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Counterterrorism regulation in Nordic criminal law  
– a last common ground for Nordic crime policy co-operation?

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# COUNTERTERRORISM REGULATION IN NORDIC CRIMINAL LAW – A LAST COMMON GROUND FOR NORDIC CRIME POLICY CO-OPERATION?

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*It has been questioned whether such a thing as a common Nordic criminal law policy exists anymore. According to some scholars, few traces of any fundamental co-Nordic discourse on a common crime policy can be found at present. But there might be one exception – the area of counterterrorism regulation. The claim that national jurisdictions have remained key bodies in combatting terrorism could be challenged by arguing that a slew of legislative measures concerning what has been called the war on terror has emanated from various international bodies, requiring national jurisdictions to adopt laws sometimes estranged from national legislative traditions. The new legislation has, according to its critics, undermined the rule of law and peeled off judicial control mechanisms – all in stark contrast to traditional Nordic respect for human rights – and is moving towards a preventive criminal justice system. In this article, the counterterrorism regulations in four of the Nordic countries are compared to illuminate differences in the implementation of international conventions in these countries and to explore the common grounds between them.*

## I. BACKGROUND – A NORDIC COMMON GROUND

Out of the five independent states called ‘the Nordic’ countries, all but Iceland are compared in this article.<sup>2</sup> The similarities of the compared countries are often emphasised with special focus on political stability, respect of human rights and high levels of equality. All four countries are members of the United Nations (UN) and all but Norway are part of the European Union (EU).

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<sup>2</sup> Iceland is left out due to lacking comparative material. In the Nordic countries there are partly autonomous regions e.g. Greenland and the Faroe Islands (Denmark) and Åland (Finland), some of which with somewhat separate legal systems. No special consideration to such jurisdictions is taken in this article.

In the area of crime policy, article 5 of the 1962 Helsinki Agreement formalises the otherwise rather informal Nordic co-operation:

The High Contracting Parties should seek to establish uniform rules relating to criminal offences and the penalties for such offences.

With regard to criminal offences committed in one of the Nordic countries, it shall, as far as circumstances allow, be possible to investigate and prosecute the offence in another Nordic country.<sup>3</sup>

Article 5 of the agreement not only promotes legislative co-operation but also ‘presupposes a fairly similar posture on crime policy matters’.<sup>4</sup> The traditional common ground for Nordic crime policy is mainly a criminal law system based on rationality and humanity. Studied from an international perspective, Nordic crime policy has even been pointed out as ‘exceptional’ – at least in contrast to the Anglophone world.<sup>5</sup> This Nordic, or more often called Scandinavian, exceptionalism usually alludes to the generally liberal and humane prison conditions as well as low imprisonment rates but may also be seen as a broader concept including a wider area of crime policy.<sup>6</sup> Whether one labels Nordic crime policy exceptional or not, it is hard to depart from some kind of Nordic uniqueness. At least, the systems are closely linked to each other.

However, the Nordic common ground in the area of crime policy – at least if such a ground still exists – has been questioned. Professor P.O. Träskman has made one of the most apposite summaries of the status of the Nordic common grounds in the crime policy area.<sup>7</sup> He does not have a naïve view, believing in a flourishing Nordic co-operation of bygone days, nor does he find it realistic that the Nordic countries could remain a regional unit, developing a

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<sup>3</sup> <http://norden.diva-portal.org/smash/get/diva2:1229026/FULLTEXT01.pdf> (accessed 2022-10-12).

<sup>4</sup> Boucht, *Nordisk kriminalpolitik: Finns den längre, och i så fall, vart är den på väg?* 156 *Tidskrift utgiven av Juridiska Föreningen i Finland* (2020) p. 223. Author’s translation.

<sup>5</sup> Pratt, *Scandinavian exceptionalism in an era of penal excess: Part I: The nature and roots of Scandinavian exceptionalism* 48 *British Journal of Criminology* (2008) pp. 119–137, and Pratt, *Scandinavian exceptionalism in an era of penal excess: Part II: Does Scandinavian exceptionalism have a future?* 48 *British Journal of Criminology* (2008) pp. 275–292. See also Pratt & Eriksson, *Den skandinaviska exceptionalismen i kriminalpolitiken* 96 *Nordisk Tidskrift för Kriminalvetenskap* (2009) pp. 135–151.

<sup>6</sup> The Nordic exceptionalism-theory has not been unopposed. See e.g. Ugelvik and Dullum (eds.), *Penal exceptionalism? Nordic prison policy and practice* (Routledge 2012).

<sup>7</sup> Träskman, ‘The Golden Age of Nordic Cooperation,’ *Har de nordiska kronjuvelerna kommit på museum? – Den nordiska brottskontrollen: nutid, dåtid och framtid*, 100 *Nordisk tidskrift för kriminalvetenskap* (2013) pp. 333-355.

uniform criminal policy differently marked from the surrounding world. But, Träskman continues,

[...] this does not have to and should not mean that one in the Nordic countries lies down flat for all external impulses. There are still positive features of a Nordic exceptionalism and other things that can be used as positive examples of a successful control policy and criminal justice policy.<sup>8</sup>

In Professor Johan Boucht's more recent study, the question whether there still exists such a thing as a common Nordic criminal law policy is raised.<sup>9</sup> The answer he provides is that it is uncertain whether the Nordic posture is as united – or even *Nordic* – as we perhaps believe it to be. Boucht finds that no fundamental Nordic discourse on a common criminal law policy seems to exist at the present, i.e., the 2020s.<sup>10</sup>

Even though co-operation may have ceased in the general area of criminal law, it might have prevailed regarding counterterrorism: in 2015 the three Scandinavian countries and Finland agreed upon a collaboration to form a network in the battle against terrorism.<sup>11</sup>

This article is structured into six parts. After the background, a brief description and comparison of counterterrorism legislation of the four countries follows in Part 2. In Part 3, the Nordic dealing of counterterrorism measures is further examined. Part 4 adds the concept of preventionism to the article. In Part 5 it is exemplified how a certain legislative feature was adopted into the compared legislations and what problems that might have caused. Part 6 concludes the article with some summative reflections.

## 2. CURRENT LEGISLATION – A COMPARATIVE OVERVIEW

This article is not the place to elaborate on details in the different countries' legislative measures against terrorism.<sup>12</sup> I will, however, briefly present some of its most significant features and make a short comparison.

<sup>8</sup> Träskman 2013 p. 353. Author's translation.

<sup>9</sup> Boucht (2020).

<sup>10</sup> *Ibid.*

<sup>11</sup> SOU 2019:49 p. 128.

<sup>12</sup> For further reading see, for Denmark Vestergaard et al., *Forbrydelser og andre strafbare forhold*, 3rd ed. (Gad 2018) pp. 248–275; for Norway Husabø, *Terrorisme i norsk strafferett. Ein analyse av straffelova kapittel 18* (Fagbokforlaget 2018); for Sweden Cameron and Jonsson Cornell, *Terroristbrott – en översikt*, 102 *Svensk juristtidning* (2017) pp. 709–734, and Johansson, *Terroristbrottslighet – från den 11 september 2001 till sönderfallet av den islamistiska*

The *Danish* counterterrorism criminal legislation, introduced in 2002 to implement the EU Terrorism Framework Decision and the UN Financing Convention, is found in Chapter 13 of the Danish Penal Code (*straffeloven*). Starting with the original provisions on terrorist offenses and terrorist financing, the law has gradually been supplemented with additional provisions on other terrorist acts such as recruitment, education and training. Prosecution for the crimes may only be brought after permission is given by the Minister of Justice. Section 114 a contains a provision – practically a rule on sharpening of sentences – on other terrorist acts, which was introduced together with other provisions on e.g. recruitment to implement the Council of Europe Convention on the Prevention of Terrorism in Danish law. Offenses that are covered are also intended to correspond to the violations of the UN conventions annexed to the Terrorism Convention. The provision is, in the same way as the corresponding regulation in Swedish law, relatively extensive and includes references to both national penal provisions and the UN conventions. Chapter 15 of the Penal Code, which regulates provisions on violations of public order, provides for a special criminal responsibility for those who publicly express approval of crimes covered by Chapter 13, i.a. terrorist offenses (Section 136).

*Norway* introduced provisions on criminal responsibility for terrorist acts and terrorist financing in 2002 following the UN Financing Convention. The legislation was later supplemented with several provisions when the new Norwegian Penal Code (*straffeloven*) came into force on 1st of October 2015. The provisions on criminal responsibility for terrorist acts and terrorism-related acts are located in Chapter 18 of the Penal Code. Besides provisions on criminal responsibility for terrorist acts, the chapter contains special provisions on threats of terrorist acts, terrorist financing, incitement, recruitment and training for terrorist acts, participation in a terrorist organisation, travel for terrorist purposes and complicity in the escape of punishment for terrorist acts. Special provisions on criminal responsibility for, i.a., participation in military activities in an armed conflict abroad are found here. According to the general provisions on criminal responsibility in Chapter 3 of the Penal Code, a penal provision covers those who participate in an act as well. Attempts are also punishable for acts that could give rise to imprisonment for at least one year. Attempts are punished for anyone who, with the intention of completing a crime, commits an act that leads directly to the execution of the crime. Preparation of a crime is not generally punishable under Norwegian law. Norway, not being a member state of the EU, lacks the same design of some

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staten in *Vänbok till Fredrik Wersäll*, eds. Bäcklund et al. (Iustus 2018) pp. 281–295; for Finland e.g. Nuotio, *Några anmärkningar kring regleringen av terroristiska brott i de nordiska rättssystemen*, 156 *Tidskrift utgiven av Juridiska Föreningen i Finland* (2020) pp. 248–264.

of the requisites as is the case in the other countries where the regulation is in close compliance with the EU Terrorism Directive. In all the countries, a certain terrorist purpose is needed for criminal responsibility but in the Norwegian legislation, the objective criterion (seriously damaging a country etc.) is not necessary.<sup>13</sup>

The Swedish legislation has its origin in international conventions within the framework of the UN, the Financial Action Task Force (FATF), the Council of Europe and the EU. Until recently, counterterrorism legislation within criminal law in Sweden was scattered over a number of statutes which made Sweden stand out in comparison. Since July 2022, however, the legislative measures have been gathered into one single act, the new terroristbrottslag (2022:666). The new act regulates not only criminal responsibility for terrorist offenses and collaboration with a terrorist organisation, but also financing of as well as recruitment and training for terrorism. According to 4 §, a person can be guilty of a terrorist offense to either commit, or to attempt to commit, an intentional act that could seriously damage a country or an inter-governmental organisation (the 'objective criterion'). It is moreover necessary that the perpetrator in committing the act has had a certain intent, fulfilling at least one out of three stipulated 'subjective' criteria. Previously, a list of what offenses that could be considered terrorist offenses was presented in the act but now any (intentional) offense under Swedish law could be seen as a terrorist offense if committed with the abovementioned purpose.

*Finland's* counterterrorism regulation is located in chapter 34 a of the penal code (*strafflagen*). The regulation was, as for the other countries, introduced in 2002 to implement the EU Terrorism Framework Decision and the UN Financing Convention. The legislation has been supplemented subsequently by additional provisions on several offenses. In addition, there are also provisions on definitions, prosecution and criminal responsibility. The crimes listed in chapter 34 a 1 § corresponds to the EU Terrorism Directive. A certain terrorist purpose (*terroristiskt syfte*) is needed to qualify the action taken by the perpetrator as an act of terror. Finland has not, as opposed to the other countries compared, introduced terrorist offense as a separate type of crime.

Despite some differences, many similarities between the Nordic countries in the design of the counterterrorism regulation could be seen. These are rather the consequence of adoption of binding international obligations than of

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<sup>13</sup> As it is expressed in the preparatory works, such an objective criterion is precarious both legally and evidentially since it bears a stamp of security policy. See Ot.prp. nr. 8 (2007-2008), p. 179.

Nordic common grounds. However, the common grounds and values that the Nordic regulation rests upon should not be underestimated. In the next sections, I will further elaborate on this.

### 3. LEGISLATIVE COMPETENCE OF THE UN SECURITY COUNCIL – RESOLUTION 2178 (2014) AS AN EXAMPLE

The UN Security Council's legislative competence is much debated under international law, as it lacks, for example, the democratic legitimacy of a national legislator. Professors Iain Cameron and Anna Jonsson Cornell have concluded that '[o]bligations for Member States to legislate in a way that imposes obligations on individuals are hardly part of the Security Council's actual tasks'.<sup>14</sup> It has therefore been argued that legislative resolutions from the Security Council should not be read in the same way as legal texts and that there should be room for national interpretation.<sup>15</sup>

In another matter, namely concerning Resolution 1373 (2001), the legislative competence of the Security Council has been scrutinised by the Norwegian scholars Erling Johannes Husabø and Ingvild Bruce.<sup>16</sup> The critique presented in their study is also applicable to the circumstances regarding Security Council Resolution 2178 (2014) and therefore referred to here. Husabø and Bruce question the legitimacy of such resolutions, which are binding for the member states, but decided on by only fifteen states of which five are permanent members, much unlike conventions that are entered into by choice.<sup>17</sup>

In a traditional understanding of criminal law, legislation in this field is part of national sovereignty. Even though the EU aims to build an area of criminal justice, and there is some common legislation, criminal law is still to a significant extent a national matter. Nevertheless, the role of the (national) state has changed due to the adoption of a counterterrorism framework of legally binding obligations.<sup>18</sup> The traditional legislative order, where the population of a country elects parliamentarians who in turn decide what is to be criminalised, is gradually replaced by regulation decided upon on a level that is far removed

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<sup>14</sup> Cameron and Jonsson Cornell 2017 p. 726. Author's translation.

<sup>15</sup> *Ibid.*

<sup>16</sup> Husabø and Bruce, *Fighting Terrorism through Multilevel Criminal Legislation: Security Council Resolution 1373, the EU framework decision on combating terrorism and their implementation in Nordic, Dutch and German criminal law.* (Martinus Nijhoff 2009).

<sup>17</sup> Husabø and Bruce 2009 p. 51.

<sup>18</sup> Husabø and Bruce 2009 p. 7.



from the citizens due to the need of international co-operation. Here, ‘national rules become means of realising transnational rather than national interests’.<sup>19</sup>

The national legislation is placed under restrictions due to obligatory international provisions, but according to Husabø and Bruce the degree of restrictions can vary. How much it varies depends on the scope of discretion offered to national legislation or, as the authors more accurately put it, ‘on how flexible the legislature considers the international obligations to be’.<sup>20</sup> This is a central wording in looking for Nordic exceptionalism, and I will return to this further on.

Resolution 2178 (2014) was transposed into national law by the compared countries in somewhat different ways. In Norway, § 145 in *straffeloven* was introduced but criticism was directed towards the legislature for taking the provision further than imposed by the Security Council.<sup>21</sup> Merely the fact that § 145 was introduced into Chapter 18 of the Norwegian criminal code has caused critique since it criminalises a much wider range of acts than other provisions in the same chapter, regulating even participation and not only concrete acts.<sup>22</sup> The Norwegian regulation on foreign terrorist fighters can be – and has been – even more questioned. According to Husabø, the most substantial critique concerns the very foundation of the provision. Criminalising even the act of beginning a journey is an entirely preventative measure, and not in accordance with the harm (to others) principle. The design of § 145 is not only problematic in expanding the responsibility for attempted crimes, but there also seems to be a discrepancy between the wording and what the legislator supposedly originally intended: ‘the provision conjures up a misleading image of what the legislator intended to criminalise’.<sup>23</sup>

In an article that focuses on Danish law, scholar Helene Højfeldt asks an important question, namely does the counterterrorist regulation form a third legal system?<sup>24</sup> She spots the tendency among counterterrorist measures to go further than the regular criminal law and concludes:

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<sup>19</sup> *Ibid.*

<sup>20</sup> Husabø and Bruce 2009 p. 8.

<sup>21</sup> See Høgestøl, En generell kriminalisering av fremmedkrigere: den norske modellen og påtaleskjønn i straffeloven § 145, in *Fremmedkrigere: forebygging, straffefølgning og rehabilitering i Skandinavia*, eds. Andersson et al. (Gyldendal juridisk 2018), pp. 27–64.

<sup>22</sup> Husabø 2018 p. 325.

<sup>23</sup> *Ibid.* Author’s translation.

<sup>24</sup> Højfeldt, Fremmedkrigere og den internationale terrorismebekæmpelse: folkeretslige instrumenter, in *Fremmedkrigere: forebygging, straffefølgning og rehabilitering i Skandinavia*, eds. Andersson et al. (Gyldendal juridisk 2018) pp. 97–130, at 122.

Even if the counterterrorist conventions do not form a legal system in a traditional sense, based on a general convention on terrorism, one could nevertheless establish that the counterterrorism regulation – through the international anti-terrorist conventions – puts itself in between and thereby overlaps humanitarian international law as well as general criminal law, based upon human rights.<sup>25</sup>

However, the Danish Criminal Law Council (*Straffelovrådet*) found that the Danish regulation was in line with the Resolution and that no further action had to be taken.

The Swedish implementation of Resolution 2178 (2014) has also been criticised by academics. As mentioned above, the Swedish scholars Cameron and Jonsson Cornell question the Security Council's legislative powers and conclude that resolutions from the Security Council 'should not be read literally as law or be followed slavishly, but rather be seen as a binding decree to take necessary actions'.<sup>26</sup> The authors emphasise the national margin of discretion, but that was not the way the Swedish legislator interpreted the situation.

Many of the acts in Resolution 2178 (2014) were already criminalised under Swedish national law except for travelling with the intention to commit terrorist acts. As part of the Swedish Recruitment Act, a new provision was therefore proposed in 2015, criminalising journeys with the purpose of committing terrorist acts abroad. Subsequently, the new legislation was in place by spring 2016 despite certain critique from some of the referral bodies. The critical voices focused mainly on some of the difficulties with – and questioned the efficiency of – the proposed legislation. The critics especially foresaw application problems, which also was the case in the first trial based on the new legislation.<sup>27</sup>

#### 4. CRIMES OF TERRORISM AND NORDIC UNIQUENESS

The special counterterrorism criminal law has been claimed to be 'an extreme form of preventive and proactive criminal law',<sup>28</sup> not only widening the area of criminal offenses but also allowing more pre-inchoate, preparatory, facilitative and associative offenses.<sup>29</sup> The measures taken in fighting terrorism might not be

<sup>25</sup> Højfeldt 2018 p. 125. Author's translation.

<sup>26</sup> Cameron and Jonsson Cornell 2017 p. 726. Author's translation.

<sup>27</sup> This is further elaborated in Anderberg, Alla sätt är bra, utom de dåliga: kriminaliseringen av terroristresor i svensk rätt in *Fremmedkrigere: forebygging, straffefølgning og rehabilitering i Skandinavia*, eds. Andersson et al. (Gyldendal juridisk 2018) pp. 65–82.

<sup>28</sup> Nuotio 2020, p. 248. Author's translation.

<sup>29</sup> See Ashworth and Zedner, *Preventive Justice* (Oxford University Press 2014).

problematic when used for their intended purposes, but could be questioned as soon as they sidle into other forms of regulation. When criminalising terrorist acts in the general criminal code, the measures used for counterterrorist actions are transferred into parts of the law where they were not originally supposed

to be. However, once the regulation is in place, legislators find it somewhat convenient to use the counterterrorism rules as ‘good’ examples of efficient legislation, making it easier for them to provide similar rules in other parts of the criminal law.

The tendency to criminalise acts at an early stage, which can also be seen elsewhere in the field of criminal law, is particularly clear within the counterterrorism regulation.<sup>30</sup> The scope of criminal responsibility in the Nordic countries has, highly influenced by the international obligations, been considerably extended due to the criminalisation of a broad range of acts preparatory to terrorism. Husabø finds it ‘remarkable’ that the Nordic states, despite a history of relative reluctance in criminalising mere preparations to crime, all decided to add certain new preparatory offenses.<sup>31</sup>

A common, pan-Nordic, problem seems to be that the counterterrorism legislation is – or at least has been – complex and not easily grasped.<sup>32</sup> The simple explanation is that the regulation has been created at different times and with different purposes, making the overall impression somewhat blurry. The special counterterrorism criminal law is from a Nordic perspective of foreign and international origin. Different international bodies have at different times required changes and criminalisation on sometimes unstable grounds. Making the international edicts national has not always been easy. Some differences can also be seen in how the resolutions have been adapted nationally. The Swedish inquiry that proposed a cohesive legislation (however still not in the general criminal code), has been described as an example of how the counterterrorism criminal law regulation has ‘matured’. Previously, the legislative process has been primarily focused on swiftly satisfying obligations stated in international law, though lately, Nuotio claims, it seems that there could be a national ground for such a regulation.<sup>33</sup>

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<sup>30</sup> Boucht 2020 p. 231.

<sup>31</sup> Husabø, Counterterrorism and the expansion of proactive police powers in the Nordic states, 14 *Journal of Scandinavian Studies in Criminology and crime prevention* (2013) pp. 3–23, at 6.

<sup>32</sup> See both Cameron and Jonsson Cornell 2017 and Nuotio 2020.

<sup>33</sup> Nuotio 2020 p. 263.

## 5. A TREND TOWARDS PREVENTIONISM

Swedish scholar and Supreme Court justice Petter Asp has stated that the interest of prevention often is greater than the interest of repression.<sup>34</sup> The claim that the interest of preventing a crime is as strong as – or perhaps even stronger than – the interest of prosecuting the crime is, at least to some extent, true. This is, of course, even more so the case from a terrorist crime-perspective: the interest of preventing a serious act of terrorism is so great that it is even hard to try to value it.<sup>35</sup> However, there are also considerable concerns about a preventive way of approaching terrorist offences, especially since they do not shape a separate area of law but are part of the general criminal law. Preventionist criminal law becomes particularly dangerous when it is affected by the ineffectiveness of criminal law. Criminal law in itself rarely solves any problems, something that legislators often forget, overestimating the efficiency of the criminal law.<sup>36</sup> This situation has been described as ‘the unfortunate spiral’. Criticism (based on the lack of efficiency) is directed at the legislator who creates a new symbolic legislation (to show power of action) which, however, cannot live up to what it promises. The consequence will be further criticism, new criminalisation and increased levels of repression.<sup>37</sup>

Professor Magnus Ulväng claims that regardless of whether there are good reasons for treating terrorist offenses in a separate way, preventionism becomes truly problematic when focus is shifted from terrorist acts to every-day crimes that also become affected by the preventive measures.<sup>38</sup> Ulväng further claims that one could perhaps deal with the fact that terrorists are monitored, wire-tapped etc., but if preventive measures are to permeate all types of criminal offenses, we are ideologically back to a late 19th century way of thinking. Elements of prevention in the criminal law are however not an entirely new phenomenon in the Nordic countries: traces of preventionism could be found, although under different names, at least 40 years back in time.<sup>39</sup>

Since the interests and stakes are so high, they give rise to the most coercive instances of prevention and, as a consequence, some of the greatest justificatory challenges.<sup>40</sup> It is, however, not obvious in what part of the legal system counter-

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<sup>34</sup> Asp, Går det att se en internationell trend? Om preventionismen i den moderna straffrätten, 92 *Svensk juristtidning* (2007) pp. 69–82, at 79.

<sup>35</sup> *Ibid.*

<sup>36</sup> See, e.g., Anderberg 2018.

<sup>37</sup> Asp 2007 p. 81.

<sup>38</sup> Ulväng, Brottsbekämpning, rättssäkerhet och integritet – vad är det som har hänt och vad skall vi göra?, 92 *Svensk juristtidning* (2007) pp. 1–16.

<sup>39</sup> See Boucht 2020 p. 230 (in note 64).

<sup>40</sup> See Ashworth and Zedner 2014.

terrorism matters should be dealt with. Classifying terrorist acts as either acts of war or as crimes does have great implications in the pursuit of prevention.<sup>41</sup> It has been claimed that making terrorism a criminal offence is a way of overlooking the political dimensions of terrorism.<sup>42</sup> However, defining acts of terrorism as crimes is problematic in several ways. The ordinary criminal law already covers almost every form of terrorist act under definitions as murder, sabotage, etc.<sup>43</sup> The matter is not of crimes that differ, in a qualitative way, from other types of crimes. It is simply that the purpose of the criminal offense differs, and by creating certain terrorist crimes the legislator just transforms existing regulations.<sup>44</sup>

To counteract terrorist acts, criminal law measures are deployed at a much earlier stage than for other forms of offences, in hopes that the preconditions for the acts may be prevented from ever arising in the first place. It is perhaps therefore not so much for deterrence, since terrorists are unlikely to be deterred when willing to die for their cause, that legislators proceed with far-reaching measures, I claim. More likely, it is because the counterterrorism regulation opens up the toolbox for the police to intervene and hopefully abort the terrorist acts. Extensive police and investigatory powers together with coercive measures are consequences of counterterrorism regulation, and might be adequate in the 'war on terror', but could be questioned when used for mere criminal offenses. However, the counterterrorism measures taken in order to allay our fear of terrorist acts cannot alone be the reason for the generally widened ambit of the criminal law.<sup>45</sup>

Nuotio rhetorically asks whether we just need to acknowledge that the criminal law is developing in a preventive direction and therefore must become more flexible, or if there are any ways in which the special counterterrorism criminal law (*terroriststraffrätten*) could be adapted that would satisfy basic criteria for a rule-of-law-based criminal law. As Nuotio has put it, the security thinking could either change the whole criminal law system when it is noticed that the criminal law could be used as a means of administrating security in the modern welfare (risk-) society, or we could observe a fragmentation of the criminal law.<sup>46</sup> The latter would divide the criminal law in two parts where one regards questions of 'hard' security such as terrorism and organised crimes and is dealt with in a separate order, while the other – ordinary

<sup>41</sup> Ibid.

<sup>42</sup> Andersson and Nilsson, *Svensk kriminalpolitik* (Liber 2017) p. 241.

<sup>43</sup> See, e.g., Ashworth and Zedner 2014.

<sup>44</sup> See Nuotio 2020.

<sup>45</sup> See Ulväng 2007.

<sup>46</sup> See Nuotio 2020 p. 251.

criminal law – works as usual. A consequence is that a risk-based ‘security law’ (*Sicherheitsrecht*) could prevail in the traditional domains of criminal law.<sup>47</sup>

## 6. SUMMARISING REMARKS

It is a somewhat scattered picture that frames the Scandinavian counterterrorist regulation in relation to Scandinavian exceptionalism. On the one hand there is the tendency of in-line, almost over-adapting international law regulation and on the other hand a strong tradition of a humanitarian view on the legal system and – may I say – a touch of proud integrity in the Nordic countries. Furthermore, we have opposing statements saying that the Nordic co-operation in the crime policy area is at its bottom level at the same time as few significant traces of an actual movement towards a less rational and human crime policy could be seen.

To some extent, the development of counterterrorist measures in the Scandinavian countries could of course be explained by binding international law. But, as we have seen, at the same time these international resolutions and conventions are subject to national interpretation or at least a margin of state discretion. However, this possibility is, as it seems, not often used by the separate states. What this might depend on is not clear. One possibility is the endeavour from the Scandinavian states to be in line with international law, being particularly UN-friendly and often voting in the same way.

It seems as if most scholars accept counterterrorism measures to some extent, as long as they stay within the counterterrorism area of law. The real difficulties, it appears, begin when the rather far-reaching regulation gets slipped into the general criminal law, applicable for all sorts of offenses. The legislation, characterised by a sense of hurry, will affect us for a long time to come, which is often forgotten: it is much easier to criminalise than to decriminalise. Temporary measures, that perhaps could be a temporary solution, often become permanent.

This also points out another problematic aspect, namely the question of where counterterrorism law should ‘belong’ in the legal system. Should counterterrorism measures, with its global recognition, be dealt with in the international or humanitarian law, or ought it be a part of the national criminal law? The cross-border character of modern crimes demands co-operation not only within a certain region but globally, forcing us to see criminal justice from a macro-perspective rather than subject to national interests. Comparisons,

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<sup>47</sup> The reputable Max Planck Institute for Foreign and International Criminal Law (as of 2020) in Freiburg im Breisgau is possibly a, however small, example of this: the institute is now known as the Max Planck Institute for the *Study of Crime, Security and Law* <https://csl.mpg.de/en/>

especially with the other Nordic countries, are important steps of the legislative procedure in the Scandinavian countries, but could also be exploited by shrewd legislators to point at differences and creating a spiral of new punitive measures.

The Nordic legal tradition – whether we call it exceptional or not – should, I believe, continue to be known for its rationality and humanity. The work on counterterrorism measures has (re)united the Nordic countries into criminal law co-operation once again, but the question is whether some uniqueness can remain in a rapidly moving international context. 🙌