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Terrorism and Legal Security – a Swedish and European perspective

Abstract: In this paper we discuss the influence the struggle against terrorism has had on criminal law and public international law during the last decade. The paper begins with a very brief historical overview and a discussion concerning the definition of terrorism. The question of how terrorism is to be defined has – not least in Swedish perspective – been controversial. Thereafter we examine how terrorism has influenced developments in the two subjects. The following issues in particular are taken up:

- international law concepts are now being increasingly used in a criminal law context, which can create problems, at least for states which take international law seriously,
- terrorism has led to new types of sanctions which do not build in traditional guarantees for legal security (Rechtssicherheit), such as freezing of financial assets which in principle are put into operation on the basis simply of suspicion,
- terrorism is one of the most important causes of the trend towards bringing forward the point in time when an offence is regarded as having started (illustrated inter alia by EU and Council of Europe conventions),
- terrorism is used to justify new and powerful types of coercive investigative measures e.g. as regards preventive (proactive) use of surveillance, and strategic surveillance.

Generally one can say that the importance attached to preventing terrorist crime has heavily influenced the legislator. The Swedish legislator has shown a bit more care in this area, as compared to the legislator in a number of other European states, but the overall tendencies have been the same.

1 Introduction

Terrorism is a complex issue and so is the legal response to terrorism. In this article we tell two tales of terrorism which focuses on two of the most striking features of the legal response to terrorism: (1) the difficulties in defining terrorism and (2) the tendency to intervene with criminal law measures (or measures similar to such measures) at a very early stage in the process towards the consummation of a terrorist offence. The first part addresses the problem of defining terrorism. For a long time it was very hard to agree on a definition of terrorism. Lately things have changed, however, and there exist, now, several instruments containing very explicit definitions of terrorism. The supposed agreement, though, seems to conceal a great deal of disagreement and we argue that the definitions are easy to apply in theory but problematic as soon as they are taken out of this context. One might say that the first part asks whether the concept of terrorism can be caught at all without reference to values. The second part addresses the tendency to criminalize acts which have a very remote connection to terrorism (as defined in the relevant instruments). It is argued that, in this regard, terrorism can be seen as one of the best examples of a more general tendency which could be labeled as *preventionism*, i.e. a tendency under which the criminal law is seen as a proactive rather than reactive tool in the hands of the legislator.

2 Defining terrorism

2.1 Defining terrorism at international law

The term “terrorism” covers a multitude of different phenomena and different groups, from small “single issue” factions using force in one State to secure limited changes in government policy in it to well-armed, organised and financed entities in control of territory behaving as a quasi-government and aiming for the control of the State or the creation of a new State. There is no agreement in doctrine as to what constitutes ter-

rorism.¹ International lawyers have been trying to define terrorism since 1937.² There is still no *universally* accepted legal definition of the term “terrorism”. It is not difficult to see why this is the case. The label of terrorism serves to de-legitimise those who use such methods.³ Terrorists are evil. If they are evil, then it is morally wrong to try to negotiate with them.⁴ And there is no point in ever negotiating with them, as they will never keep any agreement. But the deaths of civilians caused by one’s own military forces in fighting wars for national defence (even if these are far away, in other countries) are of course another matter, as are deaths caused by guerrilla groups one’s country supports, morally, economically or with weapons and training.

Fundamental political disagreement over how to define terrorism has meant that States have tended to focus on specific *types* of terrorism – hijacking, attacks against diplomats, etc. and agree by treaty that this conduct, at least, is not acceptable.⁵ The breakthrough really came in

¹ See, e.g. A. Schmid and A. Jongman, *Political Terrorism: A New Guide to Actors, Authors, Concepts, Databases, Theories and Literature* (2nd ed., North-Holland, Amsterdam, 1988).

² A. Bianchi (ed.), *Enforcing International Law Norms Against Terrorism*, (Hart, Oxford, 2004.)

³ C. Warbrick, ‘The Principles of the ECHR and the Response of States to Terrorism’, *European Human Rights Law Review* (2002) pp. 287, 288.

⁴ This is the very point of the label according to Fisk, see R. Fisk, *The Great War for Civilization*, Harper, Glasgow, 2007.

⁵ There are 13 global multilateral treaties dealing directly with specific acts of terrorism and nine regional treaties dealing with terrorism as a whole or particular aspects of it. The ICAO has adopted the following treaties, the Tokoyo Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963, the Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 1970, the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971, the Protocol to the Montreal Convention for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, 1988 and the Montreal Convention on the Marking of Plastic Explosives for the Purpose of Detection 1991. The UN has adopted the following treaties, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1973, the International Convention against the Taking of Hostages 1979, the International Convention for the Suppression of Terrorist Bombings 1997, the International Convention on the Suppression of Financing of Terrorism 1999 and the International Convention for the Suppression of Acts of Nuclear Terrorism 2005. The International Atomic Energy Agency has adopted the Convention on the Physical Protection of Nuclear Material, 1980. The International Maritime Organisation has adopted the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation 1988, and the Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf,

1999, and as such is yet another result of the (temporary?) end of the Cold War, with the adoption of the UN Convention for the Suppression of the Financing of Terrorism.⁶ Article 2 of this convention refers to the specific acts criminalised by the various multilateral conventions on terrorism and “[a]ny other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act”.⁷

There was a very slow rate of ratification of this treaty. Following the Al-Qaeda attacks on the US of 11 September 2001, the United Nations Security Council adopted a series of resolutions under Chapter VII of the UN Charter (UNC). These resolutions are binding upon states, by virtue of Article 25 UNC. Resolution 1373 of 28 September 2001, was the first of two (so far) resolutions where the Security Council identifies a standing threat to international peace and security and requires states to take “legislative” action.⁸ It provides *inter alia* that all states shall:

Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the 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, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities.

The resolution amounts, in essence, to an obligation to apply the operative parts of the 1999 Convention. It complements the (vague) obliga-

1988. All these treaties can be accessed at <http://untreaty.un.org/English/Terrorism.asp>. See <www.untreaty.un.org/English/Terrorism.asp>.

⁶ UN Res. 54/109, 9 December 1999, at <http://www.un.org/law/cod/finterr.htm>.

⁷ As of 31 May 2009, there were 167 parties to the Convention, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-11&chapter=18&lang=en. Cf. the definition employed in the EU Framework Decision on Terrorism, below, which does not exclude acts in armed conflicts.

⁸ The other resolution, 1540, prescribes a duty to criminalize transfers of weapons of mass destruction (and components thereof) to terrorists. For a discussion of the compliance of these resolutions with the UNC see, e.g., R. Laval, A Novel, If Awkward, Exercise in International Law-Making: Security Council Resolution 1540 (2004), 51 *Netherlands International Law Review*, p. 411 (2004).

tions forbidding states from encouraging or financing “armed intervention” in each other’s affairs which exist under customary international law and/or as authoritative interpretations of the UN Charter.⁹ The 1999 convention has since been ratified by a large number of states, making its definition of terrorist acts at least quasi-universal. The important points to note here are that the definition requires an intent to harm civilians and a purpose of intimidating a population, or compelling changes of government policy. Later attempts at the UN level to produce a comprehensive definition have failed. In the imperfect world in which we live, it is, in our view quite simply not possible to produce a conceptually satisfactory definition which catches those one wants to catch (terrorists), and leaves untouched those one does not want to catch (“freedom fighters” and one’s own, and friendly, military forces).

2.2 Defining terrorism at the regional European level

European states, first the Western states, but with the end of the Cold War, even the central and east European states, have participated in an international organization, the Council of Europe. This organization has long had an interest in criminal law matters and has adopted over the years a number of conventions designed to facilitate cooperation in criminal procedural issues, as well as harmonizing substantive criminal law. Even this organization of like-minded states was long unable to agree on a definition of terrorism. Instead, the 1977 Convention on the Suppression of Terrorism¹⁰ focuses on particular methods of committing terrorist acts, and provides for mutual extensions of jurisdiction and a duty to extradite or prosecute. More recently, the Council of Europe has adopted a Convention on the Prevention of Terrorism,¹¹ considered further below.

The European Union (EU) has been gradually increasing its competence in criminal law matters. This process began properly in 1993 when the Maastricht-Treaty entered into force. The cooperation is still an interstate cooperation between sovereign states, but it has successively

⁹ See Declaration on Principles of International Law Concerning Friendly Relations and Co-operation between States in Accordance with the Charter of the United Nations, GA Res. 2625 (XXV), 1970 and Resolution on the Definition of Aggression, GA Res. 3314 (XXIX) 1974, Case Concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States*), ICJ Rep. 1986 p. 1.

¹⁰ 90 ETS 1977.

¹¹ 196 ETS 2005.

been institutionalized in a way which makes it hard to compare with other interstate cooperation. The interest of the EU in criminal law is mainly a knock-on effect of the creation of a genuine internal market. This has opened up new possibilities for transboundary organized crime. The rapid expansion of membership from 15 states in 1995 to 27 states in 2007 and including states in eastern and central Europe with extensive problems of corruption, has also made better cooperation in mutual assistance, jurisdictional issues, transfer of prosecution etc. much more urgent.¹² The EU, unlike a traditional international organisation such as the Council of Europe, contains supranational legislative elements in its first, European Community, pillar. The EC legislates by means of regulations and directives, the former automatically binding in all member states, the latter norms which have to be implemented in national law within a given period of time. The fact that members-states have partially transferred legislative competence to the EC (and thus, no longer have the competence to legislate on such matters by themselves) plus the fact that EC norms have a supra-constitutional status, which means, simply put, that they can only be challenged before the European Court of Justice, makes the whole system very much more complicated, and creates considerable accountability problems. The second – foreign and security policy – pillar is mainly a forum for the adoption of political declarations which, however, are implemented by legally binding measures at the level of EC and national law. The third – police and judicial cooperation in criminal matters – pillar adopts treaties in simplified form, framework decisions, which, like directives, have to be implemented in national law within a given period of time. Decision-making in any field where the EU is involved is multi-layered. One and the same initiative can involve measures being adopted in all three pillars, and with national implementing legislation.

The EU governments felt the need to show both solidarity with the US and a resolute approach to dealing with terrorism. They implemented

¹² The EU had been working for quite some time on the issue of a European arrest warrant which was, and is, the centrepiece in the EU efforts to create a more modern system of cooperation, and is not limited to terrorism. The Arrest Warrant framework decision [2002] OJ L 190/1 – which is a treaty in simplified form – is based on the principle of mutual recognition of an order to transfer a suspect, or fugitive convicted person, from one EU state to another. This makes transfer more or less automatic, rather than a time-consuming, and uncertain procedure of extradition. It removes the requirement of double criminality for a list of 32 offences, including terrorism.

Security Council Resolution 1373 by the adoption of two “Common Positions”, 2001/930/CFSP on combating terrorism and 2001/931/CFSP on the application of specific measures to combat terrorism (both 27 December 2001).¹³ These involve the “blacklisting” of suspected terrorist groups and the seizure of their assets. Providing finances to such groups is made a criminal offence. Article 1(3) of the former Common Position reads: “‘terrorist act’ shall mean one of the following intentional acts, which, given its nature or its context, may seriously damage a country or an international organisation, as defined as an offence under national law, where committed with the aim of: (i) seriously intimidating a population, or (ii) unduly compelling a Government or an international organisation to perform or abstain from performing any act, or (iii) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation: (a) attacks upon a person’s life which may cause death; (b) attacks upon the physical integrity of a person; (c) kidnapping or hostage taking; (d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property, likely to endanger human life or result in major economic loss; (e) seizure of aircraft, ships or other means of public or goods transport; (f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons; (g) release of dangerous substances, or causing fires, explosions or floods the effect of which is to endanger human life; (h) interfering with or disrupting the supply of water, power or any other fundamental natural resource, the effect of which is to endanger human life; (i) threatening to commit any of the acts listed under (a) to (h); (j) directing a terrorist group; (k) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the group”. The same article defines “Terrorist group” to mean: “a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist acts. ‘Structured group’ means a group that is not randomly formed for the immediate commission of a

¹³ [2001] OJ L 344/90.

terrorist act and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.”

These two definitions were later incorporated in the Framework Definition on Terrorism.¹⁴ This requires states to extend their extraterritorial jurisdiction over terrorist acts, to criminalize certain activities, in particular, directing a terrorist group and to make participation in terrorist activities subject to stiffer penalties.

2.3 Some Problems with the EU definitions

One of the major problems relates to the fact that the definitions have a global scope. They deal both with crimes within the territories of EU states and also with extraterritorial crime. The EU definitions are not limited to terrorist acts within the democratic countries of the EU, or other democratic countries in the world. The EU definitions seek to criminalise non-state groups *solely and consistently* on the basis of the methods they use, wherever these occur. Like the UN definition, there is no exception for acts directed against non-democratic regimes.¹⁵ The focusing of attention on methods naturally caused a degree of embarrassment in that it condemns means of warfare which were used in the past by resistance forces during the Second World War.¹⁶ It is not difficult to see why EU states baulked at inserting requirements of civilian targets or that the terrorist group be attacking a “democratic” state. Obviously, acts of terrorism in democratic states must be condemned, prevented and punished and all democratic states have a common interest in criminalizing such acts and in cooperating with dealing with them. But one problem is that “democracy” is a sliding scale: some governments are at the low end of it, but no EU state wants openly to say this to the government in question. Can one nonetheless equate a democratic with a non-democratic state

¹⁴ [2002] OJ L 164/3.

¹⁵ Compare the UK definition under section 1(5) of the Terrorism Act 2000, which does not impose such a requirement either. Attempts in parliament to limit the application to ‘designated countries’ were not successful. For criticism see C. Walker, *Blackstone’s Guide to the Anti-terrorism Legislation* (Oxford, Oxford University Press 2002) 27.

¹⁶ The EU Council adopted a statement in connection with the Framework Decision to the effect that conduct of people attempting to preserve or restore democratic values, “as was notably the case in some member states during the Second World War” “cannot be construed” as terrorist acts. See Council Doc. 14845/1/02.

on the basis that, wherever it occurs, an act of violence *directed against a civilian* is never justified?¹⁷

Here one should note that, unlike the UN definition, there is no requirement in the EU definitions that the terrorist act be directed against a non-military target. The European states did not want to say explicitly that military targets are legitimate targets, because this would legitimize, for example, Al-Qaida attacks against US military personnel. The problem is obvious: this definition can create an imbalance in how EU states regard what may be a political struggle between two more or less morally equal combatants in a non-democratic state, one governmental and one terrorist/guerrilla. One can argue that there is no imbalance in that wanton acts of violence by governmental forces, for example, killing civilians on a large scale or otherwise committing war crimes or crimes against humanity, can also be punished, in particular under the Statute of the International Criminal Court (ICC).¹⁸ However, this punishment is, in practice, a fairly remote possibility. The state in question may not have ratified the ICC statute.¹⁹ Even if it has, it is no easy business for the ICC to get hold of an alleged perpetrator, let alone gather sufficient evidence to convict him.

An organisation can employ terrorist methods, often or occasionally, but also engage in other activities (such as humanitarian aid among refugees, as do the PFLP and Hamas). Should we nonetheless regard the organization as a whole as a terrorist organization? The circumstances of guerrilla/terrorist warfare should be borne in mind. Guerilla/terrorist groups which do not have sustained control over territory tend to be organized in cells, operating more or less autonomously. In such a network of cells, there is bound to be different levels of fanaticism and brutality, depending upon the people involved. Some cells may devote much less care than others to avoiding civilian casualties. Even if terrorizing the civilian population is not the explicit aim of the organization – and few presumably write this into their statutes – there may be individual cells who embrace this with enthusiasm. Armies attract young men who like violence for the sake of it, and terrorist groups certainly do so. This is not

¹⁷ See the Secretary General Report, *In larger freedom*, 2005. Cf. T. Farer, *Confronting Global Terrorism and American Neo-Conservatism*, Oxford UP, 2007.

¹⁸ Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (July 17, 1998), reprinted in 37 *International Legal Materials* 999 (1998); 6 IHRR 232 (1999).

¹⁹ It is possible for the Security Council to refer a case to the ICC, notwithstanding the fact that the state in question is not a party, but the permanent member veto applies.

to say that there may not be good reasons for imposing on an organization collective responsibility for everything which one or other cell purporting to belong to the organization does. But from the criminal law policy perspective of basing individual responsibility on *actual* control over one's actions, it should be recognized such this actual control will not always, or even often, exist for the *leaders* of a group in practice.²⁰

Another point is that, although the distinction is fundamental to humanitarian law, in practice, there is a grey zone between military and non-military targets. Unarmed civilians are definitely a civilian target, but what about armed civilians organised into militia units? And some of the methods associated with the most awful terrorist attacks in recent years, such as suicide bombing, are not so morally repugnant, or some would say, not repugnant at all, when directed against a military target.

It will not have escaped the reader that, while the main point we are making is that there can be morally little to choose from in a struggle between an organization operating violently in non-democratic state, and the authoritarian or dictatorial government it is struggling against, we must also face the issue of how to regard non-state combatants in a situation where a democratic state, legally, or illegally, occupies foreign territory or uses force against terrorists/guerrillas. For example, in recent years the armed forces of Israel and US have killed a great many civilians in Gaza and Iraq/Afghanistan respectively. Sweden too has peace-keeping forces in Afghanistan which have used armed force in self-defence. Should one automatically regard as terrorists the non-state combatants in such a conflict? We would say: clearly not. But should one regard them as terrorists if they cause civilian casualties? Or if they use indiscriminate weapons against civilian areas (as Hamas did against Israeli villages). Whereas a terrorist is a terrorist whether he kills one or one hundred people, the number of casualties in a conflict is of direct relevance for determining whether the threshold has been reached for an internal or international armed conflict. When that level is reached, is it not better for third states to say that terrorism is not the crime at issue, but crime against international humanitarian law?²¹

²⁰ The Swedish prosecutor with special responsibility for security cases decided in 2006 not to prosecute the exile leaders of the Aceh independence movement despite the fact that a number of terrorist incidents had occurred in Aceh. He took the view that the political leaders in Sweden had no command responsibility for the activities in question.

²¹ For an Italian case where the court considered that terrorism as such could not be committed in an armed conflict see Office of the Public Prosecutor of the Italian Republic v

Here one can note that in humanitarian law there is a grey zone when it comes to civilian casualties which are a side-effect of an attack on a military target, so called, “collateral damage”. Horrible though it is, the laws of war permit this where the civilian losses are not “disproportionate” to the end to be achieved. Indeed, though a state which purports to abide by the laws of war may not have the intention in a specific case to cause civilian casualties, and may put in efforts to avoid this, a degree of collateral damage can even said sometimes to be part of the *policy* of a state. The United States, for example, considers that humanitarian law permits a greater degree of imprecision in aerial bombardment when there are anti-aircraft defences, it being unreasonable to expect air crew to fly low and risk their lives. In the circumstances, one can certainly argue that it is hypocritical not to permit guerrilla/terrorist groups to attack “softer” military-civil targets (militia etc.) and not to allow them the same degree of “collateral damage” we permit regular armed forces.

We raise all these points to show that there are going to be some situations for a prosecutor in a liberal democratic state where she will not want to bring a prosecution for an extraterritorial crime, notwithstanding the objective wording of the crimes of terrorism and financing of terrorism. She may not want to prosecute N who has done act X in circumstances Y in foreign state Z, whereas she will want to prosecute P who has done act X in circumstances Y in foreign state W. Similarly, there will be circumstances in which this prosecutor may want to bring charges against M (acting in the prosecutor’s own state) for financing P but not against Q (again acting in the prosecutor’s own state) for financing N. So, an American might ask: what is the problem? The answer is that, first, solving the difficulty by relying upon prosecutorial discretion can give an unacceptable degree of uncertainty. Second, there is a knock-on effect in terms of the availability of coercive measures (dealt with further below). Third, the Swedish system is not based upon prosecutorial discretion but the principle of legality (obligatory prosecution). The scope for avoiding “inappropriate” prosecutions is much less great in the Swedish system.

Bouyahia Maher Ben Abdelaziz, Toumi Ali Ben Sassi, Daki Mohammed ILDC 559 (IT 2007). The use of terror methods against the civilian population is still an offence under humanitarian law. The main difference would lie in that the preparatory and inchoate offences (discussed later, in section 3) would not be applicable. For a Swedish case regarding financing of terrorism in an armed conflict, where the issue was not raised, see Public Prosecutor v A.B and F.J., ILDC 280 (SE 2005).

3 Terrorism and preventionism

3.1 Introduction

Above we have been discussing the problems of defining terrorism. In this section we will focus on the impact the international fight against terrorism has had on the national system(s) of criminal law and procedure and especially on the tendency to criminalize behaviour which has only a remote connection to actual terrorist attacks.

When doing this, we describe changes made in Swedish criminal law which are more or less directly attributable to the existence of terrorism and reflect on what they actually entail.

Our main point here is that the work done against terrorism reflects and enhances a general tendency in the criminal law of today, namely a tendency to upgrade the importance of prevention, not only as a general justifying aim for the criminal law system, but also as a primary task for the system.²² The basic thought seems to be that if the system does not prevent crime efficiently, then there must (i) be something wrong with it and (ii) it must be changed in order to do so. This ultimately means that many basic principles that aim at legal security or at securing liberty, but which might limit the efficiency of the system are put under pressure. This tendency could be labeled as *preventionism*.²³

Many of the examples of this tendency are connected to terrorism in one sense or the other and we argue that it is essential to be aware of this tendency in order to strike a balance between different interests and to protect values such as legal security and integrity.

The first example of this tendency is the increasing inclination to construct proscriptions in a way which allows for the imposition of criminal liability at a very early stage and on the basis of an evil intent on part of the perpetrator; the ideal type for this kind of liability is the one imposed for preparatory conduct ("Any person who buys matches with the intent to promote an offence, should be sentenced ...").

The second example, which we will get back to later, is the ever increasing interest for the possibility to detect crime in advance, inter alia by using different kinds of surveillance measures.

²² N. Jareborg, Vilken sorts straffrätt vill vi ha? Eller Om defensiv och offensiv straffrättspolitik, in *Inkast i straffömrådet* (Iustus, Uppsala, 2006).

²³ See P. Asp, Går det att se en internationell trend? – om preventionismen i den moderna straffrätten. *Svensk juristtidning* 2007 pp. 69–82.

3.2 Substantive Criminal Law – towards liability for “inchoate” offences

Let us start with the area of substantive criminal law. As far as Sweden is concerned, none of the rules of substantive criminal law dealing with terrorism is “home grown”. All are the result of international initiatives. As shown below, this is not the case as regards administrative law and criminal procedure.

Having said this, one should also emphasize that the carrying out of terrorist attacks regularly include acts that are, and have been, criminalized for a long time in Sweden. Moreover, and in sharp contrast to the position under US law, these criminalizations have also encompassed extraterritorial offences committed by people against foreigners and foreign interests. Put very simply, Sweden has the jurisdictional rules enabling it to punish any serious act of violence committed anywhere by anybody. Typically when we speak of terrorism we mean acts such as the causing of death, the causing of bodily harm or the causing harm to other's property. Thus, one might say that acts of terrorism are typically covered by traditional proscriptions, and that they differ from ordinary crime mainly in respect of *the purpose* with which they are committed and in respect of their *magnitude*.

Be that as it may, as a result of what is sometimes called the fourth wave of terrorism during the sixties and the seventies, a lot of international conventions were adopted mainly within the framework of the United Nations. These conventions concerned a lot of different questions, but they all included articles that required the parties to criminalize different acts typically used for terrorist purposes. If one takes a closer look at the effect of these conventions²⁴ on the substantive criminal law of Sweden, the impact has not been very dramatic; generally speaking they required criminalization of acts that were already criminalized under Swedish law. At times new and specific offences – corresponding to the requirements of the conventions – were introduced, but very often they overlapped with already existing offences. The convention on the suppression of the financing of terrorism is, however, somewhat of an exception, since it focuses on acts which are clearly inchoate in character and must be considered as fairly far reaching in this respect.

We will get back to this question later, but before that we should

²⁴ See the references in footnote 5.

take a look at the EU framework decision on the combating of terrorism. As already mentioned this includes requirements of *magnitude* (the acts shall, given their nature or context, have such a character that they may seriously damage a country or an international organization) and of a *specific intent* (the act shall be committed with the aim of seriously intimidating a population etc.) This framework decision was implemented by a special statute,²⁵ i.e. it was not integrated into the Criminal Code (Brottsbalken). Thus, its impact is particularly visible. Since most, or all of the acts included in the act, were already criminalized under Swedish law (also in absence of a certain magnitude and/or in the absence of a specific intent on the part of the perpetrator), the main substantive impact of the framework decision was, however, that the potential *penalties* for acts falling under the new legislation were raised. For example, the reform had as a consequence that the possibility to use life time-imprisonment for different types of terrorism related acts increased dramatically. Due to this one Supreme Court judge has characterized this as the most dramatic criminal law reform since the 18th century, when King Gustav III, by a regulation, abolished the death penalty for some 10 offences.

So far, we have implied that the criminalized area has not increased that much as a result of the struggle against terrorism; the conventions and framework decisions may have led to new criminalizations with harsher penalties attached, but they have, by and large, overlapped with old and traditional proscriptions.

In one respect, however, the fight against terrorism has clearly led to an increase in the criminalized area and that is with regard to inchoate offences.²⁶ One can see a general tendency within criminal law to criminalize behaviour that is not in itself harmful, but which aims at the commission of, or aims at contributing to, harmful behaviour; typically we speak of acts that are preparatory in character. And this general tendency is reflected in, and enhanced by, the work against terrorism. Let us display this with an (admittedly extreme) example.

Article 2.1 in the Convention on Suppression of the Financing of Terrorism reads as follows:

²⁵ The act (2003:148) on the punishment of terrorist offences.

²⁶ See P. Asp, Går det att se en internationell trend? – om preventionismen i den moderna straffrätten. Svensk juristtidning 2007 pp. 69–82 and P. Asp, On the Justification of Non-consummate Offences. Festschrift für Heike Jung, ed. by Heinz Müller-Dietz, 2007 pp. 29–45.

1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out [a terrorist offence].

Thus, according to this section, the collection of money for the purpose of later sending them to someone who will use them for committing a terrorist offence should be criminalized. Already here, it is fairly obvious that we are fairly far away from the harm that we actually want to prevent, namely the harm that is caused by the consummated terrorist offence. We may speak of three steps: (i) collecting money, in order (ii) to send them (iii) to someone who will use them for some terrorist purpose.

The convention does not only, however, require the criminalization of the collection of money, but also, in accordance with article 2.4, that attempts to commit an offence that falls under the convention should be criminalized:

4. Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1 of this article.

Thus, the section requires that *attempts* to collect money which will later be sent to someone who will use them for the purpose of committing a terrorist offence should be criminalized. Thus we could add a fourth step to our list; the state must criminalize:

(i) to attempt (ii) to collect money, in order (iii) to send it (iv) to someone who will use it for the purpose of committing terrorist offences.

Another way of putting it, is to say that this section requires the criminalization of an inchoate offence that relates to another inchoate offence.

But we have not reached the end yet. If one continues to read the text of the convention one finds article 2.5 which states that:

5. Any person also commits an offence if that person:

(a) Participates as an accomplice in an offence as set forth in paragraph 1 or 4 of this article;

(b) Organizes or directs others to commit an offence as set forth in paragraph 1 or 4 of this article.

The most interesting thing here is, for our purposes, paragraph 2.5(b), which requires that it should be criminalized to direct others to commit an attempt to collect money which are later supposed to be handed over to someone who will use them for terrorist purposes. Once again we could add another step to our list; the state must criminalize:

(i) to direct people (ii) to attempt (iii) to collect money, in order (iv) to send it (v) to someone who will use it for the purpose of committing terrorist offences.

Well, you might think that we with this have reached the end of the chain, but no.

In 2005 a new Council of Europe convention, focusing on the prevention of terrorism, was adopted.²⁷ The convention aims primarily at proscribing public provocation of terrorism, recruitment to terrorism and training for terrorism.

In order to fully understand what this means one must, of course, first understand what the convention labels as terrorism. And terrorism according to the convention is everything that counts as terrorism according to the above mentioned conventions including ancillary offences.²⁸ Thus, according to the Council of Europe convention on the prevention of terrorism all of the acts in the abovementioned chain of acts constitutes terrorism. This means that it is terrorism to:

(i) direct people (ii) to attempt (iii) to collect money, in order (iv) to send it (v) to someone who will use it for the purpose of committing terrorist offences.

And in relation to this very “inchoate” definition of terrorism, the prevention convention adds yet another layer.

First it requires the criminalization of public provocation to commit a terrorist offence, recruitment to terrorism, and the training for terrorism. This means, *inter alia*, that the convention requires the criminalization of:

(i) the recruitment of people (ii) to direct people (iii) to attempt (iv) to collect money, in order (v) to send it (vi) to someone who will use it for the purpose of committing terrorist offences.

²⁷ See footnote 11 above.

²⁸ Article 1.1 of the Convention.

And since this is an international convention within the area of substantive criminal law it does, as most conventions do, also contain an article, article 9, which deals with ancillary offences. And article 9 requires, *inter alia*, the criminalization of attempts to recruit people to terrorist acts, thus adding yet another layer to our chain. Formally the convention requires the criminalization of:

- (i) an attempt (ii) to recruit people (iii) to direct (other) people (iv) to attempt (v) to collect money, in order (vi) to send it (vii) to someone who will use it for the purpose of committing terrorist offences.

Having seen this chain, a natural question to ask might be: Is this really what the drafters of the convention intended? The answer is actually both yes and no. In the explanatory report one finds the following statement:

In paragraph 1, the offences are defined by reference to the treaties in the Appendix. The reference to the offences "within the scope and as defined" in the conventions listed in the Appendix indicates that, in addition to the definitions of crimes, there may be other provisions in these conventions that affect their scope of application. This reference covers both principal and ancillary offences. Nevertheless, when establishing the offences in their national law, Parties should bear in mind the purpose of the Convention and the principle of proportionality as set forth in Article 2 and Article 12, paragraph 2 respectively. The purpose of the Convention is to prevent terrorism and its negative effects on the full enjoyment of human rights and in particular the right to life. To this end, it obliges Parties to criminalise conduct that has the potential to lead to terrorist offences, but it does not aim at, and create a legal basis for, the criminalisation of conduct which has only a theoretical connection to such offences. Thus, the Convention does not address hypothetical chains of events, such as "provoking an attempt to finance a threat".²⁹

Thus, to summarize one might say that the convention formally covers the chain of acts I have been describing, but at the same time it is said that it does not aim at creating a legal basis for criminalization of conduct which has only a theoretical connection to terrorist offences. Perhaps it is fair to say that the very far reaching formal requirements of the convention are supposed to be implemented with reason.

Well, then, what is the point of displaying this chain? Well, it is not to say that these international agreements are by necessity a great problem

²⁹ See the Explanatory Report paragraph 49.

if looked at from a national perspective. It will, most certainly, and inter alia thanks to the statements of the explanatory report, be possible to implement the convention in a way which is acceptable from a principled as well as a practical point of view. Actually, one of us (Asp) has on behalf of the government written the official report in which it is proposed that Sweden should ratify the Council of Europe convention and which also includes suggestions on how to implement it and an EU framework decision which involves similar obligations relating to criminalisation of promoting terrorism.³⁰

The point has rather been to show that the general tendency towards the criminalization of non-consummate offences is definitely reflected and enhanced through the struggle against terrorism. We would suggest that this reflects an increased emphasis on prevention that, at least in the long run, creates risks from the viewpoint of legal security.³¹ We will get back to the risks after having said a few words on the use of coercive measure and surveillance measures for the purpose of combating terrorism.

3.3 The use of surveillance, coercive measures etc.

The other story to be told is the Swedish history as regards the use of coercive measures and individualized surveillance for preventive reasons. Generally speaking the authority to use coercive measures and different measures of surveillance such as secret wiretapping, secret tele-surveillance etc. has presupposed that someone is reasonably suspected of having committed an offence. During the second world war Sweden had some

³⁰ Straffrättsliga åtgärder till förebyggande av terrorism Ds 2009:17, <http://www.regeringen.se/content/1/c6/12/59/75/1194e7ae.pdf>.

³¹ The concept of “legal security” (*Rechtssicherheit*) is fundamental to Germanic-influenced legal orders. There is no definitively agreed content to the concept. Elements generally considered to be part of it are free and independent courts bound by law, the right of access to court to challenge coercive state measures, the need for criminalization and coercive state measures to have clear support in law, the prohibition of legislating to cover a single case, the prohibition of retroactive legislation and a requirement that crimes be proved beyond reasonable doubt. Foreseeability (legal certainty) is thus an important part of the concept, but does not exhaust it fully. The concept tends to be used to evaluate critically the *lawful* exercise of authority. The closest approximation to it in common law is another concept with unclear contours, namely the rule of law. See N, Jareborg, Straffrättsideologiska fragment, Iustus, 1992, pp. 80–94. For a discussion in English, see Å. Frändberg, Some reflections on legal security, in *Philosophical Essays dedicated to Lennart Åqvist on his fiftieth birthday*, Pauli, Uppsala, 1982.

legislation allowing for such measures to be used without any suspicion of an offence, but that was, of course, an exception justified having regard to the special situation during the war.

In the seventies, however, after having experienced two terrorist attacks – the murder of the Yugoslavian ambassador in 1971 and the hijacking of an airplane on its way between Stockholm and Gothenburg in 1972 – a new act on “the prevention of certain violent acts with an international background”, the so called Terrorist Act, was enacted.³² This piece of legislation has been amended – and changed names – on several occasions (in 1975, 1989 and in 1991), but we do not have to go into details. The special feature that we want to highlight in this context is that the Act – at the time it was introduced – was special since it was the only act that allowed for the use of certain types of coercive measures, and surveillance measures – such as search of premises, body search, body examination and secret telephone tapping – also in relation to persons who are not suspected of having committed any offence.

According to § 19 of the Act a foreigner may – under certain preconditions – be subject to search of premises, body search and body examination if it is needed to find out whether the foreigner or an organisation or a group to which he belongs are taking steps towards or planning or preparing a terrorist offence. If there are extraordinary reasons secret wire tapping and secret tele surveillance (i.e. registering of telecommunications data, numbers, duration of call etc.) may also be used. Thus, the use of the measures does not presuppose that an offence has been committed, but merely that the use of the measure is needed to find out *whether* an offence is planned.

As indicated, this was a clear exception to the general rule, that coercive measures and surveillance may be used only when someone is suspected of having committed an offence of a certain dignity.

The suggested justification of this breakthrough was that some people who cannot be expelled due to humanitarian reasons (because the only state prepared to receive them may subject them to torture or the death penalty) might constitute a threat to national security. Thus, in order to be able to let these people stay, we must have tools for maintaining that the threat they may pose to national security is minimized.

The Act was heavily criticised during the seventies. The critics argued among other things that the act was discriminatory, that it presupposed

³² Now the Act on Special Control of Aliens 1991:572.

that terrorist offences are only carried out by foreigners and that the prerequisites for the use of coercive measures were too generous.

In the 1989 a legislative committee dealing with terrorism wrote as follows:

”The committee has considered whether it would be possible to meet the need which has been shown to exist by means of general rules in the Code on Judicial Procedure. However, it appears difficult to have such a solution without drastically diminishing the level of protection offered. It is in the committee’s view hardly possible to introduce the possibility to take coercive measures against serious crime in general on the relatively vague grounds the Terrorist Act allows. This would involve making major changes in the system of rules set out in the Code of Judicial Procedure of a character which, from the perspective of principle, would seem extremely suspect. It is incontrovertible that the rules in the Terrorist Act diverge from the demands placed by legal security which have traditionally been upheld in our country. As already mentioned, these rules obtain their legitimacy precisely by reason of the fact that they are directed against a very small group of people who we do not want in the country because they represent a danger, but who are nonetheless permitted to stay here for humanitarian reasons.”³³

Even clearer was the opinion of the committee dealing with the powers of the security police a year later:

“Such rules (that is rules that do not presuppose a suspicion of a concrete offence) exist in the Terrorist Act. Those rules must, however, be regarded as an exception from a basic principle the content of which is that coercive measures may be used only if there is a suspicion that a concrete offence has been committed. The exception in the Terrorist Act can be justified only as a consequence of Sweden’s right to chose which foreigners that are allowed to stay in the country.”³⁴

To summarize: the official view seems to have been that the use of coercive measures without a connection to a reasonable suspicion that a criminal offence has been committed can be justified only under exceptional circumstances.

³³ SOU 1989:104 s. 220, authors’ translation.

³⁴ SOU 1990: 51, authors’ translation.

Recently, however, a new act on the use of coercive measures for preventive reasons was enacted.³⁵ According to this legislation the court can authorize the use of secret wiretapping, secret tele-surveillance and secret camera surveillance on the condition that it, having regard to the circumstances, has reason to believe that a person will perform criminal acts including certain listed offences (such as sabotage, arson, terrorist offences and murder). Thus we can see a clear shift in attitude. What was considered exceptional and basically inappropriate only some fifteen years ago, is now apparently acceptable. And if one reads the preparatory works, the threat from international terrorism is obviously the main thing that has contributed to this shift in views.

We are not suggesting that it is the use of surveillance measures for preventive reasons is unacceptable under any circumstances. On the contrary, it seems clear that in Sweden we might have been focusing too much on the very well regulated area of the use of coercive measures for investigative reasons, while underestimating the implications of the expansion of proactive measures and of the even more speculative “strategic surveillance”.³⁶ What we would like to do is simply to draw attention to the shift in attitude that seems to have been taken place. In the beginning of the 1990s it was clearly expressed that the use of coercive measures without reference to a committed offence could be justified only under exceptional circumstances (i.e. only against persons who we would expel if only it was possible). Now we have introduced rules that, at least on the level of principle, are comparable and they are applicable in relation to all citizens. In our view, this shift in attitudes invites us to reflect upon the development. What has changed? Is the new situation such – so different from the situation some fifteen year ago – that it justifies the new measures?

³⁵ SFS 2007:979.

³⁶ In Sweden during 2008, a government bill allowing the Defence radio interception organisation, Försvarets Radio Anstalt (FRA) also to monitor all international telecommunications transiting Sweden by way of cable traffic, caused a storm of public protest. The original bill (prop. 2006/07:63) was passed, but a new bill has been prepared during 2009 (prop. 2008/09:201, Förstärkt integritetsskydd vid signalspaning) providing for improved safeguards.

3.4 Preventive Freezing of assets

This is a large and complicated chapter in itself. We will not go into this in detail in the present paper.³⁷ There is an EU norm requiring member states to criminalize the conduct of belonging to a criminal organization. But there are special constitutional difficulties in Sweden of criminalizing membership of organizations. Prohibition of an organization is legally possible under the constitution (RF 2:14) if a statute is passed on the matter. However, such a statute has not been passed. Registration of an organization is not a public law requirement for the organization to begin its activities, and so prohibition of an organization would be easily circumvented.³⁸ Active participation in a grouping committing criminal acts is, however, largely caught in Sweden by the relatively wide provisions on participation in crime. So far the European Commission – charged with overseeing how EU norms are implemented in national law – has accepted that Sweden need not formally criminalize membership of criminal organizations. But there are indications that this excuse will not be accepted so much longer.³⁹

Moreover, as far as concerns financing of terrorism, the Swedish restrictions on criminalizing organizational membership have been circumvented. Simply put, the EU has implemented Resolution 1373 by creating a blacklisting system. It resembles the US system of blacklists, and has borrowed a lot from this. The EU acting unanimously adopts a sanction, listing a named organization. The listed organization in its entirety is regarded as being terrorist in character. Anyone giving money or anything of value to it (such as the lease on property), or handling money or anything of value on its behalf, is committing a criminal offence.⁴⁰

³⁷ See I. Cameron, EU Anti-terrorist Blacklisting, 3 Human Rights Law Review, s. 225–256 (2003) and UN Targeted Sanctions, Legal Safeguards and the ECHR, 72 Nordic Journal of International Law 1–56 (2003).

³⁸ SOU 2000:88 Organiserad brottslighet, hets mot folkgrupp, hets mot homosexuella, m.m. – Straffansvarets räckvidd kap. 16.

³⁹ Commission evaluation of Sweden, European Commission, Report and annex based on Article 11 of the Council Framework Decision of 13 June 2002 on combating terrorism COM(2007) 681 final 6.11.2007.

⁴⁰ The EU system of blacklisting is examined in detail in I. Cameron, Respecting Human Rights and Fundamental Freedoms and EU/UN Sanctions: State of Play, European Parliament, Policy Department, External Policies, October 2008, <http://www.europarl.europa.eu/activities/committees/studies.do?languageE>.

Once the organization is blacklisted by executive decree, on US experience, on largely unreviewable grounds,⁴¹ there is no need to show a further terrorist intent on the part of people giving money to it, or receiving money on its behalf. The blacklisting mechanism neatly avoids having to submit intelligence material to a court in a criminal case. We accept that there can be good reasons for this in common law systems relating to the nature of the criminal trial (jury trial, and correspondingly strict rules on admissibility of evidence). However, in Sweden the principle of free evaluation of evidence applies. There is correspondingly a lesser need for such offences.⁴²

This type of offence creates a problem for the legitimacy of the law in a country with a large immigrant population from a country with an ongoing conflict between an authoritarian regime and a terrorist/guerilla group. And, internationally speaking, the EU, and EU states, will no longer be perceived as an honest broker in this conflict. One 'side' is able to operate freely in EU states, and its property may well be protected by diplomatic immunity, whereas the other 'side' is having its assets seized, and it is a criminal offence to support it financially in any way.⁴³

Sweden introduced this form of blacklisting by the "back door", by making the existing statute imposing penalties for violation of UN and EU sanctions applicable to such executive EU decisions to blacklist organisations. That Sweden has been prepared to do this, in clear breach of its ordinary principles of criminalization shows the pressure it has been under.

⁴¹ *People's Mojahedin Organization of Iran, v. United States Department of State*, 182 F.3d 17 (D.C. Cir. 1999) "The information [consists of] sources named and unnamed, the accuracy of which we have no way of evaluating ... We reach no judgment whatsoever regarding whether the material before the Secretary is or is not true ... Her conclusion might be mistaken, but that depends on the quality of the information in the reports she received – something we have no way of judging." (pp. 23, 25) We will not here go into the long – and as yet unfinished – saga concerning the establishment of meaningful review mechanisms at the EU level. See Cameron, *ibid*.

⁴² This is illustrated by the already mentioned Swedish court of appeal case (above note 21) where a complicated flow chart was submitted by the Security police showing the network of communications between the accused and people belonging to the group Ansar al-Islam, linked to a number of terrorist deeds in Iraq.

⁴³ This imbalance was the reason why Norway – not a member of the EU – later refused to follow the EU blacklists. Norway, Ministry of Foreign Affairs, press release 5 January 2006, <http://www.statewatch.org/terrorlists/terrorlists.html>.

3.5 The risks with the tendency

In the above sections we have tried to describe a tendency which we have labeled as *preventionism*. We have not, however, said anything about whether and if so, why, there are reasons to be worried about the tendency. So, why should we worry? We would suggest that there are at least four interconnected reasons for being concerned.

First, one should be aware of the logic of prevention. Prevention is a future oriented rationale, and the standard for measuring success is simply whether something (e.g. a terrorist offence) has been prevented or not. One can express this by saying that the logic of prevention is empirical in character, and that normative concerns are not built in to the concept.⁴⁴ This lack of a *normative* standard is in itself dangerous: it is, and it will always be, fairly easy to cause harm (i.e. to kill a person). We cannot therefore only ask ourselves what measures are necessary in order to prevent something (e.g. terrorist acts). There is no end to the measures necessary to prevent an act.⁴⁵ We must also and constantly ask ourselves what measures are *reasonable* to take. To summarize one could say that *the logic of prevention creates risks for excessiveness*.

Second, the focus on prevention means that the criminal law system is seen as a “problem solving” system, which ultimately leads to a pressure on the legislator to change the law in order to achieve results. This creates risks for increased repression (if the things done are not enough, then we must have more of the same) and a pressure on the legislator to make exceptions from such basic criminal law principles (based on notions of fairness and individual autonomy) which might limit the efficiency of the system. Thus, one might say that *the tendency to see the criminal law system as (merely) a tool for prevention creates risks for increased repression and exceptions from basic fairness standards*.⁴⁶

⁴⁴ See W. Hassemer, Strafrecht, Prävention, Vergeltung, Zeitschrift für Internationale Strafrechtsdogmatik, 2006 p. 270.

⁴⁵ We refer to Oren Gross' chapter in this volume for a discussion of the psychological and other factors which make it easier for people to see the benefits in “more” security and to underestimate the price which is paid in terms of loss of integrity.

⁴⁶ See P. Asp, Går det att se en internationell trend? – om preventionismen i den moderna straffrätten. Svensk juristtidning 2007 p. 80 f.

Third, the general tendency to build responsibility on preparatory acts (which might be quite innocent seen in an objective perspective) increases the importance of an “evil intent”. The evil intent becomes (more or less) the one and only thing that distinguishes a serious crime from innocent everyday conduct. Since the evidentiary problems as regards intent are big (and this is especially true as regards acts that are “innocent” and therefore possible to interpret in different ways), this general tendency towards criminal responsibility built on ulterior intent are negative in a rule of law perspective: *the tendency to intervene with criminal law at a very early stage creates risks for wrongful convictions.*⁴⁷

Fourth, the tendency to focus on prevention enhances a tendency to focus on dangerous people, rather than on harmful acts; if one wants to prevent things it is more important to find the people that are dangerous, than to punish single criminal acts, and once this view has got hold of us, we are not far from a division of people into two categories: on the one hand we have “us” (the decent citizens that should be protected), and on the other we have “them” (the dangerous people that we should try to protect ourselves from). Thus one might say that *the tendency to focus on prevention creates risks for a new relation between state and citizen and ultimately for a enemy-based criminal law system.*⁴⁸

Having said this one should emphasize that we see preventionism as a tendency which gives rise to concern, not as a full blown disease. Thus, we are not saying that we have passed the border to the unacceptable, but merely that we should be careful in trying to avoid doing so. Terrorism poses a serious threat to our society. It is natural and fully justifiable to try to prevent terrorist attacks from occurring. However, when trying to do this we should be careful not to find solutions worse than the problem.

⁴⁷ See E.J. Husabo, The Implementation of New Rules on Terrorism Through the Pillars of the European Union, Harmonization of Criminal Law in Europe, ed. by Husabo and Strandbakken (2005), p. 74 f.

⁴⁸ See P. Asp, Går det att se en internationell trend? – om preventionismen i den moderna straffrätten. Svensk juristtidning 2007 p. 79 f.

4 Concluding Remarks

We will not repeat the points already made, especially in sections 2.3 and 3.5 above. In this concluding section, we content ourselves with making a few remarks relating to the comparative (Swedish/US) perspective.

The first point we would make is that there is a (relatively speaking) strong Swedish reluctance to engage in symbolic criminalization. This is linked to the fact that Sweden applies the principle of legality as regards prosecution, in contrast to the position under both federal and state criminal law in the US. The principle of legality increases the need for care in formulating the offence, because less discretion is available to the prosecutor at when he or she is faced with the decision to bring a prosecution. Related to this is the second point, that there still appears to be a more widespread awareness among Swedish law-makers as compared to American (or European) law-makers that criminalization will not solve underlying social or political problems. Terrorism is crime with a political objective. Sweden has not been the subject of many terrorist outrages, and so the much vaunted Swedish tolerance and liberalism has not been put to the test. In this sense, the moral high ground which Swedes like to see themselves as inhabiting may not be very secure. But the relative absence of terrorist threats in Swedish society is not the product of chance, but a combination of different factors. The first line of defence of Sweden itself is the welfare state and the inclusiveness of Swedish society. So far, this line of defence is holding, and terrorism is still seen largely as a problem for other states. At the same time, Swedish law-makers, police and prosecutors are aware that terrorists can both use Sweden as a base for gathering resources and as a – relatively weakly defended – place to attack foreign interests. For this reason, it is accepted that criminalization of financing of terrorism and inchoate (preparation etc.) offences is necessary, as is more extensive police or intelligence powers. And it is clear that a future free from serious terrorism is certainly not guaranteed even in Sweden. There are, for example, alienated immigrant communities in Sweden too and the more extensive, and more savage, the conflicts which affect other states, the more likely that sections of these exile communities will be drawn into these conflicts. However, increased criminalization and increased police powers must not contribute towards the very problem – alienation – they were designed to guard against. As already made clear in this article, most of the Swedish anti-terrorist legislation has an international and European origin. If Sweden had more of a say

in European and world anti-terrorism policy it would probably focus less on criminalizing and more on doing something about the – much more challenging – structural causes of terrorism. While making the world a better place in a wishy-washy liberal Swedish sort of way will not eliminate political violence, if the political injustices which are the root, or the excuse, for the violence are removed or ameliorated, then at the very least the supply of new European recruits to terrorism will be made more difficult.⁴⁹

Another point, which perhaps is difficult for US lawyers to grasp, is the extent to which Swedish criminal law policy in this area is steered by developments within the EU, which itself is influenced to some degree by American pressures. We think that international and European lawyers have been naïve or have shown hubris in thinking that they can “solve” what are essentially disputes over values with a “neutral” legal definition of terrorism. This article has largely been devoted to the “one size fits all” problems which emerge when legislation dealing with a fundamental part of sovereignty, namely central concepts of criminal law and criminal procedure, becomes partly the domain of international organizations, the UN and the Council of Europe, and partly the domain of the EU, which is something between an international organization and a proto-federal state. The EU definitions which have been discussed in the present article should admittedly not be seen as dictates directed to the states.⁵⁰ The national parliaments did have the possibility of influencing the content of the various definitions. But they had relatively little time in which to do so, and the room for maneuver was much more limited than a traditional international law negotiation. The result of this is a certain “delegitimation” of the end-product. And as already mentioned, procedural and other problems emerge from the supra-national status of EC law. Criticism has certainly been voiced of the EU fixation with terrorism as distorting the EU criminal law agenda leading to a risk of long-term loss in confidence for the European project.⁵¹ A similar criticism can be

⁴⁹ Compare Council of Europe Parliamentary Assembly Resolution 1271, which notes that higher levels of education, access to decent living conditions and respect for human dignity are the best instruments for reducing the support given to terrorism in certain countries.

⁵⁰ See, e.g. K. Nuotio, *Terrorism as a Catalyst for the Emergence, Harmonization and Reform of Criminal Law*, 4 *Journal of International Criminal Justice* pp. 998–1016 (2006).

⁵¹ Nuotio *ibid.*

made against the UN blacklisting measures in relation to terrorism, but not the UN Convention against Financing of Terrorism – which was drafted with care, and leaves room for states to take into account value conflicts and makes it easier to avoid oppressive prosecutions. As regards the Council of Europe treaty on prevention of terrorism which we discuss in section 3, this, like the UN Convention against Financing of Terrorism Sweden can formally decide freely to ratify or not. However, in practice, it is difficult for Sweden to abstain from ratification. In any event, parallel legislative developments within the EU have reached, or are in the process of reaching, the same result.

US lawyers may find alien the idea that, in practice, the content of central areas of criminal law and criminal procedure are being heavily influenced by international organizations. But in another sense, this situation – where the legislature has passed legislation which is not entirely rational, or, at least, not well-enough thought through – will be very familiar to US lawyers. The US courts have long played the role of trying to ameliorate or minimize problems with both state and federal legislation which has been passed hastily, in response to public pressure, or perceived public pressure. Such an approach, however, involves something of a change in emphasis for Sweden. We put the emphasis on the legislature, making sure that the law is as well thought out as possible from the beginning, rather than expecting that the judges will afterwards check constitutionality, smooth over deficiencies, cutting down “overbroad” criminal provisions and otherwise trying to curb “oppressive” prosecutions. We will, in the future, have to think a bit more about what can be done at the negotiation and implementation stages of EU and Council of Europe norms to ameliorate problems which inevitably arise from the “one size fits all” solution. However, we will probably also have to encourage a bit more activism on the part of our judges when it comes to applying criminal law with a “European” origin. The need to protect fundamental – albeit only implicit – Swedish values in this controversial area, must be squared with the legal requirement on Sweden, as all EU member states, to apply European law loyally.