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## Pre-active Anti-terrorism Legislation: The Case of Denmark

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# **Pre-active Anti-Terrorism Legislation: The Case of Denmark**

Jørn Vestergaard

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## 1 Two Packages of Anti-terrorism Legislation in Denmark

Following the 9/11 terrorist attacks, the desire to respond with firm, unmistakable resolve in order to maintain both international and domestic security dominated global politics, as well as shaped many specific measures enacted by the international community and by individual states. In European contexts, national and EU legislation was significantly affected by, for example, the 1999 UN Terrorist Financing Convention and Security Council Resolution 1373, which was issued shortly after 9/11. With a new determination, European Union institutions intensified their preparations of various counter-terrorism measures; previous to the attacks, negotiations over such measures had been moving forward slowly. After 9/11, however, political agreement was swiftly reached on two framework decisions: one on combating terrorism and another concerning the European Arrest Warrant. In order to comply with the Security Council's resolutions on targeted sanctions, the EU also established common blacklist regimes requiring Member States to freeze the assets of listed individuals and organisations. The intrusive effects of these lists and the flimsy nature of the procedural guarantees associated with them raise a number of fundamental questions with regard to due process and fundamental rights.<sup>1</sup>

In Denmark, the 9/11 events immediately triggered a series of legislative initiatives that were clustered into a single anti-terrorism package enacted in 2002. In the wake of the 2006 terrorist bombings in Madrid and London, a second anti-terrorism package was adopted. The two anti-terrorism packages expanded the ambit of substantive criminal law significantly. These and other amendments to the substantive part of the Danish Penal Code (PC) represent new, far-reaching forms of criminalisation with indeterminate scope. The boundaries of criminal law have been pushed forward in order to encompass various new modalities of participation, which are "pre-active" in nature and include activities that might represent a hypothetical risk of facilitating actual terrorist acts in the future, but may actually be only very remotely linked to such activities. The *actus reus*, as well as the *mens rea*, requirements for incurring criminal liability are stipulated in quite vague terms, not only in the statutory provisions, but also in the preparatory work for the underlying bills.

In general, then, the two anti-terrorism packages consist of precipitate measures based on preparatory work lacking sufficient legislative quality. For example, the new provisions in the criminal law consist partly of verbatim transcripts of formulations found in EU law and other international sources; these are not suitable paradigms for drafting statutes under a domestic legal order.

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1 See Jørn Vestergaard, *Terror Financing – Asset Freezing, Human Rights and the European Legal Order*, (2011) 2 *New Journal of European Criminal Law* 175.

## 2 Terrorism Provisions as an Anchorage Point for other Legislation

The provisions regarding acts of terrorism and offences related to terrorism enshrined in the Danish Penal Code do not just declare certain acts to be punishable criminal offences. They also constitute the foundation on which all other legislation on combating and preventing terrorism rests, giving them a common point of reference. Thus, the rules in the Penal Code provide the basic setting for many other components of Danish anti-terrorism legislation, such as regulations that determine the nature and scope of special powers held by various government bodies with regard to cases involving “crimes against the state”.<sup>2</sup>

A whole series of other statutes are linked to these core provisions. Therefore, the provisions defining terrorist offences are integrated and constituent parts of the material criteria for demarcating the limits for other crimes, as well as for setting the boundaries of various powers vested in the courts, law enforcement and intelligence agencies, and other government authorities. Consequently, the substantive criminal provisions greatly influence decision-making regarding, for example, instigating coercive and intrusive measures in criminal investigations and proceedings, disclosing or exchanging sensitive personal information and other kinds of data, refusing to grant citizenship, expelling foreigners from the country, and placing aliens under detention or restricted conditions. It is also a concern that the adoption of vague and wide-reaching criminal law provisions will negatively impact decision-making in intelligence, investigative and administrative-law contexts; in these areas, there is a considerable risk that due process and fundamental rights will be jeopardized. The new provisions are also conducive, for example, to an exaggerated government propensity to authorise disproportionate control measures – including, in particular, targeting political activists and people with a non-Danish ethnic background, who belong to groups that communicate via obscure messages or use militant rhetoric.

### *The core provision on terrorist acts – Danish Penal Code Section 114*

The 2002 anti-terrorism package inserted a new and innovative Section 114 into chapter 13 of the Penal Code.<sup>3</sup> The provision did not in itself broaden the already existing scope of criminalisation. Evidently, terrorist acts could earlier have been punished under existing provisions concerning various forms of serious crime, irrespective of a perpetrator’s terrorist motive. Politically, however, there was a desire “to convey more clearly that terrorism in all its forms is

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2 Such offences are determined by the provisions in chapters 12 and 13 of the Penal Code. The anti-terrorism provisions in PC Section Section 114-114h are placed in chapter 13. Translations of Danish legal texts are the author’s own.

3 A provision with the same numbering previously contained a so-called “corps ban” against supporting or participating in certain militant groups. These provisions have now been moved to Section 114 f and Section 114 g, discussed below.

unacceptable in a democratic society”.<sup>4</sup> Under the new Section 114, the maximum penalty for terrorism-related crimes now became life imprisonment.

The amended Section 114 contains a definition of “terrorism”. This statutory definition enumerates a number of offences committed with the intent to seriously intimidate a population, compell a Government or an international organisation to do or not do anything, or destabilise or destroy the social order in certain vaguely specified ways. The statute is particularly open and far-reaching, among other things because the Penal Code in line with the Framework Decision on combating terrorism has adopted the term “destabilise or destroy [...] fundamental political, constitutional, economic or social *structures*” [italics added]. The concept of “structures” is not used in a similar manner anywhere else in Danish legislation.

The *mens rea* required under Section 114 may be any form or degree of intent. In principle, therefore, even *dolus eventualis* (in German, *Eventualvorsatz* or *bedingter Vorsatz*) could imply criminal liability. The technical completion of an offence under Section 114 has been moved forward in the sense that it depends on the perpetrator’s preparatory acts and the relevant intent, not on the commission of a fully-fledged act of terrorism. A terrorist act can also consist of threatening to commit one of the offences specifically listed under Section 114.

During the political discussions of 6-7 December 2001 about the EU Commission’s proposal for a Framework Decision on Combating Terrorism, the EU Council issued a statement in order to express agreement that the proposed instrument would cover acts “committed by individuals whose objectives constitute a threat to democratic societies respecting the rule of law and the civilisation upon which these societies are founded”.<sup>5</sup> Further, it stated that the Framework Decision “cannot be construed so as to argue that the conduct of those who have acted in the interest of preserving or restoring these democratic values . . . could now be considered as ‘terrorist’ acts”. According to the Council Statement, the Framework Decision can also not be construed so as to incriminate on terrorist grounds “persons exercising their fundamental rights to manifest their opinions, even if in the course of the exercise of such rights they commit offences”. In principle, this implies that demonstrators and activists cannot normally be charged under sections related to terrorism. The legal boundaries are, however, still fluid.

The Council Statement regarding the interpretation of the Framework Decision is quoted in the memorandum issued by the Danish Parliament’s Judiciary Committee to accompany the bill concerning the 2002 anti-terrorism package. The Committee noted that the Council Statement should be taken into consid-

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4 The Government’s explanatory memorandum to the bill. For more bibliographic information on cited legal sources, see the author’s articles in Danish: Jørn Vestergaard, “Strafferetlig lovgivning om bekæmpelse af terrorisme,” (2006) 1 *Tidsskrift for Kriminalret* 2-13; Jørn Vestergaard, *Det strafferetlige værn mod terrorisme – nye konventionsforpligtelser mv.* ” (2006) 4 *Tidsskrift for Kriminalret* 246-260.

5 Council of the European Union, Statement 109/02.

eration in the interpretation of the new statute to rule out criminal liability in atypical cases not reasonably meant to be covered.

The phrasing chosen in Section 114 is essentially the same as that of the Framework Decision. Wording of this sort is not necessarily suitable when it comes to defining offences under national criminal law, where a higher degree of precision should ideally be sought in accordance with the *lex certa* principle. Indeed, other Member States have opted to implement the Framework Decision in completely different ways than Denmark.

It is a matter of particular concern that Section 114 generally applies a maximum penalty of life imprisonment. In doing so, the legislature has, in quite a broad area covering very different types of offences, vested vast discretionary sentencing powers with the judiciary. This sends a confusing signal to the courts and the public, since all offences listed are placed on an equal footing in terms of the sentencing latitude. Furthermore, the indiscriminate increase of the maximum penalty for these offences to life imprisonment implies that there is no statute of limitations for any of the offences listed.

In a relatively large number of cases, defendants have actually been indicted and convicted under Section 114. Accordingly, it suffices here to point to the possible impact of Islamic radicalisation in Denmark, in light of the fact that Denmark is a close ally of the USA, that the Danish Government has been a very active participant in the military operations in Iraq and Afghanistan, that the political climate in Denmark is utterly tainted by xenophobic and anti-Muslim sentiments, and that the publication of the cartoons of the Prophet Muhammad in the newspaper *Jyllands-Posten* has been widely noticed internationally and has caused anger and uproar in Muslim communities.

#### *Notable cases applying Section 114*

There have been several prominent terrorism cases in Denmark involving the application of Section 114. These cases demonstrate the breadth of Section 114 and give a sense of the situations to which it can apply:

*Glostrup case:*<sup>6</sup> The defendant T was found guilty of attempted terrorism. T and two young co-defendants were charged with planning a trip to Bosnia in order to procure weapons and explosives for use in a terrorist act at an unspecified location. The co-defendants M1 and M2 subsequently acquired approximately 19.8 kg of explosives, a suicide belt, a suicide video, a detonator and a pistol with a silencer and ammunition. The attempted offences were prevented by the arrest of M1 and M2 by the local police in Bosnia. Both were subsequently convicted by Bosnian courts of planning a terrorist act and sentenced to prison for eight and six years, respectively. Initially, T was supposed to travel with the other two to Bosnia, but he was prevented from doing so by his father, who had learned of the plans and confiscated his passport.

Observing that, on the one hand, T had been found guilty of attempting the most serious form of terrorism and that, on the other hand, he had just turned 16 at the time of the offence, the Supreme Court sentenced him to seven years

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6 U 2008.127 H.

imprisonment. Three co-defendants were found guilty by the jury, but the verdicts were overruled by the High Court. The Director of Prosecution [in Danish, the *Rigsadvokat*] subsequently dropped the charges against two of the three men and pursued a new indictment against the third. At the retrial, this defendant was acquitted by the jury, even though the presiding judge favoured a guilty verdict in his summing-up prior to the jury's deliberations.

The case gave rise to discussion about the quality of evidence and the admittance of witness evidence regarding the defendants' religious beliefs and possible radicalisation, including testimony by one of the defendants' former teachers.

*Vollsmose case:*<sup>7</sup> Three defendants were convicted of attempted terrorism for acquiring fertilizer chemicals and laboratory equipment, and producing home-made explosives. This was in preparation for the manufacture of one or more bombs for use in a terrorist act at an unspecified location. The Supreme Court stated that the ordinary sentence for attempted terrorism by bomb detonation and homicide is twelve years imprisonment.<sup>8</sup> A fourth defendant was entirely acquitted by the jury. The case raised questions about the use of informants and undercover agents by the Danish Security and Intelligence Service (the *Politets Efterretningstjeneste* or PET), the partial lack of disclosure of case documents to the defence, the introduction of character witnesses, and the court's exclusion of defence witnesses.

*Glasvej case:*<sup>9</sup> Two defendants, both aged twenty-two, were found guilty of attempted terrorism by acquiring bomb manuals and chemicals, and by producing and detonating TATP, an unstable explosive which they had tested on the staircase in the building where they lived and in other places. There had been contacts with al-Qaeda and the main perpetrator had attended training camps in Waziristan. The main perpetrator was sentenced to twelve years imprisonment, the co-defendant to eight years.

*'Mohammad cartoonist' attack case:*<sup>10</sup> A twenty-eight year old Somalian man was convicted, *inter alia*, of attempted terrorism by endeavouring to assassinate the newspaper cartoonist Kurt Westergaard. The defendant was sentenced to ten years imprisonment. The perpetrator broke into the cartoonist's house in the evening of 1 January 2010 by smashing a window with an axe. His intention to kill the cartoonist was thwarted because the latter had taken refuge in his bathroom, which the police had previously secured as a panic safe-room; the police arrived just minutes after Westergaard had pushed the emergency button. In the High Court, the judges and three jurors voted to uphold the ruling

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7 U 2008.1587 H.

8 Twelve years imprisonment is also the ordinary punishment for completed homicide. The normal penalty for attempted homicide is six years imprisonment.

9 TfK 2009.762 Ø.

10 U 2011.2778 V.

of the municipal court, while the other three jurors voted to acquit the defendant of the count regarding attempted terrorism.

*Lors Doukaev case:*<sup>11</sup> A 25-year-old Chechen residing in Belgium was convicted, *inter alia*, of attempted terrorism by being in possession of a bomb containing TATP, which he intended to send to the offices of *Jyllands-Posten*, the newspaper that had initially published the Mohammad cartoons. Bringing an explosive device and a gun, the perpetrator entered Denmark under a false name, registered at the Hotel Jørgensen in downtown Copenhagen using a second fake identity, and ordered a bus ticket to Liège under yet another false name. Visiting various shops, he wore varying disguises. The bomb exploded in his hands in a bathroom at the hotel where he was lodging and, after a dramatic chase, he was arrested in a nearby public park. The ruling was sustained by the Supreme Court.

*Activist arsonists case:*<sup>12</sup> At the time of writing, five militant, left-wing activists have been charged with attempted terrorism. The charges include arson attacks and attempted attacks on the Police Educational Centre, the Police Intelligence and Security headquarters, the Parliament building, the Greek Embassy and several buildings belonging to private companies, such as those in the fur trade.

#### *Support for terrorism*

Inspiration for the amended Penal Code provisions, which concern conduct related to actual terrorist acts, was primarily derived from the templates used in the design of various UN legal instruments. The new anti-terrorism legislation has made it a criminal offence to support a terrorist or a terrorist organisation or to facilitate such a person's or entity's activities, even though the general and wide-reaching rules regarding aiding and abetting terrorism do not apply.

Providing economic or financial support to a terrorist, a terrorist group, or a terrorist organisation may constitute a violation of the exceedingly vague provision on financing, etc., in PC Section 114(b):<sup>13</sup>

“Section 114(b). Imprisonment of up to 10 years shall be imposed on anyone who

- 1) directly or indirectly *provides financial support* for,
- 2) directly or indirectly *procures or collects funds* for, or
- 3) directly or indirectly *makes money, other assets or financial or other similar services available* to  
a person, group or association that commits or intends to commit acts covered by Section 114 or Section 114(a).”<sup>14</sup>

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11 Copenhagen Municipal Court judgement, 30 May 2011, unreported.

12 Copenhagen police charge, August 2011.

13 Originally PC Section 114a.

14 Emphasis added; Regarding the current Section 114a, see the discussion below about terror-like acts, introduced in 2006 under the second anti-terrorism package.

The *mens rea* requirement under Section 114(b) is intent, and even the lowest degree of intent is sufficient. This provision also targets the funding of organisations whose activities include both humanitarian and terrorist activities. The idea is that it is in principle immaterial whether the actual support “allegedly has a humanitarian purpose” if the recipient “is known to commit terrorist acts”.<sup>15</sup>

The justification offered in the explanatory memorandum is that the Terrorist Financing Convention requires the criminalisation of the procurement or collection of funds that “in whole or in part” are intended to be used to carry out terrorist acts.<sup>16</sup> The stated justification is of questionable tenability, since the Convention does not explicitly require the criminalisation of acts that have an entirely humanitarian purpose. If, in a specific case, it can be ensured in a satisfactory manner that no part of the funds are used for funding of terrorist acts, but exclusively for supplying food, medicine, teaching materials or for the construction of emergency shelters, then a possible course of action might be to interpret Section 114(b) restrictively. The judiciary has not subscribed to such an interpretation of the statute.<sup>17</sup>

Several cases illustrate how Danish law now criminalises humanitarian assistance in some cases:

*Fighters+Lovers* case:<sup>18</sup> Six activists were indicted for attempt to procure funding for terrorist organisations. They had been involved, via the company *Fighters+Lovers*, in selling T-shirts worth approximately DKK 25,000 (approx. \$ 4,500 or £ 2,800) with the goal of transferring a portion of the profit to FARC (*Fuerzas Armadas Revolucionarias de Columbia*) and the PFLP (*Popular Front for the Liberation of Palestine*). Allegedly, the money was earmarked for purchasing radio equipment for FARC and a printing press for the PFLP. All defendants were acquitted by the municipal court, which did not find sufficient grounds to consider FARC and PFLP as terrorist organisations. On appeal, the High Court found the defendants guilty. It held that FARC had been responsible for launching indiscriminate attacks that had killed civilians, subjected civilians to serious violence and carried out kidnappings (including of politicians and a presidential candidate), in order to undermine the political process in Columbia. The Court also found that the PFLP had, in a number of incidents, attacked and killed civilians (for example, by using car bombs and suicide bombers), and that PFLP’s militant wing, the Abu Ali Mustafa Brigades, had

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15 The *travaux préparatoires* to the Government’s bill.

16 Article 2(1) of UN Security Council Resolution 1373 also requires the criminalisation of financing, but does not explicitly require a ban on funding that is meant exclusively for humanitarian projects.

17 In this, the Danish judiciary is in line with the much criticized judgement of the US Supreme Court in *Holder v. Humanitarian Law Project*, 561 U. S. (2010). The Court observed, *inter alia*, that money raised for charitable purposes could be redirected to funding the group’s violent activities or unencumber other funds for use in facilitating such activities.

18 U 2009.1453 H.

carried out attacks, including suicide attacks that had killed and wounded civilians.

The fact that the funds in question were allegedly raised for humanitarian purposes was insignificant to the High Court's ruling on the question of guilt or innocence. However, one of the judges dissented by stating that FARC must be considered a rebel movement and the PFLP a resistance movement; the intent to commit terrorism could not therefore be attributed to such organisations. Thus, this member of the Court voted to acquit all of the defendants entirely. The Court did acquit one defendant, however, finding his participation in the fund-raising to be insufficient for purposes of criminal liability. That defendant had been indicted solely for the reason that he had placed a poster on his hot-dog cart, displaying the T-shirts and a web address. The Supreme Court upheld the High Court ruling, but suspended all sentences for the reason that the exact reach of PC Section 114(b) had been questionable before the trial.

*'Rebellion' case:*<sup>19</sup> The association 'Rebellion' (in Danish, *Foreningen Oprør*) published documents on its website, calling for European solidarity movements to participate in continuing resistance to anti-terrorism legislation, terrorist lists, and the international 'war on terror'. The documents stated that substantial amounts had been transferred to the PFLP and FARC. The Government seized these documents, a ruling sustained by the Supreme Court. Later, a spokesperson for the association was convicted and sentenced to six months suspended imprisonment.

*Horserød-Stutthof Foreningen & Den Faglige Klub:*<sup>20</sup> A seventy-two year old chairman for an association of former concentration camp prisoners was convicted and sentenced to six months imprisonment, of which four months were suspended. Subsequent to the Fighters+Lovers judgement, the survivors' association had collected DKK 17,700 (approx. \$ 3,200 or £ 2,000) for the PFLP. Furthermore, the chairman for a labour union movement was convicted and sentenced to six months suspended imprisonment for collecting DKK 10,000 (approx. \$ 1,800 or £ 1,125) for FARC.

*Al-Aqsa case:*<sup>21</sup> In 2005, charges were brought under Section 114(b) (originally Section 114(a)) against the chairperson and treasurer of the al-Aqsa Association in Denmark. The investigation was initiated in 2002, when information was received that members of this association had collected and transferred funds to organisations and individuals in the Middle East with links to Hamas, which was on the EU terrorist list. However, the prosecution service failed to provide sufficient evidence that the organisation was part of Hamas. The High Court therefore upheld a municipal court acquittal by a tie vote of 3 to 3.

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19 U 2007.1831 HK and Copenhagen Municipal Court judgement, 16 March 2010, unreported.

20 Copenhagen Municipal Court judgement, 16 June 2011, unreported.

21 Eastern High Court appellate judgement, 6 February 2008, unreported.

As the above cases show, inclusion of a group or individual on either the UN or EU terrorist list will normally constitute sufficient grounds for seizure of assets. On the other hand, the mere inclusion of a person or organization on either list is not necessarily sufficient proof in criminal proceedings that the party involved is a terrorist or terrorist group. In principle, this determination depends on the court's assessment of the particular evidence presented. In practice, however, inclusion on a terrorist list will serve as a compelling presumption that financial or other support for the person or organisation concerned is covered by PC Section 114(b).

*Promoting terrorism*

An "extended complicity rule" has been added to the Penal Code as Section 114(e),<sup>22</sup> which now prohibits any form of assistance to an individual, group or association that commits or has the intention to commit terrorism or act related to terrorism. This statute even covers activity which cannot be attributed to specific acts of terrorism:

114(e). Imprisonment of up to 6 years shall be imposed on anyone who otherwise advances the activities of an individual, a group or an association, committing or intending to commit actions included in Sections 114, 114(a), 114(b), 114(c), or 114(d).

According to the preparatory works of the anti-terrorism packages, the aim of this provision, *inter alia*, is to target anyone who provides professional and general advice that is not directly related to a specific terrorist act (for example, in the form of a lawyer or accountant offering assistance to an organisation that the provider knows commits terrorist acts). This may imply the attribution of criminal liability to "a person who, in relation to a specific act of terror may only be complicit at third or fourth hand".<sup>23</sup>

However, as cases have shown, at the core of the statute there is an implied requirement of reasonableness in its application; accordingly, courts have not interpreted Section 114(e) excessively:

*Said Mansour case:*<sup>24</sup> The very first indictment under the new anti-terrorism provisions was raised against a Danish citizen of Moroccan origin. This radical Islamist was found guilty of public incitement to crime and hate speech. The defendant had produced and distributed materials that explicitly call for militant jihad, by depicting known terrorists and celebrating suicide bombings and the killing of innocent hostages. He was sentenced to three years and six months imprisonment.

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22 Originally PC Section 114b.

23 The Government's explanatory memorandum to the bill.

24 Copenhagen City Court judgement, 11 March 2007, unreported.

*Al-Aqsa case:* In the aforementioned case concerning the al-Aqsa association in Denmark, the charges were in principle brought principally under Section 114(b) and subordinately under Section 114(e). As previously mentioned, the case referred to the collection and transfer of funds to certain organisations in the Middle East.

*TRO Denmark case:*<sup>25</sup> In a television news programme broadcast by *Danmarks Radio*, the organisation *Tamils Rehabilitation Organisation* (TRO) was accused of having diverted money collected for tsunami victims to the Tamil Tigers, an organisation that appears on the EU terrorist list. The Canadian intelligence service had labelled TRO Canada as a front for the Tamil Tigers. Accounts belonging to the organisation were seized by the Danish authorities. In the course of the investigations, TRO Denmark was added to the USA's terrorist list, but the Court was not sufficiently furnished with in-depth information as to why the organisation had been included in that list. However, the Court found that the conditions for seizure, or freezing, of assets with a view to confiscation had been met by reference to inclusion on the American list.

*ROJ TV A/S & Mesopotamia Broadcast A/S METV:*<sup>26</sup> The charge concerned repeat broadcasting of propaganda in favour of the Kurdish organisation PKK/Kongra Gel, which had been blacklisted by the EU. The broadcasts included interviews with PKK-leaders and sympathizers, coverage of battles between Kurds and Turkish authorities, and reports from PKK-training camps. The indictment was addressed to the corporations as legal persons. The prosecutor's principal claim was that the corporation be legally disqualified from broadcasting TV-programmes. Previously, an independent administrative board had three times considered the question of revoking the corporation's broadcasting licence, but without finding sufficient reason to do so. The Copenhagen Municipal Court supported the prosecutor's claims that the broadcasting system has acted as a mouthpiece for the PKK, *e.g.* by advocating association with the PKK and participation in terrorism actions conducted by PKK and by glorification of the PKK and terrorism actions committed by the organisation. The companies were sentenced to 40 day fines of DKK 64,000 (approx. \$ 1.150 or € 7,2000) and DKK 10,000 (approx. \$ 1,800 or £ 1,125) respectively. The prosecutor's demand that the corporations be legally disqualified from broadcasting TV programmes was overruled. In accordance with the travaux préparatoires concerning the rules on criminal responsibility for legal persons, the court found no authorisation for depriving companies from the right to exercise certain rights, as such authorisation is only granted with regard to individuals. Thus, the judgement represents a kind of paradox, as the broadcasting system has been convicted of facilitating terrorism, but hasn't been banned from con-

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25 Eastern High Court ruling, 8 April 2008.

26 Copenhagen Municipal Court judgement of 10 January 2012. In addition to indicting the two companies, the prosecutor seized their bank accounts in order to secure trial costs and payment of possible fines. However, the court held that a freezing measure would infringe the defendants' right of expression under ECHR Article 10, see U 2011.918 Ø.

tinuing its activities. As neither the defendants nor the prosecutor are fully satisfied by the judgement, an appellate process is to be expected.

### 3 Terror-like Offences

The 2006 anti-terrorism package further extended the scope of criminalisation in a very peculiar and rather diffuse way, via the insertion of a new Section 114(a) into the Danish Penal Code. The new provisions expressed a wish to accede to the Council of Europe's Convention on the Prevention of Terrorism from 2005, which obligates states to criminalise incitement to, recruiting for, and training in terrorism. However, at the time when the Convention was being negotiated, agreement could not be reached on a general definition of terrorism. The Convention therefore only contains an empty framework provision for so-called "terrorist offences". This general concept was then "completed" by reference to a number of older conventions, listed in an appendix to the new European Convention. These other conventions deal with terrorist acts, as well as other types of offences, without necessarily identifying a particular purpose, motive or intent with respect to intimidating a population, threatening a government, etc. These conventions cover security for diplomats, airlines, maritime vessels, nuclear-power plants and platforms on the continental shelf. They also cover hostage-taking, terrorist bombings and the funding of terrorism. Admittedly, these treaties were adopted with an overall aim of combating terrorism in various guises, but they also include a diverse range of other types of acts. The conventions reflect the fact that the UN has not been able to establish a consensus on a uniform definition of terrorism, which is why a "salami-slicer method" has been employed instead, identifying many different criminal acts. Whenever the opportunity to work on a general definition of "terrorism" had occasionally presented itself (usually after another serious terrorist act somewhere in the world), an additional convention would instead be introduced, focusing on specific actions, which might or might not have a terrorist aim.

The new Section 114(a) is a rambling, verbose and unreadable statute that lists the many conventions mentioned above. It authorises enhanced sentences for offences that are covered by these treaties, but which do not constitute terrorist acts in the stricter sense of PC Section 114:

Section 114(a). If one of the acts mentioned under para. 1-6 below is committed without the act being covered by Section 114, the punishment may exceed the statutory maximum penalty for the offence by up to half . . . .<sup>27</sup>

The opening of the statute is followed by a long-winded and complicated catalogue, in six separate paragraphs, of offences that trigger the prescribed enhancement of the ordinarily authorised sentencing maximum. Each paragraph

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<sup>27</sup> The second part of the first paragraph under Section 114a provides that the punishment can, under certain conditions, be enhanced to imprisonment for up to six years, where the ordinary maximum sentence for the offence concerned is less than four years imprisonment.

consists of a long list of selected provisions from the substantive part of the Penal Code, accompanied by a requirement that the particular offence is also covered by one of the specified treaty provisions. No other provision in the Danish Penal Code has ever been phrased in such a chaotic and unreadable manner.

In itself, Section 114(a) solely concerns stricter sentencing for terrorism offences. However, since all the other statutes regarding the prevention of terrorism refer directly to Section 114(a), this provision has the actual effect of creating several new criminal offences. The odd statute constitutes a link to other provisions, including the section on support and funding,<sup>28</sup> the special and very wide-ranging complicity rule,<sup>29</sup> new sections on recruitment and training for terrorism or terrorist-like acts,<sup>30</sup> as well as the provision about public incitement or approval of the offences covered by part 12 or part 13 of the Penal Code.<sup>31</sup>

In 2008, the Framework Decision on the Combat of Terrorism was amended to include provisions equivalent to those of the European Convention. No additional legislative initiative was needed under Danish law.

#### **4 Recruitment and Training for Terrorism**

##### *Active recruitment or training*

Under the 2005 European Convention on the Prevention of Terrorism, recruitment and training for terrorism must be criminalised. The Danish 2006 anti-terrorism package contained two long sections about this, consisting of the amended statutes under PC Section 114(c) and Section 114(d). Both of these provisions relate not only to actions covered by the actual provision on terrorist acts in Section 114, but also to the additional provision on terror-like activities under the new Section 114(a).<sup>32</sup> Both Section 114(c) and Section 114(d) include activities that might lead someone either to commit or facilitate an as yet unspecified terrorist act or terror-like activity:

Section 114(c)(1). Imprisonment of up to 10 years shall be imposed on anyone who recruits another person to commit or facilitate acts covered by Sections 114 or 114(a) or to join a group or association in order to facilitate that the group or association commits acts of this nature.

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28 PC Section 114b.

29 PC Section 114e.

30 PC Section 114c and Section 114d, respectively.

31 PC Section 136(2). In 2008, the European Framework Decision on Combating Terrorism was amended to include provisions equivalent to those of the European Convention. No additional legislative initiative was needed under Danish law.

32 Both Section 114c and Section 114d authorise enhanced sentencing of up to sixteen years for particularly aggravating circumstances.

Section 114(d)(1). Imprisonment of up to 10 years shall be imposed on anyone who trains, instructs or in any other way teaches another person to commit or facilitate acts covered by Sections 114 and 114(a), knowing that this person has an intention to use the skills to pursue such an aim.”

The *mens rea* requirement under both of the cited provisions is intent. However, it is uncertain what the requirement is with respect to the concretization of such an intent in relation to the activities towards which the recruitment/training is aimed. Ostensibly, the offences criminalised under Section 114(d)(1) might include training in skills that, under certain circumstances, could be perfectly legal to acquire and practise, but which can also be used in connection with a terrorist or terrorist-like action. However, the *mens rea* requirement is intensified in two ways. Liability for a “teacher” requires that the “pupil” *intends* to use the acquired skills for the stipulated purpose, and that the former has *knowledge* of this.

The second subsections of Section 114(c) and Section 114(d) also ban recruitment and training to commit or facilitate acts covered by Section 114(b), which, as mentioned above, prohibits various forms of financial support for terrorists or terrorist organisations.<sup>33</sup>

#### *Passive recruitment or training*

The new provisions in the second anti-terrorism package, Section 114(c)(3) and Section 114(d)(3) respectively, also made it a criminal offence to “let oneself” be recruited or trained “to commit or facilitate” terrorist acts or terror-like acts. The European Terrorism Convention, however, does not in any way oblige the signatory states to establish such criminalisation. In the Danish Government’s preparatory comments to the bill, this legislative innovation was merely explained by a bland remark that, as a counterpart to the criminalisation of active recruitment and training for terrorism, it would allegedly be “natural” to also criminalise letting oneself be recruited or trained “to commit terrorist acts”, and that this would be in line with the general trend to advance the boundaries for the use of criminal law to protect society against terrorism.

#### *Incitement to terrorism and expressions of sympathy*

The 2005 European Terrorism Convention obliges signatories to criminalise public provocation to commit a terrorist offence. Under Danish law, this did not necessitate any criminalisation of new offences, as Penal Code Section 136(1) already contains a general provision on public incitement to “crime”.<sup>34</sup> However, until the above mentioned 2007 judgement in the case against the Danish-Moroccan Said Mansour, this provision had not been used since 1938.

Indirectly, the two anti-terrorism packages criminalised expressions of sympathy in relation to terrorism activity to a wider extent than was previously

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33 In Section 114b there is, as already mentioned, a reference to the terrorist acts and terror-like acts covered by Section Section 114 and Section 114a.

34 The maximum punishment under Section 136(2) is imprisonment for up to two years.

the case. An old provision regarding public approval of a crime against the State is contained in PC Section 136(2). Technically, this statute is completed by a general reference to all offences under chapters 12 and part 13 of the Penal Code. As the statutes on terrorism offences are placed in chapter 13, the anti-terrorism packages have now given Section 136(2) broader application.

## 5 Territorial Reach

Penal Code Sections 114-114(e) covers not only attacks on Danish national interests. The overall object of protection can be “a country or an international organisation”, and the territorial reach of the anti-terrorism provisions is not subject to limitations. The provisions also include acts that do not require that force is deployed in order to exert influence on Danish affairs or to undermine the Danish social order; force can be directed against the fundamental interests of other countries or international organisations. As far as Sections 114(b)-114(e) are concerned, extraterritoriality is made explicit by references to Section 114 and Section 114(a). Thus, these provisions protect public affairs and social orders elsewhere, including from acts committed exclusively abroad. This extraterritorial application reflects the Danish Government’s desire to address terrorism’s global reach, as required under Security Council Resolution 1373.

Such extraterritorial reach would be excessive if the anti-terrorism provisions, with all their ambiguity and vagueness, were applied in such a wide-ranging manner that any state – including dictatorships and the most repressive regimes – were in principle protected by them. The previously mentioned Council Statement and the Judiciary Committee’s remarks in its preparatory report relating to the first anti-terrorism package help mitigate the risk of such an exaggerated application. However, there is a considerable lack of foreseeability in this context. As demonstrated by the judgements in the cases discussed above regarding support of FARC and PFLP, even oppressive regimes are protected in instances where the resistance victimises civilians.

The Danish anti-terrorism laws have been applied extraterritorially in at least one case:

*Weapons for Bengal resistance movement:*<sup>35</sup> In 2010, the Ministry of Justice decided to extradite a Danish citizen to India, where he was accused of criminal offences committed in 1995. He acknowledges having participated in dropping weapons meant for a Bengal resistance movement from an aircraft. In 2002, Indian authorities had submitted a request for extradition subsequent to a change in Danish law that had made it possible to extradite Danish citizens to states outside the Nordic countries. The Ministry linked the conduct of the accused to the Danish statute on terrorist acts, which had been inserted into the Penal Code as PC Section 114 in 2002, after the conduct in question had occurred. The Ministry also precariously relied on Section 114(f) with the aim of

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35 U 2011.2904 Ø.

offering a subordinate response to the requirement regarding double criminality. The overall effect of these provisions, however, was to justify extradition of a Danish citizen to India for alleged terrorist crimes committed outside of Denmark. Nevertheless, the Hillerød Municipal Court overruled the administrative decision on extradition on the grounds that diplomatic assurances offered by the Indian Government could not be taken at face value. This ruling was sustained by the High Court.

#### *Corporate liability*

As a secondary effect, the Danish 2002 anti-terrorism package considerably expanded the area in which penalties may be imposed on institutions and organizations designated as legal persons (thus imposing corporate criminal liability) under PC Section 306. A legal person can now become criminally liable for any violation of the Penal Code. The stated reason for such an amendment on corporate criminal liability was a reference to the requirements contained in the UN Convention on the Prevention of Terrorism. However, the scope of the Penal Code's provision on corporate criminal liability is general in its reach; that is, it includes not only terror-related activities, but any violation of the Penal Code.

#### *The prosecutorial authority of the Minister of Justice*

Traditionally, chapter 13 of the Penal Code covers crimes against the constitution and the supreme Government authorities or, in other words, attacks on the State's internal security. The new provisions introduced by the two anti-terrorism packages form part of chapter 13 and the 2006 anti-terrorism legislation added 'terrorism' to the title of the chapter. As a matter of principle, offences referred to in chapter 13 of the Penal Code are prosecuted only on the orders of the Minister of Justice, pursuant to PC Section 118a. This scheme relies on the fact that, in some instances, such offences are tainted by political considerations, rather vaguely described and of uncertain reach. This practice does not imply that the Minister personally assesses whether an indictment should be invoked. Rather, the Director of Public Prosecutions (*Rigsadvokaten*) prepares and submits a recommendation to this effect and the Minister will normally adhere to the prosecutor's advice. However, the fluid state of the law in this area entails a significant risk of politicization, arbitrariness and abuse of power in relation to intelligence gathering, investigation and the way in which the prosecution service exercises discretion.

#### *Evidence problems*

Danish terrorism cases have been characterised by severe difficulties involved in providing adequate evidence. However, none of the cases have concerned terrorist acts that have actually been completed. The charges have either focused on the preparation of terrorist acts, or on support or facilitation of terrorism activities. Some cases on attempted terrorism have mainly been based on information stemming from the surveillance of groups of people over considerable time periods. If such intelligence or police information indicates a significant risk of an imminent terrorist act, it will trigger immediate pre-emptive intervention. At this point, there is not necessarily sufficient evidence to form

the solid basis for an indictment, let alone a conviction. However, the risk that a terrorist act will be committed may be considered serious enough that it would be irresponsible to take chances, even if a reticent and hesitant approach with continued surveillance could provide greater clarity about the degree of weight behind the suspicions.

The prosecutor's material has generally been quite complex and difficult to decipher, as much of the information is characterised by a certain degree of ambiguity. The monitored individuals communicate (whether via telephone calls, internet chat, sms messages, etc.) in a particular jargon, which can either be construed as a form of sub-cultural dialect or as a security-conscious code, possibly in languages other than Danish. This makes it difficult to determine exactly what the aims of the behaviour and arrangements are, and whether a specific terror intent can be proven. This has, for example, given rise to evidence being presented on whether the accused's attitude to society is characterised by an ideological or religious "radicalisation". In cases of funding terrorism, it has been necessary to obtain information about conditions in distant countries; this has posed particular difficulties in obtaining reliable information from independent sources. For these reasons, the acquittal rate has so far been relatively high. In several cases, there has been considerable uncertainty as to the validity of both convictions and acquittals. This has attracted particular attention in cases where jurors and judges have reached different conclusions concerning the question of guilt or innocence.

## 6 Conclusion

Recent Danish anti-terrorism legislation raises questions about its compatibility with basic principles of the rule of law and due process. The packages of anti-terrorism legislation introduced in 2002 and 2006 include a range of provisions so uncertain and wide-reaching in their application and scope that they fundamentally challenge the principle of legality.

The basic provision in Section 114 of the Penal Code covers terrorist acts *per se*. This provision intended to implement the basic requirements of the 2002 EU Framework Decision on Combating Terrorism. The Framework Decision's terminology is applied directly in the sense that the definition of a terrorist act has been transcribed literally into domestic law without further amelioration. Such a legislative technique causes substantial problems with regard to interpretation of the law by the national judiciary. Furthermore, as this chapter has shown, a vast number of supplementary statutes are characterised by a substantial widening of the scope of criminal law. These provisions are inchoate in the sense that they criminalise various activities that are more or less remote from actual or attempted terrorist acts, as well as participation in such activities. They not only cover funding and other means of supporting terrorism, but any conceivable kind of facilitation, incitement, training or recruitment. This modality of criminal law has rightly been labelled "pre-active". To a significant extent, the legislature has even over-implemented various legal instruments that are binding on Denmark by virtue of European Union law or other interna-

tional obligations. The anti-terrorism statutes have been drafted in a somewhat loose manner, without sufficiently thorough legislative preparations.

The provisions in the Penal Code constitute the common reference point for all the rest of Danish anti-terrorism legislation. Consequently, the challenges regarding the rule of law and due process also relate to secondary legislation in fields such as law enforcement, intelligence gathering, public law, the treatment of foreigners, preliminary actions under criminal procedure (wiretapping and bugging, for example), *data*-mining, and room searching, among other things.

Fortunately, the judiciary has acted as a deliberate backstop in certain respects in order to avoid serious interference with the rule of law.