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'Foreign Terrorist Fighters'—De-Radicalisation and Inclusion vs Law Enforcement and Corrections in Denmark

JØRN VESTERGAARD

I. The Dual Challenge with Responding to the Phenomenon of Foreign Fighters

By the end of 2012, it had become clear to decision-makers in many countries and international organisations that the flow of outgoing travellers sympathising with insurgent groups in Syria called for prompt and resolute countermeasures. The phenomenon gave rise to grave worries that some returning individuals represent a perilous risk of terrorist activities in their home countries due to radicalisation, direct dealings with militant circles, and maybe even personal experience of battlefield participation. The rise of ISIL and the movement's ability to recruit supporters willing to engage actively in the armed fight for the proclaimed 'Caliphate' accentuated the security concern further.[1]

In the first place, the phenomenon mainly called for measures more or less well suited for preventing individuals from *travelling to conflict zones* with the intention of joining militant or terrorist groups or organisations as associates, supporters or actual foreign fighters.[2] Due to the increasing military pressure on ISIL in Syria

[1] ISIL is also known as The Islamic State, ISIS, IS, and Da'esh. For an account of the origin and development of the organisation, see for example Loretta Napoleoni, *Islamic Phoenix: The Islamic State and the redrafting of the Middle East* (Seven Stories Press 2014).

[2] No common definition of the concept 'foreign fighters' or 'foreign terrorist fighters' exists. From a prevention and criminal justice point of view, this chapter mainly deals with societal responses to activities in connection with an individual's voluntary affiliation with an insurgent group during an armed conflict in a country other than the person's habitual place of residence. In several widely disseminated works, Norwegian researchers Thomas Hegghammer and Peter Nesser have analysed various aspects of Islamic terrorism and the threat from different types of foreign fighters, see publications lists at www.ffi.no. See also publications from The International Centre for Counter-Terrorism at www.icct.nl.

and Iraq, a substantial number of such individuals are now expected to gradually *return from conflict zones* to Europe, which accentuates the need to develop adequate and differentiated policies and practices for receiving and dealing with them.

As will be demonstrated in this chapter, there is an inherent ambiguity in an overall policy, which at the same time promotes a harsh criminal justice response at the international and national levels and a multi-faceted social welfare reintegration approach at the local level.

First, an account of the so-called Aarhus de-radicalisation and rehabilitation model will be presented. In addition, legislation recently introduced in Denmark will be discussed. Along the way, an overview and a critical analysis of legal instruments recently introduced by the UN Security Council, the Council of Europe and the EU will be offered, too.

The analysis in the following is devoted to the schism caused by the ever more expansive criminalisation of preparatory acts and ancillary offences with no manifest or immediate proximity to actual terrorism. The efforts vested in de-radicalisation and exit programmes in a municipal context can be eroded by the perpetual legislative adoption of repressive net-widening initiatives.

On a positive note, it deserves mentioning that a comprehensive approach to rehabilitation and reintegration strategies for returning foreign terrorist fighters seems to have gained substantial support among practitioners and experts. Various agencies are actively advocating such schemes, see for example the elaborate manual presented by the Radicalisation Awareness Network, RAN, *Responses to returning foreign terrorist fighters and their families*.[3]

II. Denmark as an Actor in the Theatre of International Terrorism

Supplying nearly 20 departing jihadist supporters per one million inhabitants, Denmark has more so-called foreign fighters than most other EU Member States, only slightly outscored by Belgium. At least 125–135 individuals have travelled from Denmark to Syria/Iraq, according to the latest assessment from the Danish Security and Intelligence Service. Approximately half of the travellers have returned. More than one in every five has been killed in the conflict zone.[4] However, it seems that the flow of travellers has been declining since the middle of 2014.

[3] *Ran Manual: Responses to returning foreign terrorist fighters and their families* (Radicalisation Awareness Network, July 2017).

[4] See for example the Danish Security and Intelligence Service, Centre for Terror Analysis (CTA): *The Threat to Denmark from Foreign Fighters in Syria* (December 2013); *Assessment of the Terror Threat to Denmark* (April 2016). More reports in Danish and English are accessible at www.pet.dk.

The backdrop of the Danish foreign fighters phenomenon is a rather mixed composition of interrelated factors, but certain contributing components can easily be identified, such as the *Jyllands-Posten* Cartoon crisis, Denmark's activist foreign policy including military engagement in the Middle East, and the generally rather harsh and polarised political debate regarding the integration of Muslim citizens into Danish society. A substantial number of criminal convictions of home-grown jihadists indicate the comprehensive scope of the aggregate problem.[5]

III. The Aarhus De-Radicalisation and Rehabilitation Model

Strikingly, Denmark has been recognised globally for tackling de-radicalisation in a systematised fashion founded on a principle of inclusion. This particular mode of reintegration has become known as the Aarhus Model, a label referring to the programme implemented by the town of Aarhus, the country's second largest city with approximately 350,000 inhabitants.[6] The Aarhus Model is definitely paradigmatic and may very well serve as an inspiring example of best practice.[7] A similar multi-agency approach is applied by several other Danish and European municipalities.[8]

The philosophy behind the mentioned approach is induced from the notion that many radicalised youth are essentially bothered with existential misgivings.[9] Their extremist motivation is basically perceived as a kind of existentialistic pursuit for the opportunity to live a good and decent life on par with others. Consequently, the better response to their rebellion is not to be found in further stigmatisation and exclusion, but in targeted individual assistance for the purpose of developing adequate life skills in order to become part of or re-enter ordinary society in a

[5] For a comprehensive account of Danish law, see Jørn Vestergaard, 'Criminal law as an anchorage point for proactive antiterrorism legislation: Denmark' in Francesca Galli and Anne Weyembergh (eds), *EU counter terrorism offences. What impact on national legislation and case law?* (Institut d'Etudes Européennes, Éditions de l'Université de Bruxelles, 2012) 169–94.

[6] Information regarding the programme has kindly been provided by Detective Inspector Thorleif Link. For a general introduction to the Danish approach to countering and prevention Extremism and radicalisation, see Ann-Sophie Hemmingsen, DIIS Report 2015:15 (Dansk Institut for Internationale Studier 2015), at www.diis.dk.

[7] Various materials on the Aarhus Model may be accessed from the internet. For an informative recent text and audio: www.npr.org/sections/health-shots/2016/07/15/485900076/how-a-danish-town-helped-young-muslims-turn-away-from-isis.

[8] The development of comprehensive rehabilitation and reintegration strategies for returning foreign terrorist fighters has been urged, inter alia, by the Global Counterterrorism Forum in the so-called Hague-Marrakech Memorandum, in which various aspects of good practices to that effect are outlined.

[9] On the Danish preventive measures and de-radicalisation strategies as applied under the Aarhus Model, see Professor of Psychology Preben Bertelsen, *Panorama Insights into Asian and European Affairs* (2015) vol 1, 241–53.

non-violent manner and to exercise meaningful citizenship. All along, any citizen's fundamental rights regarding personal political conviction and religious faith should be recognised and respected. In the Danish setting, the Aarhus programme is mostly an extension of a general, early intervention crime prevention scheme that has been applied for more than 30 years, including inter-agency information sharing and coordinated action involving the school system, the social welfare system and the local police.[10]

The Aarhus police have set up a clearinghouse, a hotspot called the Info House that handles information regarding signs of radicalisation from worried family members, teachers, social workers and ordinary citizens. In addition, the Danish Security and Intelligence Service[11] is an important driver in the reintegration scheme by supplying the local police with dossiers of individuals considered at risk. The person concerned is summoned for a talk, screening, visitation, risk assessment, etc. Depending on the individual circumstances, a tailored and preferably proportionate intervention will be offered, such as counselling, healthcare, assistance with education, employment, accommodation, a programme to exit from extremist circles, and linking up with a trained mentor. If no further action is needed, the intelligence service will just continue to keep a watchful eye on the individual concerned. It has actually been reported that some returnees have come back fundamentally disillusioned with the cause of ISIL, or other insurgent groups, after having witnessed mismanagement or even repulsive atrocities. Such individuals are obvious targets for rehabilitation programmes such as the one implemented by the Aarhus authorities.

Not anybody at risk of radicalisation is considered eligible for admission to the programme. According to official sources, an individual will only get help to find a way back to society if he or she has not committed any serious offences. If there is reason to believe that the person has done something criminal, the matter will be investigated and eventually prosecuted, depending on sufficient evidence to build a case on. Other things being equal, the prospect for such legal action naturally improves in light of the many current initiatives in order to strengthen intelligence and investigation tools, eg due to the focus on collection and exchange of digital evidence. In particular, it might bring added value that surveillance and interception of Danish citizens abroad by the Danish Intelligence Service[12] has recently been authorised.[13]

[10] The so-called SSP-network (*s*chool, *s*ocial welfare, *p*olice).

[11] PET, ie *Politiets Efterretningstjeneste*.

[12] FE, ie *Forsvarets Efterretningstjeneste*.

[13] Parliament's Act No 1571, 2015. After the Copenhagen killings at the venue 'Krudttønden' (The Powder Barrel) and the Synagogue in February 2015, the Government presented an action plan concerning prevention of radicalisation and extremism, including prevention of radicalisation related to participation in armed conflict abroad. The plan involved a controversial proposal to authorise the military intelligence service to monitor Danish citizens outside of Denmark without a court warrant. Due to substantial criticism by academics and others, judicial oversight was granted, but the legislative requirements for intervention remained weak.

Obviously, it makes a lot of sense that a returnee who has been apprehended while deliberately preparing a terrorist attack should not be granted impunity in exchange for enrolment in a programme for rehabilitation and reintegration. The following case can serve as illustration:

Glasvej case: In 2008, two young males were convicted of attempt to commit a terrorist act. The principal perpetrator had returned from an al-Qaeda training camp in Waziristan bringing with him an elaborate bomb manual. Together they then produced and tested a small amount of TATP (triacetone triperoxide), an explosive intended as a component in a so far unspecified terror attack. They were not included in the reintegration programme but sentenced to 12 and 7 years' imprisonment, respectively.[14]

Still, it must give cause for concern if a law enforcement approach is rigidly applied in minor cases involving only preparatory offences with only a remote nexus to actual terrorism, at least if the perpetrator is prepared to abandon violent extremism and reach out for reintegration. This concern should be taken into account even more as some recent initiatives imply further criminalisation of activities not manifestly representing a genuinely substantiated risk of facilitating terrorism.

IV. Outline of Danish Criminal Law Concerning Terrorism and Foreign Fighters

While the Aarhus rehabilitation model has attracted widespread appraisal, and as more or less similar schemes have been adapted in other municipalities, the attention by a majority of politicians in the Danish Parliament has simultaneously been determinedly focused on the application of punitive measures.

Under Danish criminal law, there is no general ban on participating in armed conflict abroad. However, such activities might very well be covered by various criminal provisions, naturally depending on the specific circumstances. Thus, a number of the antiterrorism provisions could be highly relevant in certain instances.[15] Evidentially, violence, killings, hostage-taking, sexual assaults, and other serious offences are punishable in accordance with the common provisions

[14] See TfK 2009.762 Ø (*Tidsskrift for Kriminalret*, a regular court reporter, Ø = *Østre Landsret*, ie The Eastern High Court).

[15] Penal Code (PC) Sections 114 ff. The enactment in 2002 of amended criminal provisions by the first antiterrorism package reflected a transposition of the obligations due to Security Council Resolution 1373, the UN 1999 Convention on the Prevention of Terrorism, and the EU Framework Decision on Combatting Terrorism 2002/475/JHA. The 2006 adoption of the second antiterrorism package basically implemented obligations stipulated by the Council of Europe's 2005 Convention on the Prevention of Terrorism, later to be followed up by the 2008 amendment of the 2002 Framework Decision. See Jørn Vestergaard (n 5 above).

to that effect, granted that such acts are covered by jurisdictional rules and are not defined as lawful due to a combatant's privilege under International Humanitarian Law (IHL). Obviously, the overriding concern regarding bringing foreign fighters to justice would be to ensure that they do not get away with impunity if they have participated in any kind of atrocities, including acts of terrorism. However, in such instances, the burden of proof is an onerous one for the prosecutor, as sufficient evidence concerning criminal activities would typically be lacking, partly due to the difficulties in obtaining relevant information regarding an insurgent group's activities in remote and chaotic conflict zones, and partly due to the need to protect sources and collaborators and to the secrecy regarding intelligence technicalities and modalities.

In 2002, the Penal Code (PC) was amended to include provisions concerning actual terrorist acts, financing or otherwise facilitating terrorism. In 2006, the Parliament criminalised recruiting and training for terrorism purposes in order to pave the ground for ratifying the 2005 European Convention on the Prevention of Terrorism. Concurrently, being recruited or receiving training for terrorism purposes was criminalised, too.[16] The article regarding reception of training has been applied in the following case:

Al-Shabaab training camp: In 2014, two brothers of Somalian origin and residents of Aarhus were convicted of attempt to receive training for terrorism and both sentenced to two years' imprisonment. The elder brother had spent a couple of weeks in an al-Shabaab camp with the intention of receive training, but it was uncertain whether he had succeeded. The other had supported him financially and otherwise.[17]

No information is publicly available with regard to the risk assessment concerning the two defendants. Nevertheless, the outcome of the case represents a significant contrast to the alternative reintegration scheme, in particular considering the fact that the conviction related to an only attempted perpetration, and that the offender had actually made an effort to return home expediently.

Under Danish criminal law, the antiterrorism provisions in the Penal Code are applicable even in instances where members of a rebel group or organisation commit acts of terrorism in the context of an armed conflict. This has been established by several judgments.[18] Except for legislation specifically covering

[16] Cf PC Section 114 c (3), and PC Section 114 d (3). The first mentioned articles also covers recruiting somebody to finance or to facilitate the financing of terrorism. These provisions were amended due to a more comprehensive legislative initiative aiming at complying with the then anticipated requirements of the Council of Europe Convention on the Prevention of Terrorism (2005) ETS No 196. However, said Convention does not call for 'passive recruitment' to be criminalised, a matter which is now dealt with by the Additional 2015 Protocol to the Convention, which transposes the obligations under Security Council Resolution 2178, S/RES/2178 adopted the 24.09.2014 under Chapter VII of the Charter of the United Nations, see later.

[17] Both defendants were convicted of attempted violation of PC Section 114 d (3), cf U 2014.3017 V (weekly court reports published in *Ugeskrift for Retsvæsen*).

[18] See the landmark judgment UfR 2009.1453 H, ie the so-called 'Fighters+Lovers' case. (*Ugeskrift for Retsvæsen*, a weekly court reporter, H = *Højesteret*, ie the Supreme Court). Recently, the Eastern

terrorism offences and a separate statute concerning genocide, there are no particular provisions targeting international crimes. Moreover, there is no legal reservation preventing courts from adjudicating on war crimes and crimes against humanity under antiterrorism provisions.

By the end of 2015, an article regarding treacherous participation in armed conflict in alliance with an enemy of Denmark was introduced. In the Spring of 2016, prohibitions regarding travelling to or staying in certain areas where armed conflict is taking place, as well as regarding facilitating such travelling, were inserted in the Penal Code, as will be explained in more detail below.

V. Updating the Treason Provisions

For quite some time after the beginning of the flow of foreign fighters to Syria, the legal status of Danish citizens and foreign residents of Denmark travelling to the conflict zone was inconclusive.

In October 2014, Denmark once again engaged in armed conflict in the Middle East. Parliament decided to join the alliance including Iraq and the US in the armed conflict with ISIL by deploying seven F-16 fighter planes and supplementary military manpower in order to join the alliance with the Iraqi State by participating in offensive air strikes against ISIL targets in Iraq. At least as from that moment, Denmark had become part of the non-international armed conflict between ISIL and a number of states.

Despite the availability of a vast set of antiterrorism provisions in the Penal Code, a majority in Parliament regarded it as compelling to ensure that affiliation with an armed group of adversaries in an armed conflict involving Denmark shall be punishable as treason.

For decades, the Penal Code has featured an article criminalising 'recruiting for or being in the service of belligerent or occupying enemy or armed forces or being in connection with such entities operating in military or police corps or similar corps or organisations'.[19] In everyday speech, this article was referred to as 'the treason article'. Representatives for the parliamentary parties in opposition to the then Social Democratic-led Government called for indictments under this article

High Court upheld a municipal court judgment finding the Penal Code's antiterrorism provisions applicable by rejecting the argument that since the al-Nusra Front is responsible for killings of civilians in Syria, the organisation's participation in armed conflict is not to be considered legitimate according to International Humanitarian Law, Frederiksberg Municipal Court, case no 7156/2014, Eastern High Court, Section 15, case no S-3475-14. Regarding the rating of the PKK as a terrorist organisation in various cases concerning the financing of terrorism, see U 2014.1540 H (ROJ TV) and Eastern High Court judgment of 08.06.2016, case nos S-3006-14 and S-616-15.

[19] Cf PC Section 102 (1) and (2)(1). Further, PC Section 101 criminalises preparation for assistance to the enemy for the purpose of 'war, occupation or other hostilities', so-called fifth column activities.

of foreign fighters affiliated with Islamic groups in Syria. When politicians challenged the administration in power by raising questions in Parliament regarding this matter, the response on the part of the Ministry of Justice was hesitant and offered only vague indications with regard to the possible application of the law.[20]

After having entered the theatre of armed conflict in the Middle East, it became evident that there was a pressing demand for a thorough examination of the scope of existing legislation and the possible need for amendments. Therefore, after quite a lot of political commotion, initiatives were taken to introduce a new offence to this effect. It became the responsibility for the Permanent Penal Committee under the Ministry of Justice to produce an analysis and to present suitable recommendations pertaining to bringing enemy foreign fighters to justice. The Committee's report to that effect was published in June 2015.[21]

The Permanent Penal Committee's point of departure for its considerations concerning the aim of criminalising participation in and recruitment for armed conflicts abroad was primarily the need to counter the risk posed by returning foreign fighters, but also a desire to curtail the extent and seriousness of armed conflicts. However, with regard to conflicts directly involving Denmark, the main argument for criminalisation is that a particular bond of loyalty binds (1) Danish citizens, regardless of residence or possible double citizenship, (2) stateless individuals, and (3) foreign citizens residing in Denmark. Such persons enjoy Danish jurisdiction and protection, which—in accordance with international law—corresponds with an obligation not to fight for the enemy in an armed conflict. Thus, the Committee recommended a specific criminalisation of affiliating with enemy forces.

In the summer of 2015, the Centre-Left lost a general election and a new Cabinet was formed by one of the former opposition parties.[22] After taking office, the new Minister of Justice, Mr Søren Pind, endorsed the recommendation from the Committee and presented a Bill to that effect to Parliament. Without much public attention, the proposed legislation was adopted in December 2015.[23] The new article in the Penal Code has the following wording:

> PC Section 101 a. Anyone who has Danish citizenship or residence in the State of Denmark and who during an armed conflict involving as a party the State of Denmark, is affiliated with an armed force belonging to a party fighting against the State of Denmark, is punishable by imprisonment of up to 10 years. Under especially aggravating circumstances, the punishment is imprisonment of up to life. In particular, instances

[20] A detailed account of the debate can be read in Danish in the author's contribution to the publication Peter Vedel Kessing and Andreas Laursen (eds), *Robust mandat* (DJØF 2016) 371–418.

[21] The Permanent Penal Committee's report 1556, 2015 'opinion on certain matters regarding participation in and recruitment for armed conflicts abroad that the State of Denmark is a party to' ('Straffelovrådets udtalelse om visse spørgsmål vedrørende deltagelse i og hvervning til væbnede konflikter i udlandet, som den danske stat er part i').

[22] Venstre—The Liberal Party of Denmark, 'liberal' as in 'liberalism'.

[23] Parliament's Act No 1880, 29.12.2015 amending the Penal Code ('Tilslutning til fjendtlig styrke'—Affiliation with an enemy force), adopted by Parliament 15.12.2015.

> where someone has participated in armed combat shall be considered aggravating circumstances.
>
> Subsection 2. Anyone who under circumstances as stipulated in Subsection 1 recruits somebody who has Danish citizenship or residence in the State of Denmark for an armed force, or who publicly incites such a person to affiliate with enemy forces in such conflicts shall be punished by imprisonment up to 10 years. Under especially aggravating circumstances, the punishment is imprisonment of up to 16 years. In particular, instances where violations of a systematic or organised character are in question shall be considered aggravating circumstances.

No formalised procedure exists for determining whether Denmark is participating in an 'armed conflict' or how the particular character of such a conflict should be assessed in accordance with International Humanitarian Law. In a specific instance, the issue might, or might not, have been clarified by Parliament when consenting to the use of armed force. In the *travaux préparatoires* to the newly introduced treason article, it is emphasised that its application in a specific case depends on a solid basis for presupposing that Denmark is taking part in an armed conflict.[24] Liability under said article requires a criminal intent with regard to the factual circumstances justifying the legal assessment of the situation as an armed conflict.

Hereafter, the mere *affiliation* with the forces of an adversary will be sufficient basis for criminal liability. It is not a legal requirement that the person has participated in actual combat or, as a member of enemy forces, has aided these in other ways. Any type of armed conflict involving Danish military units is covered, no matter whether it takes place near or far from Danish territory. It does not matter whether the adversary party is fighting directly against Danish combat forces or against a state to which Denmark is an ally. Neither is it relevant whether the unit with which the person is affiliated is specifically fighting Danish forces.

The amended article includes any function in a hostile armed force. It is not a condition for criminal liability that the person's purpose for joining the enemy was an intention to participate in active combat, or that he/she actually does so. Affiliation by serving in supportive operations is also prohibited, even if these merely involve medical or religious services. It also does not matter whether the person has status as a combatant and thus is a legitimate target according to International Humanitarian Law. The offence is completed when an individual has joined an enemy unit or has made an agreement to that effect with a representative for the enemy, and it does not matter whether the person has been located in a conflict area at all.

Employment in an enemy state's civil administration or other affiliation with entities not included in its armed forces is not considered a criminal offence. Likewise, affiliation with an insurgent group's branches responsible for social welfare, health or education issues is not an offence if such units are structurally segregated from the group's armed forces.

[24] With regard to non-international armed conflicts, the 'point of departure' is taken in Common Article 3, which has a wider scope of application than Additional Protocol II.

At sentencing, a substantial risk of execution or other serious consequences of attempted deserting or escaping from the group may be considered a mitigating or exonerating factor.

Depending on the concrete circumstances of the individual case, criminal liability under the amended treason article can be incurred concurrently with liability under antiterrorism provisions, eg regarding facilitation of or training for terrorism purposes.

Adoption of the new treason article was not really required in order to bring foreign fighters to justice, as already existing provisions were absolutely sufficient to serve that purpose, given that incriminating evidence was solid enough. However, it should not be underestimated that introducing the amended article might have been appropriate in order to satisfy a fundamental public and political desire for denouncing the kind of treacherous activities it covers. As a symbolic expression of societal dissociation from such behaviour, the article is fairly well suited to serve a symbolic function by sending a rather clear and adequate message.

It is a quite different question whether such specific kind of criminalisation can be expected to provide any added value to the prevention of travel to conflict zones to join ISIL or other insurgent groups or organisations. For individuals who are inspired or aroused by a desire to do so, such legislative initiatives hardly have a persuasive influence, not to speak of a deterrent impact. Still, it cannot be completely denied that there might be some marginal positive preventive effect of the legislative step. Thus, the treason article could serve as a kind of bottom plug in relation to the overall and more comprehensive undertaking to prevent radicalisation and travel to specific conflict zones. At least, the introduction of the new article has resulted in a heightened degree of clarity as to of the state of the law.

On the other hand, criminalisation in order to enforce the loyalty obligation might be counterproductive in relation to the aim of the part of International Humanitarian Law that is intended to provide an incentive for members of armed forces to comply with the laws of war, including in relation to protection of civilians. If there is a risk of serious repercussions from the very affiliation with enemy forces, it might not be of essential importance that there is also a prospect of liability for assaulting civilians or butchering prisoners *hors de combat*.[25]

Under humanitarian law, there is a presumption that the territorial state after cessation of a non-international armed conflict in the widest possible manner offers amnesty to members of non-state groups who have not committed war crimes or other international crimes.[26] The aim of this recommendation is precisely to strengthen the impulse to respect standards of behaviour equivalent to those prescribed for combatants. Under a similar rationale, it could be argued that

[25] The analysis in the present contribution draws extensively on the work of Sandra Kraehenmann, *Foreign Fighters under International Law* (Briefing No 7, Geneva Academy of International Humanitarian Law and Human Rights, October 2014) 20, where comprehensive reference to the literature is provided.

[26] Additional Protocol II, Art 6(5) only has binding effect in relation to the territorial state. Neither Iraq, Syria nor the USA have ratified AP II. However, the International Red Cross regards this rule as an expression of international customary law.

particular criminalisation should be avoided in relation to individuals travelling abroad to participate in armed conflict, even if such activities involve betraying your home country.[27] However, it would probably be naïve to overstate expectations regarding the rationality of calculations made by an individual who is already part of enemy forces. Moreover, it cannot be denied that it could be perceived as grossly provocative if that type of turning against your own country were to be endorsed.[28]

In any case, it amounts to an erosion of the principles underlying IHL, if a government categorically treats insurgents as common criminals or terrorists. Such a policy poses the risk of depriving civilians and captured individuals of the protection established under Common Article 3 of the Geneva Conventions. It should further be remembered, that international human rights are applicable during armed conflict, too, although with certain modifications.[29]

For returning foreign fighters without a history of participation in active combat, it would no doubt be the rational option to offer enrolment in a reintegration programme like the one practised under the Aarhus model, assuming that the individual in the specific instance demonstrates sincere intentions to renounce militant activities. It would be counterproductive to insist on criminal liability and imposition of an unconditional imprisonment sentence for violation of a very wide-reaching treason article.

VI. Amending the Passport Code and the Foreigners Act

After the Paris attacks and the Copenhagen shootings in early 2015, the Danish Passport Code was amended in order to authorise the police to deny issuing and to revoke previously issued passports, and to order a travel ban if there is 'reason

[27] For discussions of criteria and procedures concerning the treatment of insurgents who have respected the principles of IHL, including the possibility of amnesty, annulment of criminal liability, or leniency in sentencing with regard to the actual participation in armed conflict, see for example Francois Bugnion (2003) *Yearbook of International Humanitarian Law* 167–98; Marco Sassòli, *Essays in Honour of Yoram Dienstein* (Martinus Nijhoff 2007) 256; Jonathan Somer, 'Jungle justice: passing sentence on the equality of belligerents in non-international armed conflict' 89 *International Review of the Red Cross* No 867 (September 2007) 655–90; Ezequiel Heffes and Marcos D Kotlik, 'Special agreements as a means of enhancing compliance with IHL in non-international conflicts: An inquiry into the governing legal regime', 96 *International Review of the Red Cross* (December 2014) 1195–224.

[28] For a sophisticated analysis of this problem, see Michael Scharf, 'Defining Terrorism as the Peacetime Equivalent of War Crimes: Problems and Prospects' (2004) *Faculty Publications*, Paper 229, Case Western Reserve University.

[29] This has been established inter alia in ECtHR, 16.09.2014, *Hassan v UK* (Application no 29750/09). See also Helen Duffy, *The War on Terror and the Framework of International Law* (Cambridge University Press 2005) ch 7; Alex Conte, 'An Old Question in a New Context: Do States Have to Comply with Human Rights When Countering the Phenomenon of Foreign Fighters?' (*EJIL: Talk!*, 19.03.2015): www.ejiltalk.org/an-old-question-in-a-new-context-do-states-have-to-comply-with-human-rights-when-countering-the-phenomenon-of-foreign-fighters/, accessed 20.11.2016; Council of Europe, *Guidelines on human rights and the fight against terrorism* (adopted by the Committee of Ministers at its 804th meeting, 11.07.2002).

to assume' that an individual 'has an intention to participate abroad in activities that could imply or enhance a danger for the security of the Danish State or the security of other States, or a substantial threat against the public order', ie a security risk of engaging in violence upon return.[30] A decision to this effect may be accompanied by a time-limited prohibition on leaving the country. A violation of such an injunction is punishable by fine or imprisonment up to two years.[31]

Concurrently with the introduction of the new passport rules, the Foreigners Act was amended in order to authorise the revocation of a residence permit under criteria basically equivalent to those in the Passport Code.[32]

The threshold regarding suspicion under these newly introduced articles is significantly lower than those associated with criminal provisions under the Penal Code. The manifest intention behind this approach is to facilitate the application of the rules in instances where it would be difficult to satisfy the burden of proof in a criminal case regarding violation of the prohibition on being recruited for the purpose of terrorism. The scheme raises a number of so far unresolved questions regarding substantive criteria and evidentiary requirements. According to the *travaux préparatoires*, information that an individual is staying in a conflict zone without a creditable objective will ordinarily be sufficient to meet the stipulated standard of proof. A number of decisions have now been made, and the course is apparently somewhat meandering. Particular attention has been attracted by a case regarding revocation of a passport belonging to a Danish-Kurdish woman who had travelled to Iraq several times, allegedly in order to join Peshmerga forces that are known to be operating side by side with allied forces in the fight against ISIL.

VII. The UN Security Council—Adopting Resolutions 2170 and 2178 (2014)

In 2014, the UN Security Council adopted Resolutions 2170 and 2178 directed at what were labelled *foreign terrorist fighters*.[33] The two instruments enhance the sweeping obligations imposed on all states by Resolution 1373 (2001), whereby the Council promptly followed up on the 9/11 attacks by placing itself in the position as international law-maker. Basically, Resolution 1373 stated a mandatory requirement concerning criminalising the financing, planning, preparation, perpetration or supporting of terrorist acts, etc.[34] It also established an obligation

[30] Passport Code Section 2 (1)(4), implemented by Parliament's Act No 176, 2015.
[31] Passport Code Section 5 (1), cf Section 2 b (1).
[32] Foreigners Act Section 21 b (1).
[33] Security Council Resolution 2170 S/RES/2014 adopted the 15.08.2014 and Security Council Resolution 2178 (n 16 above).
[34] Security Council Resolution 1373 S/RES/2001 adopted 28.09.2001 under Chapter VII of the Charter. The resolution also obligated all states to freeze funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the

to refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, including an obligation to suppress recruitment of members of terrorist groups. Furthermore, by adopting Resolution 1373 the Security Council decided that all states shall prevent the movement of terrorists or terrorist groups by effective border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents. Still, Resolution 1373 did not include a specific obligation to criminalise travelling to areas where terrorist groups are involved in armed conflict.

When adopting Resolution 2170 (2014), the Security Council called upon all Member States to take national measures to suppress the flow of foreign terrorist fighters to—and bring to justice foreign terrorist fighters of—ISIL, ANF and all other individuals, groups, undertakings and entities associated with al-Qaeda. The Council further reiterated the obligations to prevent the movement of terrorists or terrorist groups by effective border controls, to expeditiously exchange information, and to improve cooperation among competent authorities to prevent the movement of terrorists and terrorist groups to and from their territories, etc. Member States were encouraged to engage with those within their territories at risk of recruitment and violent radicalisation to discourage travel to Syria and Iraq for the purposes of supporting or fighting for terrorists.

The Member States' obligations were then further broadened by the adoption of Resolution 2178 (2014). This instrument instructs Member States to criminalise outward travelling aimed at activities related to terrorism, 'including in connection with armed conflict'. Resolution 2178 rounds up the primary target group in quite broad terms, and it is not solely addressing the situation in Syria and Iraq.

The basic obligation in Resolution 2178 is stipulated in Article 6, according to which the Security Council:

> *decides* that all States shall ensure that their domestic laws and regulations establish serious criminal offenses sufficient to provide the ability to prosecute and to penalize in a manner duly reflecting the seriousness of the offense:
>
> (a) their nationals who travel or attempt to travel to a State other than their States of residence or nationality, and other individuals who travel or attempt to travel from their territories 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.[35]

commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities. It furthermore called upon all states to intensify and accelerate the exchange of information and to cooperate on administrative and judicial matters to prevent the commission of terrorist acts and take action against perpetrators of such acts, etc. The resolution provided no definition of terrorist acts. There is a vast amount of academic analysis of Resolution 1373.

[35] Pursuant to Article 6(b) and (c), the Member States' obligation to criminalise and bring to justice also covers financing and facilitating activities mentioned under (a).

Further, Member States are urged to employ evidence-based traveller risk assessment and screening procedures including collection and analysis of travel data, and they are called upon to cooperate, including by preventing the radicalisation to terrorism and recruitment of foreign terrorist fighters, preventing foreign terrorist fighters from crossing their borders, disrupting and preventing financial support to foreign terrorist fighters, and developing and implementing prosecution, rehabilitation and reintegration strategies for returning foreign terrorist fighters.

Many legal experts have criticised Resolution 2178 for contributing to blur the distinction between war crimes and terrorism beyond the sphere of armed conflict, as Member States are now under an obligation to criminalise certain activities as participation in terrorist acts or terrorist training despite the fact that the aim is to prevent conduct exercised in relation to armed conflict. This blending is unfortunate, because the purpose of and the content of International Humanitarian Law regarding the use of force and rules under public international law regarding preventing and combatting terrorism in peacetime, respectively, are basically different.[36]

Under International Humanitarian Law, certain forms of resorting to use of force are approved in the course of an armed conflict, while others are prohibited, in an effort to reduce loss of human lives and human suffering caused by wanton display of violence and other excesses, including acts of terror directed against civilians.[37] The rules to this effect are binding upon all parties in international as well as non-international armed conflicts.

International agreements concerning the prevention and combat of terrorism in peacetime do not rely on a distinction between lawful and illegal use of force. Their aim is to obligate states to engage in international cooperation with regard to certain modes of qualified violence during peacetime by means of rules regarding criminalisation, universal jurisdiction, prosecution, mutual legal aid, etc. In accordance with such international agreements, contracting parties must criminalise activity that is, in some instances, lawful under IHL, including attacks against a government's or an adversary rebel group's armed forces during a non-international armed conflict. Normally, such instruments have a caveat stipulating that they are not applicable with regard to the activities of armed forces during an armed conflict.[38] The prevailing opinion in academic literature is that this reservation covers both international and non-international armed conflicts. Besides, the global 'sectorial' antiterrorism conventions do not encompass any obligation to criminalise recruitment or training for terrorism.

[36] For a thorough account, see Sandra Kraehenmann, *Foreign Fighters under International Law* (n 25 above), p 19 f and p 61 ff.

[37] Under IHL, the concept of terrorism is tied to the prohibition on 'measures of intimidation or terrorism' directed at civilians or other protected persons. The concept is intimately connected to the principle of distinction, according to which the protection of civilians against the impact of belligerent activities depends on the ability to distinguish them from combatants. See Geneva Convention IV Art 33, Protocol I Art 51(2), Protocol II Art 4(2)(d), and Art 13(2).

[38] See for example conventions regarding hostage taking Art 26(5), terror-bombing Art 19(2), terror-financing Art 2, nuclear terrorism Art 4(2).

In a series of resolutions adopted in the wake of 9/11, the Security Council has blended the international regulation concerning the prevention of terrorism in peacetime and the governing of armed conflicts. Thus, the sanctions regime concerning al-Qaeda and affiliated entities and individuals includes operators both engaged in armed conflict and directly or indirectly involved in terrorism.[39] In the wide-reaching Resolution 1373, there is no caveat regarding armed conflicts. Consequently, neither Denmark nor a number of other states have made exceptions when implementing this resolution into domestic criminal law.[40] Resolution 2178 regarding foreign terrorist fighters is tailored to the same pattern and is explicitly directed towards 'terrorist acts and participation in armed conflicts'. Admittedly, the resolution obliges states to implement their duties under the instrument in accordance with IHL, but this does not imply any limitation with regard to its application in situations including war crimes, eg hostage taking, torturing captives, recruiting child soldiers, grave assaulting of non-combatants, direct attacks on civilians, or actual terrorist acts.

Furthermore, Resolution 2178 does not offer any definition of terrorism, but solely refers to previously adopted 'sectorial' conventions regarding hijacking, hostage taking, terror-bombing, financing of terrorism, etc. In accordance with the above-mentioned tradition, most of these instruments do not cover acts committed during armed conflict.[41] Consequently, the reference to International Humanitarian Law contributes to substantial uncertainty as to the reach of the resolution's obligations and their compatibility with the principle of legality and otherwise established requirements regarding legal certainty and predictability.

In addition, the EU Framework Decision on Combatting Terrorism[42] and the Council of Europe 2005 Convention on the Prevention of Terrorism[43] exclude

[39] The global sanctions regime against al-Qaeda et al was established by Security Council Resolution 1390 of 16.01.2002 that built on Security Council Resolution 1267 of 15.10.1999 and most recently has been maintained by Resolution 2161 of 17.06.2014. In Resolutions 2170 and 2178, it is observed that *foreign terrorist fighters* and persons who finance or otherwise facilitates such individuals' travel or subsequent activities can be included in the sanctions list, which actually has happened for individuals affiliated with al-Nusra or ISIL. To follow up on Resolution 1373, the EU has established an autonomous sanctions regime. The academic literature on blacklisting and terrorist lists is abundant. For a contribution by this author, see 'Terror Financing—Asset Freezing, Human Rights and the European Legal Order' (2011) 2 *New Journal of European Criminal Law* 175–200.

[40] An example regarding a reservation in national criminal law modifying the application of antiterrorism legislation on activities of armed forces during an armed conflict can be found in the Belgian Criminal Code Section 141*bis* ('ne s'applique pas aux activités des forces armées en période de conflit armé, tels que définis et régis par le droit international humanitaire'). For an account of Belgian law, see Anne Weyembergh and Celine Cocq 'Belgium' in K Roach (eds), *Comparative Counter-Terrorism Law* (Cambridge University Press 2015) 234–68.

[41] An exception is found in the 1973 Convention on crimes against internationally protected persons.

[42] See the Council Framework Decision of 13.06.2002 on Combating Terrorism [2002] OJ L164/3, Recital 11.

[43] See Council of Europe, Convention on the Prevention of Terrorism (2005) CETS 196, Art 26(5). The Convention has been ratified by 37 Member States; however not by Belgium, the Czech Republic, Georgia, Greece, Iceland, Ireland, Italy, San Marino, Switzerland, or the UK. It was signed by the EU on 22.10.2015.

the actions of armed forces during periods of armed conflict from the obligations imposed on Member States.

By adopting resolutions drafted on the kind of template utilised for the issuing of Resolution 1373 and Resolution 2178, all members and affiliates of certain rebel groups are designated as participants in terrorism. This mode of legislating is rather excessive in comparison with the regulation under International Humanitarian Law. One consequence is that states have become under an obligation to criminalise attacks on military targets, despite such belligerent actions being legitimate under IHL. Furthermore, it leads to an extensive criminalisation of acts related to participation in armed conflict, since the mere acquisition of knowledge and skills concerning handling of weapons and explosives when in the company of a rebel group participating in armed conflict might be interpreted as receiving training for terrorism.

Most international antiterrorism agreements do not apply during armed conflict. Neither do they entail obstacles under national criminal law to defining various acts committed in such situations as terrorism or crimes related to terrorism. Thus, in many jurisdictions, international obligations regarding the prevention and combat of terrorism committed in connection with an armed conflict have been implemented by amending common antiterrorism provisions without any distinction between the activities that are prohibited under IHL and those that are not. The immediate impact of such indiscriminate legal action is to establish a protruded legal shield criminalising a broad range of ancillary activities such as financing of, recruiting for, training for terrorism, etc.

Under domestic criminal law, there are no legal barriers to criminalising the act of joining an insurgent group or organisation, even though such doings are not as such prohibited under the laws of armed conflict, either for nationals or for foreigners.

Prosecuting members and supporters of rebel groups under antiterrorism legislation even blurs the fact that actual terrorist acts affecting civilians during a non-international armed conflict constitute a violation of IHL. Such acts might be covered by the rules regarding war crimes or crimes against humanity under international and possibly under domestic criminal law.[44] As a result, the rhetoric of Resolution 2178 is suited to send a misguided signal and to give rise to fallacious notions that might contribute to the glorification of individuals and movements, which consider terrorism to be a legitimate or plainly admirable means to be deployed in an ideologically or politically tainted struggle.

[44] Regarding assaults on individuals, who do not participate in hostilities, see the enumeration in Common Article 3, which is assumed to be an expression of customary international law. See also Additional Protocol II Art 4. See further the more extensive codifications in the Rome Statute Art 8(2)(c) and the explanatory Elements of Crimes; the ICTR Statute Art 4; the SCLS Statute Art 3. The leading precedent regarding jurisdiction *ratione materiae* with respect to international crimes committed in the course of non-international armed conflicts is ICTY *Prosecutor v Dusko Tadić*, IT-94-1-A, Interlocutory Appeal on Jurisdiction, 02.10.1995. See also icrc.org/customary-ihl: Rule 156, *Definition of War Crimes*.

Certain regimes utilise excessive antiterrorism legislation in the fight against local dissident groups and organisations, claiming that the conflict is one between a legitimate government and lawless criminals and terrorists with no rights under International Humanitarian law. The broad and unspecific denunciation of 'terrorism in all forms and manifestations' might contribute to legitimising the repression of political opponents and opposition groups, eg Kurds, Chinese Uighurs, Chechens, Palestinians or units under the Free Syrian Army.[45]

The wide-reaching criminalisation of activities suited to directly or indirectly facilitating terrorist activities during armed conflict might hamper operations by humanitarian organisations to the detriment of civilians and others who do not take an active part in the hostilities. The designation of an insurgent movement as a terrorist organisation can be used by a government to legitimise the refusal to permit aid workers to perform their humanitarian activities in a conflict area. The Syrian government's position can in this regard serve as an illustration. In the extreme, it could be regarded as a criminal offence under domestic law to offer health or social welfare services to members of a unit belonging to an organisation encompassing a branch responsible for terrorist acts.

The International Red Cross has urged that the use of the concept terrorist act in connection with armed conflict should be reserved for activities covered by the prohibition under IHL, and that the concept otherwise should only be tied to acts committed outside of armed conflict:

> In sum, it is believed that the term 'terrorist act' should be used, in the context of armed conflict, only in relation to the few acts specifically designated as such under the treaties of International Humanitarian Law. It should not be used to describe acts that are lawful or not prohibited by IHL. While there is clearly an overlap in terms of the prohibition of attacks against civilians and civilian objects under both IHL and domestic law, it is believed that, overall, there are more disadvantages than advantages to additionally designating such acts as 'terrorist' when committed in situations of armed conflict (whether under the relevant international legal framework or under domestic law). Thus, with the exception of the few specific acts of terrorism that may take place in armed conflict, it is submitted that the term 'act of terrorism' should be reserved for acts of violence committed outside of armed conflict.[46]

Other things being equal, it might obstruct peace negotiations and reconciliation processes, if someone's affiliation with a militant rebel group is simply regarded and treated as complicity in terrorism, and consequently implies the prospect of prosecution under domestic law. The fundamental presumption ought to be that activities that are not considered unlawful under International Humanitarian Law should not be criminalised under domestic antiterrorism legislation, including

[45] See likewise former Special Rapporteur on human rights and counter-terrorism, Professor Martin Scheinin at www.justsecurity.org. See also Bibi van Ginkel and others at www.icct.nl.

[46] See further ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* (Chap VI, 2011) 51.

the mere joining of a rebel group.[47] The matter might be more complicated where an insurgent group is involved in a non-international armed conflict and also bears the responsibility for terrorist acts outside the territory of the conflict.[48] It is well known that ISIL is responsible for terrorist acts involving returning foreign fighters, eg as established with regard to the attacks in Paris on 13 November 2015 and in relation to several subsequent incidents.

VIII. The Council of Europe—Adopting an Additional Protocol

On 19 May 2015, an Additional Protocol to the Council of Europe's 2005 Convention on the Prevention of Terrorism was adopted.[49] The principal aim of this instrument is to convey a common European implementation of the obligations stipulated in Security Council Resolution 2178.[50] The Protocol supplements the Convention by, inter alia, committing states to criminalising: participation in a terrorist organisation, receiving training for terrorism, travelling abroad or attempting doing so with the aim of participating in terrorism, and financing, organising or otherwise facilitating such travelling.[51] The working group that prepared the draft Protocol regarded it as inadvisable to criminalise the mere circumstance of 'being recruited for terrorism' ('passive recruitment'). Instead, the Protocol obligates contracting parties to criminalise active participation in a terrorist organisation or terrorist group. No such provision exists under Danish law, but as previously mentioned, the Penal Code was amended in 2006 to include articles regarding 'submitting to being recruited' and 'submitting to being trained, instructed or in another manner educated' for the purpose of terrorism.

Contrary to Resolution 2178, the European Convention—and correspondingly the Additional Protocol—is not applicable in case of armed forces' activities

[47] A number of informative Policy Briefs concerning Resolution 2178 (n 16 above), and initiatives prompted by various countries at www.globalcenter.org.

[48] See Sandra Kraehenmann, *Foreign Fighters under International Law* (n 25 above) 64.

[49] (2015) CETS 217. See also the Explanatory Report to the Additional Protocol. The Protocol became open for signatures 21.10.2015. It has been signed by 31 Member States, and was signed by the EU on 22.10.2015. The Protocol's entry into force requires 6 ratifications, including 4 Member States. It was ratified by Denmark on 03.11.2016 and had previously been ratified by Albania and Monaco. It has since been ratified by Bosnia and Herzegovina, Italy, Latvia, and the Republic of Moldova.

[50] See the Explanatory Report at www.coe.int/t/dlapil/codexter. For summaries of the Protocol, see Nicola Piacente, 'The Contribution of the Council of Europe to the Fight against Foreign Terrorist Fighters: The Draft Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism 2005' *eucrim* 1/2015, 12–15, and Kristian Bartholin, 'The Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism' *eucrim*, 3/2015, 124–28. On the 2005 Convention and Danish law, see Jørn Vestergaard (n 5 above).

[51] The 2005 Convention obligates participating parties to criminalise incitement, recruitment and training in terrorism.

during armed conflict. This is paradoxical, since it is the conflict in Syria and Iraq which is the immediate cause for composing the Protocol.[52]

IX. The European Union—Proposing a New Directive

After 9/11, the Framework Decision on Combatting Terrorism was adopted.[53] The Member States agreed to criminalise acts of terrorism and certain preparatory offences, including financing and other forms of facilitating terrorism. Prompted by the adoption of the Council of Europe 2005 Convention, the Framework Decision was amended in 2008 to also cover recruiting, training and public provocation for terrorism.[54]

In view of Security Council Resolution 2178, the Council of Ministers decided to explore the need for expanding the Member States' obligations to cover even earlier stages of preparatory activities. The Paris attacks on 7 January 2015 gave further cause for reinforcing the available measures in the prevention of extremism and radicalisation, etc.[55]

In light of incidents culminating in the Paris attacks on 13 November 2015, the Commission presented a proposal for a new directive to replace the existing Framework Decision.[56] The proposal specifically targeted the problem concerning foreign terrorist fighters. Its eventual adoption will pave the way for ratification of the Additional Protocol to the European 2005 Convention on the Prevention of Terrorism, which the EU signed in October 2015.

[52] Cf the Convention Art 26 (5). See critical comments issued in common statements dated 06.03.2015 and 7.04.2015 by Amnesty International and The International Commission of Jurists. The critical statements by the two organisations lead to the insertion of statements regarding respect for fundamental rights in the Protocol's Recitals and operative Article 8. See also United Nations, General Assembly, Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, United Nations, General Assembly, A/70/371 (2015).

[53] Framework Decision on Combating Terrorism 2002/475/JHA, as amended by Framework Decision 2008/919/JHA.

[54] For a comprehensive account, see Francesca Galli and Anne Weyembergh, *EU counter terrorism offences. What impact on national legislation and case law?* (Éditions de l'Université de Bruxelles, 2012).

[55] An excellent status on the efforts regarding '*Foreign fighters*' was prepared by Piotr Bakowski and Laura Puccio for the EU Parliament, February 2015. A useful entry by Commissioner for Justice, Consumers and Gender Equality, Véra Jourová, has been published by *eucrim* 1/2015: www.eucrim.mpicc.de. A comprehensive evaluation of the EU's antiterrorism initiatives has been conducted by the consortium SECILE, see www.cordis.europa.eu/result/rcn/164039_en.html; see also the summation at www.statswatch.org.

[56] Proposal for a Directive of the European Parliament and of the Council on combating terrorism and replacing Council framework Decision 2002/475/JHA on combating terrorism 2015/0281, COM(2015) 625 final, 02.12.2015. After nearly one and a half year's negotiating, Directive (EU) 2017/541 entered into force on 20.04.2017, see [2017] OJ L88, pp 6–21.

The Directive proposal inter alia included offences regarding receiving training for terrorism and also dealt with travelling and facilitation, including cross-border travelling within the EU. In addition, the Commission proposed widening of the rules concerning criminal attempt and participation as well as of the rules regarding jurisdiction. Various actors criticised the proposal for imposing extraordinarily wide-reaching obligations without offering the necessary guarantees regarding fundamental rights.[57]

With regard to the Commission's quest to criminalise travelling abroad for terrorist purposes, it appeared adequate to agree with at least a number of the LIBE Committee's suggestions. Thus, the Committee advocated that such activities should only be criminalised when the terrorist purpose of the travel is proven by inferring from 'objective, factual circumstances'.[58] Likewise, the Committee's suggestion that public provocation by, inter alia, glorification or justification, should be criminalised only when it causes a danger 'in a concrete case' that a terrorist offence may be committed, seemed sensible.[59]

The LIBE Committee also pointed to the importance of providing effective de-radicalisation and exit programmes.[60]

Originally, the proposal did not repeat the caveat included in the Framework Decision Recital 11, modifying its scope of application by excluding armed forces activities during armed conflict. Subsequently, this shortcoming has been remedied.[61] Member States will keep a certain margin of appreciation, under which they may exclude certain activities conducted during an armed conflict and not violating IHL. Proposed new antiterrorism legislation under Swedish law includes a caveat exempting its application with regard to situations during which an organisation participating in armed conflict does not violate International Humanitarian Law.[62]

[57] See for example an opinion from the Parliament's Economic and Social Committee, EUT C177/51. See also Meijers Committee, *Note on a Proposal for a Directive on combating terrorism* (2016). On 09.03.2016, a majority decision was taken by the British Parliament not to opt-in on the proposed directive.

[58] See suggested amendment to Recital 8 and operative Articles 3(2)(i) and 9 of the draft Directive, Report of 12.07.2016, Committee on Civil Liberties, Home and Justice Affairs, A8-0228/2016. Such a requirement has been inserted in Recitals 8 and 17 of the Directive.

[59] See suggested amendments to Recital 7 and operative Article 5 of the draft Directive, ibid. Such a requirement has been stipulated in Recital 10 of the Directive.

[60] See the suggested amendment of a new Recital 17c to the draft Directive, ibid. A dedication to a comprehensive prevention approach has been stated in Recital 31 to the Directive with a reference to inter alia the EU Strategy for Combating Radicalisation and Recruitment to Terrorism of 2014.

[61] Regarding the addition of a proposed Recital 19a, see the Council's documents 'Examination of the Revised text' of 12.02.2016 and 23.02.2016, 'General approach' of 03.03.2016, and '[E]xchange of views on the LIBE orientation vote' of 15.07.2016. The caveat has been established in Recital 37 of the Directive.

[62] SOU 2016:40 on criminal law measures against participation in an armed conflict for the support of a terrorist organisation ('*Straffrättsliga åtgärder mot deltagande i en väpnad konflikt till stöd för en terroristorganisation*'). It is observed in the report that the application for this kind of excuse will be rather limited.

Due to the Danish reservation regarding JHA matters, the adoption of the Proposal will not be binding upon Denmark as a Member State. The Framework Decision will remain in force with respect to Denmark. Largely, it can be assumed that Danish law is already compatible with the obligations enumerated in the proposed directive.

X. Introducing a Ban on Travelling to and Remaining in Conflict Zones

In late 2014, Centre-Right politicians in Denmark called for initiatives to criminalise travelling to and staying in certain conflict zones. The demand for such legislation was driven by right-wing opposition parties, but the Government, which was at that time headed by Social Democrats, responded reluctantly. Inspiration came from new legislation recently enacted in Australia with the aim of targeting foreign fighters before departure and after return by setting up special provisions allowing overseas conflict zones to be declared as no-go zones.[63]

Under Australian law, a new offence criminalises travel to any area designated as a no-go zone by the Minister for Foreign Affairs on the grounds that a terrorist organisation operates within this area. The broad designation power allows the prescription of entire countries, or regions spanning two or more countries. The offence carries a maximum penalty of 10 years' imprisonment. An exhaustive list of specific defences is included in the legislation, and covers situations where a person's reason for visiting the designated area can be considered as a 'legitimate purpose' such as bona fide visits to family members, performing humanitarian aid work, or undertaking official or journalistic duties. The discretion of the judiciary to consider an accused person's legitimate purposes for travel is limited, and the onus to satisfy the evidential burden that travel was for a legitimate purpose rests with the suspect. Individuals who return to Australia accused on reasonable grounds of engaging in 'hostile activities' overseas can be subjected to control orders, if a court is satisfied that the controls are 'reasonably necessary and reasonably appropriate and adapted for the purpose of protecting the public from a terrorist act'. These control orders can foresee measures such as overnight curfews, reporting requirements and substantial phone and internet restrictions. Until recently, Australia was the sole country where such legislation had been adopted.[64] So far, Raqqa in Syria and Mosul in Iraq have been designated as *declared areas*.

[63] The Additional Protocol 2015 to the European Convention 2005 (n 16 above) does not require states to introduce such schemes. In a statement of 17.10.2014, the Norwegian Attorney General suggested introducing legislation authorising the Government to designate certain armed conflicts in order to forbid Norwegian citizens and foreigners living in Norway to join a party in the conflict.

[64] *Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*, Sections 119.2 and 119.3.

The Danish Permanent Penal Committee was requested to analyse if further criminalisation under Danish law was needed, especially whether some sort of prohibition on travel to conflict zones should be enacted. In early 2016, the Committee delivered a report regarding criminalising participation in an armed conflict abroad, irrespective of whether Denmark is involved in the particular situation.[65] As a general understanding, the Committee stated that Danish law fully complies with the requirements of Security Resolution 2178 and the Additional Protocol to the 2005 Council of Europe Convention on the Prevention of Terrorism, implying that none of these documents motivates amendments to the Penal Code. Furthermore, the Committee found no cause for introducing a separate article in order to criminalise travelling abroad for the purpose of being involved in terrorism, since such preparatory activities would already be punishable as inchoate or preparatory offences under the Penal Code's general and very broad rules regarding criminal attempt and participation.

Basically, the Committee considered criminalising the mere entry into or remaining in a conflict zone to be an excessive measure, irrespective of the particular modality of such a possible regulation and its corresponding exemptions. The Committee considered that such a ban means that a person will be punishable for activities that do not necessarily imply any substantiated risk of violence or any proven adverse impact. The fundamental dilemma is that such a regulation would either be so strict that it curtails some objectively legitimate travelling to and residing in certain areas or it would allow for such broad exceptions that no added value to existing prohibitions is achieved. There is a risk that a ban in some cases will afflict ordinary law-abiding citizens instead of individuals aiming to join an armed group. Basically, the Committee questioned whether the benefits of such an injunction are reasonably proportional to the inconveniences affecting individuals' freedom of movement and the increase in red tape.

Furthermore, the Committee found it unlikely that a ban on travelling and remaining in conflict zones is suited to preventing participation in armed conflict abroad. Courts can be expected to assess the seriousness of an unqualified violation of a travel ban by entering or remaining in a no-go zone without a proper permit from the Danish authorities as relatively light. Even with a statutory sentencing maximum of six years' imprisonment, the penalty in specific instances will be much more lenient than in cases regarding terrorism or treason, typically a fine or a short prison term. Individuals with a strong commitment to the cause they want to fight for are not likely to be deterred by the risk of punishment, in particular as the sanction inevitably must be more lenient than the penalty for actually unlawfully joining an armed force. In many instances, it will even be difficult to prove violations, no matter how the regulation is constructed.

[65] The Permanent Penal Committee's report 1559, 2016 on armed conflicts abroad ('Straffelovrådets betænkning om væbnede konflikter i udlandet').

Dutifully, the Penal Committee indicated various possible schemes, but basically did not find any such kind of prohibition recommendable. In the light of the Committee's fundamental disclaimers, it chose to abstain from advocating one particular mode of possible prohibition, and instead it drew up a number of varying modalities supplemented by a description of their distinct advantages and disadvantages.

Despite the Committee's reservations, the Minister of Justice, Mr Søren Pind, decided to present a draft Bill containing a proposal to insert an article in the Penal Code by which the Minister would be authorised to designate a particular geographical area as a no-go zone. During the very busy closing session immediately before Parliament's summer recess, the Minister's Bill to that effect was passed without much attention or debate.[66] The meek reservations voiced by a minority of politicians concerned with civil liberties resulted only in a superfluous amendment allowing Parliament to revoke a specific decision by the Minister of Justice regarding the designation of a certain area as affected by a travel ban.

The Minister's draft proposal was presented on the very same day that the Committee's 256-page report was published. Because of the timing, there was scant opportunity for other politicians and the public to familiarise themselves with the Committee's analysis and reservations, let alone time for sober reflection. In addition, it was not very tempting for any politician to object, considering the fact that just the previous day vast media attention had been devoted to the swift arrest of a number of individuals accused of having travelled to Syria as foreign fighters at one or other point in time. The draft proposal immediately gained univocal political support.

The mentioned police action resulted in the arrest of a total of nine persons, five of these *in absentia*, the others incarcerated in pre-trial detention. The preliminary hearings were held *in camera*, so public information regarding the charges was minimal. However, it might be considered a paradox that a proposal for extended restrictions was promoted at the exact same time that provisions already in existence were demonstrated to obviously serve their purpose rather effectively. The outcome of one of the cases will be dealt with later in this chapter.

According to the new rules, travelling to and residing in a designated area where a terrorist group is a party in an armed conflict requires prior permission.[67] Upon application, a permit may be issued provided that the purpose of the journey or stay is considered sufficiently proper.[68] A licence can be issued not only to certain

[66] The introduction of a new provision in PC Section 114 j was enacted by Parliament's Act 642, 2016. Violation is punishable by imprisonment up to 6 years. In addition, the maximum penalty for recruitment to or facilitation of terrorism was increased from 6 years' to 10 years' imprisonment and increased to 16 years' imprisonment if the person has participated in armed combat. Under newly enacted Swedish law, the ordinary maximum for such an offence is imprisonment up to 2 years; if the crime is serious, a sentence of imprisonment for at least 6 months and at most 6 years may be imposed.

[67] On the basis of consultations with the Foreign Minister and the Minister of Defence, the Minister of Justice can designate a particular area where a terrorist group is involved in armed conflict.

[68] Travel and stay in a designated area by Danish, foreign or international public servants may take place without prior authorisation.

individuals but also to collectives of persons due to their affiliation to a particular business or organisation, eg a media enterprise.

Criminal liability requires merely that the concerned individual has travelled to or stayed in a prescribed no-go zone without relevant permission. It is not necessary to prove that the person in question has violated any other prohibition, eg antiterrorism provisions or the treason article.

The application procedure is going to be cumbersome, and errors can hardly be avoided in the administrative assessment of the legitimacy of the travel purpose.[69] The potential for innocent people to be affected is imminent, and as no particular procedural relief regarding access to judicial review has been granted, the likelihood that objectively wrong estimates will be corrected by court review is slim. The article is likely to have the chilling effect of discouraging people from travelling to designated areas, even when they wish to do so for innocuous reasons and have no intention of participating in foreign conflicts.

Fundamentally, a general requirement for preapproval of travelling to or staying in a particular area abroad raises concerns regarding certain human rights. Article 2 of Protocol No 4 to the ECHR as well as Article 12 of the International Covenant on Civil and Political Rights allow only for narrow exceptions with regard to the right to travel. In the explanatory memorandum to the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, it is emphasised that said article is only concerned with criminalisation of travelling 'under very particular conditions'. The memo goes on by adding the following accentuation:

> That these conditions are met in a concrete case must be proven … through evidence submitted to an independent court for scrutiny …
>
> In order for a Party to criminalise behaviour under Article 4 of the Protocol … the real purpose of the travel must be for the perpetrator to commit or participate in terrorist offences, or to receive or provide training for terrorism …[70]

Thus, it is questionable whether the courts in Denmark or the Strasbourg court would consider the application of a general travel ban to be compatible with ECHR requirements.

The author of this chapter pointed this potential problem out to the Ministry of Justice during the hearing process before the final adoption of the proposed Bill. The Ministry's reply was a blank and not very meaningful reference to a general statement that the measure is motivated by important societal interests, ie national

[69] The Government expects to be issuing an administrative Regulation in the course of September 2016 regarding the implementation of the travel restrictions. When media coverage appeared in the summer of 2016 regarding an apparent increase in the frequency of young women travelling to Syria, it was criticised that the law was not expediently implemented already when the new article was enacted in early June.

[70] Explanatory Report to the Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (Riga October 2015), paras 47–48. Art 4 of the Protocol provides the legal framework for facilitating the implementation of a ban on travelling abroad for the purpose of terrorism as required by Security Council Resolution 2178 (n 16 above), Para 6(a).

security, public safety and prevention of crime, and that the legislation is therefore not disproportionate with regard to its stated purpose.[71]

XI. The First Conviction by Danish Courts of a Syrian-Traveller

Due to a perceived lack of sufficient evidence against suspected foreign fighters returning from Syria, the Danish prosecution service did not until very recently become able to produce an indictment concerning violation of antiterrorism legislation, etc.

Formally, the Danish Minister of Justice is in charge of public prosecution. In principle, this implies that the Minister is vested with the power to issue instructions to the Director of Public Prosecutions (*Rigsadvokaten*), even regarding the specific handling of concrete cases. Traditionally, this authority is exercised with considerable restraint, meaning that the Minister in office does not normally interfere in decisions as to whether or not someone should be indicted in a particular instance. Thus, despite continuous public pressure from the political right, previous Social Democratic justice ministers persistently maintained as a matter of principle that such decisions ought to be left to the professional discretion practised by the prosecutorial system.

In the summer of 2015, the previously mentioned change in Government generated a new approach to the issue of enforcing provisions regarding terrorism, etc, and the situation was then altered significantly. Now, the newly appointed Minister of Justice, Mr Søren Pind, set a revised agenda for implementing criminal justice measures in the fight against terrorism. In his former opposition days, he had been one of the very outspoken and impatient advocates for a more rigorous mode of suppressing activities related to terrorism. As previously mentioned, he had vigorously acted as one of the leading partisans for the firm position that affiliation with an adversary armed force during an armed conflict involving Denmark must be severely punishable as an act of treason, and after taking office, he promoted the new legislation to that effect and concerning no-go zones.

Now, a special task force was established under the Director of Public Prosecutions. The purpose of this initiative was to pinpoint cases suited for indictment for perpetration of offences related to terrorism. This effort entailed a significant momentum to a determined push in the investigation and screening of potential court cases and the judicial enforcement of the criminal law. Consequently, several individuals were charged under various criminal provisions, including facilitation of terrorism by affiliation with ISIL, public glorification of terrorism, etc.

Additional fuel to further prosecutorial initiatives materialised when data files containing systematic membership information registered by ISIL were published.

[71] Ministry of Justice brief 04.05.2016.

The materials emerged in March 2016 when a renegade affiliate of ISIL delivered a USB-device storing confidential records to Sky-News. The documents held forms completed with personal details regarding more than 1,700 individuals from a large number of countries, including at least 12 jihadists from Denmark, according to media accounts. Consequently, a more solid foundation had materialised for building cases against persons suspected of having submitted themselves to being recruited by ISIL. As already mentioned, recruiting as well as the act of being recruited for terrorism became criminal offences under Danish law as early as 2006. However, no part of the provision to that effect had until recently been in use in a criminal case.

The relevant parts of the leaked ISIL materials were to be incorporated into the evidence against a 23-year old Turkish-Danish male, who back in December 2015 had been charged with violations of antiterrorism provisions, including by letting himself be recruited by ISIL.[72] According to the indictment, he had at one time been to Syria, where he joined ISIL, and he was furthermore suspected of planning another similar trip, which was averted when he was arrested in March 2015. His passport was then confiscated. In addition, the police seized 20,000 DKK, which he allegedly intended to bring along to Syria and donate to ISIL, and for this, he was also indicted for attempted financing of terrorism.

According to the court record, the defendant had made a first flight trip to Istanbul in July 2013.[73] From there he went to Kilis and took a taxi to the Syrian border where he met a contact person who smuggled the defendant and others into Syria. They were then picked up in cars by someone from ISIL. After a couple of days, the defendant started working, but a short time afterwards he decided to leave, and he then travelled back to Turkey.

In August 2013, he once again went on a similar journey to Syria. He was accepted by ISIL and took up work, for which he was paid $300–400 per month. He testified in court that he had been employed in a bakery and that he delivered food to people and cooked for those that he lived with. He maintained that he did not receive training in arms usage.

On arrival the second time he took part in the completion of a formula designed for registering personal data. An exhibit presented in court revealed that he had been indexed as 'fighter', and that an equal capacity had been attributed to him in a box regarding the person's speciality. Concerning this information, the defendant explained that there had simply not been a more adequate option, as the selection of answering choices only covered 'martyr', 'bomb belt-bearer' and 'fighter'.

Among the defendant's belongings, the police had recovered a photo of him in front of an ISIL banner where he was posing with AK47-rifles and the text 'Abu Aya Al-Kurdi' and 'No honour without Jihad'. He insisted that he had solely wanted to brag.

[72] Mid-2016, an additional six individuals were still under pre-trial custody under suspicion of having been recruited for terrorism.

[73] Judgment by Glostrup Municipal Court, 24.06.2016, case no 15-570/2016.

The Municipal court rejected the defendant's allegations regarding his work activities as incoherent, muddled and illogical. Consequently, the court found him guilty of joining ISIL and of receiving weapons training. Further, the defendant was found guilty as charged with regard to the financing of terrorism.[74]

In addition, the defendant was convicted of glorifying terrorism.[75] In a Facebook-group entitled 'Allah knows best' including 17,000 followers, he had posted edited video footage showing a hearse bearing the coffin at the funeral service for Omar El-Hussein, the young Muslim responsible for the Copenhagen shootings in February 2015. The defendant was deemed responsible for the text: 'Wallah this man has shaken Denmark MashAllah. And support your brother. May we in shaa Allah have more brothers like Omar. Who sacrificed his life for Allah and his prophet'.

The judges and jurors in the Municipal court unanimously voted for sentencing the defendant to seven years' imprisonment, which was actually one year more than called for by the prosecutor. Due to the defendant's lack of relations with Turkish society, the court decided not to deprive him of his Danish citizenship.

On appellate review, the Eastern High Court upheld the conviction and complied with the prosecutor's plea for revocation of citizenship and for banishment, but lowered the sentence to six years' imprisonment.[76] The defendant has since been granted leave for partial appellate review of the sanctions issues, and the case is currently pending before the Supreme Court.[77]

Another six individuals are currently held in pre-trial custody on suspicion of associating with ISIL as foreign fighters. Other suspects have been arrested *in absentia*.

XII. Looking Back—Looking Forward

The trouble with restraining the flow of more or less radicalised individuals travelling abroad to join terrorist groups and organisations and with bringing foreign fighters to justice has not been rooted in a lack of adequate penal provisions. Largely, criminal legislation to that effect has been plentiful all along, at least

[74] Regarding the first trip to Syria, one of the six jurors did not find sufficient evidence that the defendant had received weapons training, but this juror concurred as far as the main indictment regarding training for terrorism was concerned. One juror voted for acquittal with regard to financing of terrorism.

[75] In early 2016, a young man was sentenced to 6 months' imprisonment for violation of PC Section 136 (1) by posting a link on Facebook to a video-recording of a speech by a representative for ISIL who prompted attacks and killings on citizens from the coalition fighting ISIL. Furthermore, the defendant was convicted for violation of PC Section 136 (2) by glorifying he attack on Charlie Hebdo. The judgment is recorded in U 2016.1743 Ø.

[76] Judgment by the Eastern High Court, 31.03.2017, case no S-1922-2016.

[77] Permission regarding third instance appellate review granted by the Appeals Permissions Board (Procesbevillingsnævnet), 08.06.2017, case no 2017-25-0100.

under Danish law. Moreover, the Passport Code and the Foreigners Act have been amended in order to require authorisation for outward passage by individuals under suspicion of being potential foreign fighters. The recently introduced provisions regarding no-go conflict zones have completed the criminal law response. Furthermore, both national rules and EU rules on security agencies' access to PNR information regarding passengers have been enacted. In addition, the Danish Military Intelligence Service has been authorised to conduct surveillance and interception of Danish citizens abroad outside the country. *Ceteris paribus*, the challenge of detecting, investigating and prosecuting perpetrators violating antiterrorism provisions or committing other more or less serious crimes while associated with militant or terrorist groups is met by rather comprehensive legislation. Obviously, however, the application of criminal justice measures and other forms of restraining or repressive tools offers no efficient deterrent or guarantee for an adequate justice response and thus cannot be the only or definitive answer to the challenges presented by foreign fighters.

All accessible information clearly indicates that radicalised individuals who are aroused and committed to their cause do not respond to threats of punishment but are in fact willing and ready to burn bridges to ordinary everyday life and even risk their lives in dauntless pursue of excitement, affirmation of individual identity, commitment to a cause, etc. Neither legislation nor other measures can close all loopholes for the most persistent and energetic individuals, who relatively easily may find travel routes and be able to keep under the radar.

Furthermore, a rigid law enforcement scheme is counterproductive, since it contributes to undermining the opportunity to address lost souls who only temporarily have gone astray and to bring them back to ordinary society. In less serious instances and in cases where prosecution is not an option, diversion alternatives aiming at reintegration should be available as an alternative to imprisonment, especially considering the risk of further radicalisation when serving a prison term. In addition, an individual stigmatised as a foreign fighter facing criminal trial after returning will have less incentive to come back at all and less motivation to comply with the law of armed conflict.

It is of the utmost importance to strike a just and adequate balance between an ever-more expanding criminal justice response to the threat of terrorism and a social welfare reintegration approach to the prevention of various activities by foreign fighters. The value and importance of developing and prioritising de-radicalisation and exit programmes deserves further consideration and exploration.

From a civil rights perspective, the categorical drive by national politicians to apply criminal justice measures and other repressive remedies indiscriminately in order to cope with returning foreign terrorist fighters as understood in a very broad sense is worrying. At least in instances where there is no compelling evidence that the individual in question has personally been directly involved in terrorism or other types of international crimes, the wiser approach is the one represented by the Aarhus rehabilitation model and like schemes.