

## ASPECTS REGARDING THE CRIMINALIZATION AND INVESTIGATION OF THE OFFENCES RELATED TO TERRORIST ACTIVITIES IN ROMANIAN LEGISLATION\*

Adrian Cristian MOISE<sup>1\*\*</sup>

### **Abstract:**

*Starting from the definition of terrorism, this article aims to present and analyze aspects related to the crimes in relation to terrorist activities at the national and European level.*

*First, the article analyzes the offences related to terrorist activities provided by Law no.535/2004 on the prevention and combating of terrorism in Romania, after which the article analyzes the offences related to terrorist activities included in the European Union Directive 2017/541 from the 15<sup>th</sup> of March 2017 on combating terrorism, as well as in the Council of Europe Convention on the Prevention of Terrorism and the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism.*

*At the same time, the article presents and analyzes aspects regarding the activities of prevention and combating of the offences related to terrorist activities, as well as the criminal investigation of these offences.*

*Finally, the article will establish whether the Romanian legislation regarding the offences related to terrorist activities adapted to the provisions in the field included in the most important legal instruments in the field of prevention and combating of terrorism at the European and international level.*

**Keywords:** terrorism; offences related to terrorist activities; investigation; prevention; combating.

### **§1. Preliminary considerations**

The most important legal instrument in combating terrorism in Romania is Law no.535/2004 on the prevention and combating of terrorism. Article 1 of the Law no. 535/2004 on the prevention and combating terrorism defines terrorism as “those actions, inactions, as well as threats against them which pose public danger,

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\*\* Associate Professor, PhD, Spiru Haret University of Bucharest, Faculty of Juridical, Economic and Administrative Sciences, Craiova, Romania; Attorney-at-law, Dolj Bar Association, Romania; E-mail: adriancristian.moise@gmail.com.

affect the life, the bodily integrity or the health of the people, the material factors, the international relations of the states, the national or international security, are politically, religiously or ideologically motivated and are committed for one of the following purposes: a) intimidating the population or a segment thereof by producing a strong psychological impact; b) the illegitimate constraint of a public authority or international organisation to perform, not to perform, or refrain from performing a particular act; c) serious destabilization or destruction of the fundamental, constitutional, economic or social political structures of a state or international organisations”.

Under the Article 4(1) of Law no.535/2004 on the prevention and combating of terrorism is defined the notion of *terrorist entity*, “this being a person, a grouping, a structured group or organisation, which, by any means, directly or indirectly commits or participates in acts of terrorism; is preparing to commit acts of terrorism; promotes or encourages terrorism; supports, in any way, terrorism”. According to the provisions of Article 4(2) of Law no.535/2004, *terrorist* is “the person who committed an offence under this law or intends to prepare, commit, facilitate or instigate acts of terrorism”.

In accordance with the provisions of Article 3 of Law no.535/2004, “the terrorism acts are transnational in nature, if: they are committed in the territory of at least two states; they are committed in the territory of one state, but part of their planning, preparation, management or control takes place in the territory of another state; they are committed on the territory of one state, but involve a terrorist entity that carries out activities on the territory of another state; are committed on the territory of one state, but have substantial effects on the territory of another state”.

The offences related to terrorist activities are the following: public provocation to commit a terrorist offence, recruitment for terrorism, providing training for terrorism, receiving training for terrorism, travelling for the purpose of terrorism and terrorist financing.

## **§2. The offences related to terrorist activities stipulated by Law no.535/2004 on the prevention and combating of terrorism**

The offences related to terrorist activities are included in Articles 33, 33<sup>1</sup>, 33<sup>2</sup>, 35<sup>1</sup> and 36 of the Law no.535/2004 on the prevention and combating of terrorism.

Article 33 of the Law no.535/2004 punishes the following acts, if they are committed for the purposes provided by Article 1: procuring, holding, preparing, manufacturing, transporting or providing dual-use products or technologies or military or explosive or flammable materials, for the purpose of producing destructive means, explosive devices of any kind, as well as chemical, biological,

radiological or nuclear, which could endanger the life, health of humans, animals or the environment; providing instructions on the manufacture or use of explosives, firearms or any other weapons, harmful or dangerous substances, or on specific techniques or methods of committing or supporting the commission of an act of terrorism, knowing that the respective competences offered are or can be used for this purpose; receiving or acquiring instructions by self-documenting the manufacture or use of explosives, firearms or any other weapons, harmful or dangerous substances, or on specific techniques or methods of committing or supporting the commission of an act of terrorism; qualified theft committed in order to commit the offences provided by this article; facilitating border crossing, hosting or facilitating access to the target area of a person known to have participated or committed or is going to participate or commit a terrorist offence; collecting or holding, for the purpose of transmitting, or making available data and information on objectives targeted by a terrorist entity; forgery of official documents or their use for the purpose of facilitating a terrorist act; the blackmail committed for the purpose of committing an act of terrorism.

Article 33<sup>1</sup> of the Law no.535/2004 punishes the act of asking one or more persons, directly or indirectly, by any means, to commit or support the commission of an act of terrorism.

Article 33<sup>2</sup> of the Law no.535/2004 incriminates the act of urging the public, verbally, in writing or by any other means, to commit crimes provided by the Law no.535/2004. The same Article 33<sup>2</sup> incriminates the promotion of a message by propaganda committed by any means, in public, with the intention of instigating the act of terrorism, whether or not the message directly supports the terrorism or whether or not the crimes have been committed.

Article 35<sup>1</sup> of the Law no.535/2004 incriminates the movement of a person from the territory of the State of which he is a citizen or from the territory of which he resides or resides in or on the territory of a state other than the one whose citizen or resident is for the purpose of committing, planning or preparing terrorist acts or to participate in them or to offer or receive training or preparation for committing an act of terrorism or for supporting, in any way, a terrorist entity, constitutes displacement for terrorist purposes. Moreover we emphasize that the same article punishes any act of organization or facilitation by which assistance is offered to any person to travel abroad for terrorist purposes, knowing that the assistance thus is provided for this purpose.

Article 36 of the Law no.535/2004 incriminates the offence of terrorist financing which consists in the collection or making available, directly or indirectly, of funds, licit or illicit, with the intention of being used or knowing that they are to be used, in whole or in part, for committing acts of terrorism or for supporting a terrorist entity.

### **§3. The offences related to terrorist activities stipulated by the legal instruments in the field of combating terrorism at the European and international level**

The most important legal instruments in the field of combating terrorism at European and international level are the following: the Directive 2017/541/EU<sup>2</sup> of the European Parliament and of the Council of 15 March 2017 on combating terrorism; the Council of Europe Convention on the Prevention of Terrorism; the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism.

On the 31<sup>st</sup> of March 2017 it was published in the Official Journal of the European Union the Directive 2017/541/EU of the European Parliament and of the Council of 15 March 2017 on combating terrorism, replacing Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, which is the most important legal instrument in the fight against terrorism at European Union level.

Directive 2017/541/EU on combating terrorism covers the offences related to terrorist activities in the Articles 5-12, which refer to public provocation to commit a terrorist offence, recruitment for terrorism, providing training for terrorism, receiving training for terrorism, travelling for the purpose of terrorism, organising or otherwise facilitating travelling for the purpose of terrorism, terrorist financing and other offences related to terrorist activities, as it is for example, aggravated theft for the purpose of committing terrorist offences, extortion with a view to committing one of the terrorist offences and drawing up or using false administrative documents with a view to committing one of the terrorist offences.

The Convention of the Council of Europe on the Prevention of Terrorism<sup>3</sup>, adopted in Warsaw on the 16<sup>th</sup> of May 2005, represents one of the most important legal instruments in the field of prevention and combating terrorism, which was ratified by Romania by Law no. 411/2006<sup>4</sup>.

Pursuant to the Council of Europe Convention on the Prevention of Terrorism, in Articles 5-7, the signatory parties must take the necessary measures to provide as a crime according to their national law the following criminal behaviours that lead to offences related to terrorist activities: public provocation to commit a terrorist offence (Article 5); recruitment for terrorism (Article 6); training for terrorism (Article 7). All the three behaviours to commit offences must be committed without right and intentionally.

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<sup>2</sup> Directive 2017/541/EU of the European Parliament and of the Council of 15 March 2017 on combating terrorism, replacing Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism and amending Council Decision 2005/671/JHA, Official Journal of the European Union, 31.03.2017, L88/6.

<sup>3</sup> Council of Europe on the Prevention of Terrorism from the 16<sup>th</sup> of May 2005, Retrieved 31 October 2019 from: <http://conventions.coe.int/Treaty/en/Treaties/html/196.htm>

<sup>4</sup> Romanian Official Gazette no.949 from the 24<sup>th</sup> of November 2006.

The offences related to terrorist activities stipulated by the Council of Europe Convention on the Prevention of Terrorism can also be done by using the Internet network<sup>5</sup>.

The Additional Protocol to the Council of Europe Convention<sup>6</sup> on the prevention of terrorism was adopted in Riga on the 22<sup>nd</sup> of October 2015. The purpose of this Additional Protocol is to complement the provisions of the Council of Europe Convention on the prevention of terrorism as regards the criminalization of the deeds described in Articles 2 to 6, thereby enhancing the efforts of States Parties to prevent terrorism and its negative effects on the full exercise of human rights, in particular the right to life, both by measures to be taken at national level and by international cooperation, taking into account the multilateral or bilateral treaties or agreements between the parties, currently in force.

This Protocol complements the Council of Europe Convention on the Prevention of Terrorism by adding provisions on the criminalization of acts related to terrorist offenses and provisions on the exchange of information. The offences provided in the protocol, such as those in the Convention, are mainly preparatory in relation to acts of terrorism.

The Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism incriminates the following offences related to terrorist activities: receiving training for terrorism (Article 3); travelling abroad for the purpose of terrorism (Article 4 ); funding travelling abroad for the purpose of terrorism (Article 5); organising or otherwise facilitating travelling abroad for the purpose of terrorism (Article 6).

The European Union signed the Additional Protocol to the Council of Europe Convention on the prevention of terrorism on 22<sup>nd</sup> of October 2015.

Romania signed the Additional Protocol to the Council of Europe Convention on the prevention of terrorism on the 11th of March 2016 and shall ratify it in the immediate future.

#### **§4. The forensic investigation of the offences related to terrorist activities**

The process of investigating the offences related to terrorist activities takes place in two stages: *the informative-operative investigation* stage referring to checks and activities specific to collection of information carried out exclusively by state bodies with duties in the field of national security, such as the Romanian Intelligence Service, before the commencement of the trial phase of criminal

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<sup>5</sup> Britz, Marjie T. (2013). *Computer Forensics and Cyber Crime. An Introduction*, Third Edition, Upper Saddle River, New Jersey: Pearson Education Inc., pp. 149-150.

<sup>6</sup> The Additional Protocol to the Council of Europe Convention, Retrieved 31 October 2019 from: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/217>

prosecution and which may contribute to the commencement of criminal prosecution and the stage of *criminal investigation* that is carried out by the judicial bodies, that is, the Service for combating terrorist offences and those against national security within the Directorate for the Investigation of Organized Crime and Terrorism of the Prosecutor's Office near the High Court of Cassation and Justice, helped by state bodies with duties in the field of national security during the trial phase of the prosecution<sup>7</sup>.

*The informative-operative investigation* stage s carried out during several phases:<sup>8</sup> planning; obtaining information; verification of information; information analysis; notifying the competent judicial bodies.

After completing the file of informative documentation<sup>9</sup>, the Romanian Intelligence Service will notice Service for combating terrorist offences and those against national security within the Directorate for the Investigation of Organized Crime and Terrorism of the Prosecutor's Office near the High Court of Cassation and Justice by means of a report of finding, according to the provisions of Article 21 (1)<sup>10</sup> of the Law no.51/1991 regarding the national security of Romania, Article 11<sup>11</sup> of the Law no.14/1992 regarding the organization and functioning of the Romanian Intelligence Service, related to Article 61<sup>12</sup> paragraph (1) (c) from the Romanian Criminal Procedure Code, in order to start the criminal prosecution, in connection with the commission of an offence related to terrorist activities.

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<sup>7</sup> Moise, Adrian Cristian; Stancu, Emilian (2017). *Forensics. Methodological elements for investigating offences. University course*, Bucharest: Universul Juridic, pp. 290-291.

<sup>8</sup> Idem, pp. 295-299; Ronczkowski, Michael R. (2012). *Terrorism and organized hate crime. Intelligence gathering, analysis and investigations*, Third Edition, Boca Raton, Florida: CRC Press, Taylor & Francis Group, pp. 151-183.

<sup>9</sup> Maras, Marie Helen (2014). *The CRC Press Terrorism Reader*, Boca Raton, Florida: CRC Press, Taylor & Francis Group, p. 137 and the following.

<sup>10</sup> Article 21 paragraph 1 of the Law no. 51/1991 regarding the national security of Romania states: "The data and information of interest for national security, resulting from the authorized activities, if it indicates the preparation or the commission of a crime provided by the criminal law, are retained in writing and transmitted to the bodies of criminal prosecution, according to Article 61 of the Romanian Criminal Procedure Code, accompanied by the mandate issued for them, to which is added the proposal to declassify, as the case may be, total or in an extract, according to the law, of the mandate. The intercepted calls and/or communications, recorded in writing, and/or the recorded images are transmitted to the criminal investigation bodies in their entirety, accompanied by their original digital content".

<sup>11</sup> Article 11 of the Law no. 14/1992 regarding the organization and functioning of the Romanian Intelligence Service provides: "If from the specific checks and activities provided in the Articles 9 and 10 result in data and information indicating the preparation or commission of a crime provided by the criminal law, they are transmitted to the criminal prosecution bodies under the conditions provided by the Article 61 of the Romanian Criminal Procedure Code".

<sup>12</sup> Article 61 paragraph (1) (c) of the Romanian Criminal Procedure Code provides: "(1) Whenever there is a reasonable suspicion regarding the commission of a crime, they are obliged to draw up a report on the circumstances found: c) public order bodies and national security, for the offences found during the exercise of the duties provided by the law".

The criminal prosecution is carried out by the competent judicial bodies within the Service for combating terrorist offences and those against national security within the Directorate for the Investigation of Organized Crime and Terrorism of the Prosecutor's Office near the High Court of Cassation and Justice, in order to establish the existence of the offences related to terrorist activities, to identify the perpetrator and to know all the circumstances necessary for the just settlement of the case.

The Romanian Intelligence Service, through the Anti-Terrorist Operational Coordination Center technically coordinates the National System for the Prevention and Combating of Terrorism. At the same time, within the Romanian Intelligence Service there are two departments that fight against terrorism, besides the Anti-Terrorist Operational Coordination Center: The department dedicated to the collection of information, which ensures constant monitoring and analysis of terrorist risks at national level and in relation to the global evolution of the terrorist phenomenon; The Anti-Terrorist Brigade, which provides anti/counterterrorism intervention at national level, but also airport security, on all sixteen civil airports in Romania, as well as the security of the flights of the Romanian aviation companies.

According to the provisions of Article 11<sup>1</sup> of the Law no.535/2004 on the prevention and combating of terrorism, in the case of imminence or the occurrence of an offence related to terrorist activities on the territory of the country, at the proposal of the director of the Romanian Intelligence Service, the Supreme Council for the Defense of the Country may issue a decision regarding the declaration of the terrorist crisis situation. Thus, on the logistical and operational support of the Anti-Terrorist Operational Coordination Center, the National Antiterrorist Action Center is activated, which ensures at national level the management of the terrorist crisis, in order to remove the threats to the national security generated by the fact created situation.

The process of investigating terrorism continues with the stage of the *criminal investigation* of the offences related to terrorist activities, through which the transition from the secret investigation to the criminal investigation that begins with the opening of the criminal process is initiated, by starting the criminal prosecution under the conditions of ensuring the procedural rights and guarantees of all terrorism suspects.

The criminal investigation of the offences related to terrorist activities is carried out on the basis of the rules of the criminal procedural law, as regulated by the Romanian Criminal Procedure Code.

The criminal investigation of the offences related to terrorist activities uses special techniques and methods of supervision or investigation, provided by Article 138 of the Romanian Criminal Procedure Code, these being the following: the interception of communications or any type of distance communication; access to a computer system; video, audio or photo surveillance; localization or tracking

by technical means; obtaining data regarding a person's financial transactions; retention, delivery or search of postal items; the use of undercover investigators and collaborators; authorized participation in certain activities; supervised delivery; obtaining the traffic and location data processed by the providers of public electronic communications networks or the providers of electronic communications services for the public. The special investigation techniques and methods provided by Article 138 (1) (a-d) of the Romanian Criminal Procedure Code are used under the name of *technical supervision*<sup>13</sup>.

For the relationship with the providers of electronic communications for the public, the National Center for Interception of Communications within the Romanian Intelligence Service is designated with the role to obtain, process and store information in the field of national security. At the request of the criminal prosecution bodies, the National Center for Interception of Communications ensures their direct and independent access to the technical systems for the purpose of executing the technical supervision provided by the Article 138 (1) (a) of the Romanian Criminal Procedure Code, namely the interception of communications or any type of distance communication.

The concrete conditions regarding the access of the judicial bodies to the technical systems are established through cooperation protocols concluded by the Romanian Intelligence Service with the Public Ministry, the Ministry of Internal Affairs, as well as with other institutions within which it operates, under the conditions of the Article 57 (2) of the Romanian Criminal Procedure Code, the special criminal investigation bodies.

The criminal jurisdiction as the first court of trial for the offences related to terrorist activities belongs to the High Court of Cassation and Justice.

The National Office for the Prevention and Combating of Money Laundering has a very important role in the investigation of the offences related to terrorist activities, which represents a specialized body with legal personality, operating under the subordination of the Government, has as an activity object besides the prevention and combating of money laundering, and the prevention and combating of terrorist financing<sup>14</sup>, according to Article 26 (2) of Law no.656/2002 for the prevention and sanctioning of money laundering, as well as for the establishment of measures to prevent and combat terrorist financing, and for this purpose receives, analyzes, processes information and immediately notifies the Romanian Intelligence Service and the Directorate for the Investigation of Organized Crime and Terrorism of the Prosecutor's Office near the High Court of

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<sup>13</sup> United Nations. United Nations Office on Drugs and Crime. United Nations Counter-Terrorism Implementation Task Force (2012). *The use of the Internet for terrorist purposes*, New York, September 2012, pp. 53-72.

<sup>14</sup> Turner, Jonathan E. (2011). *Money Laundering Prevention. Deterring, Detecting, and Resolving Financial Fraud*, Hoboken, New Jersey: John Wiley & Sons, Inc., pp. 132-135.

Cassation and Justice when it is established the existence of sound indications regarding suspected terrorist financing operations.

According to the provisions of Article 22<sup>1</sup> of the Law no.535/2004 on the prevention and combating of terrorism, the Romanian judicial authorities shall transmit, upon request or ex officio, as soon as possible, to the competent authorities of another Member State of the European Union the relevant information collected in the criminal proceedings in relation to terrorist offenses, when the respective information could be used in the respective Member State for the prevention, detection, investigation or criminal prosecution of offences related to terrorist activities.

Unlike the Law no.535/2004 on the prevention and combating of terrorism, the Council of Europe Convention on the Prevention of Terrorism and the Directive 2017/541/EU on combating terrorism contain provisions regarding the protection, compensation and support for the victims of terrorism. We remark that the Article 24 from the Directive 2017/541/EU on combating terrorism includes provisions related to assistance and support to victims of terrorism, referring in particular to: emotional and psychological support, such as trauma support and counselling; provision of advice and information on any relevant legal, practical or financial matters, including facilitating the exercise of the right to information of victims of terrorism; assistance with claims regarding compensation for victims of terrorism available under the national law of the Member State concerned. The Article 25 from the Directive 2017/541/EU refers to the existence of measures to protect victims of terrorism and their family members. Also, the Article 25 pays particular attention to the risk of intimidation and retaliation and to the need to protect the dignity and physical integrity of victims of terrorism, including during questioning and when testifying.

The Article 13 from the Council of Europe Convention on the Prevention of Terrorism contains measures relating to the protection, compensation and support for victims of terrorism, that has been committed within its own territory. Moreover the Article 13 contains provisions regarding the financial assistance and compensation for the victims of terrorism and their close family members.

## **§5. Conclusions**

Following the carried out analysis, we found out that the text of Articles 33, 33<sup>1</sup>, 33<sup>2</sup>, 35<sup>1</sup> and 36 regarding the offences related to terrorist activities from the Law no.535/2004 on the prevention and combating of terrorism adapted almost entirely to the provisions of the text of Articles 5-12 of the Directive 2017/541/EU on combating terrorism, to the provisions of Articles 5-7 of the Council of Europe Convention on the Prevention of Terrorism and to the provisions of Articles 3-6

from the Additional Protocol to the Council of Europe Convention on the prevention of terrorism.

Thus, we highlight that the actions of prevention and combating of the offences related to terrorist activities, as well as the forensic investigation procedures of these offences from the Romanian legal system, adapted to the actions of prevention, combating and forensic investigation of the offences related to terrorist activities from the Directive 2017/541/EU, the Council of Europe Convention on the Prevention of Terrorism and the Additional Protocol to the Council of Europe Convention on the prevention of terrorism.

In addition to the convergence elements listed above, we have noticed that the legal instruments from Romania in the field of the offences related to terrorist activities, also present elements of divergence from the legal instruments at the European and international level regarding the protection, compensation and support for the victims of terrorism.

Another element of divergence from the European and international legal instruments in the field of the offences related to terrorist activities, refers to the fact that the offences related to terrorist activities from the Law no.535/2004 on the prevention and combating of terrorism cannot be committed using the Internet network and the information and communication technology.

Therefore, the Romanian legislators should update as soon as possible the Law no.535/2004 regarding the offences related to terrorist activities, by introducing an article referring to the commission of the offences related to terrorist activities by using the Internet network and the new technologies.

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