pre-zone of endangering the protected property (*ante portas del delicti)*, i.e. to some early stages of criminal progression, introducing a kind of *ante delictum* measures, such as predicting preparatory actions as a separate act of execution, by predicting abstract danger as the basic reason for criminal law reaction or on the other hand, by predicting certain actions, which can be seen as actions of complicity, in the form of an action of execution.
All of the above is justified by the high degree of social danger of terrorist behavior and the need to strengthen the general - preventive function of the criminal justice response in this area through increased repression.
Although European regulations, which contain criminal law provisions, leave a wide space for the implementation of provisions adopted at the international level, numerous legislations went further in the process of criminalization, and used the obligations from European regulations as a justification for such actions
General conclusion for the further harmonization and criminalization of transnational crimes, at the European and national level, should be:
the harmonization of criminal law and criminal procedure in the EU is subject to specific conditions, which differ from those generally applicable to the approximation of laws in the Union. Specific limits may result from the rules of competence set out in art. 82 *et seq*. TFEU, from EU fundamental rights, or from constitutional conditions applicable in

[33] More about the characteristics of the European criminal law approach to the fight against terrorism in E.VAN SLIEDREGT, *European Approaches to Fighting Terrorism*, in *Duke Journal of Comparative & International Law*, Vol. 20, 2010, pp. 413-428, pp. 413-417.

certain Member States. These factors can impede the negative approximation of national criminal law systems through mutual recognition as well as the positive approximation through EU secondary law.
The terms “approximation of laws” and “harmonization” stand for the alignment of national rules with a standard prescribed by Union law. Since the Treaty of Lisbon, criminal law in the EU has been approximated or harmonized within the supranational framework of “Judicial Cooperation in Criminal Matters” (art. 82 *et seq.* of the Treaty on the Functioning of the European Union, TFEU), which is part of the “Area of Freedom, Security and Justice” (art. 67 *et seq.* TFEU). In principle, criminal law thus follows general rules, which also apply in other areas.
Harmonization yes, negative criminal politics tendencies no:
No to “Overcriminalization” – the overuse and abuse of criminal law to address every societal problem and punish every mistake – is an unfortunate trend. The criminal law should be used only to redress blameworthy conduct, actions that truly deserve the greatest punishment and moral sanction.
No to Penal populism is a media driven political process whereby politicians compete with each other to impose tougher prison sentences on offenders based on a perception that crime is out of control.
The criminal code and the relevant European criminal law documents should reflect common understandings of morality, rather than political opportunism (such as responding to crises to appease voters).

ABSTRACT

In a wider context of the European integration processes, there are a lot of problematic legal questions on the side of both member states’ legal systems and legal systems of the candidates’ countries.
One of those questions is certainly the question: what are the limits of the criminal law reaction in a field of contemporary forms of crimes?
All the countries in the liberal democracy have similar principles in the field of substantive criminal law, such as the principles of legality and legitimacy. In accordance with these core principles, the author will try to provide research in a field of the ground, quality and quantity of criminal law provisions that are named to be so called "last resort" of the state reaction to criminality- especially transnational crimes.
Bearing in mind the defined goal of the research, there will be applied the theoretical and critical approach, about the definition of transnational crimes and a quality of the criminal law documents in processes of their constant criminalization.
The main approach will be a dogmatic one, especially the normative method will be used.
It is expected that the findings will go in a way of criticizing contemporary trends of continuous widening and strengthening of the criminal law repression, both on European level, both on the side of national criminal law provisions. Only the theoretical point of view as the critic of the penal populism and punitive reaction of the legislators could be a borderline in overcriminalization as the negative criminal policy trend.

KEYWORDS

Criminalization, Overcriminalization, Principle of Legality, Principle of Legitimacy, Transnational Crimes.

QUESTIONI PROBLEMATICHE NELLA CRIMINALIZZAZIONE DEI REATI TRANSNAZIONALI A LIVELLO UE E NAZIONALE. REATI CONNESSI AL TERRORISMO NELLA LEGISLAZIONE PENALE DELLA SERBIA

ABSTRACT

In un contesto più ampio dei processi di integrazione europea, ci sono molte questioni giuridiche problematiche sia da parte dei sistemi giuridici degli Stati membri che dei sistemi giuridici dei paesi candidati.

Una di queste domande è certamente la domanda: quali sono i limiti della reazione del diritto penale nel campo delle forme di crimine contemporanee?

Tutti i paesi della democrazia liberale hanno principi simili in materia di diritto penale sostanziale, come i principi di legalità e legittimità. In conformità a questi principi fondamentali, l'autore cercherà di fornire una ricerca in un campo che riguardi il fondamento, la qualità e la quantità delle disposizioni di diritto penale chiamate "ultima istanza" della reazione dello stato alla criminalità, in particolare ai crimini transnazionali.

Tenendo presente l'obiettivo definito della ricerca, verrà applicato l'approccio teorico e critico, sulla definizione dei crimini transnazionali e sulla qualità dei documenti penalistici in un processo di loro costante criminalizzazione.

L'approccio principale sarà quello dogmatico, in particolare verrà utilizzato il metodo normativo.

Si prevede che i risultati andranno in modo da criticare le tendenze contemporanee di continuo ampliamento e rafforzamento della repressione penale, sia a livello europeo, sia sul versante delle disposizioni penali nazionali. Solo il punto di vista teorico critico del populismo penale e della reazione punitiva dei legislatori potrebbe costituire il limite nell'eccessiva criminalizzazione come tendenza negativa della politica criminale.

KEYWORDS

Criminalizzazione, Crimini Transnazionali, Principio di Legalità, Principio di Legittimità, Sovra-criminalizzazione.