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## **The legal qualification of the military jihad idea<sup>1</sup> and of the dissemination of other materials facilitating terrorist activities**

In the recent history the Middle East<sup>2</sup> has been a place where crucial historical processes went on. The most important were colonisation that peaked at the end of the 19<sup>th</sup> century and at the beginning of the 20<sup>th</sup> century as well as the de-colonisation processes that had started in the 1920s. Also the cold war competition between the superpowers after the Second World War left its mark on the Muslim societies. Numerous significant events followed up those processes. The most important were the following: the Israeli and Palestinian conflict, the Islamic revolution in Iran and the Afghanistan war against the USSR military intervention. To a large extent, the so called First War in the Gulf has contributed to the present situation in the Middle East, which resulted in heavy sanctions on Iraq, taken as the humiliation of the country and then the final overthrow of the Saddam Hussein's regime as the result of the Second War in the Gulf, and finally – the destabilization of Libya and Syria as the result of the Arab Spring. The above-mentioned events led to significant civilization changes. On one hand – the domination of colonial empires and the latter attempts by the USA to impose its will on the Middle East countries caused the negative attitude towards the Western countries. On the other

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<sup>1</sup> In Islam there is this distinction between the “greater” and the “lesser jihad”. The greater jihad is the struggle against oneself and the lesser jihad means armed struggle. Within the lesser jihad we have the defensive struggle and offensive struggle. Cf. J. Danecki, *Kłopoty z dżihadem*, in: *Islam a terroryzm*, A. Parzymies (ed.), Warsaw 2003, pp. 47, 52. In this article the idea of armed jihad (called also in the text Islamic extremism, Islamic fanaticism or struggling Islam) is the ideology build on intolerance and hatred towards people rejecting the radical interpretation of the Quran, which promotes and justifies violence against those who are regarded as non right-minded Muslims. The ultimate goal of the idea is to subordinate – through the war the whole world, to the Muslim law.

<sup>2</sup> Both in literature and in politics there is no one and common list of countries that can be counted in the Middle East region. The term “the Middle East” itself is disputable. Cf. A. Dzisiów-Szuszczkiewicz, *Bliski Wschód – wyzwanie dla polskiej polityki zagranicznej?*, „Bezpieczeństwo Narodowe” 2008, No. 7–8, pp. 145–146. Taking geographical criteria into consideration it is assumed that the Middle East includes the territories of the northern Africa and western Asia, i.e. the following countries: Egypt, Jordan, Syria, Israel, Libya, Algeria, Morocco, Tunisia, Iraq, Iran, Kuwait, Saudi Arabia, Bahrain, Qatar, Oman, the UAE and Yemen. See. R. Bania, *Bliski Wschód w wybranych anglosaskich koncepcjach geopolitycznych – zarys problematyki*, in: *Bezpieczeństwo narodowe i międzynarodowe w regionie Bliskiego Wschodu i Północnej Afryki (MENA) u progu XXI wieku*, R. Bania, K. Zdulski (ed.), Łódź 2012, pp. 15, 16. In literature we can come cross other term “Greater Middle East”, which refers to the northern Africa with Egypt, Israel, countries of the *Tigris-Euphrates River Valley*, the Persian Gulf countries, Turkey and countries from the basin of Caspian Sea. Cf. R.D. Blackwill, M. Stürmer, *Introduction*, in: *Allies Divided: Transatlantic Policies for the Greater Middle East*, R.D. Blackwill, M. Stürmer (ed.), Cambridge, Mass. 1997, p. 1.

hand, however, the willingness to reduce the dependence from colonizers and to catch up on the backwardness forced the Middle East societies to use the *acquis* of the Western civilization. It results in rejecting the European and American culture and in desiring, at the same time, their technical achievements.<sup>3</sup> Such processes, events and civilization changes contributed also to the sense of injustice among some Islam believers from the Western countries.<sup>4</sup> This feeling of seeking revenge for humiliation and mobilizing to fight for their own culture have led to the forming of the radical Islamic fundamentalism.<sup>5</sup> Its followers believe that they can rebuild the power of Muslim civilization due to come back to laws and traditions from the early times of Islam and to rejecting totally the values of the West perceived as threat to their religion. A total negation of the axiological layer of the Euro-Atlantic civilization typical for Islamic fundamentalism and defining the West as a mortal enemy contributes to internationalization of the Muslim terrorism and to globalization of its goals. For many years the activities of Islamic terrorists have been limited mainly to local conflicts, and thus they were limited in terms of territories and subjects.<sup>6</sup> Religious motivation played often a minor role.<sup>7</sup> With the growing importance of religion as a motive for fighting and regarding the whole Western world as the enemy, the nature of Islamic terrorism has changed. Establishing organizations referring to the concept of global jihad<sup>8</sup>, like Al-Qaeda<sup>9</sup> or the Islamic

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<sup>3</sup> Such opinions presents a fellow of the Islamic State Abu Rumaysah al Britani. Cf. *A brief guide to the Islamic State* (b.m.w. 2015), pp. 28, 39. Cf. W. Stankiewicz, *Terroryzm w świetle walki Dwóch Światów*, in: *Islam a terroryzm...*, p. 294. The usage of cutting-edge technology for spreading extremely conservative ideology is repeatedly pointed out by J.M. Martin, *The information battlefield: Al-Qaeda's use of advanced media technologies for framed messaging*, Las Vegas 2011.

<sup>4</sup> "Western countries" in this article are foremost the USA and European countries, particularly those with the colonial past: the UK, France, to some extent Germany and Italy. Cf. S. Huntington, *The Clash of Civilization and the remaking of world order*, New York, London, Toronto, Sydney 2011, p. 46.

<sup>5</sup> The fundamentalist attitude is based on unlimited faith that the ideas one preaches is right. It can be a religious idea or any other. So, the Islamic fundamentalism is only one among others kinds of fundamentalism. The fundamentalist confidence in equity of their claims leads to a definitive rejection and condemnation of all different opinions. In consequence fundamentalism is intolerant and closed for any dialogue. Such behaviour causes in the end aggressive activities, such as imposing other people self-believed opinions. The aggression is fully justified by the faith in full value and truthfulness of the preached ideas.

<sup>6</sup> Such clearly limited nature has terrorism connected to fighting for independence in Palestine. Islamic terrorist organizations supporting Palestinian struggles, like Hamas or Palestinian Islamic Jihad, carry out their actions in Israel and their targets are mainly Jews.

<sup>7</sup> M. Adamczuk, *Ewolucja strategii i metod działania islamskich ugrupowań terrorystycznych i ich wpływ na bezpieczeństwo Polski*, „Bezpieczeństwo Narodowe” 2011, No. 19, pp. 199–201.

<sup>8</sup> The idea of 'global jihad' calls for Islamic caliphate as a condition of healing Muslim civilization. As a minimum the caliphate is to take lands that used to be under Arab authority, as a maximum it is to embrace the whole world.

<sup>9</sup> The Sunni organization founded in the end of 1988 and at the beginning of 1989 by a Palestinian, Abd Allah Jusuf Azzam linked to the Muslim Brotherhood and Osama bin Laden. In the beginning

State<sup>10</sup> caused that the threat of terrorist attacks inspired by skewed understanding of Islam appeared also in the Western Europe and in the USA. Bloody attacks carried out effectively<sup>11</sup> over the last few years prove that the threat is real.<sup>12</sup> They caused the death of thousands of innocent victims and a series of negative consequences.<sup>13</sup>

In Poland, until now, there have not been any attacks inspired by the Islamic fundamentalism. It does not mean though, that there are no fans of Islamic terrorist organizations at all or the ideology itself is not present in our country. On the Internet one can easily find different materials (posts, commentaries, pictures and films) calling for the holy war with the Western civilization, propagating terrorism and facilitating the activity.<sup>14</sup> There are more and more web pages, magazines<sup>15</sup>,

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it was focused on the resistance to the Soviet intervention in Afghanistan. In the 1990s it claimed the USA the biggest enemy of Islam. The best known leader of Al-Qaeda was a Saudi, Osama bin Laden. After his death, the leadership in the organization was taken by an Egyptian individual, Ayman al Zawahiri.

<sup>10</sup> The Sunni terrorist organization using different names, referred to ideas of Salafi and Wahhabi movements. It was one of Al-Qaeda's wings. Between 2012 and 2014 members of the Islamic State had conquered vast lands of Syria and Iraq, which allowed their leader Abu Bakr al-Baghdadi to proclaim on 29 June 2014 the Islamic caliphate.

<sup>11</sup> It goes as far as to say that few unsuccessful attacks stopped by the services or the police on time fall on one successful. Because the data is covert, mass media pass on the information on the unsuccessful attacks from time to time, so no one knows exactly how many attacks were successfully stopped in recent years.

<sup>12</sup> The most renowned terrorist attacks carried out by Islamic fanatics in the 20th century in the USA and in Europe were the World Trade Center attacks (2001), attack in Madrid (2004), attacks in London (2005), attack in Boston (2013), the Charlie Hebdo shooting (February 2015), Paris attacks (November 2015), Brussels airport attack (March 2016), Nice attack (July 2016) and Berlin attack (December 2016).

<sup>13</sup> The influence of the World Trade Center attack on the world's economy was thoroughly examined. It was stressed in the studies that the effect of the attacks on the WTC and the Pentagon was, *inter alia*, temporary breakdown in aviation with huge financial losses, the necessity of tremendous compensation payments by insurance companies and increase in sense of danger. Cf. Chernick, *Intruduction*, in: *Resilient City: The Economic Impact of 9/11*, H. Chernick (ed.), New York 2005, pp. 1–6.

<sup>14</sup> A. Wejkszner, *Ewolucja zagrożenia dżihadystycznego w Europie*, „Przegląd Strategiczny” 2014, No. 7, pp. 225, 232; *ibidem*. *Zagrożenie fundamentalizmem islamskim w Europie*, „Biuletyn Instytutu Zachodniego” 2011, No. 49, p. 3.

<sup>15</sup> The widely known magazine promoting fighting Islam was Dabiq magazine published since July 2014 to June 2016 by the Islamic State followers in paper and online. See: <http://www.clarionproject.org/news/islamic-state-isis-isil-propaganda-magazine-dabiq#>. Its name referred to the name of the Syrian town, in which – according to some Islamic myths – the final battle was supposed to take place and all those who object sharia law were to be defeated. Dabiq was of a high quality, each issue contained numerous articles accompanied by the high quality pictures. On the above web page all edited issues are available. For a short period of time the magazine was available via Amazon (<https://www.rt.com/news/265546-isis-magazine-amazon-sale/>). The second propaganda magazine of the Islamic State was Rumiyah. It was of a high quality as well. All edited issues are also still available on <http://www.clarionproject.org/news/islamic-state-isis-isil-propaganda-magazine-dabiq#>. One of Al-Qaeda branches in Saudi Arabia had published between 2004 and 2007 a magazine the Voice of Jihad, another Al-Qaeda branch in Yemen had published between 2007 and 2009 a magazine The Echo of Battles (Arabic “Sada al-Malahim”,

leaflets<sup>16</sup> and other papers<sup>17</sup> promoting the Islamic fanaticism. Using the cutting-edge technology and gaining the necessary trust, you can connect with terrorists in other countries active in areas of direct activities within the so-called war with terrorism, i.e. in Iraq, Syria and Afghanistan. The media and the Internet above all, are an extremely important part of the terrorist activity.<sup>18</sup> Al-Qaeda started the broadcasting public appeals and proclamations to terrorism as well as material useful in the recruitment of new fighters started on a large scale already in the 1990s and currently it is particularly visible the in modus operandi of the Islamic State.<sup>19</sup>

Dissemination of materials calling for acts of terror in the name of Allah and praising them is very harmful for the society, and as such they should be eradicated by the competent state authorities. To make the struggle more efficient we should know what kind of acts are punished by the law in terms of praising the ideology of an armed jihad. Further in his thoughts the author addressed the topic of the proper legal qualification of such behaviours that led to spreading Islamic fanaticism and to spreading other materials facilitating terrorist activities.

The analysis of materials connected to the so called crusading Islam allows to draw the conclusion that most of them contain mostly contents threatening with death everyone who is a non-Muslim or who would not be ready to convert immediately to Islam. There are also threats of direct attacks on people's lives, threats of mutilating, threats of property and the life's work damage. Assessing legal meaning of such messages, we should pay attention to the fact that threatening other people by

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and\_politics/explainer /2009/12/its\_like\_slate\_for\_terrorists.html). Another magazine propagating terrorism was Turkistan al-Muslimah edited in 2009 by the Islamic Party of Turkistan, more on the magazine (Arabic "Turkistan al-Muslimah" – check at [http://www.jamestown.org/programs/tm/single/?tx\\_ttnews%5Btt\\_news%5D=34838&tx\\_ttnews%5BbackPid%5D=412&no\\_cache=1#.Vtmr0Xnls5s](http://www.jamestown.org/programs/tm/single/?tx_ttnews%5Btt_news%5D=34838&tx_ttnews%5BbackPid%5D=412&no_cache=1#.Vtmr0Xnls5s)).

<sup>16</sup> For example the booklet *Safety and Security guidelines for Lone Wolf Mujahideen and small cells, Summarized English Translation* (lack of date, place of edition and the editor's name), written by an important Al-Qaeda strategist, Abu Ubayde Abdullah al-Adm. It is available at <https://cryptome.org/2016/01/lone-wolf-safe-sec.pdf>.

<sup>17</sup> The example of such study is *The Al Qaeda Manual* found in 2009 in Manchester during search by a person suspected of links to Al-Qaeda. The English version is available at <http://fas.org/irp/world/para/manualpart1.html>, and it is a 95-page manual. Other examples are books by Muhammad Abdus Salam Faraj, *Jihad The Absent Obligation* (Birmingham 2000, Maktabah Al Ansaar Publications) and Abu Bakr Naji, *The Management of Savagery: The Most Critical Stage Through Which the Umma Will Pass*, 2004, <https://azelin.files.wordpress.com/2010/08/abu-bakr-naji-the-management-of-savagery-the-most-critical-stage-through-which-the-umma-will-pass.pdf>. In this article the author uses the translation by William McCants and John M. Olin Institute for Strategic Studies at Harvard University) of 2006.

<sup>18</sup> It is true to say that "terrorism needs audience", cf. M. Adameczuk, *Ewolucja strategii i metod...*, pp. 208–209. Cf. A. Dzisiów-Szuszczkiewicz, M. Trzpil, *Działania, strategiczne cele i nowe trendy Al-Kaidy*, „Bezpieczeństwo Narodowe” 2009, No. 9–10, pp. 93–94 and K. Górak-Sosnowska, *Jihadi cool: popkultura w służbie dżihadyzmu*, „Kultura-Historia-Globalizacja” 2015, No. 17, pp. 55–56.

<sup>19</sup> Abdel Bari Atwan, *Islamic State: The Digital Caliphate*, London 2015 (in the article the author used electronic version for Google Books with no page numbers).

committing a crime on them or on their relatives – if the threat arouses justified fear of being fulfilled – is a punishable act under Article 190 § 1 of the Polish penal code, i.e. the punishable threat. And the punishable threat is, according to Article 115 § 12 of the penal code, an aggravated form of the unlawful threat. In the result, posting in the Internet contents threatening with death or with other offences people who reject Islam stays in accordance with Article 190 § 1 of the penal code and Article 119 § 1 of the penal code. The articles punish, *inter alia*, the application of the unlawful threat to a group of people or to individuals because of their faith affiliation or because of the lack of their religious denomination.

The indicated concurrence of Article 190 § 1 with Article 119 § 1 of the penal code is of a colourable (negligible) nature.<sup>20</sup> It comes from the fact that application of Article 119 § 1 of the penal code leads to exclusion of Article 190 § 1 of the penal code according to the *lex specialis derogat legi generali* rule.<sup>21</sup> Article 119 § 1 of the penal code is *lex specialis* for Article 190 § 1 of the penal code. There are several reasons for that. First, both articles, despite different editorial records, have the same feature “threat application”.<sup>22</sup> Second, Article 119 § 1 of the penal code contains additional elements like the enumerative list of reasons for the threat formulated which deserve particular condemnation. The consequence of the increased culpability of the behaviour described in Article 119 § 1 of the penal code is a more severe liability. Article 119 § 1 of the penal code provides for a penalty of imprisonment for a fixed period of at least 3 months and not more than 5 years. The act under Article 190 § 1 of the penal code is liable only to a fine, restriction of liberty or deprivation of liberty for a period of not more than 2 years. The consequence of the higher social noxiousness of the act described in Article 119 § 1 of the penal code is also the fact that the behaviour under this act is an indictable offence, whereas the ordinary punishable threat, according to the provision of Article 190 § 2 of the penal code, is prosecuted in the application procedure. Finally, it should be stated that the relation between Article 119 § 1 and Article 190 § 1 of the penal code causes that spreading contents that threaten non-Islamic believers should be qualified in accordance with Article 119 § 1

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<sup>20</sup> In this text ‘an apparent (negligible) concurrence’ means concurrence of provisions in relation *lex specialis derogat legi generali* rule. And ‘an inapt concurrence’ is in a situation that preclusion of multi assessments follows the *lex consumens derogat lege consumptae* or *lex primaria derogat legi subsidiariae* rules. More on the concurrence of provisions in the penal law and differences between ‘an apparent (negligible) concurrence’ and ‘an inapt concurrence’ see M. Gałązka, *Komentarz do art. 11 kk*, in: *Kodeks karny. Komentarz*, A. Grześkowiak, K. Wiak (ed.), Warsaw 2012, pp. 118–122.

<sup>21</sup> J. Kosonoga is of a different opinion. He assumes that Articles 119 § 1 of the penal code and 190 § of the penal code are excluded according to the *lex consumens derogat lege consumptae* rule, cf. J. Kosonoga, *Komentarz do art. 190 kk*, in: *Kodeks karny. Komentarz*, R. Stefański (ed.), Warszawa 2015, p. 1088. Acknowledgement that both analyzed concurrence is of apparent (negligible) nature and approval of a different opinion that it is a inapt concurrence lead to the same result, i.e. preclusion of multi assessments by qualification.

<sup>22</sup> Article 119 § 1 of the penal code refers to the unlawful threat and Article 190 § 1 of the penal code refers to threatening.

of the penal code. In case of spreading contents that offend and humiliate other social groups because they do not believe in a radical version of Islam, Article 257 of the penal code should be applicable. It penalizes<sup>23</sup> public insult of a group of people or an individual because of their nationality, ethnic affiliation, race or belief, or because the lack of their religious denomination.<sup>24</sup>

Other material contents connected to the armed jihad focus on glorifying offences, particularly terrorist attacks, and on the incitement to crimes. The materials justify and praise acts of terror. Such activities are usually called “a fight for a just cause” and their perpetrators are called “fighters” and “martyrs for faith”.<sup>25</sup> The act of spreading such materials depending on the detailed content may result in prosecution according to provisions of Article 255 § 1, 2 and 3 of the penal code. The acts prosecuted under this article are public calling for a misdemeanour or fiscal offence (§ 1), a crime (§ 2), or praising the fact of committing a crime (§ 3). Such behaviour described in Article 255 § 1 of the penal code provides for a fine, penalty of restricted liberty or penalty of imprisonment for a fixed period not exceeding 2 years; any behaviour described in Article 255 § 2 of the penal code provides for a penalty of imprisonment for a fixed period not exceeding 3 years; any behaviour described in Article 255 § 3 provides for a fine of 180 daily rates, penalty of restricted liberty or penalty of imprisonment for a fixed period not exceeding 1 year. In case of calling for offences or praising offences described in Article 118 of the penal code (genocide crime), in Article 118a of the penal code (committing ordinary offences listed in the article, like *inter alia*, murder, serious injury, deprivation of liberty for a fixed period not exceeding 7 days, taking part in a mass attack or in one of the repeated attacks against a group of people to support or execute the politics of a state or an organization), in Article 119 § 1 of the penal code (the use of violence or unlawful threat against a person or a group of people because of the reasons described in the article), in Articles 120–125 of the penal code (forbidden by the international law ways of combat) – the application of the Article 255 of the penal code is in concurrence with Article 126a of the penal code, which introduces a higher penalty of behaviours that praise or call for acts described in the above mentioned articles. Committing a criminal offence under Article 126a of the penal code is punishable by a deprivation of liberty for a fixed period of at least 3 months and not exceeding 5 years. In case of calling for an aggressive war or its praising Article 255 § 2 and 3 in concurrence with Article 117 § 3 of the penal code are applicable. The concurrence of Article 255 § 2 and 3 of the penal code with Article 126a of the penal code and with Article 117 § 3 of the penal code, like the concurrence of Article 119 § 1 with Article 190 § 1 of the penal code is of apparent (negligible) nature, which in effect causes that in cases of calling for offences described in Articles 118, 118a, 119 § 1, 120–125 of the penal code or praising

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<sup>23</sup> Article 257 of the penal code stipulates the penalty of deprivation of liberty for a fixed period not exceeding 3 years.

<sup>24</sup> Cf. K. Wiak, *Komentarz do art. 119 kk*, in: *Kodeks karny. Komentarz...*, p. 699.

<sup>25</sup> The term used commonly for people lighting for Islam; mujahid literally means “sacred fighter”, cf. S.J. Murdico, *Osama Bin Laden*, New York 2007, p. 26.

such offences, based on the *lex specialis derogat legi generali* rule, only Article 126a of the penal code will be applicable. Whereas, while calling for an offence described in Article 117 § 1 of the penal code or praising it, only Article 117 § 3 of the penal code should be applicable. The colourable nature of the concurrence of Article 255 § 2 and 3 of the penal code with Article 117 § 3 and Article 126a is decided by the application of the same expression “calling for an offence” or “praising its commitment” in Article 255 § 2 and 3, in Article 117 § 3 and in Article 126a of the penal code as well as more detailed content of Articles 117 § 3 and 126a of the penal code, which penalize calling for offences and praising only the offences listed in the articles. Offences prosecuted according to provisions of Articles 117 § 3 and 126a of the penal code are of particular social noxiousness so the sanctions for them are higher than those envisioned in Article 255 § 2 and 3 of the penal code. Higher sanctions are an additional argument that in concurrence of those provisions Article 255 § 2 and 3 of the penal code should not be applicable. A particular material propagating terrorism, apart from calling for killing infidels, can also call for other offence, not embraced by the provision of Article 126a of the penal code. In such situation a cumulative qualification should apply.<sup>26</sup>

Bearing in mind the idea of qualifying behaviours of calling for a war with infidels as calling for an aggressive war, one should consider one more thing, i.e. that such calls are not made in the name of the country as a traditional subject entitled to waging wars. Faulting the people linked to the idea of armed jihad that they call for starting an aggressive war depends on the relevant interpretation of the term “aggressive war” formulated in Article 117 § 1 and 3 of the penal code. In literature there is this opinion that the interpretation of the term should be done by referring to the term used in acts of international law “aggression”.<sup>27</sup> The most recent understanding of the term in international documents can be found in the Rome Statute of the International Criminal Court of 17 July 1998.<sup>28</sup> Article 8bis amended by the RC Resolution of 11 June 2010<sup>29</sup> introduced definitions of “acts of aggression” and “crime of aggression”. The act of aggression is understood as the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations. The crime of aggression means

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<sup>26</sup> For example, if a particular material called for an aggressive war (Article 117 § 3 of the penal code), for not paying taxes (which is a call for fiscal offence under Article 265 § 1 of the penal code), for money fraud (Article 265 § 2 of the penal code), and praised committing those offences, then the act of publication of those materials should be qualified under Article 117 § 3 of the penal code in concurrence with Article 265 § 1 of the penal code, in concurrence with Article 265 § 2 of the penal code, in concurrence with Article 265 § 3, in connection with Article 11 § 2 of the penal code.

<sup>27</sup> Cf. K. Wiak, *Komentarz do art. 117 kk*, in: *Kodeks karny. Komentarz...*, p. 693.

<sup>28</sup> Journal of Laws of 2003, No. 78, item 708. In the article the author used English language version on the official web page of the ICC: <https://www.icc-cpi.int/Pages/default.aspx> [access: 25 IV 2017].

<sup>29</sup> This resolution has been agreed during the Revision Conference of the International Criminal Court in Kampala in 2010. Cf. *Poprawki do Rzymskiego Statutu Międzynarodowego Trybunału Karnego, sporządzonego w Rzymie dnia 17 lipca 1998 r., przyjęte podczas konferencji rewizyjnej w Kampali (rezolucje nr 5 i 6) w dniach 10 i 11 czerwca 2010 r.* (Journal of Laws 2018, item 1753).

planning, preparations, initiating or executing an act of aggression by a perpetrator in a position effectively to exercise control over or to direct the political or military action of the state which committed the act of aggression. The act of aggression, by its character, gravity and scale, constituted a manifest violation of the Charter of the United Nations. The understanding of the terms “act of aggression” and “crime of aggression” from the Rome Statute of the International Criminal Court which explicitly links these acts with the states’ activities, leads to the conclusion that individuals acting for and on behalf non-state subjects cannot be assigned acts connected to “an act of aggression”. In consequence presumptive interpretation of the notion “aggressive war” by referring to the vocabulary of the international law will lead to the affirmative that calling for a war with infidels by people linked to an armed jihad movement cannot be treated in Polish law as an act of Article 117 § 3 of the penal code. It is worth pointing out though that the term “aggressive war” used in Article 117 of the penal code can be interpreted differently. Since the legislator did not define in Article 117 of the penal code nor in any other place of the penal act the term “aggressive war”, let alone indicated that the term should be interpreted by referring to an internationally legal term of “act of aggression”. If the legislator wished to make those two notions equal, the relevant provision in the code would be introduced. Article 8bis of the Rome Statute states that the definitions of “act of aggression” and “crime of aggression” were formulated only for the purposes of the Statute. So, the above lead to the conclusion that using the term “aggressive war” in Article 117 of the penal code the legislator referred to a common understanding of the word “war”. In this understanding a war is (...) *an organized armed struggle between states, nations or social groups, religious groups and so on to gain intended purpose, for example to seize foreign territory*.<sup>30</sup> Whereas an “aggressive war” is such armed struggle that is of an assault nature.<sup>31</sup> This dictionary definition of the word “war” assumes directly that it can be waged by other entities than a state. In consequence, adopting the common understanding of the term “war” allows to assume that calling for organized military actions by a certain religious group to impose a certain religion by force on others, is in fact a calling for “aggressive war” or, depending on the specific wording, a public praising of such war. And such behaviour fills the features of the criminal offence described in Article 117 § 3 of the penal code which is punishable by a deprivation of liberty for a fixed period of at least 3 months and not exceeding 5 years.

Further analysis of the Internet materials linked to the armed jihad leads to the conclusion that they include contents threatening terrorist attacks, calling for the attacks and praising committing the attacks, but they also include contents for seeking new active participants ready for joining terrorist organizations and taking up extreme activities. They can include contents directly calling for joining terrorist movements or giving information on how to join such organizations by showing, for example, the routes to get to lands

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<sup>30</sup> *Słownik języka polskiego*, L. Drabik, A. Kubiak-Sokół, E. Sobol, L. Wiśniakowska (ed.), Third edition, Warsaw 2014, p. 1160.

<sup>31</sup> According to the dictionary definition ‘assault’ is a military aggression; attacking someone unexpectedly in order to rob somebody, or to beat somebody, etc. *Słownik języka polskiego...*, p. 483.



controlled by terrorists or indications how to avoid being tracked by security services. Spreading such contents facilitating recruitment of new fighters, that are usually appeals for joining the holy war with infidels and that offer specifically understood salvation, fills the features of the criminal offence described in Article 142 § 1 of the penal code. A punishment of deprivation of liberty for a fixed period of at least 3 months and not more than 5 years is for any activity to recruit either Polish citizens or foreigners staying in the Republic of Poland for any foreign military service or for any military organization. Recruitment in the sense of Article 142 § 1 of the penal code means any activities to encourage people to enter foreign military service or military organization.<sup>32</sup>

Penal code does not limit in any way the scope of activities to encourage for enlistment in foreign military services. So the encouragement can be expressed directly by words, by presentation of proper pictures or by airing proper music to make the listeners eager to join. Recruitment can appeal to either financial or ideological motivation. The possibility to use Article 142 § 1 of the penal code for punishing recruitment for terrorist organizations is based on the belief that numerous terrorist movements are of military nature nowadays. In favour of considering some Islamic terrorist organizations military organizations are the following circumstances. First, those organizations have developed organizational structure with specialized cells for different tasks.<sup>33</sup> Second, they have access to weapon and they use it for current activities, i.e. for carrying out attacks. Third, the most developed terrorist organizations, like the Islamic State, Al-Nusrah front linked to Al-Qaeda, the Nigerian Boko Haram, the Afghan Talibs, the Sudanese Janjaweed or the Somali Al-Shabaab mastered vast territories. This fact and the support the organizations got from the part of local societies made it possible to organize terrorist attacks and crossing the threshold of asymmetric activities, and, in consequence, carrying out classical military actions, i.e. clashes with regular military units. In case of recruitment for financial reasons there is a possibility to classify such behaviour as the recruitment for a military mercenary service prohibited by the international law. According to provisions of Article 142 § 2 of the penal code such conduct is punishable by a deprivation of liberty for a fixed period of at least 6 months and not more than 8 years. Article 142 § 2 of the penal code is applicable if the status of people entering terrorist organizations is established as mercenaries. Legal definition of “mercenaries” is included in Article 47.2 of the Additional Protocol (Protocol 1) of 1977 to the Geneva Conventions of 12 August 1949.<sup>34</sup> According to the provisions of Article 47.2 the mercenary is any person, who:

- a) is specially recruited locally or abroad in order to fight in an armed conflict;

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<sup>32</sup> According to the dictionary definition ‘recruitment’ means recruiting volunteers for a job (in the past also to the military), *Słownik języka polskiego...*, p. 1243.

<sup>33</sup> Cf. A. Dzisiów-Szuszczkiewicz, M. Trzpił, *Działania, strategiczne cele...*, p. 86.

<sup>34</sup> *Additional Protocols to the Geneva Conventions of 12 August 1949, relating to the protection of victims of international armed conflicts (Protocol I) and relating to the protection of victims of non-international armed conflicts (Protocol II), amended in Geneva on 8 June 1977* (Journal of Laws 1992 No. 41 item 175) – further as the Additional Protocol 1.

- 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;
- 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.

The analysis of the provided conditions leads to the conclusion that in the case of people recruited in Europe and in the USA, who decided to join Islamic terrorist organizations and eventually went to territories under the military control of those organizations there is no doubt that the conditions under a), b), d), e), f) are fulfilled. The fulfilment of the c) condition needs a more thorough analysis. This point uses the conjunction “and” and the fulfilment of this condition requires not only taking part in the military actions mainly for personal benefit but also getting from a party to the conflict or on behalf of the party of the conflict a promise of material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that party. Fulfilment of the first part of the analyzed conjunction is obvious. Personal gains are different benefits for any needs but not material compensations which can be expressed in money.<sup>35</sup> All positive, not convertible to money benefits resulting from joining terrorist organization by their receiver should be treated as a personal gain. Such personal gains are mostly: mental satisfaction, satisfaction with the faith that the person takes up a fight for the right cause with salvation in the end of it, and the sense of acceptance from the fellow fighters. In case of the Islamic State such personal gain for joining the organization was often the possibility of sexual contacts.<sup>36</sup>

Despite the fact that it does not always come directly from recruitment messages, recruitment to terrorist organizations is in fact included in the second part of the conjunction in Article 47.2 point c of the Additional Protocol I (*offering or getting from the conflict party or on its behalf the promise of material reward much higher than it is promised or paid to veterans with the same grade and having the same position*). In its language and symbolic layer the recruitment materials of Islamic terrorist organizations refer mostly to the fascination with Islam and faith in eternal reward for the fight in the name of Allah and they call for disdain for material values and consumerist civilization of the West. However, after a thorough analysis of Islamic

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<sup>35</sup> P. Daniluk, *Pojęcie korzyści majątkowej w prawie karnym*, „Wojskowy Przegląd Prawniczy” 2014, No. 1, pp. 4, 5. 11.

<sup>36</sup> Sexual abuse of slaves was regulated in details in a fatwa of 29 January 2015 issued by the Committee of Studies and Fatwas of the ISIL (former name for the Islamic State). The text of the document is available in English at <http://www.dailymail.co.uk/news/article-3377086/Islamic-State-ruling-aims-settle-sex-female-slaves.html> [access: 25 IV 2017 r.].

militias activities it has been clear that ideological message for recruitment is enhanced quite often with the promise of direct material benefits. The Islamic State activity insight has proved that its fighters from Western countries could count on numerous benefits. They were offered, *inter alia*, high compensation (often much higher than fighters recruited from the local people<sup>37</sup>), some material benefits and other profits<sup>38</sup>, which sometimes seems childish, tempting with ice-cream and chocolate bars<sup>39</sup>, and part of spoils of war.<sup>40</sup> It should, therefore, be stated that establishing a particular recruitment message as referring to gaining material benefits, justifies spreading such material as recruiting mercenaries, and – in consequence, as organizing recruitment to a mercenary service forbidden by the international law.

Materials connected to the idea of armed jihad contain also contents facilitating joining terrorist organizations. Spreading such information can be regarded as one of the forms of the offence described in Article 255a of the penal code. It penalizes behaviours relying on dissemination<sup>41</sup> or public presentation of the content that can facilitate a terrorist offence with intention of committing such an offence. The phrase “content that can facilitate an act of terrorist nature” used in Article 255a of the penal code is open, which results in possibility of breaching the norm from Article 255a by the dissemination or public presentation of numerous materials. The phrase “content that can facilitate an act of terrorist nature” covers the information on transfer routes, ways of communication with guidelines how to avoid security services’ controls. The aim of such content/messages is to facilitate recruiters to reach the territories controlled by terrorist organizations and, in the result, to join the organizations and begin the fight.<sup>42</sup>

Blatantly obvious violation of Article 255a of the penal code is also publishing the information on how to construct, carry out and hide explosives, information

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<sup>37</sup> According to some available information the Islamic State fighters from Western countries, could count on 500 US dollar military salary. Cf. <http://www.dailymail.co.uk/news/article-3192024/Join-ISIS-washing-machine-Jihadis-trying-lure-Brits-join-promise-fridges-domestic-appliances-offer-money-bring-children.html> [access: 25 IV 2017].

<sup>38</sup> Like for example heating costs in the winter time. Cf. Abu Rumaysah al Britani, *A brief guide...*, p. 19.

<sup>39</sup> Ibidem, pp. 15–16.

<sup>40</sup> According to the US State Department revealed by the Reuters Agency the Islamic State formed a separate organizational structure for management of the spoils of war, cf. *Exclusive: Seized documents reveal Islamic State's Department of 'War Spoils'*, <http://www.reuters.com/article/us-usa-islamic-state-documents-group-exc-idUSKBN0UB0AW20151229> [access: 25 IV 2017].

<sup>41</sup> Dissemination does not have to be public, so it can be done in a particular closed group of trusted people. A. Herzog, *Komentarz do art. 255a kk*, in: *Kodeks karny. Komentarz*, R. Stefański (ed.), Warsaw 2015, p. 1603.

<sup>42</sup> In the Islamic State propaganda materials the obligation to leave for Iraq or Syria (the so called Hegira) is often presented as the obligation of every Muslim equal to the five pillars of Islam, *arkan ad-din or arkan al-islam*, i.e. the obligation of faith, prayer, charity, fasting and pilgrimage to Mecca. Cf. K. Górak-Sosnowska, *Jihadi cool: popkultura...*, p. 62. It is worth adding that the next obligation according to numerous Islamic extremist organizations is the obligation of jihad. Cf. A. Kuriata, K. Sadowa, *Podstawy ideologiczne islamu – filary wiary. Zarys tematyki*, „Acta Erasmiana” 2015, Vol. 9, p. 185.

on communication and encryption techniques, on camouflage and covert ways of obtaining funds. Nevertheless, it should be stressed that it is not enough for the penal responsibility under Article 255a of the penal code. Additionally, the article requires that the dissemination or the public presentation of the contents facilitating terrorist acts would be accomplished with the intent to carry out a terrorist act.<sup>43</sup> The intention to carry out a terrorist act is of key importance in terms of qualifying a particular act as the so called directional offence from Article 255a of the penal code. Directional offences can be committed only with the direct intent (*dolus directus coloratus*).<sup>44</sup>

There is a significant amount of content calling for financial support towards struggles in the materials connected to the idea of armed jihad. Publishing proclamations, calls and other messages to provide the money and other material support for actions, that turn out to be effective, should be treated as one of potential forms of criminal behaviour described in Article 165a of the penal code. It is the collecting, passing or offering money, financial instruments, securities, foreign currencies, material rights, effects and real assets in order to finance terrorist offences. Such act is liable to punishment of deprivation of liberty for a fixed period of at least 2 years and not exceeding 12 years. If materials calling for financing the terrorist activity do not lead to the collection of any material, such behaviour should be qualified as an attempted offence from Article 165a of the penal code.

Among materials that are disseminated in public linked to Islamic extremism one can also find contents praising such state organization that is based on distortional and extremely restrictive version of the Quran. The picture of the country coming from such materials shows a country governed by few people with the majority of citizens deprived of their rights, the country with intolerant and extremely repressive system. The essence of the country is discrimination not only the people regarded as unwanted (religion is the crucial factor) but also their physical extermination.<sup>45</sup> Glorifying such organized country suits public promotion of other than fascist totalitarian system. Spreading such contents should be regarded as committing an offence consistent with provisions of Article 256 par. 1 of the penal code, and is liable to a fine, restriction of liberty or deprivation of liberty for a period of not more than 2 years. In the context of legal and penal analysis of spreading Islamic fanaticism it is worth noting that spreading the ideology publicly makes an access to it very easy. Numerous people interested can download the content very easily. Then, they can pass the content on very easily as well, which can result in committing the offence. According to Article 256 par. 2 of the penal code producing, preserving, acquiring, storing, owing, presenting, carrying and sending prints, recordings or any other stuff with contents described in Article 256 par. 1 of the penal code or being a medium of fascist, communist or other totalitarian

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<sup>43</sup> For example: such intention is unequivocally visible in a booklet by Abu Ubayda Abdullah al-Adm, *Safety and Security guidelines...*, pp. 4–7.

<sup>44</sup> A. Herzog, *Komentarz do art. 255a kk...*, p. 1604.

<sup>45</sup> The best known example of introducing such system is the Islamic State. Similar systems tried also other radical Islamic groups on the controlled territories like the Nigerian Boko Haram, the Somali Al-Shabaab or the Sudanese Janjaweed movement.

symbols in order to disseminate such ideology is liable to a fine, restriction of liberty or deprivation of liberty for a period not exceeding 2 years. The necessity of proving that materials calling for religious hatred are collected to pass them on (which in reality happens quite often) lowers the preventive effectiveness of Article 256 par. 2 of the penal code. *De lege ferenda* it seems appropriate to change the provision of Article 256 par 2 of the penal code. Materials promoting Islamic fanaticism are socially harmful enough<sup>46</sup> that already possessing them, acquiring them or collecting them, even with no intention of disseminating them, should be regarded as an offence and as such it should be penalized. Presumptive removal of its illegality should be of an exceptional nature, limited only to situations listed in article 256 par. 3 of the penal code.

The next type of contents connected to Islamic fanaticism dissemination in public refers to different kinds of message presenting contemptuous and hateful attitude to authorities and soldiers of/from foreign countries. They are described with negative and pejorative words, with “crusaders” as the mildest.<sup>47</sup> Despite the highest social harm of such messages, the act as a rule cannot be qualified as an offence from Article 226 par.1 of the penal code. According to Article 226 the responsibility for insulting a public official is conditional and such act should be committed in the exercise of official functions and in connection with performance of those duties. The present text of the analyzed provisions is a result of the judgment of the Constitutional Tribunal of 11 October 2006<sup>48</sup>, which questioned the former text of Article 226 par. 1 of the penal code. Before the amendment of 9 May 2008<sup>49</sup> the text of Article 226 par. 1 of the penal code used the term “during or in connection with”. The disjunct alternative allowed prosecute offences of insulting a public official only because the person was an official and therefore in connection with performance of official duties. The insult could not happen in the exercise of official functions. Such broad scope of penalization was regarded by the judgment as unconstitutional, which made the disjunct alternative was changed into conjunction, and that caused the present article 226 par. 1 of the penal code cannot be applied to persecution of such offences as insults and humiliations of public officials only because they have such status. Such editing suggests that the analyzed article is applicable primarily to real interventions, during which the public officials are insulted. So, in this case Article 226 par. 1 of the penal code is applicable here only exceptionally to assess activity referring to the Islamic fanatic propaganda. The example of a situation justifying the use of Article 226 par. 1 of the penal code in connection with spreading contents referring to the armed jihad is online commenting (on Internet forums, on Twitter or Internet radio) the military or police intervention happening simultaneously,

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<sup>46</sup> Contact with such type of materials is quite often the first step do radicalisation.

<sup>47</sup> The term “crusader” appears Inter alia in a booklet of an unknown author, *Safety and Security guidelines...*, pp. 15, 19, 52. In the Western civilization the term itself is not pejorative but in Muslim culture is of offensive nature.

<sup>48</sup> Judgment of the Constitutional Tribunal of 11 X 2006, P 3/06 (Journal of Laws 2006, No. 190, item 1409).

<sup>49</sup> Journal of Laws 2008, No. 122, item 782.

that is broadcast by media. In this case there is no doubt that insulting public officials takes place. An offence is committed in the course of their performing official functions and duties.

The considerations presented above indicate clearly that dissemination of contents linked to Islamic fanaticism violates many penal code provisions. The final qualification of behaviors encouraging to the armed jihad depends on the kind of materials disseminated and the way the materials are disseminated. Referring to materials promoting the armed jihad, it should be stated that they can be of simple and not extended nature (sometimes it is one word only) or elaborated and episodic, containing many ideas. Dissemination of the first kind of materials meets usually the features of one criminal offence only, which justifies the so called simple qualification. Dissemination of the second type of materials causes mostly the breach of numerous norms. In this situation, Article 11 § 2 of the penal code should apply. It is about the so called cumulative qualification of an act. It conveys the whole criminal violation of the law combined with behaviours breaching more provisions of the penal law. It should be stated that the application of the cumulative qualification of an act is the duty<sup>50</sup> of the subject who makes a binding legal interpretation.<sup>51</sup> The application of Article 11 § 2 of the penal code implies the necessity of rendering the punishment according to Article 11 § 3 of the penal code, i.e. in case the act meets the features of criminal offences described in two or more provisions of the penal code, the court inflicts a penalty on the basis of the provision with the most strict penalty. If the sanctions in concurrent provisions are the same, then the penalty is inflicted on the basis of provision describing an offence the features of which are provided by the behaviour of the perpetrator, which is not a marginal element of the act attributed to the defendant.<sup>52</sup> Because of the diversity and complexity of behaviours connected to the promotion of the armed jihad, the assessment of it is the main element of an act can be made only after the analysis of an individual case.

Referring to the way the idea of the armed jihad is disseminated, it should be pointed out that the behaviour of an individual perpetrator can be either of one-time or multiple nature. In the situation of a re-occurring activity, if it is proved that dissemination of all materials was done in short periods of time willfully, then Article 12 of the penal code should apply (the so called constant act). If Article 12 of the penal code does not apply, in case of multiple dissemination of materials connected to Islamic fanaticism,

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<sup>50</sup> M. Gałązka, *Komentarz do art. 11 kk...*, p. 121.

<sup>51</sup> The fact whether the features of an offence had been met is constantly heard and then verified in the course of penal proceedings. According to Article 303 of the code of penal proceeding the decision to start proceedings should contain the description of the act and its legal qualification. Depending on the stage of the proceedings the legal qualification is done by different entities. Final recognition of the features of the prohibited act is done by the court in its final decree. The recognition takes the form of an act description. Cf. A. Zachuta, *Opis i kwalifikacja prawna czynu z uwzględnieniem sprawczych odmian przestępnego współdziałania*, „Prokuratura i Prawo” 2005, No. 1, p. 47.

<sup>52</sup> Judgement of the Appeal Court in Lublin of 30 December 1997, II Aka 175/97, Apel.-Lub. 1998, No. 2, item 12.

one can consider that the perpetrator committed many separated offences in the actual concurrence. In such situation the perpetrator will be punished separately for each offence, and – eventually, will be subject to the cumulative penalty according to chapter IX of the penal code following chapter 60 of the code of penal proceedings. Proving that the acts in concurrence were committed in short periods of time with the same possibility can lead to the construction of the so-called continuation of offences described in Article 91 § 1 of the penal code.

### **Abstract**

The presented paper presents and analyzes, in the perspective of the fulfilment of the acts codified in penal law, the phenomenon of the promotion of the idea of military jihad by the Islamic terrorist organizations. The circumstances leading to the emergence of the global, Islamic, terrorist organization and the influence of their emergence on internal security have been presented in the introductory part. It has been stated there, that – although in Poland there has been no terrorist attack so far, the people who have ties with terrorist organizations or who are simply interested in terrorist ideology pose serious threat to the domestic security. The strong factor increasing the jeopardy of the terrorist attack, is the presence – mainly in virtual reality, of a myriad of different materials that promote the distortional conception of Islam. Therefore the materials that were publicized by Islamic, radical organization were thoroughly analyzed in this paper. The result of the analysis is the conclusion that the promoting of contents connected to radical Islam implies the commitment of several crimes.

**Keywords:** propaganda, Jihad, Islamic State, legal penal qualification.