Patryk Gacka
University of Warsaw

FOREIGN TERRORIST FIGHTERS FROM THE PERSPECTIVE OF POLISH AND EUROPEAN CRIMINAL LAW

1. INTRODUCTION

For many years the influence of European law upon criminal legislation of the European Union Member States was insignificant, chiefly on account of the extremely conservative position of members of both the EU and the Council of Europe who enviously insulated their ability to single-handedly criminalize acts held to be reprehensible. Clearly, penal laws often times perform not only a regulatory, but also a variety of moralising functions by exemplifying and bolstering (and on occasion even creating) the values commonly accepted in a given society. Many of those are deeply culturally conditioned and bound with a particular state. Also, it appears indisputable that criminal law was and still remains a key element of the notion of state sovereignty[1]. It is because of these reasons that a plan to form one, worldwide system of repressive law is doomed to failure[2].

Together with the burgeoning globalization of all aspects of human life, in the last decades it has become pressing to draw up mutual penal standards with a view to maximizing the effectiveness of the fight against crime, particularly where the impact of increasing social mobility and global cash flows (transnational phenomena) is observable[3]. Some of these phenomena, hitherto conceived of as inter-

[1] *Cf.* A. Sakowicz, *Zasada ne bis in idem w prawie karnym w ujęciu paneuropejskim*, Białystok 2011, pp. 137–138; K. Karski, *Realizacja idei utworzenia międzynarodowego sądownictwa karnego*, "Państwo i Prawo" 1993, issue 7, p. 65 *et seq.*; N. Boister, *The concept and nature of transnational criminal law*, (in:) N. Boister, R. J. Currie (eds.), *Routledge Handbook of Transnational Criminal Law*, Oxford–New York 2015, pp. 11–26.

[2] I refer here, however, not merely to common acceptance of international criminal law, but, first and foremost, to harmonization of domestic legal systems. *Cf.* also comments in: R. Cryer, *International Criminal Law vs State Sovereignty: Another Round?*, "European Journal of International Law" 2005, issue 5, pp. 979–1000.

[3] One response to the problem of transnational crime endangering the interests of the European Union may be the establishment of the European Public Prosecutor's Office (Article 86

nal problems of the state, are becoming of concern for the so-called international community, which leads, slowly but surely, to the creation of a culture of transnational values and legal goods. It is in this light that the dynamic development of international criminal law *sensu largo* and regional law – in the case of Poland, in particular EU law – should be analysed[4]. The subject of the paper, *terrorism*, albeit present since the ancient times[5], is a fitting example by reason of its contemporary frequency of incidence and international character. Data provided by the United Nations suggests that an estimated 30,000 volunteers from 100 countries have joined the Islamic State (hereinafter: ISIS, ISIL, Da'esh) or other terrorist groups associated with Al-Qaeda[6]. In parallel with terrorism, it is noted with regard to foreign terrorist fighters that, even though it is not a new occurrence, contemporarily it poses a danger the scale of which is greater than anything seen before[7]. Global challenges demand global responses.

This paper is intended to provide answers to three broad research questions: first, how the notions of foreign terrorist fighters and mercenaries are defined in binding international documents and in the literature; second, how travel by Polish citizens to join the Islamic State should be classified from the perspective of the Polish criminal law (*de lege lata*); lastly, the relevant provisions of Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism will be commented and expounded upon[8]. The summary will be devoted to discussing, in brief, the mutual normative relations between the Directive and the Polish law. The crucial question is whether the attainment of the goal enshrined in Article 288 of the Treaty on the Functioning of the European Union (TFEU) necessitates a reform of Polish criminal law.

TFUE). *Cf.* also the Proposal for a Regulation on the establishment of the European Public Prosecutor's Office, http://data.consilium.europa.eu/doc/document/ST-5766-2017-INIT/pl/pdf (accessed 22 April 2017).

[4] V. Mitsilegas, *EU Criminal Law*, Oxford–Portland–Oregon 2009, pp. 5–9; M. Fletcher, R. Lööf, B. Gilmore, *EU Criminal Law and Justice*, Chelthenham–Northampton 2008, pp. 7–18.

[5] *Ibidem*.

[6] *Implementation of Security Council Resolution 2178 (2014) by States affected by foreign terrorist fighters: A compilation of three reports* (S/2015/338; S/2015/683; S/2015/975), p. 4.

[7] The phenomenon of FTFs is far from new but the magnitude of the threat is unmatched. *Cf. Implementation of Security Council resolution 2178 (2014) by States affected by foreign terrorist fighters: A compilation of three reports* (S/2015/338; S/2015/683; S/2015/975). *Cf.* also T. Hegghammer, *The Rise of Muslim Foreign Fighters. Islam and the Globalization of Jihad*, "International Security" 2011, Vol. 35, issue 3, pp. 53–94.

[8] Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA.

2. DEFINITION OF "FOREIGN TERRORIST FIGHTERS"

The Polish Criminal Code does not avail itself of the concepts of foreign fighters or foreign terrorist fighters. Likewise, they are absent from other commonly binding domestic pieces of legislation and directly applied international agreements. Curiously, the aforementioned Directive does not provide a suitable definition either, despite underscoring the need to harmonize antiterrorist laws in the Member States of the European Union[9]. Inconsistent use of terminology and non-uniform reach of criminalization of terrorist acts across states generate fundamental cognitive dissonances and regulatory problems on an international scale. Many semantic issues remain unresolved as academic writers have put forward and pushed for definitions dissimilar in scope. The differentiation between foreign fighters and foreign terrorist fighters, adopted by the UN Security Council, has only compounded the confusion. Another problematic area concerns the special characteristics of foreign terrorist fighters compared to mercenaries.

In an attempt to resolve the terminological problems, the Security Council of the United Nations in its Resolution 2178 held that foreign terrorist fighters are "individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict"[10]. The definition proposed by the Council, therefore, has three parts. First, the crime described may only be committed by a natural person. Second, a terrorist crime must be committed by such a person outside of their place of residence or nationality – this is the "foreignness" element in relation to the destination country. Third, the scope of criminalization propounded by the Council includes a myriad of choate and inchoate offences, causative acts that must obligatorily arise in connection with terrorist activity. The SC's definition does not refer to the motivations of fighters (be it financial or ideological). One may surmise, therefore, that the reason why a fighter decides to move to a war zone is irrelevant in the light of the SC's qualification. The sheer act of leaving the country of origin is sufficient, regardless of the mental

---

[9] *Cf.* recital 6: "Taking account of the evolution of terrorist threats to and legal obligations on the Union and Member States under international law, the definition of terrorist offences, of offences related to a terrorist group and of offences related to terrorist activities should be further approximated in all Member States, so that it covers conduct related to, in particular, foreign terrorist fighters and terrorist financing more comprehensively (…)".

[10] United Nations Security Council Resolution 2178 (2014), adopted by the Security Council at its 7272nd meeting on 24 September 2014, S/RES/2178 (2014). *Cf.* also Article 4 of the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, concluded on 16 May 2015 in Warsaw, signed by Poland in Riga on 22 October 2015; N. Piacente, *The Contribution of the Council of Europe to the Fight against Foreign Terrorist Fighters*, "EUCRIM" 2015, issue 1, pp. 12–15.

attitude of the person towards their action. What is more, materialization of any of the causative acts provided for in the Resolution warrants, on its own, a finding of liability, notwithstanding the actual consequences of one's travel (e.g. whether there were any victims by virtue of one's participation in terrorist training). In this sense the SC's definition is preventative in its nature[11]. In other words, the Council instituted controversial, from the human rights' perspective, limitations on the the free movement of people into territories controlled by terrorist organizations, to minimize the risk of further escalation of the pending conflicts there on the one hand, and, on the other, to reduce the probability of obtaining by the volunteers who venture into such territories of skills (e.g. in preparing terrorist attacks) and contacts they could utilize in their countries of residence or nationality[12]. That the definition is wide-reaching one may be satisfied by looking at the manner in which the connection with a military conflict was regulated. A connection with a military conflict may exist, yet even in its absence any actions undertaken remain, in the eyes of the Resolution, illegal. Despite the evident imperfections of the definition, especially where it refers to the equally indefinite term of terrorism, it manages to encapsulate some of the relevant characteristics of foreign fighters.

I will now call upon a number of doctrinal accounts of foreign fighters to amplify the picture of the indefiniteness of the definition. Thomas Hegghammer has claimed that foreign fighters are those who: (1) have joined, and operate within the confines of, an insurgency, (2) lack citizenship of the conflict state or kinship links to its warring factions, (3) lack affiliation to an official military organization, and (4) are unpaid[13]. The unpaid nature of foreign fighters' actions implies their non-financial motives and a lack of institutional and national connection with the parties to the conflict. The requirement of there being an ongoing insurgency drastically narrows down the catalogue of qualifiable factual situations, albeit it differentiates foreign fighters from international terrorists "who specialize in out-of-area violence against noncombatants"[14]. David Malet

[11] United Nations Security Council Resolution 2178 (2014), adopted by the Security Council at its 7272nd meeting, on 24 September 2014, S/RES/2178 (2014). *Cf.* also Article 4 of the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, concluded on 16 May 2015 in Warsaw, signed by Poland in Riga on 22 October 2015. *Cf.* also: N. Piacente, *The Contribution*..., *passim*.

[12] *Cf.* Scheinin's critique of Resolution 2178, where he shines light on the indefiniteness of terrorism as a phenomenon and a related risk that the instruments prescribed in the Resolution may be used for purposes other than combatting terrorism (e.g. suppressing internal opposition). *Cf.* M. Scheinin, *Back to post-9/11 panic? Security Council resolution on foreign terrorist fighters*, https://www.justsecurity.org/15407/post-911-panic-security-council-resolution-foreign-terrorist-fighters-scheinin/ (accessed 28 April 2017).

[13] T. Hegghamer, *The Rise of Muslim*..., pp. 57–58.

[14] *Foreign Fighters under International Law*, Geneva Academy of International Humanitarian Law and Human Rights, October 2014, Academy Briefing No. 6, p. 6.

has written generally that foreign insurgents are "non-citizens of conflict states who join insurgencies during civil war"[15].

From the foregoing cross-section of definitions of foreign terrorist fighters and foreign fighters it appears clear that the principal line of division between them attaches to the circumstances in which they travel outside of their country of origin. What is pertinent is whether such travel is undertaken with a view to acting – not necessarily militarily (e.g. participating in training) – in an organization considered by the international community a terrorist group (e.g. ISIS), or partaking in activities under the auspices of an entity that cannot, in any event, be categorized as terrorist. It is in this sense that the Security Council's definition – by virtue of introducing another condition – confines the definitions of academic writers recorded above. Nonetheless, the definition of foreign terrorist fighters is broader to the extent that it does not obligatorily link the activity of foreign terrorist fighters with a military conflict or – in the words of Hegghammer and Malet – an insurgency – in this way covering participation in training. The ambits of both definitions overlap to a limited degree, it appears[16]. It must be noted too that Hegghammer's unpaid service criterion is highly controversial and inconsistent with contemporary practice[17]. This requirement could be reasonably neutralized by allowing for the existence of financial motivations alongside ideological, religious or ethnic ones. E. Karska and K. Karski rightly note that "(…) material reward is not a principal motivation in this respect"[18]. The categorical reservation of the unpaid service criterion helps, it must be said, to put a clear line between foreign fighters and insurgent activity of mercenaries[19].

---

[15] D. Malet, *Foreign Fighters: Transnational Identity in Civil Conflicts*, Oxford 2013, p. 9.

[16] *Cf.* J. Petzel, *Elementy teorii relacji*, (in:) A. Malinowski (ed.), *Logika dla prawników*, Warszawa 2005, p. 93.

[17] Although it is a criterion approved by other academics. *Cf.* S. Krahenmann, *Foreign Fighters under International Law and National Law*, "Recueils de la Societe Internationale de Droit Penal Militaire et de Droit de la Guerre" 2015, Vol. 20, pp. 249–250. See also press reports on the worsening financial situation of ISIS and decreses in the salaries of foreign fighters fighting in its ranks: http://www.cnbc.com/2016/01/20/isis-cuts-fighters-salaries-due-to-exceptional-circumstances.html (accessed 20 April 2017).

[18] *Cf.* E. Karska, K. Karski, *Introduction: The Phenomenon of Foreign Fighters and Foreign Terrorist Fighters. An International Law and Human Rights Perspective*, "International Community Law Review" 2016, issue 18, pp. 379–380. In fairness, it shall be mentioned that in an amended definition of foreign fighters, J. Colgan and T. Hegghammer express a similar opinion. *Cf.* J. Colgan, T. Hegghammer, *Islamic Foreign Fighters: Concept and Data*, paper presented at the International Studies Association Annual Convention, Montreal 2011, p. 6 (citing after: M. Flores, *Foreign Fighters Involvement in National and International Wars: A Historical Survey*, (in:) A. de Guttry, F. Capone, Ch. Paulussen (eds.), *Foreign Fighters under International Law and Beyond*, Hague 2016, p. 31).

[19] Ross Frenett and Tanya Silverman point to three basic motivations: (1) outrage at what is alleged to be happening in the country where the conflict is taking place and empathy with the people being affected; (2) adherence to the ideology of the group an individual wishes to join and (3) a search for identity and belonging. R. Frenett, T. Silverman, *Foreign Fighters: Motivations for*

Analogous definitional problems are observable in connection with the pair of seemingly close, semantically speaking, terms: foreign (terrorist) fighters and mercenaries. Mercenarism is defined in Article 47 of the Additional Protocol to the Geneva Conventions of 12 August 1949, under which a mercenary is a person who: "a) is specially recruited locally or abroad in order to fight in an armed conflict; b) does, in fact, take a direct part in the hostilities; c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party; d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict; e) is not a member of the armed forces of a Party to the conflict; and f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces"[20]. That a mercenary takes a direct part in the hostilities must be the key requirement as recruitment of foreign insurgents is typically motivated by the will to expedite a victory in a conflict where own potential proves insufficient. The Protocol's definition has been opined to be very restrictive as all 6 requirements must be met to regard anyone a mercenary[21]. It is relevant that the parties that negotiated the wording of the provision put forward a variety of divergent positions and stances in respect of the material compensation requirement, with material benefit being the primary motivation for mercenaries[22].

Indisputably, mercenaries and foreign fighters alike constitute external agents against the parties to a conflict. It is sometimes argued, however, that such "externality" in case of foreign fighters need not be national, for they "may encompass nationals of a party to the conflict, such as from the diaspora, while mercenaries are necessarily non-nationals"[23]. Furthermore, it is plausible that a defining element of mercenarism is the manner of recruitment that resembles a business transaction between two interested parties, at least to a greater extent than as

Travel to Foreign Conflicts, (in:) A. de Guttry, F. Capone, Ch. Paulussen (eds.), *Foreign Fighters under International Law and Beyond*, Hague 2016, p. 65.

[20] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 8 June 1977.

[21] Its narrow scope was subject to criticism as early as at the preparatory stage. *Cf.* in this regard: J. M. Henckaerts, L. Doswald-Beck, *Customary International Humanitarian Law. Volume I*, Cambridge 2009, p. 393.

[22] Rule 108: Mercenaries, as defined in Additional Protocol I, do not have the right to combatant or prisoner-of-war status. They may not be convicted or sentenced without previous trial. See: J. M. Henckaerts, L. Doswald-Beck, *Customary International*..., p. 391.

[23] *Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination* (A/70/330), p. 6.

regards foreign fighters[24]. The object of the transaction is always determined beyond a doubt – it comprises military services.

To conclude the terminological discussion, I wish to emphasize again that a delineation of semantic boundaries between the three terms noted above is impossible. If it is to be assumed that one motivational element of foreign fighters is the obtainment of a material benefit, as evidenced by the practice of rewarding ISIS fighters, then both terms, foreign fighters and mercenaries, almost fully overlap. One recognizable difference would be the nationality requirement, inasmuch as one is prompted to accept the definition proffered by the UN Security Council. Hence, it is incorrect to say that "the risks of overlap between the two categories is extremely limited" considering the rewarding mechanisms employed by ISIS, whose fighters, nevertheless, are typically not considered mercenaries[25]. I surmise that the UN definition, given its direct reference to terrorism and the circumstances of its inception (ISIS activity), is bound to have limited practical impact as proper application thereof hinges upon working out a sufficiently exact definition of terrorism, a feat which has proven almost insurmountably difficult[26].

3. CRIMINAL LAW METHODS OF SOLVING THE PROBLEM OF FOREIGN TERRORIST FIGHTERS

Foreign terrorist fighters represent a threat for both the international order and internal security of individual states. It is commonly stressed that criminalization in this respect is predicated upon, to a greater extent than in the case of mercenaries – by the risk of foreign terrorist fighters' returning to their country

[24] The recruitment of Western foreign fighters is widely presumed to occur mainly via social media platforms. *Cf. Social media used to recruit new wave of British jihadis in Syria*: https://www.theguardian.com/world/2014/apr/15/social-media-recruit-british-jihadis-syria-twitter-facebook (accessed 28 April 2017).

[25] E. Sommario, *The Status of Foreign Fighters under International Humanitarian Law*, (in:) A. de Guttry, F. Capone, Ch. Paulussen (eds.), *Foreign Fighters under International Law and Beyond*, Hague 2016, p. 157.

[26] B. Saul has written about the futile attempts to formulate a universal definition of terrorism: "As early as 1983, 109 different official and academic definitions of terrorism were identified in one much cited study". Further, however, he soberly notes that "[d]espite the divergence of opinion, there is no technical impossibility in defining terrorism; disagreement is fundamentally political". *Cf.* B. Saul, *Defining Terrorism in International Law*, Oxford 2006, p. 57 *et seq.*; Another question is which authority would be empowered to officially hold that a given entity is a terrorist organization. It is to be presumed that monopoly in this regard would be left to the UN Security Council, therefore every decision would be bound to be strictly political, not legal.

of residence or nationality to continue their terrorist activity there[27]. It is not the sheer event of fighting under the auspices of a foreign organization that is legally relevant, and so participation in training carried out by terrorist organizations carries so much weight in the definition of foreign terrorist fighters. In this sense the catalogue of legal goods protected by criminalizing the activity of foreign terrorist fighters is broad as it covers not only goods of international significance (e.g. world peace and security) or goods relevant domestically (e.g. state security). Such complexity justifies the adoption of a comprehensive approach underpinned by legislative activity on both levels.

There are at least two methods that domestic law may utilize to tackle the problem of foreign terrorist fighters. First, an internationally approved definition could be transposed domestically, a corresponding definition of terrorism could be worked out, and new offences instituted so that particular causative acts that foreign fighters manifest are penalized. A competing account holds that the instruments already available may suffice. Law enforcement and judicial authorities shall bring the activity of foreign terrorist fighters under the remit of offences already in existence in national criminal codes, from those most reprehensible (so-called core crimes of international criminal law) to crimes less socially harmful (e.g. provocation to commit an offence).

Below I attempt to analyse, in brief, the currently existing legal bases allowing for holding a Polish citizen criminally liable for undertaking activity as a foreign terrorist fighter. Next, the EU Directive on combatting terrorism will be discussed. Finally, the exact scope of changes mandated by the legislation to be transposed into domestic law will be expounded upon.

3.1. COMMENTS *DE LEGE LATA* IN THE LIGHT OF POLISH CRIMINAL LAW ON FOREIGN TERRORIST FIGHTERS' DEPARTURES

Per the International Centre for Counter-Terrorism, "Between 20 to 40 Polish nationals are believed to have travelled to Syria/Iraq, most of them residing at the time of departure not in Poland itself but in other European countries. Amongst them was an individual who had carried out a suicide attack on a refinery in Iraq in June 2015 together with three other FF"[28]. Consequently, the undertaking

[27] *Cf.* Ch. Lister, *Returning Foreign Fighters: Criminalization or Reintegration*, Policy Briefing, Brookings Doha Center, August 2015, https://www.brookings.edu/wp-content/uploads/2016/06/En-Fighters-Web.pdf (accessed 28 April 2017).

[28] Data cited after: B. van Ginkel, E. Entenmann (eds.), *The Foreign Fighters Phenomenon in the European Union Profiles*, *Threats & Policies*, ICCT Research Paper, April 2016, p. 46. In response to parliament written question No. 423 dated 8 February 2016, Bartosz Kownacki, the Secretary of State at the Ministry of National Defence, argued that "since the beginning of the Syrian conflict in 2011, 21 Polish citizens have travelled to the war zone. 10 of them remain in Syria, 6 returned to Poland or other European countries, and 5 have died. Polish citizens who find

of activities characteristic of foreign terrorist fighters by Polish citizens is a rather minimal problem[29]. This is not to say, however, that it is overlooked by Polish law enforcement authorities. For instance, in 2015 the Internal Security Agency initiated three proceedings investigating Polish citizens in Syria, including two in respect of the crime under Article 258 § 2 of the Criminal Code and one under Article 141 § 1[30].

The current Criminal Code contains a number of provisions pertaining to terrorist activity. These include, in the general part, Articles 65, 110, 115 § 20 and, in the specific part, Articles 165a, 255a, 258a, 259, 2592, 259b. Relevant to the discussion about foreign terrorist fighters are also Articles 141 and 142. I will seek to interpret only a few of those regulations to the extent that it informs the argument presented in the paper.

3.1.1. CRIME OF A TERRORIST CHARACTER – ARTICLE 115 § 20 OF THE CRIMINAL CODE

A dogmatic discussion should start with Article 115 § 20 of the Criminal Code which defines a crime of a terrorist character. The provision was enacted at the time of Poland's accession to the European Union and represents an attempt to adjust the Polish criminal law to the EU law[31]. The regulation sets two criteria to be used to determine whether a given crime is of a terrorist character. The first one is formal and pertains to the upper threshold of punishment, standing at 5 years imprisonment or more[32]. The second requirement concerns the motivations of the perpetrator or, to be exact, the purpose of the activity undertaken (serious intimidation of many people; compelling of an authority of the Republic of Poland or another state or an international organization to act in a certain way or refrain from doing so; causing of serious disturbances in the workings of the government or the economy of the Republic of Poland, another state or an international organization). Pertinently, the list of motivations is enumerative and exhaustive, therefore the existence of any of them decides whether a crime under

themselves in Syria primarily join the Islamic State (…)". *Cf.* http://www.sejm.gov.pl/Sejm8.nsf/interpelacja.xsp?typ=INT&nr=423 (accessed 25 April 2017).

[29] Such conclusions may be drawn especially when one considers the estimated number of foreign fighters coming from other European States, for instance: the United Kingdom: 700–760, Germany: 720–760, France: more than 900, Belgium: around 500.

[30] *Cf.* B. Kownacki's response to parliamentary written question No. 423.

[31] This provision was enacted by the Act of 16 April 2004 on Amending the Criminal Code and Numerous Other Acts (Polish Official Journal of Laws of 2004, No. 93, item 889 as amended); Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA).

[32] The draft bill on terrorist activity envisaged a reduction of the upper threshold of punishment to at least 3 years. In such a case the pool of crimes potentially qualifying as of a terrorist character would expand significantly. *Cf.* the reasons appended to the bill by the Government Legislation Centre, p. 18, https://legislacja.rcl.gov.pl/docs//2/12284561/12348751/12348752/dokument218596.pdf (accessed 28 April 2017).

Article 115 § 20 has been committed. The Polish parliament utilized a different legislative method than the EU legislator in the Framework Decision, however. This divergence will reappear in the context of the newest EU directive on combatting terrorism discussed under the next heading and comprehensively spelt out in the paper's summary.

3.1.2. UNDERTAKING MILITARY DUTIES IN A FOREIGN MILITARY FORCE – ARTICLE 141 OF THE CRIMINAL CODE

Article 141 § 1 of the Criminal Code stipulates that: "Whoever, being a Polish citizen, undertakes military duties in a foreign military force or a foreign military organisation without the permission from a competent authority, is subject to the penalty of deprivation of liberty for between 3 months and 5 years"[33]. It is an individual crime whose causative act consists of assuming or undertaking military duties without a competent authority's permission[34]. Pursuant to Article 199a of the Act of 21 November 1967 on the Common Duty to Protect the Republic of Poland, that authority is the Minister of the Interior or – where professional soldiers are involved – the Minister of National Defence[35]. Permission may only be given provided that the requirements listed in Article 199b and 199c of the Act are met. One requirement is that "the duty must not be forbidden by international law" makes it clear that the undertaking of military duties for Da'esh would be outright prohibited[36]. In addition, liability does not arise where the duty has

[33] Hence this excludes from the ambit of criminalization both foreigners and stateless persons. *Cf.* the Act of 2 April 2009 on the Polish Citizenship (Polish Official Journal of Laws of 2012, item 161). Considering that the provision is situated in the specific instead of the military part of the Criminal Code, the crime may be committed by every citizen and not merely by a soldier. *Cf.* M. Ścibior, *Udzielanie zgody obywatelowi polskiemu na służbę w obcym wojsku lub obcej organizacji wojskowej*, "Wojskowy Przegląd Prawniczy" 2011, issue 2, pp. 21–35.

[34] Note that, by virtue of § 3 of the Article, no liability arises in respect of a Polish citizen who is also a citizen of a foreign state and resides in its territory if he decides to undertake military service there. *Cf.* S. Małecki, *Podwójne obywatelstwo a służba w obcym wojsku*, "Wojskowy Przegląd Prawniczy", 1993, issue 3–4, pp. 83–87; S. M. Przyjemski, *Powszechny obowiązek obrony Rzeczypospolitej Polskiej a służba obywatela polskiego w obcym wojsku lub obcej organizacji wojskowej*, "Wojskowy Przegląd Prawniczy" 2007, issue 4, pp. 3–14. It is worth noting that § 3 is an exception from the rule in Article 3(2) of the Act of 2 April 2009 on the Polish Citizenship, pursuant to which "a Polish citizen cannot, before the authorities of the Republic of Poland, effectively rely on any rights or dutiies resultant from simultaneously having another citizenship".

[35] The Act of 21 November 1967 on the Common Duty to Protect the Republic of Poland (Polish Official Journal of Laws of 1967, No. 44, item 220). *Cf.* also: Resolution of the Council of Ministers of 13 April 2010 on the rules of granting consent to Polish citizens as regards service in a foreign military or a foreign military organization (Polish Official Journal of Laws of 2010, No. 68, item 438).

[36] *Cf.* "Recalling that the Al-Nusrah Front (ANF) and all other individuals, groups, undertakings and entities associated with Al-Qaida also constitute a threat to international peace and security (…). Condemns also in the strongest terms the continued gross, systematic and widespread abuses of human rights and violations of humanitarian law, as well as barbaric acts of destruction

the nature of paid employment in a foreign military force or organization that is of a purely service-like character[37]. In this aspect the *actus reus* of the offence under Article 141 § 1 of the Criminal Code diverges from the Security Council Resolution's standard as the latter also covers training activity not necessarily strictly connected with military duty. Article 141 § 1, however, penalizes participation in military training[38].

The phrasing of the provision, particularly the word "undertakes", is controversial as, theoretically, it conjures up a model where one is made a proposal to join a military force which then is either accepted or declined. In other words, on its face it appears like voluntary joining of a military force or organization falls beyond the ambit of the offence[39]. Problems also arise in relation to delineating the boundaries of the *mens rea* required of the perpetrator, however it is advisable to adopt the view suggesting full intent[40].

The phrase "foreign military force" definitely pertains to military forces other than the Polish one, i.e. belonging to other states[41]. By a military organization one should understand "a foreign organizational structure which, whilst not being a military force (foreign army), has aims, a programme or tasks of a military nature (…)"[42]. The doctrine hints that no link with state structures must be present[43]. Other characteristics of foreign military forces proposed in the literature include: a hierarchical structure of command, concentration of leadership in

and looting of cultural heritage carried out by ISIL also known as Da'esh", Security Council Resolution 2249 (2015), 20 November 2015.

[37] Judgment of the Polish Supreme Court of 10 July 1992, ref. number WRN 75/92, OSNKW 1993, No. 1–2, item 12.

[38] "Military service is fulfilling one's function as a soldier by force of common or individual military duty, as well as the service of volunteers whose essence is undergoing military training, performing the functions of a professional soldier, and, in times of war, participation in military activities" – *ibidem*.

[39] This is specially momentous as foreign terrorist fighters often profess, when talking about their motivations, that they decide to travel to Syria voluntarily, often due to ideological reasons, believing they will be admitted to the terrorist organizations operating there.

[40] This view has been espoused by Zbigniew Ćwiąkalski. *Cf.* Z. Ćwiąkalski, *Art. 141*, (in:) A. Zoll (ed.), *Kodeks karny. Część szczególna. Tom II. Komentarz do art. 117–277 k.k.*, Lex 2013; both types of intent are accepted in: J. Kulesza, *Art. 141. Służba w obcym wojsku*, (in:) M. Królikowski, R. Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do art. 117–221*, Legalis 2013.

[41] According to the Polish Supreme Court, also covered are "means earmarked by the state to protect its interests and undertake military action, grouped as an organizational entirety consisting of military units and collective entities of diverse type and dimension". *Cf.* judgment of the Polish Supreme Court of 10 July 1992, ref. number WRN 75/92, OSNKW 1993, No. 1–2, item 12.

[42] *Ibidem*.

[43] M. Kiziński, *Wybrane aspekty prawnokarne służby obywatela polskiego w obcym wojsku lub w obcej organizacji wojskowej (art. 141 § 1–3 k.k.)*, "Wojskowy Przegląd Prawniczy" 2006, issue 1, p. 37.

the hands of one person, subordination, official (even if partial) uniformization[44]. On the contrary, the mode of legal regulation of the entity is irrelevant (e.g. formal registration). J. Kulesza, it is submitted, may be, however, incorrect to avail himself of the term "legality" as it obscures the division into formal and material correspondence with the law of a given, legally relevant activity[45]. It looks as if the legislator treats as irrelevant the legal basis for the functioning of the suspect entity, that is whether its operation rests on a legal foundation (e.g. as an association, an insurgency faction etc.) or whether it is informal. Importantly, it is a different qualification to hold a given entity to be illegal – such whose form of activity is inconsistent with the currently binding provisions of the law or, in the long run, is penalized by virtue of specific regulations (e.g. a criminal organization). Therefore, it remains open whether a terrorist organization may be classified as a "military organization".

Z. Ćwiąkalski, prompted by the indefiniteness of the term "military organization", has rightly noted that "the legislator intended to sketch the reach of penalization as broadly as possible"[46]. Another academic has also correctly asserted that "the punishability of the crime is not dependent upon the place where it was committed"[47]. In the light of this, one may suppose that, given ISIS's extensive structure and military aims, it could be brought within the ambit of the definition of a "foreign military force", despite its previous classification as a terrorist organization. Therefore, where a Polish citizen enters into military cooperation with ISIS or other similar terrorist organizations, both in Syria, the bordering countries and as a consequence of assignments completed elsewhere (e.g. in Poland)[48], it would be feasible to hold such a person criminally liable under Article 141 § 1 of the Criminal Code[49]. On account of the crime's formal character, liability arises as soon as cooperation is forged, regardless of whether any planned

[44] D. Szeleszczuk, *Art. 141*, (in:) A. Grześkowiak, K. Wiak (eds.), *Kodeks karny. Komentarz*, Legalis 2017; *M. Flemming*, (in:) M. Flemming, J. Wojciechowska (eds.), *Zbrodnie wojenne. Przestępstwa przeciwko pokojowi i obronności. Rozdział XVI, XVII, XVIII Kodeksu karnego. Komentarz*, Warszawa 1999, p. 176.

[45] J. Kulesza, *Art. 141. Służba w obcym wojsku*, (in:) M. Królikowski, R. Zawłocki (red.), *Kodeks karny…*

[46] Z. Ćwiąkalski, *Art. 141*, (in:) A. Zoll (ed.), Kodeks *karny...*

[47] A. Kamieński, *Art. 141*, (in:) O. Górniok (ed.), *Kodeks karny. Komentarz*, Lex 2006.

[48] Also in this aspect the scope of penalization envisioned in Article 141 of the Criminal Code diverges from the definition of foreign terrorist fighters in the Security Council Resolution, which makes it a condition for a person to be classified as a foreign fighter to travel outside of their place of residence or nationality.

[49] Similar corollaries are drawn by D. Szeleszczuk, who writes: "There are no obstacles, it appears, to holding in violation of Article 141 § 1 of the Criminal Code those Polish citizens who undertake duty for the Islamic State (ISIS)". *Cf.* D. Szeleszczuk, *Art. 141*, (in:) A. Grześkowiak, K. Wiak (eds.), *Kodeks karny...*

military actions succeed and a pre-determined consequence materializes[50]. Yet this regulation does not criminalize participation in training conducted by a foreign military organization so long as it is not strictly tied to military activity.

Another type of service in a foreign military force is prohibited by Article 141 § 2 of the Criminal Code, which stipulates that "whoever assumes duties in a mercenary military service prohibited by international law shall be subject to the penalty of the deprivation of liberty for a term of between 6 months and 8 years". The legislator does not avail itself of the personal noun "mercenary", instead opting for a word that is undefined in either international or domestic law – "mercenary military service". In the literature, it is noted that this encompasses "units organized with a view to arranging military takeovers or protecting the interests of local warlords, as well as undertaking preparations to instigate and participate in ongoing civil wars. It is irrelevant where such units are situated geographically"[51]. Another condition, that is designation of such duties as "prohibited by international law", may be evaluated by reference to both the Additional Protocol and the International Convention against the Recruitment, Use, Financing and Training of Mercenaries enacted by the UN General Assembly on 4 December 1989[52]. Article 3(1) of the Convention stipulates that: "A mercenary (…) who participates directly in hostilities or in a concerted act of violence, as the case may be, commits an offence for the purposes of the Convention".

The above definitions evince that every natural person capable of being held criminally liable may be legally qualified as a mercenary. Contrary to Article 141 § 1 of the Criminal Code, § 2 penalizes Polish citizens, foreign citizens and stateless persons alike. As regards Polish citizens, it is rightly noted in the literature that Article 141 § 2 codifies an aggravated version of the crime under § 1[53], introducing a crime of the common type into the system.

The *actus reus* of the crime under Article 141 § 2 is also more broadly cast in comparison to § 1. The indefiniteness of the phrase "undertaking of the duties" leads me to believe that, *a contrario* to the corollaries drawn in respect of Article 141 § 1, § 2 refers to duties of not only military nature, but also of other kind (e.g. service like, by analogy to the aforementioned judgment of the Polish Supreme

[50] For instance, Article 141 § 1 of the Criminal Code would penalize the undertaking by a Polish citizen of military duty as a member of the French Foreign Legion, even if he later abandons the service. *Cf.* judgment of the Polish Supreme Court of 10 February 1994, ref. number WR 8/94, OSNKW 1994, No. 5–6, item 38.

[51] Z. Ćwiąkalski, *Art. 141*, (in:) A. Zoll (ed.), *Kodeks karny…*

[52] General Assembly Resolution 44/34 of 4 December 1989 (International Convention against the Recruitment, Use, Financing and Training of Mercenaries). Poland signed the Convention on 28 December 1990, yet, as of June 2017, it has not ratified it. *Cf.* https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-6&chapter=18&clang=_en (accessed 26 April 2017).

[53] S. Hoc, *O penalizacji służby w obcym wojsku*, "Roczniki Nauk Prawnych" 2005, Vol. 10, issue 1, p. 187.

Court). As it was the case with Article 141 § 1, the "undertaking of duties" phrasing is problematic. D. Gruszecka has noted that "undertaking of duties denotes (…) stable contribution to the functioning of an organization, not merely a one-off service"[54]. In principle, this view goes a long way to clarify the exact meaning of this legal category, yet one may doubt whether the word "stable", indefinite itself, truly reflects the nature of mercenary duty. The requirement of stability is absent from the definition of a mercenary and mercenary service recorded above. Consequently, it appears that even short-term performance of certain duties meets the requirements of the *actus reus* of mercenarism, provided that all the other elements are present. Going further, one may reasonably conceive of circumstances where foreign terrorist fighters would perform the *actus reus* of the crime under Article 141 § 2 and could be, pursuant thereto, held criminally liable.

3.1.3. CRIMES OF A TERRORIST CHARACTER IN CHAPTER XXXII OF THE CRIMINAL CODE

One of the aims of the Act of 10 June 2016 on Anti-Terrorist Activity was to "implement domestically the provisions of UN Resolution No. 2178", which resulted in the creation of several new "offences pertaining to the undertaking of activity by so-called foreign insurgents" (*inter alia*, Articles 255a § 2, 259a, 259b of the Criminal Code)[55]. The *ratio legis* of the new legislation, according to Parliament itself, was to "enhance the ability of law enforcement as regards the prevention of crimes of a terrorist character. The projected solution ensures that those who participated in the preparations to commit a crime escape liability provided that they refrain from actually going ahead with them. It is the Act's intention that the capacity of law enforcement in terms of extracting information about planned terrorist incidents be strengthened and that solidarity between members of terrorist groups be hindered, the latter being a key element from the perspective of the state's ambition to destabilize such organizations"[56].

Article 255a § 1 of the Criminal Code penalizes the spreading of information that are capable of facilitating the commission of a crime, including a crime of a terrorist character. Liability arises in detachment from and precedes actual terrorist activity, and may therefore be classified as subsidiary, as the provision recites: "whoever spreads or publicly presents contents capable of facilitating the

[54] D. Gruszecka, *Art. 141*, (in:) J. Giezek (ed.), *Kodeks karny. Część szczególna. Komentarz*, Lex 2014.

[55] Polish Official Journal of Laws of 2016, item 94. Parliament also affirmed that: "The Act will also institute penal provisions mandated by the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism concluded on 16 May 2005 in Warsaw, to which Poland is a party (Polish Official Journal of Laws of 2008, No. 161, item 998)".

[56] *Cf.* the reasons appended to the Act, p. 20.

commission of a crime of a terrorist character (…)"[57]. It is § 2 of the Article, however, that holds the most significance in relation to foreign terrorist fighters since it criminalizes participation in training capable of facilitating the commission of a crime of a terrorist character. Analysed in conjunction with Article 115 § 20, Article 255a § 2 of the Criminal Code imposes liability even where an actual terrorist act is not committed – within the ambit of the provision is even participation in relevant training that potentially may assist in a terrorist act eventuating some time down the road. Surely, criminalized is travel by Polish citizens abroad to partake in such training or doing so via the Internet. In the literature it has been qualified that participation in training sessions must "in an objective sense (…) facilitate" one in committing a terrorist crime[58]. I recognize that evidential problems may arise as regards proving this requirement, therefore a different construction should be favoured. Mere participation in relevant training should give rise to a presumption that commission of a terrorist crime was facilitated thereby. This is buttressed by the fact that that the legislator does not demand that a particular consequence eventuate. Neither does it limit the potential set of perpetrators – the crime is of the formal and common type. In this way the scope of criminalization of any activity connected with terrorist activity has been broadened[59].

Besides individual activity, the Criminal Code also penalizes acts committed by organized criminal groups or associations, including crimes of a terrorist character. Article 258 lays down the illegality of a number of causative acts related to such organizations, i.e. forming, leading and participating in their activities. This has limited relevance for foreign terrorist fighters.

Crossing the country border to commit a crime of a terrorist character is regulated in Article 259a of the Criminal Code. It is a new offence, introduced to the Code in 2016, and it holds that "whoever crosses the border of the Republic of Poland with an intention to commit, in the territory of another state, a crime of a terrorist character or a crime under Articles 258a or 258 § 2 or § 4, is subject to the penalty of deprivation of liberty from 3 months to 5 years". In Article 259a the legislator again criminalizes an act occurring before the commission of a terrorist crime. Clearly, the provision is aimed at foreign terrorist fighters. Importantly, it refers to crossing the border of the Republic of Poland, so it covers situations where a person X leaves the territory of Poland to commit a terrorist act in country Y, but also where a person X uses the territory of Poland as transit area

[57] This method is used to implement the provisions (particularly Article 1) of the Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism and the duties imposed by Articles 5 and 7 of the Council of Europe Convention on the Prevention of Terrorism of 16 May 2005 (Polish Official Journal of Laws of 2008, No. 161, item 998).

[58] K. Wiak, *Art. 255a. Rozpowszechnianie treści mogących ułatwić popełnienie przestępstwa*, (in:) A. Grześkowiak, K. Wiak, (eds.), *Kodeks Karny. Komentarz*, Legalis 2017.

[59] See the reasons appended to the Act, pp. 19–20.

on the way from country Z to country Y, crossing the Polish border in the meantime. By criminalizing the act of "crossing the border" it is the Polish parliament's intention to curb the international character of terrorism. It goes without question that Da'esh would not be as successful if it was not for the fact that so many people from so many countries fight for it. Article 259a gives grounds for criminalizing crossing the border to participate in terrorist training (Article 255) as well as travel beyond the Polish borders by organized groups and associations[60]. The reach of the provision does not, however, catch crossing the Polish border in the other way around, i.e. from another country into Poland to commit a terrorist crime there. It is a crime of the formal and common type. Significantly, Article 259a normatively complements Article 141 § 1 discussed above, as its ambit also covers acts undertaken before the commission of an actual prohibited act.

3.2. FOREIGN TERRORIST FIGHTERS IN EUROPEAN UNION LAW

3.2.1. GENERAL CHARACTERISTICS OF A DIRECTIVE IN THE SYSTEM OF EU LAW

A directive is a secondary legislative instrument of the European Union aimed at harmonizing the domestic legislations to the extent that it regulates[61]. Under Article 288 of the Treaty on the Functioning of the European Union (TFEU), "To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions (…) [a] directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods"[62]. Commentators indicate that a directive is "a peculiar legislative document of the EU, something confirmed by its unique character in the transnational legal order"[63]. The peculiarity of a directive consists in limiting the duty imposed on the Member States to the result to be achieved whilst leaving to them the decision regarding the method of implementation so that diverse solutions typically employed in a given

---

[60] This has been pointed out by: A. Lach, *Art. 259a. Przekroczenie granicy RP w celu popełnienia przestępstwa o charakterze terrorystycznym*, (in:) V. Konarska-Wrzosek (ed.), *Kodeks karny. Komentarz*, Legalis 2016; A. Herzog, *Art. 259a KK*, (in:) R. A. Stefański (ed.), *Kodeks karny. Komentarz*, Legalis 2017.

[61] M. Szwarc-Kuczer notes that "after the Lisbon Treaty has entered into force, a directive is the only legal instrument that serves to harmonize the substantive criminal law in the EU (…)". *Cf.* M. Szwarc-Kuczer, *Kompetencje Unii Europejskiej w dziedzinie harmonizacji prawa karnego materialnego*, Warszawa 2011, p. 94.

[62] The Treaty of Accession 2003, signed in Athens on 16 April 2003 (Polish Official Journal of Laws of 2004, No. 90, item 864).

[63] B. Kurcz, *Art. 288*, (in:) A. Wróbel (ed.), *Traktat o Funkcjonowaniu Unii Europejskiej. Komentarz. Tom III*, Warszawa 2012, p. 651.

country may be utilized and the sovereignty of the Member States is respected[64]. As the normative aims of directives are not determined explicitly therein, to that end construction of every individual directive must be meticulously conducted. Latitude as to the process of implementation is not absolute. The Court of Justice of the European Union (CJEU) has held that the Member States must choose "the most appropriate forms and methods to ensure the effectiveness" of a directive whilst fulfilling the requirements of "clarity and legal certainty"[65]. A directive is addressed to states and binds only them, to the exclusion of citizens and other entities[66]. Transposing of a directive, where differences between the state of the domestic law and the result envisaged by the provisions of a given directive are discerned, consists in enacting primary legislation whose effect is to either eliminate all the defective – from the perspective of the directive – provisions or filling any voids resultant from the directive legislating in an area previously unregulated. Where no discrepancies are detected, the Member State need not undertake any legislative activity[67]. The Member States are obliged to "ensure that domestic authorities responsible for the application of a given legal device act accordingly with the directive"[68]. In this sense their duty is broader than mere implementation of a directive's provisions, i.e. mechanical transposition; it also necessitates guaranteeing the effectiveness of the new laws within a national legal system[69]. Other important elements of a directive are the date of its entering into force and the deadline for its implementation. It is accepted that directives form part of domes-

[64] S. Prechal, *Directives in EC Law*, Oxford 2004, p. 73; the discretion is, however, not unconstrained. C. Mik has argued that "achieving the envisaged result encompasses materializing all the substantive provisions of a directive in the context of the general goal expressed therein". *Cf.* C. Mik, *Europejskie prawo wspólnotowe. Zagadnienia teorii i praktyki. Tom I*, Warszawa 2000, p. 499.

[65] Judgment of the Court of Justice of the European Union of 8 April 1976 in Case C-48/75 *Jean Noël Royer*; judgment of the Court of Justice of the European Union of 6 May 1980 in Case C-102/79 *Commission of the European Communities v Kingdom of Belgium*. I am citing the cases after: R. Adam, M. Safjan, A. Tizzano, *Zarys prawa Unii Europejskiej*, Warszawa 2014, p. 139.

[66] Case 152/84 *Marshall v Southampton and South-West Hampshire Health Authority* ("*Marshall I*") [1986] ECR 723; Case C-91/92 *Faccini Dori* [1994] ECR I-3325. *Cf.* K. Lenaerts, J. A. Gutiérrez-Fons, *To say what the law of the EU is: methods of interpretation and the European Court of Justice*, EUI AEL; 2013/09; Distinguished Lectures of the Academy, p. 13, http://cadmus.eui.eu/handle/1814/28339 (accessed 2 May 2017); D. Simon, *La directive européenne*, Paris 1997, p. 3. It should be noted, however, that the above statement is not accurate where, after the deadline for the implementation of a directive has passed, it becomes binding *erga omnes*.

[67] N. Foster, *Foster on EU Law*, Oxford 2009, p. 108.

[68] A. Grzelak, (in:) A. Grzelak, M. Królikowski, A. Sakowicz (eds.), *Europejskie prawo karne*, Warszawa 2012, p. 161.

[69] This is pointed out in: M. Rams, *Specyfika wykładni prawa karnego w kontekście brzmienia i celu Unii Europejskiej*, Warszawa 2016, p. 100.

tic legal systems from the moment they are enacted and, in this sense, they bind[70]. Their application, however, hinges upon the degree of correctness of their implementation. Where it has been done rightly, it will be the implementing piece of legislation that will form the basis of all proceedings, determinations and other legal acts. So direct implementation of a directive occurs "only following the passing of the deadline for implementation and only where there are no domestic laws consistent with the directive"[71]. Importantly for the purposes of this paper, a directive cannot serve as a foundation of criminal liability even where all the elements of the offences envisaged therein are present[72]. It is also contrary to EU law to increase or otherwise harshen, by means of a pro-EU construction, the criminal liability of persons where the directive has not been implemented into domestic law[73]. Optimally, a directive touching upon criminal matters should be transposed into domestic law, which introduces order into the law and realizes the principle of legal certainty at the same time[74]. It is by this reason that EU criminal law should be interpreted textually and its implementation into the law of the Member States cannot lead to violations of fundamental guarantees such as the prohibition on analogies or the prohibition on retroactive application of criminal provisions[75].

3.2.2. FOREIGN TERRORIST FIGHTERS UNDER THE DIRECTIVE OF THE EUROPEAN PARLIAMENT AND THE COUNCIL

15 March 2017 saw the enactment of Directive (EU) 2017/541 of the European Parliament and of the Council on combatting terrorism. Its Treaty foundation is Article 83(1) of the TFEU: "The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to

---

[70] B. Kurcz claims that "the case law of the CJEU clearly states that EU law constitutes an integral part of the domestic law in force in each of the Member States (6/64 *Costa*)". *Cf.* B. Kurcz, *Art. 288*, (in:) A. Wróbel (ed.), *Traktat o Funkcjonowaniu Unii Europejskiej…*, p. 665.

[71] *Ibidem*, p. 666. A directive specifies both the date of its entering into force (see Article 297 TFEU) and the deadline for its implementation.

[72] Judgment of the European Court of Justice of 3 May 2005 in joint cases C-387/02, C-391/02 i C-403/02, *Berlusconi*. Citing after: A. Grzelak, (in:) A. Grzelak, M. Królikowski, A. Sakowicz (eds.), *Europejskie prawo…*, p. 163.

[73] C-168/95, *Arcaro*. *Cf.* also: A. Wróbel, *Zasada bezpośredniego skutku prawa unijnego*, (in:) A. Wróbel (ed.), *Stosowanie prawa Unii Europejskiej przez sądy*, Vol. I, Warszawa 2010, p. 119.

[74] This method puts into reality the idea of transnationality of the law. For it is noted that the essence of transational criminal law lies in the fact that "it does not create an underpinning of criminal liability of individuals by reference to international law or a specialized subsystem thereof. Instead, it is a species of indirect criminalization founded upon duties to criminalize or rules of dealing in state parties to a given treaty (…)". *Cf.* M. Królikowski, (in:) A. Grzelak, M. Królikowski, A. Sakowicz (eds.), *Europejskie prawo karne*, Warszawa 2012, p. 5.

[75] *Cf.* , *inter alia*: Case 63/83 Kirk [1984] ECR 2689, paras 21–23.

combat them on a common basis. These areas of crime are the following: terrorism (…)".

The Directive has a hefty preamble and 31 Articles. Title III establishes various criminal offences revolving around terrorist activity. Articles 3 (where the category of a terrorist offence is defined) and 7–10 are key as regards foreign terrorist fighters.

As noted above, the EU legislator differs from the Polish one in its definition of a terrorist offence[76]. The Directive adopts a different formal criterion whilst retaining the same substantive one. Instead of focusing on the gravity of punishment meted out for qualifiable offences, Article 3(1) of the Directive uses, as the formal criterion, a list of intentional acts, "which, given their nature or context, may seriously damage a country or an international organisation". These include: attacks upon a person's life, kidnapping, seizure of aircraft and manufacture, possession, acquisition, transport, supply or use of explosives or weapons. The substantive criterion is contained in Article 3(2) and comprises the aims that a perpetrator intends to achieve by committing an act listed in subsection 1. These are: seriously intimidating a population, unduly compelling a government or an international organisation to perform or abstain from performing any act, and seriously destabilising or destroying the fundamental (…) structures of a country or an international organisation".

Breaking down the offence of providing training for the purposes of terrorism according to the agent involved is also a novelty compared to the Polish regulation. Article 7 of the Directive regulates a crime of providing training that may only be committed by an instructor whereas Article 8 covers the receipt of training as a participant. The latter provision also lists a number of causative acts the existence of which decides whether a given training session may be classified as provided "for the purposes of terrorism". The catalogue, however, is not exhaustive and should be interpreted as a guideline (e.g. instruction on the making or use of explosives, firearms etc.).

Article 9 intends to penalize travelling for the purposes of terrorism from a Member state to another country. To assign liability for a crime under this law it is of crucial importance that the perpetrator started his journey in a Member State – his destination is legally irrelevant. In other words, it may be any country in the world so, for practical purposes, it is sufficient to prove that a country border has been crossed. The Article applies to travelling in three different roles that may generally be referred to as: individual participation (committing or contributing to the commission of a crime), participation in a terrorist organization (also a group organized in the context of Article 4), and receiving or providing terrorist training. As already shown, the travelling must be intentional, and it must be done

[76] A different definition was embraced already in the Council Framework Decision of 13 June 2002 on combating terrorism (Official Journal of the European Union, L 164, 22.6.2002, p. 3–7).

with the aim of committing or contributing to the commission of a terrorist crime. Inasmuch as the first causative act amounts to direct commission, the other refers to complicity.

Under Article 10 illegal are any acts of organisation or facilitation that assists any person in travelling for the purpose of terrorism. Article 14, which regulates aiding and abetting, inciting as well as attempts, extends legal liability even to acts that were not actually committed (see Article 14(3)), and this applies also to travelling for terrorist purposes. As regards foreign terrorist fighters it is relevant that, in the light of the Directive, it is punishable to incite to travel for terrorist purposes and to attempt to commit that crime. Interestingly, this liability applies also to legal persons (Article 17).

4. FOREIGN TERRORIST FIGHTERS IN POLISH AND EU CRIMINAL LAW. SUMMARY

Article 115 § 20 of the Polish Criminal Code and Article 3 of the Directive are not mutually exclusive even though the legislative methods used to craft the definitions of a terrorist crime differed in each case. Conversely, it is right to say the Code's definition, which leaves the formal criterion slightly more indefinite, is broader than that of the Directive[77]. That this is so has been criticized[78] but, it appears, only partially fairly. The Polish definition is devoid of needless casuistry, as opposed to the EU regulation, which rationally supports the method opted for domestically[79]. It is always a question whether the Polish legislator should automatically copy-paste the transposed EU provisions into domestic law or whether it should resort to creating offences by reference to the methodology accepted under Polish law. Real doubts, I submit, are given rise to by incorporating threats to commit a crime of a terrorist character into Article 115 § 20 of the Criminal Code. For the regulation of punishable threats is too narrow to encompass all

[77] Whilst C. Sońta refers to the Council Framework Decision of 13 June 2002 and not the 2017 Directive, it appears that his opinion remains relevant under the new regime. For both definitions of that criminal act are strikingly similar, and the introduced amendments are limited to specifying one type of a causative act and adding one offence consisting of illegal interference with IT systems. *Cf.* C. Sońta, *Przestępstwo o charakterze terrorystycznym w polskim prawie karnym*, "Wojskowy Przegląd Prawniczy" 2005, issue 4, p. 17.

[78] *Ibidem*, p. 17; P. Daniluk rightly states that "[in] practice it is hardly conceivable that one could qualify as such the crime of possession of pornographic content involving a minor (Article 202 § 4a of the Criminal Code). *Cf.* P. Daniluk, *Art. 115 KK*, (in:) R. A. Stefański (ed.), *Kodeks karny. Komentarz*, Legalis 2017.

[79] This has been noted by J. Majewski, *Art. 115*, (in:) W. Wróbel, A. Zoll (eds.), *Kodeks karny. Część ogólna. Tom II. Część II. Komentarz do art. 53–116*, Lex 2016.

acts associated with terrorist activity. Article 190 § 1 protects merely two agents, i.e. the person who a threat to commit an offence is directed against and that person's next of kin, provided that the perpetrator intends to act to their detriment[80]. Abstract threats against agents other than persons fall outside of the scope of the definition. The EU Directive, at the same time, explicitly lists threats in Article 3(1) and refers them to all the causative acts of terrorism contained therein. This prompts me to argue that in this aspect the scope of criminalization in Polish law is narrower than the European one.

Notwithstanding, as regards Articles 7–10 of the Directive, correspondence with the Polish regulations is discernible, including the crime of participation in "terrorist training" since – as shown above – the concise wording of Article 255a § 2 of the Criminal Code must be understood to cover both active and passive participation in such training, in line with Articles 7 and 8 of the Directive. Similarities arise also in the context of provisions pertaining to travelling for terrorist purposes. Article 141 of the Code, I submit, complements the precise disposition of Article 259a by regulating service in a foreign military force or a foreign military organization. I would venture to claim that currently under Polish law any activity undertaken by foreign terrorist fighters, provided that they are Polish citizens, is criminalized by virtue of Article 259a.

On the contrary, a good deal of problems is immediately triggered by Article 17 of the Directive which mandates that the EU Member States take the necessary measures to ensure that legal persons can be held liable for any of the offences referred to in Articles 3 to 12 and 14. For *de lege lata* Polish law does not envisage criminal liability of collective entities (legal persons or others) "in the strict sense of the word"[81]. A separate model of liability has been introduced by the Act of 28 October 2002 on Criminal Liability of Collective Entities for Punishable Offences[82]. Stopping short of delving deeply into the provisions of the Act, it does not, relevantly for the purposes of the paper, allow for the imposition of liability on collective entities for the crimes codified in Article 259a of the Criminal Code which, as proven above, is key as regards the activity of foreign terrorist fighters. The Article does not appear in the list in Article 16 of the 2002 Act where the extent of liability of collective entities is determined by reference to

---

[80] For an account of different types of threats from a historical and psychological perspective, see: K. Nazar-Gutowska, *Pojęcie i rodzaje groźby w prawie karnym i innych działach prawa stosowanego*, "Przegląd Sądowy" 2007, No. 9, pp. 49–62.

[81] So, rightly: M. Królikowski, R. Zawłocki, *Prawo karne*, Warszawa 2016, p. 33. After the Constitutional Court handed down its judgment of 3 November 2004 (ref. number K 18/03) B. Namysłowska-Gabrysiak suggested that the Act "instituted liability of a criminal character as regards collective entities, at least at the constitutional level". *Cf.* B. Namysłowska-Gabrysiak, *Konstytucyjność przepisów ustawy z 28.10.2002 r. o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary*, "Monitor Prawniczy" 2005, issue 9.

[82] Act of 28 October 2002 on Criminal Liability of Collective Entities for Punishable Offences (Polish Official Journal of Laws of 2002, No. 197, item 1661).

particular offences. Polish law, therefore, does not fully realize the aim of Article 17 of the Directive. On top of amending Article 115 § 20 of the Criminal Code to bring the domestic law in line with the EU standard as regards threats, Article 259a of the Code should be added to the catalogue of crimes in Article 16 of the 2002 Act. Until that time the Polish law will not be fully compatible with the EU regulations.

FOREIGN TERRORIST FIGHTERS FROM THE PERSPECTIVE OF POLISH AND EUROPEAN CRIMINAL LAW

Summary

Foreign terrorist fighters represent one of the powerful threats to the security of states and humanity in the 21st century. Besides participating in the actions of the Islamic State, they also pose a significant danger when they return to their countries of origin to recruit new volunteers, radicalize local communities and actively partake in terrorist attacks. So as to increase the effectiveness of the fight against terrorism, states and international organizations (the EU, Council of Europe, UN) have been moving in the direction of criminalizing all manifestations of terrorist activity. The paper strives to achieve the following: providing a definition of foreign terrorist fighters; proffering a legal qualification of travel abroad undertaken by Polish citizens for terrorist purposes by reference to selected provisions of the Polish Criminal Code; conducting an analysis of the provisions of EU Directive of 15 March 2017 on combating terrorism against the backdrop of the criminalization of the activity of foreign terrorist fighters; comparing the Polish and European criminal legislations within the pertinent scope. *De lege ferenda* comments will be offered by means of a summary.

BIBLIOGRAPHY

Adam R., Safjan M., Tizzano A., *Zarys prawa Unii Europejskiej*, Warszawa 2014

Boister N., *The concept and nature of transnational criminal law*, (in:) N. Boister, R. J. Currie (eds.), *Routledge Handbook of Transnational Criminal Law*, Oxford–New York 2015

Cole D., *The Difference Prevention Makes: Regulating Preventive Justice*, “Criminal Law and Philosophy” 2015, issue 9

Colgan J., Hegghammer T., *Islamic Foreign Fighters: Concept and Data*, paper presented at the International Studies Association Annual Convention, Montreal 2011

Cryer R., *International Criminal Law vs State Sovereignty: Another Round?*, “European Journal of International Law” 2005, issue 5

Ćwiąkalski Z., *Art. 141*, (in:) A. Zoll (ed.), *Kodeks karny. Część szczególna. Tom II. Komentarz do art. 117–277 k.k.*, Lex 2013

Daniluk P., *Art. 115 KK*, (in:) R. A. Stefański (ed.), *Kodeks karny. Komentarz*, Legalis 2017

Entenmann E., van Ginkel B. (eds.), *The Foreign Fighters Phenomenon in the European Union. Profiles, Threats & Policies*, ICCT Research Paper, April 2016

Flemming M., (in:) M. Flemming, J. Wojciechowska (eds.), *Zbrodnie wojenne. Przestępstwa przeciwko pokojowi i obronności. Rozdział XVI, XVII, XVIII Kodeksu karnego. Komentarz*, Warszawa 1999

Fletcher M., Lööf R., Gilmore B., *EU Criminal Law and Justice*, Chelthenham–Northampton 2008

Flores M., *Foreign Fighters Involvement in National and International Wars: A Historical Survey*, (in:) A. de Guttry, F. Capone, Ch. Paulussen (eds.), *Foreign Fighters under International Law and Beyond*, Hague 2016

Foster N., *Foster on EU Law*, Oxford 2009

Frenett S., Silverman T., *Foreign Fighters: Motivations for Travel to Foreign Conflicts*, (in:) A. de Guttry, F. Capone, Ch. Paulussen (eds.), *Foreign Fighters under International Law and Beyond*, Hague 2016

Gruszecka D., *Art. 141*, (in:) J. Giezek (ed.), *Kodeks karny. Część szczególna. Komentarz*, Lex 2014

Grzelak A., (in:) A. Grzelak, M. Królikowski, A. Sakowicz (eds.), *Europejskie prawo karne*, Warszawa 2012

Hegghammer T., *The Rise of Muslim Foreign Fighters. Islam and the Globalization of Jihad*, "International Security" 2011, Vol. 35, issue 3

Henckaerts J. M., Doswald-Beck L., *Customary International Humanitarian Law. Volume I*, Cambridge 2009

Herzog A., *Art. 259a KK*, (in:) R. A. Stefański (ed.), *Kodeks karny. Komentarz*, Legalis 2017

Hoc S., *O penalizacji służby w obcym wojsku*, "Roczniki Nauk Prawnych" 2005, Vol. 10, issue 1

Kamieński A., *Art. 141*, (in:) O. Górniok (ed.), *Kodeks karny. Komentarz*, Lex 2006

Karska E., Karski K., *Introduction: The Phenomenon of Foreign Fighters and Foreign Terrorist Fighters. An International Law and Human Rights Perspective*, "International Community Law Review" 2016, issue 18

Karski K., *Realizacja idei utworzenia międzynarodowego sądownictwa karnego*, "Państwo i Prawo" 1993, issue 7

Kiziński M., *Wybrane aspekty prawnokarne służby obywatela polskiego w obcym wojsku lub w obcej organizacji wojskowej (art. 141 § 1–3 k.k.)*, "Wojskowy Przegląd Prawniczy" 2006, issue 1

Krahenmann S., *Foreign Fighters under International Law and National Law*, "Recueils de la Societe Internationale de Droit Penal Militaire et de Droit de la Guerre" 2015, Vol. 20

Królikowski M., (in:) A. Grzelak, M. Królikowski, A. Sakowicz (eds.), *Europejskie prawo karne*, Warszawa 2012

Królikowski M., Zawłocki R., *Prawo karne*, Warszawa 2016

Kuczer M., *Kompetencje Unii Europejskiej w dziedzinie harmonizacji prawa karnego materialnego*, Warszawa 2011

Kulesza J., *Art. 141. Służba w obcym wojsku*, (in:) M. Królikowski, R. Zawłocki (eds.), *Kodeks karny. Część szczególna. Tom I. Komentarz do art. 117–221*, Legalis 2013

Kurcz B., *Art. 288*, (in:) A. Wróbel (ed.), *Traktat o Funkcjonowaniu Unii Europejskiej. Komentarz. Tom III*, Warszawa 2012

Lach A., *Art. 259a. Przekroczenie granicy RP w celu popełnienia przestępstwa o charakterze terrorystycznym*, (in:) V. Konarska-Wrzosek (ed.), *Kodeks karny. Komentarz*, Legalis 2016

Law R. D. (ed.), *The Routledge History of Terrorism*, London–New York 2015

Lenaerts K., Gutiérrez-Fons J. A., *To say what the law of the EU is: methods of interpretation and the European Court of Justice*, EUI AEL; 2013/09; Distinguished Lectures of the Academy

Lister Ch., *Returning Foreign Fighters: Criminalization or Reintegration*, Policy Briefing, Brookings Doha Center, August 2015, https://www.brookings.edu/wp-content/uploads/2016/06/En-Fighters-Web.pdf (accessed 28 April 2017)

Majewski J., *Art. 115*, (in:) W. Wróbel, A. Zoll (eds.), *Kodeks karny. Część ogólna. Tom II. Część II. Komentarz do art. 53–116*, Lex 2016

Malet D., *Foreign Fighters: Transnational Identity in Civil Conflicts*, Oxford 2013

Małecki S., *Podwójne obywatelstwo a służba w obcym wojsku*, “Wojskowy Przegląd Prawniczy” 1993, issue 3–4

Mik C., *Europejskie prawo wspólnotowe. Zagadnienia teorii i praktyki. Tom I*, Warszawa 2000

Mitsilegas V., *EU Criminal Law*, Oxford–Portland–Oregon 2009

Namysłowska-Gabrysiak B., *Konstytucyjność przepisów ustawy z 28.10.2002 r. o odpowiedzialności podmiotów zbiorowych za czyny zabronione pod groźbą kary*, “Monitor Prawniczy” 2005, issue 9

Nazar-Gutowska K., *Pojęcie i rodzaje groźby w prawie karnym i innych działach prawa stosowanego*, “Przegląd Sądowy” 2007, issue 9

Petzel J., *Elementy teorii relacji*, (in:) A. Malinowski (ed.), *Logika dla prawników*, Warszawa 2005

Piacente N., *The Contribution of the Council of Europe to the Fight against Foreign Terrorist Fighters*, “EUCRIM” 2015, issue 1

Prechal S., *Directives in EC Law*, Oxford 2004

Przyjemski S. M., *Powszechny obowiązek obrony Rzeczypospolitej Polskiej a służba obywatela polskiego w obcym wojsku lub obcej organizacji wojskowej*, “Wojskowy Przegląd Prawniczy” 2007, issue 4

Rams M., *Specyfika wykładni prawa karnego w kontekście brzmienia i celu Unii Europejskiej*, Warszawa 2016

Sakowicz A., *Zasada ne bis in idem w prawie karnym w ujęciu paneuropejskim*, Białystok 2011

Saul B., *Defining Terrorism in International Law*, Oxford 2006

Simon D., *La directive européenn*e, Paris 1997

Sommario E., *The Status of Foreign Fighters under International Humanitarian Law*, (in:) A. de Guttry, F. Capone, Ch. Paulussen (eds.), *Foreign Fighters under International Law and Beyond*, Hague 2016

Sońta C., *Przestępstwo o charakterze terrorystycznym w polskim prawie karnym*, "Wojskowy Przegląd Prawniczy" 2005, issue 4
Szeleszczuk D., *Art. 141*, (in:) A. Grześkowiak, K. Wiak (eds.), *Kodeks karny. Komentarz*, Legalis 2017
Szwarc-Kuczer M., *Kompetencje Unii Europejskiej w dziedzinie harmonizacji prawa karnego materialnego*, Warszawa 2011
Ścibior M., *Udzielanie zgody obywatelowi polskiemu na służbę w obcym wojsku lub obcej organizacji wojskowej*, "Wojskowy Przegląd Prawniczy" 2011, issue 2
Wiak K., *Art. 255a. Rozpowszechnianie treści mogących ułatwić popełnienie przestępstwa*, (in:) A. Grześkowiak, K. Wiak (eds.), *Kodeks Karny. Komentarz*, Legalis 2017
Wróbel A., *Zasada bezpośredniego skutku prawa unijnego*, (in:) A. Wróbel (ed.), *Stosowanie prawa Unii Europejskiej przez sądy*, Vol. I, Warszawa 2010

KEYWORDS

foreign terrorist fighters, foreign fighters, EU directive, Polish Criminal Code

SŁOWA KLUCZOWE

foreign terrorist fighters, foreign fighters, dyrektywa Unii Europejskiej, polski kodeks karny