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EU INTEGRATION, FROM 9/11 TO FOREIGN FIGHTERS: DOES THE EU BETTER REACH THE BALANCE BETWEEN SECURITY AND FREEDOM? – ECLAN Conference 25-26 April 2016 – Session III/ Workshop 1 – EU Criminal Law

"Foreign Terrorist Fighters"
De-radicalization and inclusion vs. law enforcement and corrections

The organizers of the conference kindly proposed that I take my point of departure in the Danish situation, in particular by offering an account of the so called Aarhus de-radicalization and rehabilitation model, which I will be happy to do. From there, I will further devote my intervention to the schism caused by the still more expansive criminalization of preparatory acts and ancillary offences with no clear proximity to actual terrorism. My main point is that the efforts vested in de-radicalization and exit programs at the municipal level are to some degree eroded by the perpetual legislative adoption of repressive netwidening initiatives. My ambition is to highlight the inherent ambiguity in a policy which at the same time promotes a social welfare reintegration approach at the local level and criminal justice response at the national level.

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

The backdrop of the phenomenon is a rather complex exhibit, but certain contributing components can easily be identified, such as the Cartoon crisis, an activist foreign policy including Denmark's military engagement in the Middle East, and the rather harsh and polarized political debate regarding integration of Muslim citizens into the

Danish society. A substantial number of criminal convictions of home-grown jihadists indicate the comprehensive scope of the aggregate problem.

Strikingly, Denmark has been recognized globally for tackling de-radicalization in an systematized fashion founded on a principle of inclusion. This particular mode of reintegration has become known as the Aarhus Model, a label referring to the programme implemented by the town of Aarhus, the country's second largest city with approx. 350.000 inhabitants. The Aarhus Model is paradigmatic and may serve as an inspiring example of best practice. It deserves mentioning though, that a similar multi-agency approach is applied by other Danish and European municipalities, and a Strong Cities Network has recently been established under the heading "Building Resilience to Radicalization and Violent Extremism".

The philosophy behind this approach is derived from the notion that many radicalized youth are mainly bothered with existential misgivings. Their extremist motivation is basically perceived as a strive for opportunity to live a good and decent life on par with others. The response to their rebellion is not to be found in further stigmatization and exclusion, but in assistance to develop adequate life skills in order to become part of or re-enter ordinary society in a non/violent manner and to exercise meaningful citizenship. All along, any citizen's fundamental rights regarding personal political conviction and religious faith should be recognized and respected. The programme is simply an extension of a general, early crime prevention scheme that has been applied for more than 30 years, including information sharing and coordinated action involving the school system, the social welfare system and the local police, the so-called SSP teamwork.

The Aarhus police have set up a clearinghouse, a hotspot called the Info House that handles information regarding signs of radicalization from worried family members, teachers, social workers and ordinary citizens. In addition, the national security and

intelligence service is an important driver in the reintegration scheme by supplying the local police with dossiers of individuals considered at risk. The person concerned is summoned for a talk, screening, visitation, risk assessment, etc. Depending on the individual circumstances, a proportionate intervention will be offered, such as counselling, healthcare, assistance with education, employment, accommodation, a tailor-made programme to exit from extremist circles, and linking up with a trained mentor. If no further action is needed, the intelligence service will just continue to keep a watchful eye on the individual concerned. Is has actually been reported, that some returnees have become fundamentally disillusioned with the cause of ISIL after having witnessed mismanagement or even atrocities.

It deserves mentioning, though, that not anybody is considered eligible for being admitted to the programme. According to official sources, an individual will only get help to find a way back to society provided he has done nothing criminal. If there is reason to believe he has committed a crime, the matter will be investigated and eventually prosecuted, if there is sufficient evidence to build a case upon. Surveillance of Danish citizens abroad by the military intelligence service has recently been authorized which will naturally improve the prospect for legal action, just like the many current initiatives in order to strengthen intelligence and investigation tools will, e.g. due to the focus on collection and exchange of digital evidence.

It naturally makes a lot of sense that a person who has been apprehended while deliberately preparing a terrorist attack should not be granted impunity. The following case can serve as illustration:

CASE: Glasvej-case: In 2008, two young males were convicted of attempt to commit a terrorist act and sentenced to 12 and 7 years imprisonment, respectively. One of them had returned from an Al-Qaeda training camp in Waziristan bringing with him

an elaborate bomb manual. Together they then produced and tested a small amount of TATP intended as a component in a so far unspecified terror attack.

However, it must give cause for concern if a law enforcement approach is too rigidly applied in minor cases involving only preparatory offences with a barely remote nexus to actual terrorism, at least if the perpetrator is prepared to abandon violent extremism and reach out for re-integration.

This concern certainly relates to parts of the proposed directive, but on this occasion more concretely brings me over to presenting some current initiatives and proposals regarding even further criminalization of activities not representing a genuinely substantiated risk of facilitating terrorism.

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

Back in 2006, Parliament criminalized recruiting and training for terrorism purposes in order to pave the ground for ratifying the 2005 European Convention on the prevention of terrorism. Concurrently, being recruited and being trained for terrorism purposes was criminalized, too. Thus, for ten years now, Denmark has been in anticipatory compliance with certain parts of the currently introduced obligations as derived from Security Council Resolution 2178 and transposed to the Additional Protocol to the European Convention as well as to the Commission's current proposal for a directive.

The provision regarding reception of training has been applied in the following case:

CASE: Al-Shabaab training camp: In 2014, two brothers of Somalian origin and residents of Aarhus were convicted of attempt to receive training for terrorism and

both sentenced to 2 years imprisonment. The elder brother had spent a couple of weeks in an Al-Shabaab camp with intent to receive training, but it was uncertain whether he had succeeded. The other had supported him financially and otherwise.

I have no inside information with regard to the risk assessment concerning the two defendants. But the outcome of the case represents a significant contrast to the alternate reintegration modality, in particular considering the fact that the conviction related to an only attempted perpetration, and that the offender had actually made an effort to return home expediently.

After the Paris attacks and the Copenhagen shootings, the Passport Code was amended in order to authorize the police to deny issuing and to revoking passports and to issue a travel ban on a somewhat week suspicion that an individual's travelling might generate a security risk of engaging in violence upon return. Under similar criteria, an amendment to the Foreigner's Act has made it possible to annul a residence permit.

In October 2014, Denmark once again engaged in armed conflict in the Middle East by dispatching seven F-16 fighters and additional military manpower in order to join the alliance with the Iraqi state in the fight against ISIL. Despite the availability of a vast set of anti-terrorism provisions in the Penal Code, a majority in Parliament regarded it as compelling to make sure, that affiliation with an armed group of adversaries in an armed conflict involving Denmark can be punished as treason. After a whole lot of commotion, a new offence to this effect was enacted.

Subsequently, the Permanent Penal Committee was then requested to analyse if further criminalization was needed, especially if some sort of prohibition on travel to conflict zones should be enacted. So far, only Australia operates a general ban on travel to designated geographical areas. Dutifully, The Penal Committee indicated various possible schemes, but basically didn't find any such kind of prohibition

recommendable. Criminalizing activities which do not necessarily imply any substantiated risk of violence is a radical and far-reaching step. In the Committee's view, such a regime does not even add significant value to existing prohibitions. Sentences will be relatively lenient and can hardly be expected to function as an effective deterrent. Violations will be difficult to prove.

The Committee's 256 pages report was published a couple of weeks ago. On the very same day, the Minister of Justice presented a proposal including a travel ban and he immediately gained univocal political support. Because of the timing, opportunity for sober reflexion was scarce. In addition, it was not very tempting for any politician to object, considering the fact that just the previous day vast media attention had been devoted to the swift arrest of a number of individuals accused of having travelled to Syria as foreign fighters at one or the other point in time. Some of the defendants figure in the leaked ISIL documents, which supposedly may serve as a facilitator for prosecution.

At the present date, the police action has resulted in the arrest of a total of 9 persons, 5 of these in absentia, the others now incarcerated in pre-trial detention. The preliminary hearings are held in camera, so public information regarding the charges is minimal. However, it might be considered a paradox that a proposal for extended restrictions is promoted at the exact same time that provisions already in existence are demonstrated to serve their purpose rather effectively.

As already mentioned, my fundamental worry is the categorical strive by national politicians to apply criminal justice measures to cope with so-called foreign terrorist fighters as understood in a very broad sense. It seems to me that the wiser approach is the one represented by the Aarhus rehabilitation model, at least in instances where there is no compelling evidence that the individual in question has personally been directly involved in terrorism or other types of international crimes.

I will add finally, that a general travel ban infringes on provisions in the UN Covenant as well as art. 2 of the 4th Additional Protocol to the ECHR. If time permits, I will be happy to elaborate on this point later on.

At any rate, I tend to consider such a scheme counterproductive since it contributes to undermining opportunities to address lost souls who only temporarily have gone astray and bring them back to ordinary society. Under all circumstances, I find that in less serious cases a diversion option aiming at reintegration should be available as an alternative to imprisonment, especially considering the risk of further radicalization when serving a prison term. In addition, an individual stigmatized as a foreign fighter facing criminal trial after returning will have less incentive to come back at all and less motivation to comply with the law of armed conflict.