Competent courts

The trial phase takes place in front of the trial courts. There are four such types of courts, competent to preside over different types of offences at different stages. The Police Court (*politierechtbank; tribunal de police*) is competent for contraventions (*overtredingen; contraventions*), being the lightest offences, as well as for all traffic offences.[403] The Correctional Court (*correctionele rechtbank; tribunal correctionnel*) is competent for standard offences and appeals against the police courts.[404] The Court of Appeal (*hof van beroep; cour d'appel*) is competent for appeals against the judgments of the Correctional Courts.[405] The Assize Court (*hof van assisen; cour d'assises*), finally, is competent for felonies and all political (*politek misdrijf; infraction politique*) and press offences (*drukpersmisdrijf; délit de presse*).[406] Almost all of the terrorism offences are felonies. The exceptions are some of the lighter offences of terrorism *sensu stricto* and most of the preparation offences of article 140*septies* CC. For the offences in article 140*septies*, the sentence depends upon the prepared offence and only the preparation of the most serious terrorist offences is a felony (see below). The majority of cases being felonies, this means they should in theory be tried by the Assize Court. In the Assize Court however, jury trials take place. Because the jury trial procedure is long and expensive, a technique called 'correctionalisation' (*correctionalisatie; correctionnalisation*) is often employed.[407] Correctionalisation is possible for almost all of the terrorist felonies, except for the most severe ones such as terrorist murder. In order to apply this technique, attenuating circumstances are invoked when referring the case to trial.[408] This so called correctionalisation based on attenuating circumstances has become standard practice for every felony for which the law allows it,[409] including most of the terrorist offences. There is no list of what can be invoked as an attenuating circumstance, so the possibilities are near endless.[410] In addition to the general

[403] Art 137-138 CCP. See also: Van den Wyngaert, Vandromme and Traest (n 16) 688–689; Raf Verstraeten, *Handboek Strafvordering* (5de voll. herz. uitgave, Maklu 2012) 812.

[404] Art 174 and 179 CCP. See also: De Nauw and Deruyck (n 20) 52; Van den Wyngaert, Vandromme and Traest (n 16) 687–688; Verstraeten (n 403) 813.

[405] Art 200 CCP. See also: Verstraeten (n 403) 815.

[406] Art 150 Constitution. See also: De Nauw and Deruyck (n 20) 52; Van den Wyngaert, Vandromme and Traest (n 16) 681; Verstraeten (n 403) 815.

[407] Van den Wyngaert, Vandromme and Traest (n 16) 295 and 685.

[408] De Nauw and Deruyck (n 20) 49–50; Vanessa Franssen, 'Algemeen' in M De Busscher and others (eds), *Strafrecht: duiding* (Larcier 2018) 162–163; Tulkens and others (n 16) 653; Van den Wyngaert, Vandromme and Traest (n 16) 295; Verstraeten (n 403) 697–698.

[409] Franssen (n 408) 163–164; Van den Wyngaert, Vandromme and Traest (n 16) 295.

[410] Tulkens and others (n 16) 649–650; Van den Wyngaert, Vandromme and Traest (n 16) 294–295.

tendency to try as little cases as possible in front of the Assize Court because they are slow and expensive,[411] it has been argued that in cases of terrorism the jury could on the one hand be intimidated into giving lenient sentences or on the other hand impose very severe sentences because terrorism is a sensitive issue.[412] The trial of Nemmouche and Bendrer, the perpetrators of the terrorist attack in the Jewish museum in Brussels, took place in front of the Assize Court. The trial, which was wrought with issues, exacerbated by the massive media attention, shows that in this context jury trials are no easy task.[413] This is part of the reason why some people are worried about the upcoming jury trial for the terrorist attacks in Zaventem and Maelbeek. The federal prosecutor has warned against this[414] and a proposal to bring terrorism under the competence of

[411] Memorie van Toelichting bij het wetsontwerp van 23 oktober 2015 houdende wijzigingen van het strafrecht en de strafvordering en houdende diverse bepalingen inzake justitie, *Parl.St.* Kamer 2015-16, nr. 54 1418/001, (4) 112 – 113; Franssen (n 408) 161; Joëlle Rozie, 'Hof van Assisen En Correctionalisering Na Potpourri II: Kunst- En Vliegwerk of Dankbare Ingreep van de Wetgever?' [2016] Nullum Crimen (NC) 91, 92–93; Lientje Van Den Steen, 'De Potpourri II-Wet En de Veralgemeende Correctionaliseerbaarheid: Een Prefabbouwwerk Met Onstabiele Fundamenten' [2015–2016] Rechtskundig Weekblad 1604, 1606; Ruben Vilain and Ward Yperman, 'Grondwettelijk Hof 21 december 2017: it came in like a wrecking ball' [2018] Nullum Crimen 1, 2–4.

[412] Memorie van Toelichting bij het wetsontwerp van 23 oktober 2015 houdende wijzigingen van het strafrecht en de strafvordering en houdende diverse bepalingen inzake justitie, *Parl.St.* Kamer 2015-16, nr. 54 1418/001, (4) 113; Lore Gyselaers, *La Participation Des Citoyens à La Fonction de Juger En Matière Pénale. Etude Comparative Du Droit Anglais, de Droit Belge et de Droit Français* (PhD thesis, KU Leuven 2011) 162; D Leestmans, 'Terrorisme Blijft in Strafrechtelijke Termen Deels Onvatbaar, Interview Met Paul Ponsaers' [27 mei 2020] Juristenkrant 8, 8–9.

[413] H Decré, 'Rondleiding door slachtoffer', 'half doof' of 'skivakantie': excuses om niet in jury proces-Nemmouche te moeten zitten' (2019) *vrtNWS* 7 January 2019, <https://www.vrt.be/vrtnws/nl/2019/01/07/ik-ben-rondgeleid-door-een-slachtoffer-ik-ben-half-doof-of/>; TD, 'Juryleden proces Nemmouche bezorgd over veiligheid na diefstal dossier' (2019) *Bruzz* 31 January 2019, <https://www.bruzz.be/justitie/juryleden-proces-nemmouche-bezorgd-over-veiligheid-na-diefstal-dossier-2019-01-31>; A Vanrenterghem, 'Burgerlijke partijen en parket over complottheorie Mehdi Nemmouche: "Rookgordijn zonder bewijs, respectloos"' (2019) *vrtNWS* 4 March 2019, <https://www.vrt.be/vrtnws/nl/2019/03/04/proces-aanslag-joods-museum-replieken/>; AW, KG and HA, 'Jurylid gewraakt op proces tegen Medhi Nemmouche na bizar gesprek met collega' (2019) *HLN* 18 February 2019, <https://www.hln.be/nieuws/binnenland/jurylid-gewraakt-op-proces-tegen-mehdi-nemmouche-na-bizar-gesprek-met-collega~add55bd1/>; X, 'Opnieuw jurylid gewraakt op proces-Nemmouche' (2019) *de standaard* 16 January 2019, <http://www.standaard.be/cnt/dmf20190116_04107264>; X, 'Zevende jurylid proces Nemmouche gewraakt na gesprek met collega' (2019) *De Morgen* 18 February 2019, <https://www.demorgen.be/binnenland/zevende-jurylid-proces-nemmouche-gewraakt-na-gesprek-met-collega-bff72490/>.

[414] See for example: Sandra Cardoen, 'Federaal procureur vindt proces aanslagen te complex voor jury: "Je vraagt niet aan iemand op straat om te opereren"' (2020) *vrtNWS* 9 February 2020, <https://www.vrt.be/vrtnws/nl/2020/02/09/aanslagen-assisen-versus-correctionele/>; Douglas De Coninck, 'Assisenproces ligt opnieuw onder vuur' (2020) *De Morgen* 11 February 2020, <https://www.demorgen.be/nieuws/assisenproces-ligt-opnieuw-onder-vuur~b84189c7/>.

the Correctional Courts was tabled in parliament, but later dismissed.[415] It is somewhat ironic, however, that the constitutionally compulsory jury trial would be circumvented for practical reasons, while our constitutional order is one of the things we are trying to protect against terrorism. At the expert seminar, there was agreement that jury trials are not ideal for terrorism. The majority of participants was against an exception for terrorism, however, as this singles out terrorism as a special case once more. The preferred solution was to rethink the Assize Courts in general.

As mentioned above, the Assize Courts are not only competent for felonies but also for all political and press offences.[416] Both categories could be relevant for terrorism offences. There are two kinds of political offences. First, the pure political offences (*zuiver politiek misdrijf; infraction politique pure*). These offences can be designated so by the legislature by either explicitly making the Assize Courts competent for a standard offence or prescribing the sentence of detention instead of felony imprisonment.[417] If this is not the case, an offence can still be a pure political offence if the offence necessarily is a direct attack on the political institutions in their existence, organisations, or functioning or on the political rights of citizens.[418] The second category is that of the mixed political offences (*gemengd politiek misdrijf; infraction politique mixte*). These are offences which are not necessarily because of the nature of the offence a direct attack on the political institutions, etc. but which are committed with the intention of causing such an impairment of the political institutions

[415] Voorstel tot herziening van artikel 150 van de Grondwet teneinde de juryrechtspraak voor terroristische misdaden af te schaffen, *Parl.St.* Kamer 2019-2020, nr. 55-1287/001 and 003. For a brief analysis, see: Sofie Royer, Ruben Vilain and Ward Yperman, 'Grondwetswijziging voor terrorismeprocessen is niet radicaal genoeg' [2020] De Juristenkrant 10.

[416] Art 150 Constitution. See also: Corr. Hainaut 22 maart 2021, *JLMB* 2022, 444; Lore Gyselaers, '(Digitale) Drukpersmisdrijven En de Bevoegdheidsproblematiek – Tijd Voor Een Wettelijke Correctionalisatie?' [2013] Limb. Rechtsl. 97, 97; Anouk Kerkhofs, 'Een adequaat vervolgingssysteem inzake drukpersmisdrijven' [2016] Nullum Crimen 64, 67.

[417] De Nauw and Deruyck (n 20) 53; Vanessa Franssen, 'Begrip Politiek Misdrijf' in M De Busscher and others (eds), *Strafrecht: duiding* (Larcier 2018) 30; Tulkens and others (n 16) 347; Van den Wyngaert, Vandromme and Traest (n 16) 203.

[418] Cass. 18 november 2003, *Arr.Cass*. 2003, afl. 11, 2125, concl M Timperman; Cass. 9 november 2004, *JT* 2004, afl. 6157, 856, noot; Concl EH bij Cass. 15 februari 2006, P.05.1594; De Nauw and Deruyck (n 20) 54; Franssen (n 417) 30; J Huysmans and others, 'Grondwet (Uitreksel)', *Strafrecht geannoteerd* (die Keure 2020) 259; Jan Kerkhofs, 'Noot Onder Corr. Hasselt 27 Juli 1999' [1999] Limb. Rechtsl. 264, 265–266; Moucheron (n 7) para 9; Tulkens and others (n 16) 347; Van den Wyngaert and Vandromme (n 16) 194; Van den Wyngaert, Vandromme and Traest (n 16) 204.

and which, given the special circumstances in which they are committed, have or can have such a direct impairment as a consequence.[419]

Because of its *mens rea* and the contextual part of the *actus reus*, terrorism *sensu stricto* seems to be eligible for the qualification of political offence.[420] Terrorism has been accepted as a ground for the application of article 15 ECHR.[421] This article allows member states to derogate from most of the requirements of the ECHR[422], but only in the event of war or other public emergency threatening the life of the nation.[423] Terrorism has already been accepted as a ground of application of article

[419] Cass. 24 maart 1908, *Pas.* 1908, 142; Cass. 7 september 1935, *Pas.* 1935, 334; Cass. 21 oktober 1981, *Arr.Cass.* 1981-82, 271; Cass. 18 november 2003, *Arr.Cass*. 2003, afl. 11, 2125, concl M Timperman; Cass. 9 november 2004, *JT* 2004, afl. 6157, 856, noot; Concl EH bij Cass. 15 februari 2006, P.05.1594; De La Serna (n 7) 168; De Nauw and Deruyck (n 20) 54; Franssen (n 417) 30; Huysmans and others (n 418) 259–260; Kerkhofs (n 418) 266; Moucheron (n 7) para 9; Tulkens and others (n 16) 348; Van den Wyngaert and Vandromme (n 16) 194–195; Van den Wyngaert, Vandromme and Traest (n 16) 204–205.

[420] This is also briefly discussed in the preparatory documents, but without any real conclusion. See: Verslag namens de commissie voor de Justitie van 3 december 2003 bij het wetsontwerp betreffende terroristische misdrijven, *Parl.St.* Senaat 2003-04, nr. 3-332/3, 7, 10, 12 en 20. Looking at the historical roots of the political offence, terrorism *sensu stricto* is the type of offence the constitutional assembly of 1830 had in mind when it created the category of political offences. For an analysis, see: Moucheron (n 7).

[421] Art 15 ECHR; *Lawless v. Ireland (no. 3)* App no 332/57 (ECHR 1 July 1961) 28-30; *Ireland v UK* App no 5310/71 (ECHR, 18 January 1978) 205 and 212; *Brannigan and McBride v UK* App no 14553/89 and 14554/89 (ECHR, 25 May 1993) 44-47; *Aksoy v Turkey* App no 21987/93 (ECHR 18 December 1996) 70; *A et al v UK* App no 3455/05 (ECHR Grand Chamber, 19 February 2009) 175-181; *Guide to the case-law of the European Court of Human Rights on Terrorism* (2020) 39. France also claimed that terrorism threatened the life of the nation when it in 2015 declared the state of emergency and deviated from its obligations under the ECHR. (Declaration contained in a letter from the Permanent Representative of France to the Council of Europe, dated 24 November 2015, registered at the Secretariat General on 24 November 2015, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/declarations?p_auth=0e9U611h&_coeconventions_WAR_coeconventionsportlet_enVigueur=false&_coeconventions_WAR_coeconventionsportlet_searchBy=state&_coeconventions_WAR_coeconventionsportlet_codePays=FRA&_coeconventions_WAR_coeconventionsportlet_codeNature=10>). See also: Olivier De Shutter, 'La Convention Européenne Des Droits de l'homme à l'épreuve de La Lutte Contre Le Terrorisme' in Emmanuelle Bribosia and Anne Weyembergh (eds), *La convention Européenne des droits de l'homme à l'épreuve de la lutte contre le terrorisme* (Bruylant-Nemesis 2002) 129; H Fenwick and D Fenwick, 'The Role of Derogations from the ECHR in the Current "War on Terror"' in Eran Shor and Stephen Hoadley (eds), *International Human Rights and Counter-Terrorism* (Springer 2019) 8–11 en 18–19 <http://link.springer.com/10.1007/978-981-10-3894-5_37-2> accessed 8 January 2020; Silvis (n 57) 657–658; Frédéric Vanneste, 'Het Europese Hof Voor de Rechten van de Mens En de Overheden Die Terrorisme Bestrijden: Brothers in Arms?' (2003–2004) 41 Rechtskundig Weekblad 1665, 1674–1675; Velaers (n 183) 791.

[422] This is not the case for all of the requirements of the ECHR. The prohibition of torture (art 3 ECHR) and the prohibition of slavery (art 4, section 1 ECHR) for example are absolute. They cannot be derogated from under article 15 (art 15, section 2 ECHR).

[423] Spreutels and Velu (n 52) 130–131; Vanneste (n 421) 1674–1675. Moreover, this is only possible to the extent that the seriousness of the situation strictly requires such measures and provided that they are not in conflict with other obligations under international law.

15 ECHR and can thus threaten the life of a nation. The Belgian legislature, however, has not designated terrorism a pure political offence[424], so this qualification is dependent on the case law.[425]

The Court of Cassation states that a political offence is an offence "that both because of the intent of the perpetrator and its effects, is a direct attack on the political institutions".[426] Political offences require a possible direct impairment of the political institutions. The Court of Cassation therefore ruled that the terrorist offences are not of such a nature that they can be a political offence because "the damage the perpetrator wants to do to the political institutions is realised indirectly, by endangering random lives or economic interests, even though those lives or interests have nothing to do with the organisations or institutions the perpetrator claims to want to target".[427] So, the required political damage is not the direct and immediate consequence of the offences but only the indirect and hypothetical consequence.[428] This means that according to the Court of Cassation, terrorism is not a political offence. This seems to be accurate only for pure political offences. This category is not applicable because terrorism does not necessarily entail a direct impairment of the political institutions. Seriously intimidating a population suffices as well. Furthermore, acts against international organisation are eligible to be called terrorism *sensu stricto* while it is not clear whether they would be 'political institutions'.[429] However, it is not beyond the scope of the

[424] The custodial penalties the Criminal Code imposes are felony imprisonment and imprisonment, not detention and the Assize Court has not been explicitly given competence over the standard offences.

[425] Delmulle and Guenter (n 15) 4.

[426] Own translation, original in French: "*qui, dans l'intention de son auteur et par ses effets, porte directement atteinte aux institutions politiques*" (Cass. 5 mei 1913, *Pas.* 1913, I, 207). See also: Cass. 21 november 1927, *Pas.* 1928, I, 20; Cass. 3 april 1984, *Arr.Cass.* 1983-84, 1023; Tulkens and others (n 16) 345–346; Van den Wyngaert and Vandromme (n 16) 193–194; Van den Wyngaert, Vandromme and Traest (n 16) 204.

[427] Own translation, original in French: "*l'atteinte que son auteur cherche à porter au fonctionnement des institutions politiques se réalise de façon médiate, par la mise en péril de vies humaines ou d'intérêts économiques quelconques, fussent-ils étrangers aux structures ou aux institutions que l'auteur dit vouloir frapper.*" (Cass. 27 juni 2007, P.07.0333.F). See also: Antwerpen 7 februari 2008, *onuitg.*, 34-35; De Hert and Millen (n 32) 3; Delhaise (n 9) 20; De Nauw and Deruyck (n 20) 53; De Nauw and Kuty (n 16) 17; Deruyck and De Nauw (n 16) 8; Ketels (n 14) 239; Tulkens and others (n 16) 349; Van den Wyngaert, Vandromme and Traest (n 16) 207; Weyembergh and Kennes, 'Le Titre Iter Du Livre II Du Code Pénal: Des Infractions Terroristes' (n 7) 123–124.

[428] Cass. 27 juni 2007, P.07.0333.F; De La Serna (n 7) 213–214; De La Serna (n 15) 201.

[429] There is no definition or exhaustive list. The Court of Cassation has stated that this includes among other things the constitutional regime of the state, the parliaments, the authority and constitutional prerogatives of the King, the order of succession to the throne,

imaginable that a terrorist attack causes direct political damage, for example by targeting political leaders.[430] In this case, it would be a mixed political offence. The case law in general is very strict when it comes to the qualification of political offence.[431] The reasons of the Court of Cassation not to qualify terrorism as a political offence probably, at least partly, have to do with the competent court being the Assize Court,[432] where relatively long, cumbersome and expensive jury trials take place.

A second special category of offences which may be relevant is press offences. A press offence is the expression of an idea or an opinion which constitutes a breach of criminal law, by means of a printed document or a similar process, provided that the document containing the offence has been given effective publicity.[433] This definition requires the expression of an idea or opinion,[434] meaning that stating facts or spreading an image for example[435] is not sufficient.[436] Societal relevance, however is not required.[437] The case law states that a video or image in itself or spoken text cannot be a press offence unless they are accompanied by writing.[438] Spreading a text over the internet is

the exercise of ministerial powers and the political rights of citizens (Cass. 18 november 2003, Arr.Cass. 2003, afl. 11, 2125, concl M Timperman. See also : Tulkens and others (n 16) 346–347).

[430] De La Serna (n 7) 214; Moucheron (n 7) paras 21–22.

[431] De La Serna (n 7) 168; De La Serna (n 15) 200–201; Delmulle and Guenter (n 15) 4; Franssen (n 417) 30; Kerkhofs (n 418) 266; Moucheron (n 7) para 12; Van den Wyngaert and Vandromme (n 16) 195.

[432] Art 150 Constitution; De La Serna (n 15) 201; Delhaise (n 9) 20; De Nauw and Deruyck (n 20) 54; Kerkhofs (n 418) 265; Masset (n 7) T60/23; Tulkens and others (n 16) 342–343; Van den Wyngaert and Vandromme (n 16) 192 en 197; Van den Wyngaert, Vandromme and Traest (n 16) 207.

[433] Cass. 17 januari 1990, Arr.Cass. 1989-90, 309; Cass. 7 februari 1995, AJT 1995-96, 248, noot D Voorhoof; Cass. 28 april 2021, P.21.0029.F; Cass. 19 januari 2022, *JT* 2022, 143; Corr. Hainaut 22 maart 2021, *JLMB* 2022, 444; Gyselaers (n 416) 97; Kerkhofs (n 416) 65; Chris Van den Wyngaert, Philip Traest and Steven Vandromme, *Strafrecht En Strafprocesrecht in Hoofdlijnen* (Maklu 2017) 207.

[434] Corr. Hainaut 22 maart 2021, *JLMB* 2022, 444; Kerkhofs (n 416) 65–66.

[435] Cass. 7 december 1971, *Pas.* 1972, I, 341; Eric Brewaeys, 'Persmisdrijf via Internet' (Noot Onder Cass. 29 October 2013)' [2014] Nieuw Juridisch Weekblad 408; Kerkhofs (n 416) 69.

[436] Alain De Nauw and Filiep Deruyck, *Overzicht van Het Belgisch Algemeen Strafrecht* (die Keure 2015) 56; Tulkens and others (n 16) 359–360; Van den Wyngaert, Traest and Vandromme (n 433) 208; Jogchum Vrielink, 'Internet: Spreken Is Zilver, Schrijven Is Goud? Drukpersmisdrijf (Art. 150 Gw.), de Audiovisuele Media En de Zaak Belkacem' [2014] Tijdschrift voor Strafrecht 143, 145.

[437] Cass. 6 maart 2012, *NjW* 2012, 341; Corr. Hainaut 22 maart 2021, *JLMB* 2022, 444; De Nauw and Deruyck (n 436) 55; Gyselaers (n 416) 99; Kerkhofs (n 416) 70.

[438] Cass. 29 oktober 2013, *NjW* 2014, 406, noot Eric Brewaeys. See also: Brewaeys (n 435); De Nauw and Deruyck (n 436) 56; Gyselaers (n 416) 98–99; Tulkens and others (n 16) 360–368; Van den Wyngaert, Traest and Vandromme (n 433) 209; Vrielink (n 436) 145–146.

considered a 'similar process' to a printed document so can also be a press offence.[439] Finally, effective publicity is required, which is a factual issue.[440] The text needs to be spread, but not necessarily on a large scale. Applying this definition to the terrorist offences discussed above, we see that under the right circumstances many of them can constitute a press offence. For example, spreading certain messages on social media with an aim to incite or recruit people or to threaten a terrorist offence. This would have several consequences in criminal law and criminal procedure, the most important one being that press offences (barring the ones based on racism or xenophobia) need to be tried by the Assize Courts.[441]

[439] Cass. 6 maart 2012, *NjW* 2012, 341; Cass. 29 januari 2013, P.12.1988.N; Cass 29 januari 2013, P.12.1961.N; Cass. 29 oktober 2013, *NjW* 2014, 406, noot Eric Brewaeys; Cass. 8 november 2016, P.16.0958.N; Corr. Hainaut 22 maart 2021, *JLMB* 2022, 444; Brewaeys (n 435); De Nauw and Deruyck (n 436) 56; Gyselaers (n 416) 97–98; Kerkhofs (n 416) 70; Sofie Royer, 'Beledigingen via Sociale Media En Het Drukpersmisdrijf' [2018] Nieuw Juridisch Weekblad 650, 650; Van den Wyngaert, Traest and Vandromme (n 433) 209–210; Vrielink (n 436) 145–146.

[440] Kerkhofs (n 416) 66; Tulkens and others (n 16) 362–363; Van den Wyngaert, Traest and Vandromme (n 433) 210–211.

[441] Art 150 Constitution. See also: Cass. 29 oktober 2013, *NjW* 2014, 406, noot Eric Brewaeys; Corr. Hainaut 22 maart 2021, *JLMB* 2022, 444; De Nauw and Deruyck (n 436) 57; Kerkhofs (n 415) 67; Royer (n 439) 650; Van den Wyngaert, Traest and Vandromme (n 433) 211; Vrielink (n 436) 145.

Trials *in absentia*

Belgian criminal procedure allows for trials *in absentia*. This means that if one of the parties does not appear at trial, either in person or by representation, the trial can still go ahead without them.[442] The only exception on this rule is the public prosecution service, which has to be present. It is therefore possible for a person to be convicted without even being there. This is possible for all the aforementioned Criminal Courts, meaning even murder trials with a jury can happen *in absentia*.[443] However, if a defendant was convicted *in absentia*, he has a right to a retrial under certain conditions.[444] First of all, there is a normal deadline of fifteen days after the judgment is served within which the judgment *in absentia* must be protested.[445] If the judgment was not served to the defendant themselves, however, but to their legal address for example, there is an extraordinary deadline as well. This deadline expires on the fifteenth day after the defendant has become aware that the judgment *in absentia* has been served.[446] If this happened through the serving of a European arrest warrant or an extradition order, or if the term of fifteen days has not expired at the moment of arrest abroad, the term is extended until fifteen days after extradition or after the day of liberation abroad.[447] Secondly, if the party knew about the summons[448] and did not appear without force majeure or a lawful ground for excuse, their retrial will be declared invalid, as is the

[442] Philip Traest and Joachim Meese, 'De rechtsmiddelen verzet en hoger beroep: actualia' in T Daems, W De Bondt and N De Nil, *Strafrecht en strafprocesrecht: doel of middel in een veranderde samenleving?* (Kluwer 2017) 520–522; Van den Wyngaert, Traest and Vandromme (n 433) 1271–1272; Verstraeten (n 403) 1075–1076.

[443] Traest and Meese (n 442) 524; Verstraeten (n 403) 1079.

[444] Declercq (n 198) 1408; Patrick Vandenbruwaene, Yves Liégeois and Bart De Smet, 'Het complexe systeem van verstek, ontvankelijk of niet- ontvankelijk verzet, ongedaan verzet en de opeenvolging van verzet en hoger beroep. Voorstellen tot vereenvoudiging' [2015] Rechtskundig Weekblad 963, 963; Van den Wyngaert, Traest and Vandromme (n 433) 1356–1358; Verstraeten (n 403) 1080.

[445] Art 187, §1 and 208 CCP. See also: Tom Decaigny, 'Formele Aspecten van de Buitengewone Termijn Voor Verzet' [2016] Tijdschrift voor Strafrecht 237, 238; Declercq (n 198) 1414; Traest and Meese (n 442) 528–530; Van den Wyngaert, Traest and Vandromme (n 433) 1362–1364; Verstraeten (n 403) 1258–1260.

[446] Art 187, §2 CCP. See also: Decaigny, 'Formele Aspecten van de Buitengewone Termijn Voor Verzet' (n 445) 238; Declercq (n 198) 1418–1419; Bart De Smet, 'Het Verzet van de Beklaagde Die in Het Buitenland Is Aangehouden' [2016] Rechtskundig Weekblad 623, 623; Traest and Meese (n 442) 531–533; Vandenbruwaene, Liégeois and De Smet (n 444) 964; Van den Wyngaert, Traest and Vandromme (n 433) 1364–1366; Verstraeten (n 403) 1260–1262.

[447] Art 184, §1 CCP. See also: Cass. 14 april 2015, *RW* 2016-17, 622, noot De Smet; Cass. 5 oktober 2021, P.21.0881.N; De Smet, 'Het Verzet van de Beklaagde Die in Het Buitenland Is Aangehouden' (n 446) 624.

[448] Which needs to be proven, see: Cass. 17 januari 2017, *RW* 2018-2019, 654, noot De Smet.

case if a party does not show at its retrial.[449] A retrial procedure instigated by the defence cannot work to their detriment, meaning the sentence cannot be elevated.[450]

It is possible for these rules to apply to foreign terrorist fighters who travelled to Syria. A trial *in absentia* may go ahead while they are in Syria.[451] If they return to Belgium at some point, the normal deadline for a retrial will usually have passed. However, it is possible that they may not have known about the summons and about the judgment being served until they arrived in Belgium. This means that they will still have time to request a retrial under the extraordinary deadline. There are several examples of terrorism cases being retried after an initial trial *in absentia*.[452]

[449] Art 187, §6 CCP. See also: Cass. 18 januari 2022, P.21.1291.N; Bart De Smet, 'Het Ongedaan Verzet En de Vereiste van Kennisname van de Dagvaarding' [2018] Rechtskundig Weekblad 654, 654–655; Bart De Smet, 'Het Begrip "Wettige Verschoning" van Artikel 187, § 6, 1° Sv. Als Criterium Voor Ongedaan Verzet' [2019] Tijdschrift voor Strafrecht 164, 164; Stijn Lamberigts, 'Ongedaan Verzet: Eigen Schuld, Dikke Bult?' [2019] Tijdschrift voor Strafrecht 235, 235–237; Traest and Meese (n 442) 539–542; Van den Wyngaert, Traest and Vandromme (n 433) 1367–1368.

[450] Cass. 13 november 1985, *Arr.Cass.* 1985-86, 340; Cass. 6 oktober 1993, *Arr.Cass*. 1993, 811; Cass. 3 september 2003, P.03.515.F; Cass. 17 december 2008, P.08.1281.F; Declercq (n 198) 1426; Traest and Meese (n 442) 543–546; Verstraeten (n 403) 1264–1265.

[451] See for example: Corr. Brussel 8 mei 2017, *onuitg.*; Corr. Charleroi 22 november 2017, *onuitg.*; Corr. Mechelen 4 januari 2018, *onuitg.* See also: Elise Delhaise, Coline Remacle and Chloé Thomas, 'Après le califat, l'embarras' (2020) 6 La Revue Nouvelle 49, 63.

[452] See: Corr. Brussel 14 oktober 2014, *onuitg.*, retrial of Corr. Brussel 21 mei 2014, *onuitg.*; Corr. Antwerpen 30 juni 2015, *onuitg.*, retrial of Corr. Antwerpen 11 februari 2015, *onuitg.*

Immediate arrest warrants

If a defendant is convicted to a prison sentence, they can be deprived of their liberty in execution of this sentence. However, this execution does not start the moment the judgment is rendered. A judgment can only be executed if it has force of *res judicata*.[453] If the convicted defendant was already in pre-trial detention for those offences, however, he remains in detention, as long as he was convicted for a prison sentence which is longer than the time he already spent in (pre-trial) detention.[454] If the defendant was not in detention yet, he remains at liberty even after the judgment, until it gains force of *res judicata* and can be executed.

It is possible, however, for the trial court to order the immediate arrest of the convicted defendant who was not detained yet. This is not an early execution of the sentence, but a form of remand in custody, just like the pre-trial detention or detention during trial.[455] This is possible if the defendant was convicted to a sentence of minimum three years imprisonment.[456] When the defendant was convicted for terrorism (*sensu strico* or *sensu lato*)[457] however, their immediate arrest can be ordered if their sentence is minimum one year imprisonment.[458] In addition, an immediate arrest can only be ordered when the trial court fears (in a substantiated manner) the convicted defendant might try to evade the execution of his sentence or might commit new standard offences or felonies.[459] When a suspect is in detention after an immediate arrest (for example while awaiting

[453] Van den Wyngaert, Vandromme and Traest (n 16) 1230; Verstraeten (n 403) 1192.

[454] Van den Wyngaert, Vandromme and Traest (n 16) 1230; Verstraeten (n 403) 1170–1171.

[455] Filip Van Volsem and others, *Voorlopige hechtenis: commentaar* (Daniel De Wolf ed, INNI publishers 2014) 352; Verstraeten (n 403) 1171.

[456] Art 33, §2 Statute on pre-trial detention. See also: Marie Horseele and others, 'Recente Wijzigingen in Het Straf(Proces)Recht: Consequent Incoherent?', *Recht in beweging - 25ste VRG-Alumnidag* (Gompel&Svacina 2018) 125; Van den Wyngaert, Vandromme and Traest (n 16) 1230.

[457] or certain sexual offences.

[458] Art 33, §2 Statute on pre-trial detention. See also: Van den Wyngaert, Vandromme and Traest (n 16) 1230. It used to be one year for all offences (Verstraeten (n 403) 1171–1172.). The legislature raised this threshold to three years for all offences, except for terrorism and certain sexual offences in 2017 (art 7 wet van 21 december 2017, tot wijziging van diverse bepalingen met het oog op de invoering van een beveiligingsperiode en tot wijziging van de wet van 20 juli 1990 betreffende de voorlopige hechtenis voor wat de onmiddellijke aanhouding betreft, *BS* 11 januari 2018, 1185). This was done without really motivating the differentiation between terrorism and sexual offences on the one hand and all other offences on the other hand. See: Horseele and others (n 456) 125–126; Yperman, 'De bestrijding van terrorisme en strafprocesrecht: vele kleintjes maken een grote' (n 26) 10–11.

[459] Art 33, §2 Statute on pre-trial detention. Until 2019, an immediate arrest was only possible in case of risk of evasion of the execution of the sentence (Verstraeten (n 403) 1172.). The reasoning was that the suspect had been at liberty up until that point and had not committed other offences during the investigation and procedure (or tried to manipulate the evidence or conspired with

their appeal), they can request their provisional release from the court where their case is pending.[460] No appeal is possible against a decision from this court in this matter.[461] This technique of immediate arrest warrants is often combined with a trial *in absentia* for defendants who are believed to still be in Syria.[462] This means that the convicted foreign terrorist fighter can be arrested immediately upon returning to Belgium in execution of this immediate arrest warrant and can be kept in detention while a possible retrial takes place.

others). The judgment did, however, give him an extra reason to flee. Therefore, an immediate arrest was possible when there were reasons to believe he would do so. After a highly mediatised case of a murder committed by a man who had already been convicted for previous offences but who appealed his conviction and whose immediate arrest was not ordered because there was no risk he would flee, the legislature decided to make an immediate arrest also possible in case there is a risk of new offences being committed. See: Wetsvoorstel van 1 oktober 2019 tot wijziging van de wet van 20 juli 1990 betreffende de voorlopige hechtenis aangaande de onmiddellijke aanhouding, *Parl.St.* Kamer 2019, 55-0489/001, 3-4; amendement nr. 3 van 5 november 2019 bij tot wijziging van de wet van 20 juli 1990 betreffende de voorlopige hechtenis aangaande de onmiddellijke aanhouding, *Parl.St.* Kamer 2019, 55-0489/005, 2. This addition was challenged before the Constitutional Court, which found it to be constitutional. See: GwH 10 juni 2021, 86/2021, *Rechtskundig Weekblad* 2021-2022, 755.

[460] Art 27, §1, 2° and §2 Statute on pre-trial detention; Cass. 5 januari 2021, *T.Strafr.* 2021, 232, noot Daeninck; Van Volsem and others (n 455) 235.

[461] Cass. 5 januari 2021, *T.Strafr.* 2021, 232, noot Daeninck; P Daeninck, 'Over het verzoekschrift tot voorlopige invrijheidstelling na het instellen van hoger beroep tegen de beslissing ten gronde' (2021) 2021 Tijdschrift voor Strafrecht 232.

[462] See for example: Corr. Brussel 21 mei 2014, *onuitg.*; Corr. Brussel 25 november 2015, *onuitg.*; Corr. Brussel 3 mei 2016, *onuitg.*; Corr. Charleroi 22 november 2017, *onuitg.*; Corr. Mechelen 4 januari 2018, *onuitg.*; Corr. Brussel 1 maart 2018, *onuitg.*; Corr. Antwerpen 18 maart 2018, *onuitg.*.

Case law analysis

None of the cases analysed was tried by the Assize Courts.[463] 180 judgments were made *in absentia*, being more than half. Out of the total of 343 individual first instance judgments eight were retrials after a trial *in absentia*, divided into five cases. As explained above, the sentence cannot be elevated upon retrial. For four defendants the sentence stayed the same, for two it went down and in one case a conviction was turned into an acquittal. For one case the original *in absentia* decision could not be found, making it impossible to compare. In 152 cases an immediate arrest warrant was issued and of these 152 immediate arrest warrants 135 followed a trial *in absentia*. This means only 17 immediate arrest warrants were issued with the defendant present. In cases not *in absentia*, immediate arrest warrants were sometimes requested, but the chances of it being granted were much lower, a refusal being very rare *in absentia*.

In total 22 Court of Appeal cases were relevant concerning a total of 55 individual judgments. One of these judgments concerned a retrial after an appeal trial *in absentia*, which imposed the same sentence as the trial *in absentia*. Of the total of 55 individal Court of Appeal decisions 30 confirmed the first instance decision, fourteen imposed a higher sentence and eleven a lower sentence.

[463] Note that if prosecuted today, a few would have to be, but back then did not have to.

Prison sentences

Upon a conviction for a terrorism offence, the sentence will often be a prison sentence. Belgian legislation has three types of prison sentences: felony imprisonment, imprisonment and detention. Felony imprisonment is imposed for felonies which are not correctionalised.[464] Imprisonment is imposed for standard offences and correctionalised felonies (and contraventions)[465] and detention is imposed for political offences.[466] It is important to note that while the difference between these three types of sentences has many legal technical consequences, it has no consequences concerning everyday reality in prison. Inmates convicted to felony imprisonment, imprisonment or detention are treated in the same manner. As explained in part 2.1, terrorism is not a political offence, so detention is not relevant for our purposes. The sentence will either be felony imprisonment or imprisonment.

The prison sentences for terrorism *sensu stricto* are listed in article 138 CC as follows:

> *§1 The penalties for the offences listed in article 137 §2 shall be replaced by the following, if those offences are regarded as terrorist offences:*
> *1° a fine, by imprisonment of one year to three years;*
> *2° imprisonment of no more than six months, by imprisonment of no more than three years;*
> *3° imprisonment of no more than one year, by imprisonment of no more than three years;*
> *4° imprisonment of no more than three years, by imprisonment of no more than five years;*
> *5° imprisonment of no more than five years, by felony imprisonment of five years to ten years;*
> *6° felony imprisonment of five years to ten years, by felony imprisonment of ten years to fifteen years;*
> *7° felony imprisonment of ten years to fifteen years, by felon imprisonment of fifteen years to twenty years;*
> *8° felony imprisonment of ten years to twenty years, by felony imprisonment of fifteen years to twenty years;*

[464] Art 1, Section 1 and 7, 1°CC; De Nauw and Deruyck (n 20) 45; Tulkens and others (n 16) 334 and 582–286; Yves Van Den Berge, 'Het Belgische strafrecht: veel aandacht voor de vrijheidsbeneming en de vrijheidsbeperking' [2019] Nullum Crimen 1, 10; Van den Wyngaert, Vandromme and Traest (n 16) 195.

[465] Art 1, Sections 2 and 3, art 7, Section 2 and art 25, Section 1 CC; De Nauw and Deruyck (n 20) 46; Tulkens and others (n 16) 334, 589 and 600; Van den Wyngaert, Vandromme and Traest (n 16) 195.

[466] Van Den Berge (n 464) 10; Van den Wyngaert, Traest and Vandromme (n 433) 413–414.

9° felony imprisonment of fifteen years to twenty years, by felony imprisonment of twenty years to thirty years;
10° felony imprisonment of twenty years to thirty years, by felony imprisonment for life.
In the cases referred to in Article 137, §2, 11°, the maximum penalty imposed for the completed offence shall be reduced by one year.
§2 The terrorist offences referred to in Article 137 §3 shall be punishable by :
1° in the case referred to in 6°, imprisonment of three months to five years if the threat concerns an offence punishable by a correctional penalty and felony imprisonment from five to ten years if the threat concerns a criminal offence punishable by a criminal penalty;
2° felony imprisonment from fifteen to twenty years in the cases referred to in 1°, 2°, and 5°;
3° life felony imprisonment in the cases referred to in 3° and 4°.[467]

For the offences listed in article 137, §2 CC, which are punishable outside of a terrorist context as well, terrorism serves as an aggravating circumstance.[468] The maximum imprisonment sentence is aggravated and standard offences with a maximum sentence of five years imprisonment become felonies with a sentence of five to ten years felony imprisonment.[469] For the terrorist standard offences, the preparatory works explicitly state that if the offence was originally punishable with a fine (as principal sentence (*hoofdstraf; peine principale*) or on top of the custodial sentence), the fine remains.[470] The sentences for felonies go up one step on the scale of article 80 CC.[471] For the terrorist offences listed in article 137, §3 CC, article 138 CC imposes maximum sentences ranging

[467] Article 138 CC. Own translation, original in Dutch and French.
[468] Beernaert, 'La Loi Du 19 Décembre 2003 Relative Aux Infractions Terroristes : Quand Le Droit Pénal Belge Évolue Sous La Dictée de l'Union Européenne' (n 14) 587; De La Serna (n 7) 179 and 204; De La Serna (n 15) 207; Delhaise (n 9) 75; Flore (n 9) 214; Fransen and Kerkhofs (n 9) 22; Hameeuw (n 15) 7; Masset (n 7) T60/19; Weyembergh and Kennes, 'Domestic Provisions and Case Law: The Belgian Case' (n 7) 153; Weyembergh and Kennes, 'Le Titre Iter Du Livre II Du Code Pénal: Des Infractions Terroristes' (n 7) 109; Winants (n 7) 147.
[469] Memorie van Toelichting bij wetsontwerp van 6 oktober 2003 betreffende terroristische misdrijven, *Parl.St.* Kamer 2003, nr. 51-0258/001, (4) 11 – 12; Delhaise (n 9) 76; Hameeuw (n 15) 7.
[470] Memorie van Toelichting bij wetsontwerp van 6 oktober 2003 betreffende terroristische misdrijven, *Parl.St.* Kamer 2003, nr. 51-0258/001, (4) 11. See also: Ketels (n 14) 240.
[471] Hameeuw (n 15) 7. Article 80 CC consists of a scale of sentences which is used when applying attenuating circumstances. This scale is used in Belgian criminal procedure for several purposes besides the application of attenuating circumstances. The sentences for attempted felonies or accessories to felonies for example are also derived from the scale of article 80 CC.

from five years imprisonment to life felony imprisonment.[472] At first glance, this seems like a simple system of determining sentences but a more thorough analysis exposes some issues. First of all, the sentence for threatening is sometimes higher than the sentence for the threatened terrorist offence. The terrorist offences from article 137, §3 CC are all felonies, with one exception.[473] This exception is threatening[474] a terrorist standard offence.[475] The sentence for threatening a terrorist felony is five to ten years felony imprisonment, making the offence of threatening a felony as well. The sentence for threatening a terrorist standard offence, however, is three months to five years imprisonment, which makes the threatening a standard offence.[476] This would be the case for example for threatening to destroy a monument when this endangers human lives or causes significant economic damage, or threatening intentional battery. However, the maximum principal sentence when these offences are actually committed is three years imprisonment.[477] This means that for these standard offences (and for some of the other terrorist standard offences *sensu stricto*), threatening the offence has a higher maximum sentence than the offence itself. This seems a rather absurd consequence of careless legislating. Since the maximum principal sentence for threatening a terrorist standard offence (*sensu stricto*) is the maximum principal sentence for any standard offence, the sentence for threatening is per definition at least as high and sometimes higher than that for the actual offence. It is striking that the current wording, with a distinction between threatening a terrorist standard offence and a terrorist felony is already a refinement of the original proposal. In this proposal, threatening only had one sentence, being five to ten years felony imprisonment, regardless of the threatened offence. Some senators pointed out that this

[472] Art 138, §2 CC. See also: Flore (n 9) 220; Weyembergh and Kennes, 'Le Titre Iter Du Livre II Du Code Pénal: Des Infractions Terroristes' (n 7) 109.

[473] Beernaert, 'La Loi Du 19 Décembre 2003 Relative Aux Infractions Terroristes : Quand Le Droit Pénal Belge Évolue Sous La Dictée de l'Union Européenne' (n 14) 587; Masset (n 7) 19; Weyembergh and Kennes, 'Domestic Provisions and Case Law: The Belgian Case' (n 7) 153.

[474] The original draft bill stated 'credible threat' and the parliamentary documents stated that the threat had to be serious (Memorie van Toelichting bij wetsontwerp van 6 oktober 2003 betreffende terroristische misdrijven, *Parl.St.* Kamer 2003, nr. 51-0258/001, (4) 11). However, the Council of State pointed out that the word 'credible' was not part of the Framework Decision and wondered why it was included here (Advies van de Raad van State bij wetsontwerp van 6 oktober 2003 betreffende terroristische misdrijven, *Parl.St.* Kamer 2003, nr. 51-0258/001, 39). After this, the word was deleted.

[475] De La Serna (n 7) 205–206; Delhaise (n 9) 77–78; Masset (n 7) 19; Winants (n 7) 347.

[476] Art 138, §3, 1° CC.

[477] Respectively art 138, 3° and 2° CC.

lead some terrorist offences to have a lower sentence when committed than when merely threatened.[478] This prompted the change of the proposal to its current wording. However, the issue has not been fully solved and further refinement is required. Second, the wording of the sentencing brackets of article 138, §2, 1°-5° CC leaves much to be desired. Finally, some sentencing brackets are just not included in article 138 CC.[479]

In addition, terrorism *sensu stricto*, in the current phrasing of its sentencing brackets, neutralises the effect of some of the other aggravating circumstances and decreases proportionality between some of the offences. Since both fines as a principal penalty and imprisonment of 'no more than' six months and 'no more than' one year are replaced by imprisonment of 'no more than' three years, the proportionality in the three lowest sentencing brackets disappears. The maximum sentence for terrorist battery, for example, is three years imprisonment, regardless whether or not there was premeditation.[480] This is striking because premeditation doubles the maximum sentence for battery outside of a terrorist context.[481] Similar situations arise for other aggravating circumstances, such as the fact that the victim of the battery was a minor or someone in a vulnerable situation.[482] Finally, a strange situation arises because article 138, §1 CC does not provide for a minimum sentence for the offences originally punishable with imprisonment while it does for offences originally punishable with a fine as a principal penalty. In the latter case the sentence becomes one to three years imprisonment. For offences originally punishable with a sentence of 'no more than' six months imprisonment, however, the code only states that the sentence becomes 'no more than' three years. Since no new minimum sentence is mentioned, the application of the 'aggravating circumstance' of terrorism does not change the old minimum

[478] Verslag namens de commissie voor justitie van 3 december 2003 bij het wetsontwerp betreffende terroristische misdrijven, *Parl.St.* Senaat 2003-04, nr. 3-332/3, 19.

[479] For a detailed analysis of this, see: Yperman, 'De terroristische misdrijven in de artikelen 137 en 140 Sw.: geen legistieke voltreffer' (n 152).

[480] Delhaise states that premeditation is inherent to terrorism *sensu stricto* and that it will therefore always be present (Delhaise (n 9) 31.). Although in many cases there will indeed be premeditation, this is in my opinion not necessarily so. Premeditation is not part of the *actus reus* or *mens rea* of terrorism and it is therefore possible that these elements are present without premeditation. See for premeditation: Patrick Arnou, 'Voorbedachten Rade', *Strafrecht en strafvordering. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer* (Wolters Kluwer 1990) 2.

[481] Art 398 CC.

[482] Art 398 *j.* 405*bis*, 1° CC.

sentence.[483] By definition this sentence will be less than six months. Therefore, after the application of the 'aggravating circumstance' of terrorism, the principal sentence for an offence originally punishable with only a fine as principal sentence becomes one to three years imprisonment while the principal sentence for an offence originally punishable with for example eight days to six months imprisonment becomes eight days to three years imprisonment. In other words, the principal sentence of the lighter offence has become heavier than the one for the more serious offence. In order to avoid this, the legislature should have either provided for a minimum imprisonment for all categories originally punishable by imprisonment (which is now not the case for 2°, 3° and 4°), or he should have fixed the minimum sentence in 1° on eight days or omitted it all together.

As explained above, some of the most serious felonies cannot be correctionalised. For example, terrorist murder or terrorist manslaughter. The sentence for both these offences is life imprisonment. Other terrorist felonies *sensu stricto* can and often will be correctionalised. Their sentences go down according to article 80 CC. This article is applied below to the other terrorist offences and these examples can also be applied to terrorism *sensu stricto*. Some of the most serious terrorist felonies can be correctionalised. These felonies originally punishable with twenty to thirty years felony imprisonment or lifelong felony imprisonment (the two harshest sentences in Belgian criminal law[484]) are punishable with a maximum of twenty years imprisonment after correctionalisation.

The prison sentences for articles 140, §1, 140*bis*, 140*ter*, 140*quater*, 140*quinquies*, 140*sexies* and 141 CC are all the same: five to ten years felony imprisonment. However, as explained above, these felonies will always be correctionalised. Because correctionalisation is based on attenuating circumstances, the maximum sentence goes down.[485] Five to ten years felony imprisonment becomes one month to five years imprisonment. In practice this is the sentencing bracket the courts work with. In addition to the prison sentence, there is a fine of 100 to 5000 euros.[486] When articles

[483] Delhaise (n 9) 76.

[484] The Criminal Code also includes felony imprisonment of thirty to forty years in its list of possible sentences. However, to date no offence has ever existed which actually imposes this sentence.

[485] Art 80 CC; Franssen (n 408) 162.

[486] Note that all criminal fines have to be multiplied by a factor 8 because of the application of so called '10% surcharges'. Belgian law applies surcharges to criminal fines to adapt them to the real value of money without having to constantly change the criminal legislation. The idea is that this way the financial impact of a fine stays more or less the same over the years while the value of money

140bis to 140*quinquies* were introduced in 2013, the Council of State reasoned that having the same sentence for the person providing the training (art. 140*quater* CC) and for the person receiving the training (art. 140*quinquies* CC) could be discriminatory because it is treating two different situations in the same way.[487] The legislature replied that both actions are serious, with the perpetrators having the same intent, and both should be felonies because of how dangerous they are.[488] He gave the example of someone who goes abroad to receive training for terrorism and returns to Belgium to put that knowledge into practice. Both the trainer and trainee have the same goal, being the commission of a terrorist attack. Therefore, the legislature reasoned, it is justified they are punishable with the same sentence.[489] Something much stranger in terms of proportionality is also noteworthy however. The sentence of five to ten years (again, in practice one month to five years), is higher than the sentence for some of the terrorism offences *sensu stricto*.[490] Due to this, the sentence of for example inciting somebody to commit terrorist battery, is higher than the sentence for the terrorist battery itself (maximum three years imprisonment).[491]

In 2003, a similar issue was actually raised concerning article 140, §1 CC. participating in the activities of a terrorist group has a higher maximum sentence than some of the terrorist offence *sensu stricto*.[492] It is therefore possible that the terrorist offence the terrorist group aims to commit has a lighter sentence than participating in the activities of that same terrorist group.[493] According

changes. Since 2016, there are 70 10% surcharges, transforming a fine of 5000 euros into one of 40000 euros in practice. See: Art 59 Programmawet 25 december 2016, *BS* 29 december 2016, 90879.

[487] Advies 51 806/3 van de Raad van State van 18 September 2012 bij wetsontwerp van 13 november 2012 tot wijziging van Titel 1ter van het Strafwetboek, *Parl.St.* Kamer 2012-2013, nr. 53-2502/001, (22) 27; Delhaise (n 9) 62; Fransen and Kerkhofs (n 9) 68.

[488] Memorie van Toelichting bij wetsontwerp van 13 november 2012 tot wijziging van Titel 1ter van het Strafwetboek, *Parl.St.* Kamer 2012-2013, nr. 53-2502/001, (4) 16; Delhaise (n 9) 62–63; Ketels (n 14) 258.

[489] Memorie van Toelichting bij wetsontwerp van 13 november 2012 tot wijziging van Titel 1ter van het Strafwetboek, *Parl.St.* Kamer 2012-2013, nr. 53-2502/001, (4) 16; Fransen and Kerkhofs (n 9) 67–68.

[490] Delhaise (n 9) 78–79.

[491] See also: Dekrem (n 77) 155. As Delhaise points out, terrorists will often have the intention to kill, making them guilty of attempted manslaughter or murder, raising the sentence above the one for the terrorist offence *sensu lato*. Then applying the rules for concurrence, the higher sentence will be applied. See: Delhaise (n 9) 79.

[492] A similar argument can be made regarding the *mens rea* of the participant: the participant knows or should have known he could contribute to a standard offence or felony. It is possible that the standard offence he knows or should have known he could contribute to has a lower sentence than the one for participating in the activities of the group. See: Flore (n 9) 221.

[493] Advies 59.789/3 van de Raad van State van 19 juli 2016 bij wetsvoorstel van 13 januari 2016 tot wijziging van het Strafwetboek wat betreft de bestraffing van terrorisme, *Parl.St.* Kamer 2015-2016, nr. 54-1579/006, 7-8; Delhaise (n 9) 77.

to the secretary of justice at the time, Laurette Onkelinx, this was not a problem, since this would only be the case for "as good as risk-free terrorist acts", and concurrence between offences is possible.[494] There are two types of concurrence[495]: ideal concurrence, which means that one act constitutes more than one offence and material concurrence, which means that a person has committed an offence before being convicted for another offence previously committed.[496] Often these offences will then be tried simultaneously. With the words 'as good as risk-free', the secretary of justice referred to offences such as intentional battery, potentially with premeditation[497]; intentionally damaging part of a public telecommunications network, destroying it, or obstructing or preventing its proper functioning, when this offence endangers human lives or causes significant economic damage[498]; and maliciously or fraudulently submerging someone else's yard, when this offence endangers human lives[499].[500] All these acts can hardly be called risk-free, especially because for many of them the Criminal Code itself states that they have to endanger human lives. Hence,

[494] Verslag namens de commissie van justitie bij wetsontwerp van 6 oktober 2003 betreffende terroristische misdrijven, *Parl.St.* Kamer 2003, nr. 51-0258/004, 22.

[495] A third option is that of a collective offence, in case the different offences are part of one single criminal project (see above). In this scenario, only the harshest sentence is applied as well. According to Delhaise, in a terrorism context, there will often be collective offences. See: Delhaise (n 9) 85–86.

[496] Cass. 9 mei 1995, *Arr.Cass.* 1995, 46; Tom Decaigny, in M De Busscher and others (eds), *Strafrecht: duiding* (Larcier 2018) 114; De Nauw and Deruyck (n 20) 173; Tulkens and others (n 16) 631–640; Van den Wyngaert, Vandromme and Traest (n 16) 519.

[497] Art 398 CC.

[498] Art 114, §4 wet van 21 maart 1991 betreffende de hervorming van sommige economische overheidsbedrijven, *BS* 27 maart 1991, 6155.

[499] Art 549 CC.

[500] Other offences that fall within this category are: destroying or damaging graves, monuments, etc. when this offence endangers human lives or causes substantial economic loss (art 526 CC); intentionally destroying, rendering unusable or abandoning ship's equipment when this offence endangers human lives or causes substantial economic loss (art 15 wet van 5 juni 1928 houdende herziening van het Tucht- en Strafwetboek voor de koopvaardij en de zeevisserij, *BS* 26 juli 1928, 3341); lending out firearms without due respect for the conditions for doing so (except for arms dealers for example) (art 12/1 *j.* 23, section 4 wet van 8 juni 2006 houdende regeling van economische en individuele activiteiten met wapens, *BS* 9 juni 2006, 29840); failure to comply with safety requirements to which the storage, transport, possession and collection of fire arms, ammunition and magazines are subject (except for arms dealers for example) (art 35, 1° *j.* 23, section 4 wet van 8 juni 2006 houdende regeling van economische en individuele activiteiten met wapens; *BS* 9 juni 2006, 29840); developing, producing, stockpiling, acquiring, possessing or transferring of weapons, equipment or the means for proliferation specially designed to use agents or toxins for hostile purposes or in an armed conflict (art 2, 2° wet houdende goedkeuring van het Verdrag tot verbod van de ontwikkeling, de productie en de aanleg van voorraden van bacteriologische (biologische) en toxinewapens en inzake de vernietiging van deze wapens, opgemaakt te Londen, Moskou en Washington op 10 april 1972).

the justification of the secretary on this point makes no sense. The argument about concurrence makes a bit more sense. The secretary stated that individual actions are less dangerous than actions executed by a group.[501] Thus, a person who individually commits one of the 'lighter' terrorist offences, only risks the lower sentence for that offence. For a person who commits this offence as part of a terrorist group, there will be ideal concurrence between the terrorist offence *sensu stricto* and participation in the activities of the terrorist group. In case of ideal concurrence, only the sentence for the more severe offence is applicable[502], *in casu* the participation in the activities of the terrorist group. Although this line of reasoning is better than that of the risk-free terrorism, it is still only mildly convincing. An action of a group is not per definition more dangerous than an action of an individual[503] and furthermore, the group has not necessarily committed a terrorist offence yet (see above).

Articles 140*bis*, 140*ter*, 140*quater* and 141 CC also contain an aggravating circumstance for minority. The EU Directive states that member states should take measures to ensure that when the offences of recruitment or providing training for terrorism are directed towards children, this may be taken into account when sentencing.[504] The Directive does not state this for incitement to terrorism or financing a terrorist, however, the Belgian legislature decided to also create an aggravating circumstance for these offences.[505] He reasoned that minors can also be the specific target group of perpetrators of incitement or financing, who know that minors are more vulnerable and easier to manipulate and influence.[506] Since 2019, articles 140*bis*, 140*ter*, 140*quater* and 141

[501] Verslag namens de commissie van justitie bij wetsontwerp van 6 oktober 2003 betreffende terroristische misdrijven, *Parl.St.* Kamer 2003, nr. 51-0258/004, 22. Delhaise is also of this opinion: Delhaise (n 9) 77.

[502] Art 65, section 1 CC. See also: De Nauw and Deruyck (n 20) 175; Tulkens and others (n 16) 634; Van den Wyngaert, Vandromme and Traest (n 16) 522.

[503] The Council of State asked that same question with regard to article 140*septies* CC, pointing out that a terrorist offence committed by a person acting alone is not necessarily less serious than an offence committed by a group. See: Advies 59.789/3 van de Raad van State van 19 juli 2016 bij wetsvoorstel van 13 januari 2016 tot wijziging van het Strafwetboek wat betreft de bestraffing van terrorisme, *Parl.St.* Kamer 2015-2016, nr. 54-1579/006, 16; advies van de Raad van State (II) nr. 59 147/3 van 22 april 2016 bij wetsontwerp houdende diverse bepalingen ter bestrijding van terrorisme (III), *Parl.St.* Kamer 2015-2016, nr. 54-1951/001, 31.

[504] Art 15.4 Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, *OJ* 31 March 2017, L 88/6–21.

[505] Cesoni (n 119) 244; De Coensel (n 23) 213; Winants (n 7) 357.

[506] Toelichting bij wetsvoorstel van 6 februari 2019 houdende diverse bepalingen in strafzaken en inzake erediensten, *Parl.St.* Kamer 2018-2019, nr. 54-3515/001, (3) 103.

CC therefore have a second section, stating that the sentence is raised to a felony imprisonment of ten to fifteen years if the offence is specifically aimed at minors. Regarding article 141 CC, the legislature explains that the aggravating circumstance only covers part of the situation of 1°. Financing a minor with a view to the commission of terrorism *sensu lato* does not fall within the scope of the aggravating circumstance.[507] Nor does, according to the legislature financing a minor knowing that he is committing or will commit terrorism *sensu stricto* (2°).[508] However, as explained above we believe the Council of State is correct in arguing that this falls within the scope of 1° and therefore the aggravating circumstance could be applicable. Cesoni points out that the aggravating circumstance refers to 'minors'. The age of majority is eighteen in Belgium, but Cesoni asks what happens if the youth in question is not Belgian and the age of majority is different in their state.[509] However, it seems the legislature has answered this question. Article 100*ter* CC states that for the purposes of the offences in the Criminal Code, the term 'minor' means anybody under the age of eighteen years old.[510] The offence needs to be aimed at them specifically, but not necessarily exclusively. As examples in the context of article 140*bis* CC, the legislature mentions messages spread on online forums mainly used by minors or in the vicinity of schools,[511] or propaganda images of minors or young adults.[512] The Belgian legislature's choice for an aggravating circumstance, is a repressive one.[513] The directive states that the minority may be taken into account, but the application of an aggravating circumstance is obligatory for the judge, leaving him no choice.[514] Hence Belgian law choses the most restrictive option. More so, the considerations to the directive state: "When recruitment and training for terrorism are directed towards a child,

[507] Wetsvoorstel van 6 februari 2019 houdende diverse bepalingen in strafzaken en inzake erediensten, *Parl.St.* Kamer 2018-2019, nr. 54-3515/001, 107; Deruyck and De Nauw (n 16) 10; Winants (n 7) 358.

[508] Wetsvoorstel van 6 februari 2019 houdende diverse bepalingen in strafzaken en inzake erediensten, *Parl.St.* Kamer 2018-2019, nr. 54-3515/001, 107; Winants (n 7) 358.

[509] Cesoni (n 119) 245.

[510] Art 100*ter* CC. See also: De Nauw and Deruyck (n 20) 112; Tulkens and others (n 16) 444; Van den Wyngaert, Vandromme and Traest (n 16) 305.

[511] Cesoni criticises these examples. See: Cesoni (n 119) 244–245.

[512] Toelichting bij Wetsvoorstel van 6 februari 2019 houdende diverse bepalingen in strafzaken en inzake erediensten, *Parl.St.* Kamer 2018-2019, nr. 54-3515/001, (3) 104; Winants (n 7) 357.

[513] De Coensel (n 23) 213.

[514] Cesoni (n 119) 244; De Nauw and Deruyck (n 20) 65; Tulkens and others (n 16) 627; Van den Wyngaert, Vandromme and Traest (n 16) 296.

Member States should ensure that judges can take this circumstance into account when sentencing offenders, although there is no obligation on judges to increase the sentence. It remains within the discretion of the judge to assess that circumstance together with the other facts of the particular case."[515] By making it an aggravating circumstance, the Belgian legislature seems to have gone against this consideration. After correctionalisation, this aggravated sentence is six months to ten years imprisonment.

The offence in article 140, §1/1 CC contains the same sentence as the aggravated versions of articles 140*bis*, 140*ter*, 140*quater* and 141 CC, being ten to fifteen years felony imprisonment or six months to ten years imprisonment after correctionalisation. §2 of that article increases the sentences even further to fifteen to twenty years felony imprisonment.[516] This is more than what is required by the EU Directive, which states that member states should ensure a maximum sentence of not less than fifteen years.[517] After correctionalisation the Belgian sentence becomes one to fifteen years imprisonment. So, even after correctionalisation, the maximum sentence under Belgian law is in line with the Directive. Worth noting for article 140, §1/1 CC is that the legislature overlooked one thing when creating this new offence. The sentences for article 140, §1 and §2 are respectively "felony imprisonment of five years to ten years and a fine of one hundred to five thousand euros" and "felony imprisonment of fifteen years to twenty years and a fine of one thousand euros to two hundred thousand euros".[518] The sentence in article 140, §1/1 CC, however, is drafted as follows: "felony imprisonment for ten years to fifteen years and a fine of one thousand to two hundred

[515] Consideration 19 Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, *OJ* 31 March 2017, L 88/6-21.

[516] Art 140, §2 CC.

[517] Art 15.3 Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, *OJ* 31 March 2017, L 88/6. This was also part of the original framework decision. See: art. 5.3 Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, *OJ* 22 June 2002, L 164/5. See also: De La Serna (n 7) 204.

[518] Own translations, original in Dutch and French: "*opsluiting van vijf jaar tot tien jaar en met geldboete van honderd euro tot vijfduizend euro; la réclusion de cinq ans à dix ans et d'une amende de cent euros à cinq mille euros*" (art 140, §1 CC) and "*opsluiting van vijftien jaar tot twintig jaar en met geldboete van duizend euro tot tweehonderdduizend euro; la réclusion de quinze ans à vingt ans et d'une amende de mille euros à deux cent mille euros*" (art 140, §2 CC).

thousand euros, or one of those sentences by itself".[519] Because of the last part of this phrase, it is possible to punish the taking of any decision in the context of the activities of a terrorist group with a fine as a principal sentence, while this is not the case for participating in the activities of the group.[520] Since the latter offence is supposed to be the lighter offence, this was not the intention of the legislature.[521] As a consequence, a bill was proposed on 23 January 2020 that needs to remedy this by deleting "or one of those sentences by itself" from article 140, §1/1 CC.[522]

Lastly, article 140*septies* CC contains its own system of sentences dependent on the prepared offence. The Criminal Code sets out the following sentences:

- *Imprisonment of eight days to a year, if the prepared offence is punishable with imprisonment of maximum five years;*
- *Imprisonment of maximum three years, if the prepared offence is punishable with five to ten years felony imprisonment;*
- *Imprisonment of maximum five years, if the prepared offence is punishable with ten to fifteen years or fifteen to twenty years felony imprisonment;*
- *Felony imprisonment of five to ten years, if the prepared offence is punishable with twenty to thirty years or lifelong felony imprisonment.*[523]

As with article 138 CC, this seems like a fairly straightforward system. Preparation of terrorism is a standard offence, unless the prepared terrorist offence is punishable with twenty to thirty years felony imprisonment or lifelong felony imprisonment. In that case, preparation is a felony. The system is also created in such a way that the sentence for attempt will always be higher than the sentence for preparation.[524] In the article as originally proposed, there was one sentence for the

[519] Own translation, original in Dutch and French: "*opsluiting van tien jaar tot vijftien jaar en met een geldboete van duizend euro tot tweehonderdduizend euro of met een van die straffen alleen; la réclusion de dix ans à quinze ans et d'une amende de mille euros à deux cent mille euros ou d'une de ces peines seulement*" (art 140, §1/1 CC).

[520] Barring any exceeding of a reasonable time period, which allows for a decrease of the sentence below the legal minimum.

[521] Wetsvoorstel van 23 januari 2020 tot wijziging van het Strafwetboek wat de strafmaat voor misdrijven door terroristische groepen betreft, *Parl.St.* Kamer 2019-20, nr. 55-0962/001, 3.

[522] Wetsvoorstel van 23 januari 2020 tot wijziging van het Strafwetboek wat de strafmaat voor misdrijven door terroristische groepen betreft, *Parl.St.* Kamer 2019-20, nr. 55-0962/001.

[523] Art. 140*septies* CC. Own translation, original in Dutch and French.

[524] Amendement nr. 1 van 7 juli 2016 bij wetsvoorstel van 13 januari 2016 tot wijziging van het Strafwetboek wat betreft de bestraffing van terrorisme, *Parl.St.* Kamer 2015-2016, nr. 54-1579/005, 8.

preparation of any terrorist offence: two to five years imprisonment and a fine of twenty six to one thousand euro's.[525] This was changed after the Council of State pointed out that this could lead to proportionality and discrimination issues, providing for harsher sentences for the preparation of some offences than for their actual commission.[526] The system as adopted is more proportionate than the one originally proposed. However, three remarks can still be made regarding proportionality. The first remark is very similar to one of the comments made regarding the sentencing of article 140, §1 CC compared to terrorism *sensu stricto*. Most of the sentences for preparing terrorism *sensu stricto* are more lenient than the ones for participating in the activities of a terrorist group. This means that when terrorism *sensu stricto* is prepared in the context of a terrorist group, the defendants will be liable for the harsher sentence for participating in the activities of a terrorist group, while an individual preparing that same terrorist offence, is only liable for the lower sentence on preparation. The Council of State raised this question. The reply was that offences in group are more dangerous than offences committed by individuals, an explanation the Council of State doubted.[527] Second, the category of felony preparation will normally be correctionalised, which makes it into a standard offence punishable with one month to five years imprisonment. This puts the maximum sentence on the same level as for preparation of offences punishable with ten to fifteen years or fifteen to twenty years felony imprisonment. So in practice the maximum sentence for the preparation of an offence originally punishable with ten to fifteen years felony imprisonment will be the same as for preparation of an offence originally punishable with lifelong felony imprisonment. Third, because of the combination of article 138 and 140*septies* CC, the preparation of a terrorist offence originally punishable with only a fine is punishable with up to a year imprisonment. So outside of a terrorist context, this offence only warrants a fine, but merely preparing that same offence within a terrorist context can lead to up to a year in prison.

[525] Art 3 wetsvoorstel van 13 januari 2016 tot wijziging van het Strafwetboek wat betreft de bestraffing van terrorisme, *Parl.St.* Kamer 2015-2016, nr. 54-1579/001, (5) 5; Fransen and Kerkhofs (n 9) 77.

[526] Advies 59.789/3 van de Raad van State van 19 juli 2016 bij wetsvoorstel van 13 januari 2016 tot wijziging van het Strafwetboek wat betreft de bestraffing van terrorisme, *Parl.St.* Kamer 2015-2016, nr. 54-1579/006, 14-15; advies van de Raad van State (II) nr. 59 147/3 van 22 april 2016 bij wetsontwerp houdende diverse bepalingen ter bestrijding van terrorisme (III), *Parl.St.* Kamer 2015-2016, nr. 54-1951/001, 29-30; amendement nr. 1 van 7 juli 2016 bij wetsvoorstel van 13 januari 2016 tot wijziging van het Strafwetboek wat betreft de bestraffing van terrorisme, *Parl.St.* Kamer 2015-2016, nr. 54-1579/005, 7; Moreau (n 173) 111.

[527] Advies van de Raad van State (II) nr. 59 147/3 van 22 april 2016 bij wetsontwerp houdende diverse bepalingen ter bestrijding van terrorisme (III), *Parl.St.* Kamer 2015-2016, nr. 54-1951/001, 30-31.

Being at the disposal of the sentence enforcement court

Being placed at the disposal of the sentence enforcement court is an accessory penalty,[528] meaning it is always imposed in combination with a principal penalty such as (felony) imprisonment.[529] This penalty starts at the end of the principal penalty.[530] It was introduced into the legislation in 2007, replacing the already existing 'being at the disposal of the government'.[531] When a person who is at the disposal of the sentence enforcement court is still in prison at the end of their prison term, they are not automatically released.[532] Instead they appear before the sentence enforcement court before the end of their term, which can decide to either keep them incarcerated or release them (conditionally).[533] The sentence enforcement court keeps them incarcerated when there is a risk the person will commit serious criminal offences, which affect the physical or psychological integrity of third parties, that, in the case of supervised release, cannot be overcome by the imposition of special conditions.[534] In this scenario, the sentence enforcement court has to review the case every

[528] Art 34*bis* CC. See also: COL17/2014 – De terbeschikkingstelling van de strafuitvoeringsrechtbank, 17 July 2014, 3; Yves Van Den Berge, 'De Terbeschikkingstelling van de Strafuitvoeringsrechtbank: Alweer Een Nieuwe Straf, Alweer Een Nieuwe Uitvoering' [2013] Tijdschrift voor Strafrecht 222, 222; Van Den Berge (n 464) 12; Van den Wyngaert, Traest and Vandromme (n 433) 415; Fanny Vansiliette, 'Mise à la disposition du gouvernement des condamnés' (2014) M 140 Postal Memorialis - Lexicon strafrecht, strafvordering en bijzondere wetten 1, 10.

[529] For the procedure and practical execution of this penalty, see Ministeriële omzendbrief nr. 1813 van 18 november 2011 betreffende de terbeschikkingstelling van de strafuitvoeringsrechtbank.

[530] Art 95/2, §1 WERP. See also: Ministeriële omzendbrief nr. 1813 van 18 november 2011 betreffende de terbeschikkingstelling van de strafuitvoeringsrechtbank, 37; COL17/2014 – De terbeschikkingstelling van de strafuitvoeringsrechtbank, 17 July 2014, 10; MA Beernaert, *Manuel de droit pénitentiaire* (Anthemis 2019) 354; Van Den Berge (n 528) 222; Van den Wyngaert, Traest and Vandromme (n 433) 415; Vansiliette (n 528) 10.

[531] Wet 26 april 2007 betreffende de terbeschikkingstelling van de strafuitvoeringsrechtbank, *BS* 13 juli 2007; Ministeriële omzendbrief nr. 1813 van 18 november 2011 betreffende de terbeschikkingstelling van de strafuitvoeringsrechtbank, 1; COL17/2014 – De terbeschikkingstelling van de strafuitvoeringsrechtbank, 17 July 2014, 3. See also: Beernaert, *Manuel de droit pénitentiaire* , *Manuel de droit pénitentiaire* (n 530) 353; Veerle Scheirs, 'Van Binnen Naar Buiten. De Externe Rechtspositie van Veroordeelde Gedetineerden' in Kristel Beyens and Sonja Snacken (eds), *Straffen: Een penologisch perspectief* (Maklu 2017) 690–691.

[532] Verslag namens de commissie voor de justitie van 13 maart 2007 bij Wetsontwerp betreffende de terbeschikkingstelling van de strafuitvoeringsrechtbank, *Parl.St.*Senaat 2006-2007, nr. 3-2054/4, 10; Van Den Berge (n 464) 12–14; Vansiliette (n 528) 14.

[533] Verslag namens de commissie voor de justitie van 13 maart 2007 bij Wetsontwerp betreffende de terbeschikkingstelling van de strafuitvoeringsrechtbank, *Parl.St.*Senaat 2006-2007, nr. 3-2054/4, 10; COL17/2014 – De terbeschikkingstelling van de strafuitvoeringsrechtbank, 17 July 2014, 11-12; Beernaert, *Manuel de droit pénitentiaire* (n 530) 355; Van Den Berge (n 528) 226–227; Van Den Berge (n 464) 13–14; Vansiliette (n 528) 14–18.

[534] Art 95/2, §3 WERP. See also: Ministeriële omzendbrief nr. 1813 van 18 november 2011 betreffende de terbeschikkingstelling van de strafuitvoeringsrechtbank, 8; COL17/2014 – De terbeschikkingstelling van de strafuitvoeringsrechtbank, 17 July 2014, 13;

year.[535] If they had already been conditionally released, the period of being at the disposal of the sentence enforcement court is added to their probationary period (see below).[536]

The sentence of being put at the disposal of the sentence enforcement court can only be imposed upon conviction for certain offences. In 2007, the legislature made it an obligatory sentence for convictions of terrorism *sensu stricto* to criminal sentences if the offence had caused the death of a victim.[537] In those cases the judge had to put the defendant at the disposal of the sentence enforcement court for a period of five to fifteen years.[538] In 2016, this provision was amended so that it is obligatory for defendants convicted for terrorism *sensu stricto* for a prison sentence of at least five years if the offence caused the death of a victim.[539] The change made it an obligatory sentence for those offences of terrorism *sensu stricto* which were correctionalised but are punished with more than five years imprisonment.[540]

For the other terrorism offences currently being put at the disposal of the sentence enforcement court is not an option. One of the recommendations of the parliamentary research committee on the terrorist attacks of 22 March 2016 was to expand this sentence to the articles 140 and 141 CC.[541]

Beernaert, *Manuel de droit pénitentiaire* (n 530) 355; Van Den Berge (n 528) 226; Van den Wyngaert, Traest and Vandromme (n 433) 416–417; Vansiliette (n 528) 15–16.

[535] Art 95/21 and 95/25 WERP. See also: COL17/2014 – De terbeschikkingstelling van de strafuitvoeringsrechtbank, 17 July 2014, 27-28; Beernaert, *Manuel de droit pénitentiaire* (n 530) 362; Van Den Berge (n 528) 233–234; Vansiliette (n 528) 16.

[536] Art 95/2, §2, Section 2 WERP. See also: Verslag namens de commissie voor de justitie van 13 maart 2007 bij Wetsontwerp betreffende de terbeschikkingstelling van de strafuitvoeringsrechtbank, *Parl.St.*Senaat 2006-2007, nr. 3-2054/4, 10; Ministeriële omzendbrief nr. 1813 van 18 november 2011 betreffende de terbeschikkingstelling van de strafuitvoeringsrechtbank, 29; COL17/2014 – De terbeschikkingstelling van de strafuitvoeringsrechtbank, 17 July 2014, 13; Beernaert, *Manuel de droit pénitentiaire* (n 530) 355; Van Den Berge (n 528) 227; Van Den Berge (n 464) 13–14; Vansiliette (n 528) 18.

[537] Art 34*ter* CC, as introduced by the wet van 26 april 2007 betreffende de terbeschikkingstelling van de strafuitvoeringsrechtbank, *BS* 13 July 2007, 38299. See also: COL17/2014 – De terbeschikkingstelling van de strafuitvoeringsrechtbank, 17 July 2014, 5; Van Den Berge (n 528) 223; Van den Wyngaert, Traest and Vandromme (n 433) 416; Vansiliette (n 528) 12.

[538] COL17/2014 – De terbeschikkingstelling van de strafuitvoeringsrechtbank, 17 July 2014, 4; Scheirs (n 531) 691; Van Den Berge (n 464) 13; Van den Wyngaert, Traest and Vandromme (n 433) 416.

[539] Art 11 Wet van 5 februari 2016 tot wijziging van het strafrecht en de strafvordering en houdende diverse bepalingen inzake justitie, *BS* 19 februari 2016, 13130. See also: Scheirs (n 531) 691; Van Den Berge (n 464) 13.

[540] Memorie van Toelichting bij wetsontwerp van 23 oktober 2015 houdende wijzigingen van het strafrecht en de strafvordering en houdende diverse bepalingen inzake justitie, *Parl.St.* Kamer 2015-2016, nr. 54-1418/001, (4) 8.

[541] Derde tussentijds verslag over het onderdeel “veiligheidsarchitectuur” van 15 juni 2017 van de parlementaire onderzoekscommissie belast met het onderzoek naar de omstandigheden die hebben geleid tot de terroristische aanslagen van 22 maart 2016 in de luchthaven Brussel-Nationaal en in het metrostation Maalbeek te Brussel, met inbegrip van de evolutie en de

Two bills in that sense are pending. The first one wants to introduce the option for the judge to put the defendant at the disposal of the sentence enforcement court for all terrorist offences which are not covered by the mandatory version of this sentence, with the exception of article 140*septies* CC.[542] The parliamentarians who introduced this bill stated: "That perpetrators of terrorism crimes must be regarded as criminals who pose a significant and constant threat to our society is beyond dispute."[543] The other bill goes one step further and wants to introduce a mandatory placement at the disposal of the sentence enforcement court. It only wants to do this for convictions to prison sentences of at least five years based on articles 137, 140 and 141 CC.[544] This means that for article 137 CC the requirement of the death of the victim is dropped and articles 140 and 141 are added. It is odd, though, that the title of the bill mentions "all terrorist offences", while the actual bill does not include articles 140*bis* to 140*septies* CC.

aanpak van de strijd tegen het radicalisme en de terroristische dreiging, *Parl.St.* Kamer 2016-2017, nr. 54-1752/008, 412. See also: Toelichting bij wetsvoorstel van 21 november 2019 tot wijziging van het Strafwetboek met het oog op de uitbreiding van de lijst met misdrijven die in aanmerking komen voor de facultatieve terbeschikkingstelling van de strafuitvoeringsrechtbank tot alle terrorismemisdrijven, *Parl.St.* Kamer 2019-2020, nr. 55-0777/001, 3.

[542] Art 2 Wetsvoorstel van 21 november 2019 tot wijziging van het Strafwetboek met het oog op de uitbreiding van de lijst met misdrijven die in aanmerking komen voor de facultatieve terbeschikkingstelling van de strafuitvoeringsrechtbank tot alle terrorismemisdrijven, *Parl.St.* Kamer 2019-2020, nr. 55-0777/001, 6.

[543] Own translation, original in Dutch and French: "*Dat daders van terrorismemisdrijven moeten beschouwd worden als delinquenten die een belangrijke en voortdurende dreiging vormen voor onze samenleving staat buiten kijf; Les auteurs d'infractions terroristes doivent incontestablement être considérés comme des délinquants représentant une menace sérieuse et constante pour notre société.*" See: Toelichting bij wetsvoorstel van 21 november 2019 tot wijziging van het Strafwetboek met het oog op de uitbreiding van de lijst met misdrijven die in aanmerking komen voor de facultatieve terbeschikkingstelling van de strafuitvoeringsrechtbank tot alle terrorismemisdrijven, Parl.St. Kamer 2019-2020, nr. 55-0777/001, 4.

[544] Art 2 wetsvoorstel van 28 januari 2020 tot wijziging van het Strafwetboek, teneinde de terbeschikkingstelling van de strafuitvoeringsrechtbank uit te breiden tot alle terroristische misdrijven, *Parl.St.* Kamer 2019-2020, nr. 55-0969/001, 8.

Alternative sentences

Diversifying sentencing

The legislature decided to diversify and individualise sentencing and limit the use of prison sentences by introducing several alternative sentences.[545] These alternative sentences are the electronic tagging sentence (*straf onder elektronisch toezicht; peine de surveillance électronique*), community service (*werkstraf; peine de travail*) and the autonomous probation sentence (*autonome probatiestraf; peine de probation autonome*). They are principal sentences, meaning they cannot be imposed in combination with another principal sentence such as a prison sentence or each other.[546] These sentences can furthermore only be imposed with the agreement of the defendant, after he has received the relevant information.[547] This consent needs to be clear from the case files.[548] From the case law it is apparent that these alternative sentences are almost never used in cases of terrorism (see below). At the expert seminar the idea was proposed to split the court decision into two, one decision on the guilt or innocence and one on the sentence. Currently, this is only done in the Assize Courts, while all other courts have to pronounce their judgment

[545] Memorie van Toelichting bij het wetsvoorstel van 20 maart 2000 tot wijziging van het Strafwetboek en tot invoering van de dienstverlening en de opleiding als gevangenisvervangende straffen, *Parl.St.* Kamer 1999-2000, 50-549/001, 4; Memorie van Toelichting van 8 januari 2014 bij het wetsontwerp tot invoering van de probatie als autonome straf in het Strafwetboek, tot wijziging van het Wetboek van strafvordering, het Gerechtelijk Wetboek en de wet van 29 juni 1964 betreffende de opschorting, het uitstel en de probatie, Parl.St. Kamer, 2013-14, 53-3274/001, 4. See also: COL 18/2016 – Invoering van de probatie als autonome straf, 23 June 2016, 7-8; COL 17/2016 - Elektronisch toezicht als autonome straf, updated version 18 October 2018, 4-5; Tom Daems and Yana Magis, 'Elektronisch toezicht en autonome probatie nader bekeken' in P Traest, A Verhage and G Vermeulen (eds), *Strafrecht en strafprocesrecht: doel of middel in een veranderde samenleving?* (Wolters Kluwer 2017) 177 and 189.

[546] De Nauw and Deruyck (n 436) 125; Tulkens and others (n 16) 576–577. See for the autonomous probation sentence for example: COL 18/2016 – Invoering van de probatie als autonome straf, 23 June 2016, 8-9; Collectieve brief DG EPI nr. 138 van 29 april 2016 over de probatie als autonome straf, 1; Michel Rozie, 'De probatie kan voortaan ook op eigen vleugels vliegen' [2014] Nullum Crimen 349, 350. For electronic tagging, see: COL 17/2016 - Elektronisch toezicht als autonome straf, updated version 18 October 2018, 6; Collectieve brief DG EPI nr. 137 van 29 april 2016 over het elektronisch toezicht als autonome straf, 1.

[547] Art 37*ter*, §4, 37*quinquies*, §3 and 37*octies*, §3 CC. See also: COL 18/2016 – Invoering van de probatie als autonome straf, 23 June 2016, 15; COL 17/2016 - Elektronisch toezicht als autonome straf, updated version 18 October 2018, 11-13; Daems and Magis (n 545) 183 and 193; Tom Decaigny, 'Nieuwe correctionele hoofdstraffen: de straf onder elektronisch toezicht en de autonome probatiestraf' [2014] Tijdschrift voor Strafrecht 211, 211; Jeroen De Herdt, 'Bijzonder Strafrecht En Stratoemeting Na de Potpourri II-Wet' [2016] Nullum Crimen 189, 200; De Nauw and Deruyck (n 20) 128; Rozie (n 546) 350–351 and 354; Tulkens and others (n 16) 593, 596 and 599; Van den Wyngaert, Vandromme and Traest (n 16) 431.

[548] For electronic tagging, see: Cass. 15 juni 2021, *RABG* 2021, 1756, noot. For the community sentence, see: Cass. 24 november 2010, AR P.10.1145.F. For the autonomous probation sentence, see: Rozie (n 546) 351.

completely at the same moment. Opening the option of splitting judgments would allow for risk assesments to be carried out after a finding of guilt but before deciding on the sentence. This way, sentences could be individualised better.

Electronic tagging sentence

An electronic tagging sentence entails the obligation to be present at a set address for a certain period of time (authorised movements are possible), which is enforced by means of electronic tagging.[549] A few general conditions are imposed (e.g. not committing new offences) and extra conditions can be added in the interest of the victim.[550] The judge also gives general indications about the concrete implementation of the sentence, but this is then determined by the justice assistant.[551] Electronic tagging as a principal sentence is possible when the judge feels the offence is of such a nature that it should not be punished with more than one year imprisonment and the judge imposes the electronic tagging sentence for the same amount of time as he would have imposed imprisonment.[552] This means that the maximum term for electronic tagging is one year.

[549] Art 37*ter*, §1, section 2 CC. See also: COL 17/2016 - Elektronisch toezicht als autonome straf, updated version 18 October 2018, 5; Collectieve brief DG EPI nr. 137 van 29 april 2016 over het elektronisch toezicht als autonome straf, 1; Daems and Magis (n 545) 180; Decaigny, 'Nieuwe correctionele hoofdstraffen: de straf onder elektronisch toezicht en de autonome probatiestraf' (n 547) 213; De Herdt (n 547) 199; De Nauw and Deruyck (n 20) 127; L Todts, *Bestuurlijke En Strafrechtelijke Vrijheidsbeperkingen Ter Handhaving van de Openbare Orde* (die Keure 2021) 240; Van Den Berge (n 464) 10; Van den Wyngaert, Vandromme and Traest (n 16) 430.

[550] Art 37*ter*, §5, section 3 CC. See also: COL 17/2016 - Elektronisch toezicht als autonome straf, updated version 18 October 2018, 9; Collectieve brief DG EPI nr. 137 van 29 april 2016 over het elektronisch toezicht als autonome straf, 2; Daems and Magis (n 545) 184; De Herdt (n 547) 201; De Nauw and Deruyck (n 20) 129; Todts (n 549) 240; Tulkens and others (n 16) 599; Van Den Berge (n 464) 10; Van den Wyngaert, Vandromme and Traest (n 16) 431.

[551] Art 37*quater*, §1 C. See also: COL 17/2016 - Elektronisch toezicht als autonome straf, updated version 18 October 2018, 18; Daems and Magis (n 545) 184; Decaigny, 'Nieuwe correctionele hoofdstraffen: de straf onder elektronisch toezicht en de autonome probatiestraf' (n 547) 220.

[552] Art 37*ter*, §1, section 1 CC. See also: Collectieve brief DG EPI nr. 137 van 29 april 2016 over het elektronisch toezicht als autonome straf, 1; COL 17/2016 - Elektronisch toezicht als autonome straf, updated version 18 October 2018, 7; Daems and Magis (n 545) 181; Decaigny, 'Nieuwe correctionele hoofdstraffen: de straf onder elektronisch toezicht en de autonome probatiestraf' (n 547) 216; Tom Decaigny, 'Relatieve Zwaarte, Toepassingsgebied En Duur' in M De Busscher and others (eds), *Strafrecht: duiding* (Larcier 2018) 50; De Nauw and Deruyck (n 20) 127; Olivia Nederlandt, 'La Surveillance Électronique Comme Peine Autonome et Comme Modalité d'exécution Des Peines? Présentation et Commentaire de La Loi Du 7 Février 2014' [2014] Journal des tribunaux 441, 442–443; Tulkens and others (n 16) 598; Van den Wyngaert, Vandromme and Traest (n 16) 430.

There is a minimum as well, being one month.[553] The judge also imposes a substitute imprisonment for the same duration as the electronic tagging sentence, which will be executed if the convicted person does not abide by the imposed rules.[554] There is a short list of offences for which an electronic tagging sentence can never be imposed. This list is mainly made up out of sexual offences, but also includes murder and manslaughter[555].[556] For all other terrorist offences, an electronic tagging sentence is a possible sentence. After correctionalisation the sentence for all terrorism offences, barring the most serious terrorist offences *sensu stricto,* can drop to one year imprisonment or lower, meaning an electronic tagging sentence is possible.

Community service

Community service entails working unpaid during leisure time for a public service, non-profit organisation or foundation with a social, scientific or cultural goal.[557] The tasks cannot be those that

[553] Art 37*ter*, §2, section 1 CC. See also: COL 17/2016 - Elektronisch toezicht als autonome straf, updated version 18 October 2018, 9; Daems and Magis (n 545) 181; Decaigny, 'Nieuwe correctionele hoofdstraffen: de straf onder elektronisch toezicht en de autonome probatiestraf' (n 547) 217; Decaigny, 'Relatieve Zwaarte, Toepassingsgebied En Duur' (n 552) 51; De Herdt (n 547) 200; De Nauw and Deruyck (n 20) 128; Nederlandt (n 552) 443; Todts (n 549) 240; Tulkens and others (n 16) 598; Van den Wyngaert, Vandromme and Traest (n 16) 431.

[554] COL 17/2016 - Elektronisch toezicht als autonome straf, updated version 18 October 2018, 11; Collectieve brief DG EPI nr. 137 van 29 april 2016 over het elektronisch toezicht als autonome straf, 1; Daems and Magis (n 545) 182; Decaigny, 'Nieuwe correctionele hoofdstraffen: de straf onder elektronisch toezicht en de autonome probatiestraf' (n 547) 218; Tom Decaigny, 'Vervangende Gevangenisstraf' in M De Busscher and others (eds), *Strafrecht: duiding* (Larcier 2018) 50; De Herdt (n 547) 201; De Nauw and Deruyck (n 20) 129; Nederlandt (n 552) 443; Tulkens and others (n 16) 598; Van den Wyngaert, Vandromme and Traest (n 16) 431.

[555] This is somewhat strange since even after applying attenuating circumstances to these offences, the minimum sentences are three years imprisonment, meaning an electronic tagging sentence would not be possible either way. See: De Nauw and Deruyck (n 20) 128. The inclusion of these offences on the list, would become relevant when grounds for remission of penalty are applied, the reasonable term has not been respected, the perpetrator turned government informant or in case of attempted offences and/or aiding and abetting.

[556] Art 37*ter*, §1, section 3 CC. See also: COL 17/2016 - Elektronisch toezicht als autonome straf, updated version 18 October 2018, 7-8; MA Beernaert, 'L'individualisation dans le prononcé et l'exécution de la peine : machine arrière toute ?', *La loi « pot-pourri II » : un recul de civilisation ?* (Anthemis 2016) 182–183; Daems and Magis (n 545) 182; De Herdt (n 547) 199; De Nauw and Deruyck (n 20) 128; Nederlandt, 'La Surveillance Électronique Comme Peine Autonome et Comme Modalité d'exécution Des Peines? Présentation et Commentaire de La Loi Du 7 Février 2014' (n 552) 442; Tulkens and others (n 16) 598; Van den Wyngaert, Vandromme and Traest (n 16) 430–431.

[557] Art 37*sexies*, §1, section 1 CC. See also: De Nauw and Deruyck (n 436) 129; Tulkens and others (n 16) 594; Van Den Berge (n 464) 10; Van den Wyngaert, Traest and Vandromme (n 433) 428.

would normally be undertaken by a paid worker.[558] Community service can be imposed for facts which would be punished by a police sentence or a correctional sentence, but some offences are explicitly excluded from the application of community service.[559] This is the case for all felonies punishable with twenty years felony imprisonment or more before correctionalisation, for several sexual offences and murder and manslaughter[560].[561] In addition to the community service, the judge also imposes an alternative prison sentence or fine within the sentencing range of the offence.[562] Community services range from twenty to three-hundred hours, with a sentence of forty-five hours or less being a police sentence and anything above being a correctional sentence.[563] The judge imposes the community service and can provide instructions as to its concrete implementation.[564] However, it is the justice assistant, under the supervision of the probation commission who decides on the concrete implementation.[565]

Autonomous probation sentence

The autonomous probation sentence consists of the obligation to follow certain conditions during a certain period of time which ranges from six months to two years.[566] Twelve months or less is a

[558] Art 37*sexies*, §1, section 2 CC. See also: De Nauw and Deruyck (n 436) 129; Van den Wyngaert, Traest and Vandromme (n 433) 428–429.

[559] Art 37*quinquies*, §1, section 1 CC. See also: Beernaert, 'L'individualisation dans le prononcé et l'exécution de la peine : machine arrière toute ?' (n 556) 182; De Nauw and Deruyck (n 436) 129; Tulkens and others (n 16) 591–592; Van den Wyngaert, Traest and Vandromme (n 433) 429.

[560] Which seems redundant since those offences are punishable with more than 20 years felony imprisonment. However, the list also includes the attempted offences and aiding and abetting in those offences (see: Cass. 15 november 2006, *Pas.* 2006, 2341). Therefore, this addition will be relevant in cases where the sentence is lowered below 20 years, for example attempted manslaughter or aiding and abetting manslaughter.

[561] Art 37*quinquies*, §1, section 2 CC. See also: Beernaert, 'L'individualisation dans le prononcé et l'exécution de la peine : machine arrière toute ?' (n 556) 183–185; De Herdt (n 547) 197; Van den Wyngaert, Traest and Vandromme (n 433) 429.

[562] Art 37*quinquies*, §1, section 1 CC. See also: De Nauw and Deruyck (n 436) 130; Tulkens and others (n 16) 593; Van den Wyngaert, Traest and Vandromme (n 433) 430–431.

[563] Art 37*quinquies*, §2 CC. See also : De Nauw and Deruyck (n 436) 130; Tulkens and others (n 16) 593; Van den Wyngaert, Traest and Vandromme (n 433) 429.

[564] Art 37*quinquies*, §4 CC. See also: Van Den Berge (n 464) 10; Van den Wyngaert, Traest and Vandromme (n 433) 430.

[565] Art 37*septies*, §3 CC. See also: Van den Wyngaert, Traest and Vandromme (n 433) 430–431.

[566] Art 37*octies*, §1, section 2 CC. See also: COL 18/2016 – Invoering van de probatie als autonome straf, 23 June 2016, 8 and 11; Collectieve brief DG EPI nr. 138 van 29 april 2016 over de probatie als autonome straf, 1; Daems and Magis (n 545) 191–192;

police sentence, anything above is a correctional sentence.[567] The judge decides on the duration of the sentence and gives indications on the possible conditions, but it is the probation commission and justice assistants who decide on the concrete conditions.[568] During the execution of the sentence, the probation commission can also change, specify or suspend (parts of) the concrete measures. It can even decide that the sentence has been fully executed before the period imposed by the judge has ended or extend the period with maximum one year if it was impossible to fulfil the conditions during the original period.[569] It is possible to appeal the decisions of the probation commission in front of the courts of first instance.[570] In addition to the autonomous probation sentence, the judge imposes a prison sentence or fine which must be within the sentencing bracket for the offence and which will apply if the conditions are not met.[571] An autonomous probation sentence is possible for all offences for which a police or correctional sentence is possible, barring a short list of excluded offences.[572] This list contains all felonies punishable with more than 20 years

Decaigny, 'Nieuwe correctionele hoofdstraffen: de straf onder elektronisch toezicht en de autonome probatiestraf' (n 547) 217; De Nauw and Deruyck (n 436) 132; Tulkens and others (n 16) 595–597; Van den Wyngaert, Traest and Vandromme (n 433) 432–433.

[567] Art 37*octies*, §2 CC. See also: COL 18/2016 – Invoering van de probatie als autonome straf, 23 June 2016, 11; Collectieve brief DG EPI nr. 138 van 29 april 2016 over de probatie als autonome straf, 1; Decaigny, 'Nieuwe correctionele hoofdstraffen: de straf onder elektronisch toezicht en de autonome probatiestraf' (n 547) 217; De Nauw and Deruyck (n 436) 132; Rozie (n 546) 350; Van den Wyngaert, Traest and Vandromme (n 433) 433.

[568] Art 37*octies*, §4 and 37*novies*, §3 CC. See also: COL 18/2016 – Invoering van de probatie als autonome straf, 23 June 2016, 14; Collectieve brief DG EPI nr. 138 van 29 april 2016 over de probatie als autonome straf, 2; Daems and Magis (n 545) 194; Decaigny, 'Nieuwe correctionele hoofdstraffen: de straf onder elektronisch toezicht en de autonome probatiestraf' (n 547) 214; Rozie (n 546) 354–355; Tulkens and others (n 16) 595; Van den Wyngaert, Traest and Vandromme (n 433) 433–434.

[569] Art 37*decies*, §1 CC. See also: COL 18/2016 – Invoering van de probatie als autonome straf, 23 June 2016, 18-19; Collectieve brief DG EPI nr. 138 van 29 april 2016 over de probatie als autonome straf, 2; Daems and Magis (n 545) 194; Decaigny, 'Nieuwe correctionele hoofdstraffen: de straf onder elektronisch toezicht en de autonome probatiestraf' (n 547) 219; Rozie (n 546) 357–358; Tulkens and others (n 16) 597; Van den Wyngaert, Traest and Vandromme (n 433) 434.

[570] Art 37*decies*, §2 CC. See also: COL 18/2016 – Invoering van de probatie als autonome straf, 23 June 2016, 19; Daems and Magis (n 545) 194; Decaigny, 'Nieuwe correctionele hoofdstraffen: de straf onder elektronisch toezicht en de autonome probatiestraf' (n 547) 214–215; Rozie (n 546) 357–358; Tulkens and others (n 16) 597; Van den Wyngaert, Traest and Vandromme (n 433) 434.

[571] Art 37*octies*, §1, Section 3 CC. See also: COL 18/2016 – Invoering van de probatie als autonome straf, 23 June 2016, 13; Daems and Magis (n 545) 194; Decaigny, 'Nieuwe correctionele hoofdstraffen: de straf onder elektronisch toezicht en de autonome probatiestraf' (n 547) 217; De Nauw and Deruyck (n 436) 132; Rozie (n 546) 351 and 355–356; Tulkens and others (n 16) 596; Van den Wyngaert, Traest and Vandromme (n 433) 433.

[572] COL 18/2016 – Invoering van de probatie als autonome straf, 23 June 2016, 10; De Nauw and Deruyck (n 436) 131; Van den Wyngaert, Traest and Vandromme (n 433) 433.

felony imprisonment which are correctionalised and also for example murder and manslaughter[573].[574] Almost all of the terrorist felonies can be correctionalised, so an autonomous probation sentence would be possible, barring for the excluded offences such as terrorist manslaughter.

[573] See above, footnote 560.

[574] Art 37*octies*, §1, Section 4 CC. See also: COL 18/2016 – Invoering van de probatie als autonome straf, 23 June 2016, 10; Beernaert, 'L'individualisation dans le prononcé et l'exécution de la peine : machine arrière toute ?' (n 556) 183–185; Daems and Magis (n 545) 192; Decaigny, 'Nieuwe correctionele hoofdstraffen: de straf onder elektronisch toezicht en de autonome probatiestraf' (n 547) 217; Rozie (n 546) 351–352.

Suspension of sentence and postponement of enforcement

Two so called modalities of sentences can also be relevant. First there is the suspension of sentences. This means that the judge finds a defendant guilty of an offence but does not impose a sentence.[575] The imposition of a sentence is suspended and a term is set ranging from one to five years.[576] A normal suspension can be revoked if the person commits an offence during this period for which a criminal sentence or a correctional sentence of more than one month is imposed. They will then also receive a sentence for the originally suspended offence. A suspension subject to probation is also possible, which means that there are additional conditions to abide by.[577] Suspension of sentence is not possible if the defendant has already been convicted for an offence to six months imprisonment or more.[578] The new offence cannot be of such a nature that the judge would deem it necessary to impose a sentence of more than five years.[579] Suspension of sentence is only possible if the defendant agrees.[580] All trial courts can impose a suspension of sentence,

[575] Art 1, §1 Probatiewet. See also: De Nauw and Deruyck (n 436) 179; Van den Wyngaert, Traest and Vandromme (n 433) 525; Kristien Vanderheiden, 'Opschorting, Uitstel En Probatie' (2016) O155 Postal Memorialis - Lexicon strafrecht, strafvordering en bijzondere wetten 1, 8.

[576] Art 3, Section 4 Probatiewet. See also: De Nauw and Deruyck (n 436) 180; Van den Wyngaert, Traest and Vandromme (n 433) 533.

[577] COL7/2013 - De wet van 27 december 2012 houdende diverse bepalingen betreffende Justitie, inzonderheid: TITEL VIII Wijziging van de wet van 29 juni 1964 betreffende de opschorting, het uitstel en de probatie, 13 March 2013, 2; De Nauw and Deruyck (n 436) 185; Van den Wyngaert, Traest and Vandromme (n 433) 525; Vanderheiden (n 575) 8.

[578] Art 3, Section 1 Probatiewet. See also: Beernaert, 'L'individualisation dans le prononcé et l'exécution de la peine : machine arrière toute ?' (n 556) 185; De Nauw and Deruyck (n 436) 180; Tulkens and others (n 16) 660–661; Van den Wyngaert, Traest and Vandromme (n 433) 530; Vanderheiden (n 575) 9.

[579] Art 3, section 1 Probatiewet. See also: Beernaert, 'L'individualisation dans le prononcé et l'exécution de la peine : machine arrière toute ?' (n 556) 185; De Nauw and Deruyck (n 436) 180; Tulkens and others (n 16) 661; Vanderheiden (n 575) 10. In 2016, the legislature wanted to amend this to "*if the fact is not punishable by a correctional prison sentence of more than twenty years, and it does not appear to be of such a nature that it should be punished by a principal sentence of more than five years imprisonment*" (art 36 wet van 5 februari 2016 tot wijziging van het strafrecht en de strafvordering en houdende diverse bepalingen inzake justitie, *BS* 19 februari 2016, 13130). This was part of a fairly large criminal law reform called 'Potpourri II'. Part of this reform was the elevation of sentences after correctionalisation and this specific change to the rules on postponement of sentence enforcement was made in this contex. However, the Constitutional Court annulled the elevation of sentences after correctionalisation and thus also annulled this change to the rules on postponement of sentence enforcement. See: GwH 21 december 2017, 148/2017.

[580] Art 3, Section 1 Probatiewet; Cass. 31 mei 1995, P.94.868.F; Cass. 12 november 1996, P.95.0950.N. See also: De Nauw and Deruyck (n 436) 180; Tulkens and others (n 16) 659; Van den Wyngaert, Traest and Vandromme (n 433) 530; Vanderheiden (n 575) 9.

except for the Assize Courts.[581] It is also possible for the investigation supervision courts to impose it, if they feel like the public debates which come with a trial would impede the rehabilitation of the defendant.[582]

A second possibility is the postponement of sentence enforcement. This means that the judge does impose a sentence but that (a part of) this sentence does not have to be enforced as long as the convicted person abides by certain conditions.[583] Again a normal postponement of enforcement is possible or the postponement of enforcement can be subject to probation, meaning there are additional conditions.[584] In the latter case, the agreement of the defendant is required.[585] Postponement of enforcement is only possible if the defendant has not been convicted yet to a sentence of more than twelve months imprisonment for a single offence.[586] For postponement subject to probation there is no such threshold.[587] Postponement of sentence enforcement is possible for sentences of up to five years imprisonment.[588] It is not possible for an electronic tagging sentence, community service or an autonomous probation sentence.[589] The term for suspension of

[581] Art 3, section 1 Probatiewet. See also: Beernaert, 'L'individualisation dans le prononcé et l'exécution de la peine : machine arrière toute ?' (n 556) 185; De Nauw and Deruyck (n 436) 180; Tulkens and others (n 16) 659; Van den Wyngaert, Traest and Vandromme (n 433) 525; Vanderheiden (n 575) 8.

[582] Art 3, Section 2 Probatiewet. See also: De Herdt (n 547) 195; De Nauw and Deruyck (n 436) 180; Tulkens and others (n 16) 660; Van den Wyngaert, Traest and Vandromme (n 433) 525; Vanderheiden (n 575) 8.

[583] De Nauw and Deruyck (n 436) 182; Van den Wyngaert, Traest and Vandromme (n 433) 525; Vanderheiden (n 575) 14–15.

[584] COL7/2013 - De wet van 27 december 2012 houdende diverse bepalingen betreffende Justitie, inzonderheid: TITEL VIII Wijziging van de wet van 29 juni 1964 betreffende de opschorting, het uitstel en de probatie, 13 March 2013, 2; De Nauw and Deruyck (n 436) 185; Tulkens and others (n 16) 665; Van den Wyngaert, Traest and Vandromme (n 433) 525; Vanderheiden (n 575) 15–16.

[585] De Nauw and Deruyck (n 436) 183.

[586] Art 8, §1, Section 2 Probatiewet. See also: Beernaert, 'L'individualisation dans le prononcé et l'exécution de la peine : machine arrière toute ?' (n 556) 190; De Herdt (n 547) 196; De Nauw and Deruyck (n 436) 183; Tulkens and others (n 16) 666; Van den Wyngaert, Traest and Vandromme (n 433) 527; Vanderheiden (n 575) 15.

[587] Art 8, §1, section 1 Probatiewet. This threshold used to be three years, but was deleted in 2022. See: Art. 114 Wet van 21 maart 2022 houdende wijzigingen aan het Strafwetboek met betrekking tot het seksueel strafrecht, *BS* 30 maart 2022, 25785. For the old rule, see also: Beernaert, 'L'individualisation dans le prononcé et l'exécution de la peine : machine arrière toute ?' (n 556) 189; De Herdt (n 547) 196; Van den Wyngaert, Traest and Vandromme (n 433) 527–528.

[588] Art 8, §1, section 1 Probatiewet. See also: De Nauw and Deruyck (n 436) 183; Tulkens and others (n 16) 666; Van den Wyngaert, Traest and Vandromme (n 433) 528; Vanderheiden (n 575) 15.

[589] Art 8, §1, section 3 Probatiewet. See also: COL 18/2016 – Invoering van de probatie als autonome straf, 23 June 2016, 7-10; Beernaert, 'L'individualisation dans le prononcé et l'exécution de la peine : machine arrière toute ?' (n 556) 187; Daems and Magis

a sentence is one to three years for fines and prison sentences of up to six months and one to five years for prison sentences up to five years.[590] Suspension of the enforcement of sentences can be imposed by all trial courts, including the Assize Courts.[591]

(n 545) 185–186 and 193; De Herdt (n 547) 196; Van den Wyngaert, Traest and Vandromme (n 433) 529; Vanderheiden (n 575) 15. Specifically for electronic tagging, see: COL 17/2016 - Elektronisch toezicht als autonome straf, updated version 18 October 2018, 7.

[590] Art 8, §1, section 6 and 7 Probatiewet. See also: De Nauw and Deruyck (n 436) 183; Van den Wyngaert, Traest and Vandromme (n 433) 533; Vanderheiden (n 575) 16.

[591] De Nauw and Deruyck (n 436) 183; Tulkens and others (n 16) 665; Van den Wyngaert, Traest and Vandromme (n 433) 525; Vanderheiden (n 575) 15.

Case law analysis

As was the case in this whole part, the case law analysis has not paid attention to any possible additional sentences imposed by the courts, such as confiscation of goods or disqualification from certain rights. The focus of the analysis was on the principal sentence, always being imprisonment, being at the disposal of the sentence enforcement court, any alternative sentences and suspension or postponement. The analysis did also not include any consideration of the facts of the case. No attempts were made to qualify some cases as more serious than others or to look at for example the gender of the offender. The only factor taken into account was the legal qualification.

As discussed above, the sentence bracket for article 140, §1 CC is quite narrow. This means that the sentences in the vast majority of cases are relatively close together. The maximum sentence (barring recidivism) of five years imprisonment was imposed in 158 cases, which is almost 60%. In a few cases of recidivism, the sentence was as high as ten years, being the maximum in cases of recidivism. Sentences for article 140, §2 CC are often, although not always, higher, with several sentences of 15 years imprisonment, being its maximum. Sentences for attempted participation ranged from three years to five years imprisonment. As the maximum sentence is most often imposed for article 140, §1 CC, it is no surprise that it was usually imposed when this offence was combined with another offence *sensu lato*.[592]

The additional sentence of being at the disposal of the sentence enforcement court was only imposed upon one individual, which is not very surprising given its currently limited scope of application. Not a single alternative sentence was imposed either. As a sidenote we can mention one case in which a person was convicted to community service for the offence of participating in the activities of a terrorist group.[593] However, this case fell outside the scope of the analysis, since none of the facts of the case took place outside of Belgium. Family of the defendant had travelled to Syria to join IS and he had sent money to Turkey for them, for which he was convicted to community service.

A suspension of sentence was granted in four cases, all of which were prosecutions for the offence of article 140, §1 CC. Postponement of sentence enforcement was granted 83 times. This postponement was for the full sentence in sixteen cases and partial for the other cases. Not a single

[592] This was not so in only three out of nineteen cases.

[593] Corr. Oost Vlaanderen (afd. Dendermonde) 14 december 2018, *onuitg*.

postponement was granted *in absentia*, although theoretically possible in case of postponement which is not subject to probation since in that case the agreement of the defendant is not required. The analysis clearly shows that although the legislature has provided for many sentencing options with the goal of improved rehabilitation, they are not used very often in practice. The one exception being partial postponement of sentence enforcement. The prison sentences are often at the high end of the sentencing bracket, which supports the idea that the bracket is rather narrow.

Within prison: internal legal position

The 2006 Basic law on prisons and the legal position of detainees sets out the rights and obligations of detainees within prison.[594] A core principle of this legislation is that detention should be carried out in psychosocial, physical and material circumstances that respect the dignity of the human being, allow the preservation or growth of the self-respect of the detainee and appeal to his individual and social responsibility.[595] part of this is that the detainee shall not be subject to any restrictions on his political, civil, social, economic or cultural rights other than those arising from the criminal conviction or from the liberty-depriving measure, those inextricably linked to the deprivation of liberty and those determined by or under the law.[596] Any avoidable negative consequences of detention must be avoided.[597] This, however, does not mean the rights of detainees within prison can never be limited. When there are serious indications of danger to the order or security within the prison, special security measures (*bijzondere veiligheidsmaatregelen; mesures de sécurité particulières*) can be ordered towards a specific detainee.[598] These are not disciplinary sanctions (which are also possible, but only after disciplinary offences) but preventive measures to ensure order and security.[599] These special security measures can include (a

[594] Basiswet 12 januari 2005 betreffende het gevangeniswezen en de rechtspositie van de gedetineerden, *BS* 1 februari 2005, 2815. See also: Van Den Berge (n 464) 7–8.

[595] Art 5, §1 Basiswet gevangeniswezen. See also: Beernaert, *Manuel de droit pénitentiaire* (n 530) 90; Kristel Van Driessche, 'Wet 12 Januari 2005' in Tom Decaigny and others (eds), *Duiding Strafuitvoering* (Larcier 2014) 22. This is also imposed by the Council of Europe. See: Recommendation No. R (87) 3 of the Committee of Ministers to member states on the European Prison Rules, adopted on 12 February 1987 in Strasbourg at the 404th meeting of the Ministers' Deputies, Council of Europe, Yearbook of the European Convention on Human Rights, Dordrecht, Martinus Nijhof, 1987, 188-207. See also: Sonja Snacken and Philippe Kennes, 'De Interne Rechtspositie van Gedetineerden' in Kristel Beyens and Sonja Snacken (eds), *Straffen: Een penologisch perspectief* (Maklu 2017) 435; Van Den Berge (n 464) 7–8.

[596] Art 6, §1 Basiswet gevangeniswezen. See also: Beernaert, *Manuel de droit pénitentiaire* (n 530) 90–91; Van Den Berge (n 464) 8; Van Driessche (n 595) 22–23.

[597] Art 6, §1 Basiswet gevangeniswezen. See also: Beernaert, *Manuel de droit pénitentiaire* (n 530) 91; Snacken and Kennes (n 595) 435–437; Van Den Berge (n 464) 8; Van Driessche (n 595) 23.

[598] Art 110, §1 Basiswet gevangeniswezen. See also: Beernaert, *Manuel de droit pénitentiaire* (n 530) 206; Snacken and Kennes (n 595) 454.

[599] Art 111, §1 Basiswet gevangeniswezen. See also: Ministeriële omzendbrief nr. 1792 van 11 januari 2007 betreffende Basiswet – Titel VI: orde, veiligheid en gebruik van dwang, 3; Beernaert, *Manuel de droit pénitentiaire* (n 530) 207; Chris Hermans and Jürgen Millen, 'Controle- En Veiligheid(s)Maatregelen in de Gevangenis' in T Daems and others (eds), *Quo vadis? Tien jaar basiswet gevangeniswezen en rechtspositie van gedetineerden* (Maklu 2015) 138–139; Jürgen Millen, 'Hoe Bijzonder Zijn Bijzondere Veiligheidsregimes Voor Terro-Gedetineerden?' (2016) 152 FATIK: Tijdschrift voor Strafbeleid en Gevangeniswezen 21, 22; Snacken and Kennes (n 595) 455.

combination of) seizing objects, excluding the detainee from specific activities, putting him under observation, being put under isolation in their cell or being placed in a different security cell.[600] These measures are imposed by the prison warden, can last for maximum seven days and can be extended maximum three times.[601] If the special security measures are inadequate and the detainee is a continuous danger to the security, they can be placed in an individual special security regime (*individueel bijzonder veiligheidsregime; régime de sécurité particulier individuel*).[602] This entails (a combination of) the following: exclusion from communal activities, systematic checking of their mail, only receiving visitors in a room with a separation, limitations on phone use, systematic frisking and any of the special security measures.[603] This regime is imposed by the general director of the penitentiary institutions for maximum two months, which can be renewed.[604] The detainee can appeal this decision to the Appeals Commission of the Central Supervisory Council for Prisons (*Centrale Toezichtsraad voor het gevangeniswezen; Conseil central de surveillance pénitentiaire*).[605]

[600] Art 112, §1 Basiswet gevangeniswezen. See also: Ministeriële omzendbrief nr. 1792 van 11 januari 2007 betreffende Basiswet – Titel VI: orde, veiligheid en gebruik van dwang, 4-5; Beernaert, *Manuel de droit pénitentiaire* (n 530) 205–206; Hermans and Millen (n 599) 139; Snacken and Kennes (n 595) 455.

[601] Art 112, §2 Basiswet gevangeniswezen. See also: Ministeriële omzendbrief nr. 1792 van 11 januari 2007 betreffende Basiswet – Titel VI: orde, veiligheid en gebruik van dwang, 4-5; Beernaert, *Manuel de droit pénitentiaire* (n 530) 206; Hermans and Millen (n 599) 140.

[602] Art 116, §1 Basiswet gevangeniswezen. See also: Ministeriële omzendbrief nr. 1792 van 11 januari 2007 betreffende Basiswet – Titel VI: orde, veiligheid en gebruik van dwang, 7; Beernaert, *Manuel de droit pénitentiaire* (n 530) 215; A De Brouwer, 'Au-delà du contentieux disciplinaire' (2021) 2021 Revue de Jurisprudence de Liège, Mons et Bruxelles (JLMB) 1799, 1804; Hermans and Millen (n 599) 141; Millen (n 599) 22; Snacken and Kennes (n 595) 455; Van Driessche (n 595) 56; Comité T, 'Raport 2022 : Évaluation des mesures visant à lutter contre le terrorisme à la lumière des droits humains', 77-78.

[603] Art 117 Basiswet gevangeniswezen. See also: Ministeriële omzendbrief nr. 1792 van 11 januari 2007 betreffende Basiswet – Titel VI: orde, veiligheid en gebruik van dwang, 8; Beernaert, *Manuel de droit pénitentiaire* (n 530) 214; Hermans and Millen (n 599) 142; Snacken and Kennes (n 595) 455.

[604] Art 118, §1 and 7 Basiswet gevangeniswezen. See also: Ministeriële omzendbrief nr. 1792 van 11 januari 2007 betreffende Basiswet – Titel VI: orde, veiligheid en gebruik van dwang, 7-9; Rapport au Gouvernement de la Belgique relatif à la visite effectuée en Belgique par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 27 mars au 6 avril 2017, Strasbourg 8 March 2018, CPT/Inf (2018) 8, 28; Beernaert, *Manuel de droit pénitentiaire* (n 530) 216–219; De Brouwer (n 602) 1804–1805; Hermans and Millen (n 599) 142–143; Millen (n 599) 22; Van Driessche (n 595) 57.

[605] Art 118, §10 Basiswet gevangeniswezen. See for example: Commission d'appel francophone 24 décembre 2020, *JLMB* 2021, 1796; Comité T, 'Raport 2022 : Évaluation des mesures visant à lutter contre le terrorisme à la lumière des droits humains', 43-44. See also: Beernaert, *Manuel de droit pénitentiaire* (n 530) 220; De Brouwer (n 602) 1805–1806.

It should be clear from the previous parts of this report that imprisonment is an integral part of the fight against terrorism. According to a press article which was released in 2019, there were 227 detainees categorised as terrorist in Belgian prisons in that year.[606] However, prison is also a "potential breeding ground for radicalisation and recruitment".[607] In January of 2015, the first instructions came for prison wardens requiring prison staff to be extra vigilant against signs of radicalisation and extremism.[608] In addition, a special cell (CelEx) was founded within the general prisons administration which specialises in radicalisation and extremism.[609] These 2015 instructions are not publicly available but allegedly also stated that every detainee convicted for a terrorist offence needed to be isolated from the other detainees by the imposition of an individual special security regime.[610] When visiting Belgium in 2017, the CPT found that the vast majority of terrorist detainees they spoke to, had been subject to special security measures and an individual special

[606] D Leestmans, 'Geradicaliseerden in de gevangenis: met hoeveel zijn ze? En wat als ze vrijkomen? Negen vragen én antwoorden' (2019) *vrtNWS* 1 May 2019, https://www.vrt.be/vrtnws/nl/2019/04/23/gedetineerden-met-de-t-van-terrorisme/.

[607] F.O.D. Justitie, "Actionplan: approach to radicalisation in prisons", 11 March 2015, 3, https://justitie.belgium.be/sites/default/files/downloads/Plland%27actionradicalisation-prison-NL.pdf. See also: Verslag namens de commissie voor justitie hoorzittingen de deradicaliserings-, exit- en resocialisatieprogramma's binnen de belgische penitentiaire instellingen, *Parl.St.* Kamer 2019-2020, nr. 55-1501/001, 6; Gemeenschappelijke omzendbrief voor een globale aanpak van geweldadige radicalisering en extremisme en van terrorisme, 18 februari 2019, 1; Commission de surveillance de la prison d'Ittre, 'Rapport de fin de mandat', August 2019, 32; Léa Teper, 'Zone d'ombre Carcérale : L'isolement En Aile D-Rad:Ex' [2018] Journal des tribunaux 960, 961. Note that the parlementary research committee founded after the Brussels terrorist attacks, while agreeing, does warn for too simplistic views in this complicated matter. See: Vierde tussentijds verslag van 23 oktober 2017 over het onderdeel "radicalisme" namens de parlementaire onderzoekscommissie belast met het onderzoek naar de omstandigheden die hebben geleid tot de terroristische aanslagen van 22 maart 2016 in de luchthaven Brussel-Nationaal en in het metrostation Maalbeek te Brussel, met inbegrip van de evolutie en de aanpak van de strijd tegen het radicalisme en de terroristische dreiging, *Parl.St.* Kamer 2017-2018, nr. 54-1752/009, 76-79 and 99-100.

[608] Commission de surveillance de la prison d'Ittre, 'Rapport de fin de mandat', August 2019, 32; Teper (n 607) 961. See also: DG EPI, "Bijzondere instructies", 12 februari 2021, 8.

[609] Vierde tussentijds verslag van 23 oktober 2017 over het onderdeel "radicalisme" namens de parlementaire onderzoekscommissie belast met het onderzoek naar de omstandigheden die hebben geleid tot de terroristische aanslagen van 22 maart 2016 in de luchthaven Brussel-Nationaal en in het metrostation Maalbeek te Brussel, met inbegrip van de evolutie en de aanpak van de strijd tegen het radicalisme en de terroristische dreiging, *Parl.St.* Kamer 2017-2018, nr. 54-1752/009, 85; Commission de surveillance de la prison d'Ittre, 'Rapport de fin de mandat', August 2019, 33. Their goal is to optimise the treatment and flow of information concerning radicilisation and detainees related to terrorism

[610] Hermans and Millen (n 599) 145; Millen (n 599) 23; Snacken and Kennes (n 595) 456; Teper (n 607) 961.

security regime.[611] They add that for a number of them it was apparent that these measures were only based on the offence they had committed or were suspected of having committed.[612] In its 2022 report, Comité T states that the decisions to impose an individual special security regime systematically refer to the committed (for convictions) or suspected (for pre-trial detention) offence.[613] Different authors rightfully criticise this measure as being in violation of the Basic law and the presumption of innocence for suspects.[614] In October 2020, the Brussels Court of Appeal held that the systematic isolation of did not have an adequate legal basis and violated articles 3 and 8 ECHR.[615] In a case dating to the 24th of December 2020, the Appeals Commission held that the mere fact the arrest warrant was issued for a terrorist offence does not suffice to impose and renew an individual special security regime since this would violate the requirement of an individualised investigation of the situation.[616] In its 2022 report, Comité T quotes another case in which a negative report by OCAM was considered insufficiently precise in order to properly motivate an individual special security regime.[617] The government claimed that the instructions specify that the decision to subject a prisoner to a special security measure or an individual special security regime must always be based on an individual risk assessment, be it an automatic one in cases of terrorism.[618] Whatever the instructions may have said in the past, the most recent instructions do state that merely belonging to one of the categories of CelEx detainees (see below) is not in itself a sufficient

[611] Rapport au Gouvernement de la Belgique relatif à la visite effectuée en Belgique par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 27 mars au 6 avril 2017, Strasbourg 8 March 2018, CPT/Inf (2018) 8, 29.

[612] Rapport au Gouvernement de la Belgique relatif à la visite effectuée en Belgique par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 27 mars au 6 avril 2017, Strasbourg 8 March 2018, CPT/Inf (2018) 8, 29.

[613] Comité T, 'Raport 2022 : Évaluation des mesures visant à lutter contre le terrorisme à la lumière des droits humains', 80-81.

[614] Hermans and Millen (n 599) 146; Millen (n 599) 23–24; Snacken and Kennes (n 595) 456.

[615] Brussel 8 oktober 2020, RG 2014/AR/2257, unpublished, refered to in Comité T, 'Rapport 2021 : Evaluation des mesures visant à lutter contre le terrorisme à la lumière des droits humains', 94.

[616] Commission d'appel francophone 24 décembre 2020, *JLMB* 2021, 1796. See also: Comité T, 'Raport 2022 : Évaluation des mesures visant à lutter contre le terrorisme à la lumière des droits humains', 84; De Brouwer (n 602) 1806–1807.

[617] Comité T, 'Raport 2022 : Évaluation des mesures visant à lutter contre le terrorisme à la lumière des droits humains', 43-44.

[618] Schriftelijke vraag nr. 6-2224 van Lionel Bajart (Open Vld) d.d. 15 januari 2019 aan de minister van Justitie, belast met de Regie der Gebouwen, *Vr. en Antw.* Senaat 2018-19; Réponse du Gouvernement de la Belgique au rapport du Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) relatif à la visite effectuée en Belgique du 27 mars au 6 avril 2017, Strasbourg 19 June 2018, CPT/Inf (2018) 23, 20.

reason for imposing special security measures. In the original instructions no definitions of radicalisation or extremism were provided but they did state that the administration opted for a broad definition of detainees related to terrorism, including people suspected of or convicted for terrorist offences but also other detainees who were considered a serious risk of radicalisation (active or passive) or who engaged in armed conflict for religious or ideological reasons.[619] In March of that same year, an action plan against radicalisation in prison was released.[620] This plan set out ten action points ranging from better living conditions in prisons to deradicalisation programmes.[621] One of these ten points was the placement of radicalised prisoners and in this respect a dual approach was put forward.[622] In first instance radicalised detainees are integrated into regular prison sections to a maximum extent. However, when this is not possible and the detainee poses a serious risk in terms of (active or passive) radicalisation or when they engage in armed conflict for ideological motives, the detainee can be put in a special section with a specialised approach.[623] This

[619] Commission de surveillance de la prison d'Ittre, 'Rapport de fin de mandat', August 2019, 33-34; Teper (n 607) 961.

[620] F.O.D. Justitie, "Actionplan: approach to radicalisation in prisons", 11 March 2015, https://justitie.belgium.be/sites/default/files/downloads/Plland%27actionradicalisation-prison-NL.pdf. See also: Commission de surveillance de la prison d'Ittre, 'Rapport de fin de mandat', August 2019, 34; Willy Bruggeman, 'Radicalisering' (2020) R30 Postal Memorialis - Lexicon strafrecht, strafvordering en bijzondere wetten 66, 50.

[621] F.O.D. Justitie, "Actionplan: approach to radicalisation in prisons", 11 March 2015, https://justitie.belgium.be/sites/default/files/downloads/Plland%27actionradicalisation-prison-NL.pdf. See also: Vierde tussentijds verslag van 23 oktober 2017 over het onderdeel "radicalisme" namens de parlementaire onderzoekscommissie belast met het onderzoek naar de omstandigheden die hebben geleid tot de terroristische aanslagen van 22 maart 2016 in de luchthaven Brussel-Nationaal en in het metrostation Maalbeek te Brussel, met inbegrip van de evolutie en de aanpak van de strijd tegen het radicalisme en de terroristische dreiging, *Parl.St.* Kamer 2017-2018, nr. 54-1752/009, 79.

[622] F.O.D. Justitie, "Actionplan: approach to radicalisation in prisons", 11 March 2015, 13, https://justitie.belgium.be/sites/default/files/downloads/Plland%27actionradicalisation-prison-NL.pdf. See also: Verslag namens de commissie voor justitie hoorzittingen de deradicaliserings-, exit- en resocialisatieprogramma's binnen de belgische penitentiaire instellingen, *Parl.St.* Kamer 2019-2020, nr. 55-1501/001, 9.

[623] F.O.D. Justitie, "Actionplan: approach to radicalisation in prisons", 11 March 2015, 13, <https://justitie.belgium.be/sites/default/files/downloads/Plland%27actionradicalisation-prison-NL.pdf>. See also: Rapport au Gouvernement de la Belgique relatif à la visite effectuée en Belgique par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 27 mars au 6 avril 2017, Strasbourg 8 March 2018, CPT/Inf (2018) 8, 29; Commission de surveillance de la prison d'Ittre, 'Rapport de fin de mandat', August 2019, 34-35; This approach was confirmed in the most recent instructions on extremism (see below). See: DG EPI, "Bijzondere instructies", 12 februari 2021, 6.

dual approach was meant to reduce the risk of radicalisation among the general prison population while avoiding the issue of creating larger tightly knit groups of radicalised inmates.[624]
In 2016, in the prisons of Hasselt and Ittre, seperate sections (so called D-Rad:Ex) were opened for these terrorist detainees who it is feared would radicalise others inmates, being the leaders and recruiters.[625] The concrete facts which give rise to this fear, however, are not always clear, making the decision to place an inmate in a D-Rad:Ex section rather opaque.[626] The following are excluded: women, simple executors, internees, ideologists who are not inclined towards jihadism and detainees who cannot be placed together according to the investigating judge.[627] In practice, however, according to the prison wardens the original idea behind these sections was not followed strictly and other 'terrorist' detainees were also transferred there.[628] The decision to place a detainee in these sections is made by the general director of the penitentiary institutions on the proposal of the prison management and after an analysis of the psychosocial service and advice

[624] F.O.D. Justitie, "Actionplan: approach to radicalisation in prisons", 11 March 2015, 14, <https://justitie.belgium.be/sites/default/files/downloads/Plland%27actionradicalisation-prison-NL.pdf>.

[625] Vierde tussentijds verslag van 23 oktober 2017 over het onderdeel "radicalisme" namens de parlementaire onderzoekscommissie belast met het onderzoek naar de omstandigheden die hebben geleid tot de terroristische aanslagen van 22 maart 2016 in de luchthaven Brussel-Nationaal en in het metrostation Maalbeek te Brussel, met inbegrip van de evolutie en de aanpak van de strijd tegen het radicalisme en de terroristische dreiging, *Parl.St.* Kamer 2017-2018, nr. 54-1752/009, 80; Schriftelijke vraag nr. 6-2224 van Lionel Bajart (Open Vld) d.d. 15 januari 2019 aan de minister van Justitie, belast met de Regie der Gebouwen, *Vr. en Antw.* Senaat 2018-19; Verslag namens de commissie voor justitie hoorzittingen de deradicaliserings-, exit- en resocialisatieprogramma's binnen de belgische penitentiaire instellingen, *Parl.St.* Kamer 2019-2020, nr. 55-1501/001, 9; Brussel 12 april 2021, *onuitg.*; Rapport au Gouvernement de la Belgique relatif à la visite effectuée en Belgique par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) du 27 mars au 6 avril 2017, Strasbourg 8 March 2018, CPT/Inf (2018) 8, 29; Commission de surveillance de la prison d'Ittre, 'Rapport de fin de mandat', August 2019, 34; Beernaert, *Manuel de droit pénitentiaire* (n 530) 44; Bruggeman (n 620) 51; Teper (n 607) 961–963; Ruben Vilain, 'Ontbreken van Waarborgen Bij de Facto Bijzonder Veiligheidsregime Op D-Rad:Ex Grond Voor Schadevergoeding' [2020] Nieuw Juridisch Weekblad 183.

[626] Strafuitvoeringsrechtbank Brussel 1 oktober 2018, *JT* 2018, 959.

[627] Teper (n 607) 963. The supervisory committee of the prison of Ittre includes a shorter list of excluded categories in a report, being women, internees and ideological who are not inclined towards jihadism. See: Commission de surveillance de la prison d'Ittre, 'Rapport de fin de mandat', August 2019, 35.

[628] Vierde tussentijds verslag van 23 oktober 2017 over het onderdeel "radicalisme" namens de parlementaire onderzoekscommissie belast met het onderzoek naar de omstandigheden die hebben geleid tot de terroristische aanslagen van 22 maart 2016 in de luchthaven Brussel-Nationaal en in het metrostation Maalbeek te Brussel, met inbegrip van de evolutie en de aanpak van de strijd tegen het radicalisme en de terroristische dreiging, *Parl.St.* Kamer 2017-2018, nr. 54-1752/009, 85-86. See also: Verslag namens de commissie voor justitie hoorzittingen de deradicaliserings-, exit- en resocialisatieprogramma's binnen de belgische penitentiaire instellingen, *Parl.St.* Kamer 2019-2020, nr. 55-1501/001, 10.

from CelEx.[629] When they were founded, there was no legal framework for these D-Rad:Ex sections.[630]

In instructions dating five days after the opening of these sections, four categories of detainees were distinguished:[631] Category A includes people incarcerated for a terrorist offences, category B are people who "on the basis of their title of detention have a clear link with terrorism and/or who, by words or deeds, strongly demonstrate that they belong to the profile of violent extremists"[632], Category C includes all people who are in the OCAD database of foreign terrorist fighters and Category D detainees who show signs of radicalisation or a risk of radicalising others.[633] At the start of January 2017 there were 56 detainees in Category A, 28 in Category B, 60 in Category C and 19 in Category D.[634] In the following years these categories were expanded upon[635] until they were replaced in 2021. That year, updated instructions were released which replaced the previous versions. These instructions are applicable to all CelEx detainees, meaning detainees with a heightened risk of radicalising other inmates or engaging in violent combat for religious or ideological motives.[636] Each of these detainees is put in a category and given a typology. The

[629] F.O.D. Justitie, "Actionplan: approach to radicalisation in prisons", 11 March 2015, 13-14, <https://justitie.belgium.be/sites/default/files/downloads/Plland%27actionradicalisation-prison-NL.pdf>; Vierde tussentijds verslag van 23 oktober 2017 over het onderdeel "radicalisme" namens de parlementaire onderzoekscommissie belast met het onderzoek naar de omstandigheden die hebben geleid tot de terroristische aanslagen van 22 maart 2016 in de luchthaven Brussel-Nationaal en in het metrostation Maalbeek te Brussel, met inbegrip van de evolutie en de aanpak van de strijd tegen het radicalisme en de terroristische dreiging, *Parl.St.* Kamer 2017-2018, nr. 54-1752/009, 80; DG EPI, "Bijzondere instructies", 12 februari 2021, 6; Commission de surveillance de la prison d'Ittre, 'Rapport de fin de mandat', August 2019, 35; Teper (n 607) 963.

[630] Commission de surveillance de la prison d'Ittre, 'Rapport de fin de mandat', August 2019, 34; Teper (n 607) 961.

[631] Vierde tussentijds verslag van 23 oktober 2017 over het onderdeel "radicalisme" namens de parlementaire onderzoekscommissie belast met het onderzoek naar de omstandigheden die hebben geleid tot de terroristische aanslagen van 22 maart 2016 in de luchthaven Brussel-Nationaal en in het metrostation Maalbeek te Brussel, met inbegrip van de evolutie en de aanpak van de strijd tegen het radicalisme en de terroristische dreiging, *Parl.St.* Kamer 2017-2018, nr. 54-1752/009, 80.

[632] As appreciated by CelEx. See: Teper (n 607) 961.

[633] Bruggeman (n 620) 51; Olivia Nederlandt, 'Actualités En Droit de l'exécution Des Peines Privatives de Liberté : Un État de Crise Permanent?' in Franklin Kuty and Christine Guillain (eds), *Actualités en droit pénal et exécution des peines* (Larcier 2020) 156; Teper (n 607) 962.

[634] *Vr. en Antw.* Kamer 2016-17, *Bull.* nr. 105, 10 februari 2017, 191.

[635] See: DG EPI, "Bijzondere instructies extremisme", 2 oktober 2018. See also: Comité T, 'Rapport 2020 : Evaluation des mesures visant à lutter contre le terrorisme à la lumière des droits humains', 78.

[636] DG EPI, "Bijzondere instructies", 12 februari 2021, 4.

categories are the same categories OCAD uses,[637] being foreign terrorist fighters,[638] homegrown terrorist fighters, [639] terrorism convicted persons, [640] potentially violent extremists [641] and hatepropagandists,[642] plus two additional categories, being 'Terro EPI' detainees[643] and 'Violent extremist prisoners EPI'[644].[645] The typology refers to the role the person had in the commission of the facts, such as recruiter, leader, etc. and is assigned by CelEx.[646]

In addition to the D-Rad:Ex sections, 'satelite wings' have been created in the prisons of Andenne, Lantin, Saint-Gilles, Bruges and Ghent. These wings are staffed with people who have received special trainings on radicalisation.[647] They are meant for detainees with a high risk of radicalisation, detainees who require special monitoring.[648] It is also possible that detainees from a D-Rad:Ex

[637] These people do have to have a link with Belgium.

[638] People who, with the aim of joining or supporting a terrorist group traveled to a jihadist conflict zone, left Belgium to travel to a jihadist conflict zone, are on their way to Belgium or have returned to Belgium after having traveled to a jihadist conflict zone, were prevented from traveling to a jihadist conflict zone or have the intention to travel to a jihadist conflict zone.

[639] People for whom there are serious indications that they intend to use violence against persons or material interests for ideological or political reasons with the aim of achieving their goals through terror, intimidation or threats to achieve their objectives or that they are intentionally providing support, in particular logistical, financial or for training or recruitment purposes, to the person previously described or to persons registered as FTF for whom there are serious suspicions that they intend to carry out an act of violence.

[640] People convicted for a terrorist offence with a threat level of 2, 3 or 4 as assigned by OCAD.

[641] People who hold extremist views that legitimise the use of force or coercion as a method of action in Belgium, when there are indications they have violent intentions related to these views and they either have systematic contacts within extremist circles, have a violent judicial record, are mentally unstable or received training in the manufacture or use of explosives, firearms or other weapons or noxious or hazardous substances or other specific methods or techniques which increase the risk of terrorist violence.

[642] People or organisations which (cumulatively) cause harm to the principles of democracy or human rights, the proper functioning of democratic institutions or other foundations of the rule of law, justify the use of violence or coercion as methods of action and spread the belief to others with the intention of exerting a radicalising influence.

[643] Detainees detained for terrorist offences who have an OCAD threat level of lower than 2 and cannot be included in another category.

[644] Radicalised or extremist detainees which are not under preliminary investigation by OCAD but who required special attention based on the fact they are potentially violent towards people within prison based on an ideology.

[645] DG EPI, "Bijzondere instructies", 12 februari 2021, 4-6.

[646] DG EPI, "Bijzondere instructies", 12 februari 2021, 4.

[647] Commission de surveillance de la prison d'Ittre, 'Rapport de fin de mandat', August 2019, 35; Beernaert, *Manuel de droit pénitentiaire* (n 530) 44; Bruggeman (n 620) 50–51; Teper (n 607) 962.

[648] Vierde tussentijds verslag van 23 oktober 2017 over het onderdeel "radicalisme" namens de parlementaire onderzoekscommissie belast met het onderzoek naar de omstandigheden die hebben geleid tot de terroristische aanslagen van 22 maart 2016 in de luchthaven Brussel-Nationaal en in het metrostation Maalbeek te Brussel, met inbegrip van de evolutie en de aanpak van de strijd

section are transferred to these wings with a view to an eventual transfer to the general population.[649] Originally the idea was that these five prisons would be satellite prisons in which the terrorist detainees were spread out among the general population. However, in practice separate wings were designated for them, making the difference between these satellite wings and the D-Rad:Ex sections minimal.[650]

The supervisory committee of the prison of Ittre did a study in December 2016 on the conditions within the D-Rad:Ex sections.[651] They state that detainees in those sections cannot have any contact with any other detainees, meaning they are excluded from training and activities, from doing paid labour outside the section and are limited to a small, completely fenced courtyard and much smaller gym space.[652] In its 2019 end of mandate report the committee also notes that the prisoners are required to move cells every six months in order to avoid the same detainees spending time together regularly.[653] In addition, whenever they have to move throughout the prison, they have to be accompanied by three prison officers and in the visiting room three tables are reserved for them under the supervision of one prison officer.[654] The prisoners in these sections are also subject to the restrictions imposed upon all CelEx detainees, which are subject to an order measure requiring them to report to the prison management which telephone numbers they wish to call.[655] Finally,

tegen het radicalisme en de terroristische dreiging, *Parl.St.* Kamer 2017-2018, nr. 54-1752/009, 80; Beernaert, *Manuel de droit pénitentiaire* (n 530) 44; Bruggeman (n 620) 50.

[649] Vierde tussentijds verslag van 23 oktober 2017 over het onderdeel "radicalisme" namens de parlementaire onderzoekscommissie belast met het onderzoek naar de omstandigheden die hebben geleid tot de terroristische aanslagen van 22 maart 2016 in de luchthaven Brussel-Nationaal en in het metrostation Maalbeek te Brussel, met inbegrip van de evolutie en de aanpak van de strijd tegen het radicalisme en de terroristische dreiging, *Parl.St.* Kamer 2017-2018, nr. 54-1752/009, 80.

[650] Vierde tussentijds verslag van 23 oktober 2017 over het onderdeel "radicalisme" namens de parlementaire onderzoekscommissie belast met het onderzoek naar de omstandigheden die hebben geleid tot de terroristische aanslagen van 22 maart 2016 in de luchthaven Brussel-Nationaal en in het metrostation Maalbeek te Brussel, met inbegrip van de evolutie en de aanpak van de strijd tegen het radicalisme en de terroristische dreiging, *Parl.St.* Kamer 2017-2018, nr. 54-1752/009, 84.

[651] We have been unable to find this study but the committee itself refers to it in its 2019 end of mandate report. See: Commission de surveillance de la prison d'Ittre, 'Rapport de fin de mandat', August 2019, 36.

[652] Commission de surveillance de la prison d'Ittre, 'Rapport de fin de mandat', August 2019, 38-41; Teper (n 607) 962.

[653] Commission de surveillance de la prison d'Ittre, 'Rapport de fin de mandat', August 2019, 38.

[654] Teper (n 607) 962.

[655] DG EPI, "Bijzondere instructies", 12 februari 2021, 13; Commission de surveillance de la prison d'Ittre, 'Rapport de fin de mandat', August 2019, 42; Comité T, 'Raport 2022 : Évaluation des mesures visant à lutter contre le terrorisme à la lumière des droits humains', 85-88; Teper (n 607) 962.

any visitors to CelEx detainees need to be vetted by the management and will be refused if they do not have a legitimate interest for the visit.[656] Some people such as their parents, siblings, uncles and aunts are excluded from this. In 2019, the Court of First Instance in Brussels had to rule on a case relating to the D-Rad:Ex sections.[657] It ruled that D-Rad:Ex sections in themselves did not violate human rights, but they also do not constitute a 'normal' prison regime. Instead, the inmates in these sections are subject to an individual special security regime. However, they do not benefit from the legal safeguards awarded to detainees subject to such a regime and therefore the Belgian government has tort liability.[658] They were awarded one euro damages per day spent in D-Rad:Ex. The government appealed this decision. The Court of Appeal went over the conditions of detention in the D-Rad:Ex section in Ittre carefully and concluded that it did violate the Basic Law but only in terms of the conditions of the sports activities and the daily surveillance the detainees underwent without being informed of the findings concerning them.[659] This last observation is important since without this information they lack an effective remedy to challenge their continued detention in the D-Rad:Ex section, violating articles 6 and 13 of the ECHR.[660] The Court of Appeal granted each of the inmates 2500 euro in damages. According to the 2022 Comité T report, in 2021 there were no more inmates in the D-Rad:Ex section in Hasselt and only five in Ittre.[661]
Many of the abovementioned rules on 'terrorist' detainees have been criticised in the literature for violating human rights and being insufficiently clear and foreseeable.[662]

[656] Vierde tussentijds verslag van 23 oktober 2017 over het onderdeel "radicalisme" namens de parlementaire onderzoekscommissie belast met het onderzoek naar de omstandigheden die hebben geleid tot de terroristische aanslagen van 22 maart 2016 in de luchthaven Brussel-Nationaal en in het metrostation Maalbeek te Brussel, met inbegrip van de evolutie en de aanpak van de strijd tegen het radicalisme en de terroristische dreiging, *Parl.St.* Kamer 2017-2018, nr. 54-1752/009, 79; DG EPI, "Bijzondere instructies", 12 februari 2021, 13; Teper (n 607) 962.

[657] Eerste aanleg Brussel 26 april 2019, *NjW* 2020, 179, noot Vilain. Note that in the journal in which the case is published, it is listed as 26 April 2018 instead of 2019. This is in all likelihood a clerical error. See also: Vilain (n 625) 183–184.

[658] See also: Commission de surveillance de la prison d'Ittre, 'Rapport de fin de mandat', August 2019, 43; Comité T, 'Rapport 2020 : Evaluation des mesures visant à lutter contre le terrorisme à la lumière des droits humains', 83; Beernaert, *Manuel de droit pénitentiaire* (n 530) 214–215; Nederlandt, 'Actualités En Droit de l'exécution Des Peines Privatives de Liberté : Un État de Crise Permanent?' (n 633) 166–167.

[659] Brussel 12 april 2021, *onuitg.*

[660] Brussel 12 april 2021, *onuitg.*

[661] Comité T, 'Raport 2022 : Évaluation des mesures visant à lutter contre le terrorisme à la lumière des droits humains', 90.

[662] Comité T, 'Rapport 2020 : Evaluation des mesures visant à lutter contre le terrorisme à la lumière des droits humains', 78-85; Millen (n 599) 21–24; Teper (n 607) 960–965; Vilain (n 625) 183–184.

Before moving on to the external legal position of detainees, we will give a brief overview of the bodies providing social help and services to detainees. These bodies are important in the context of rehabilitation, allowing detainees to work on themselves during detention and increasing their chances of early release and successful reintegration into society. While the prison system itself is a federal competence, the communities are responsible for providing certain services and support within prison. In 2013 a Flemish decree was issued to "ensure the right of all prisoners and their immediate social environment to comprehensive and high-quality assistance and services aimed at achieving the objectives set out in Article 4 [e.g. reducing recidivism and limiting negative consequences of detention], in order to enable them to develop in society."[663] Based on this decree the Flemisch government has to approve a strategic plan which has to implement the goals of the decree.[664] The current version of this plan spans 2020 to 2025 and pays special attention to certain groups of detainees, among who radicalised detainees.[665] In addition, in each prison a policy team and a coordination team are created which are responsible for the implementation of the strategic plan.[666] Within the Flemish community the '*Centrum Algemeen Welzijnswerk*' (CAW) and '*Centra Geestelijke Gezondheidszorg*' (CGG) are of particular importance. The CAW functions inside prison and assures the transition to other organisations for about six months after release.[667] Disengagement programmes have been structurally embedded within the functioning of CAW.[668] In addition, there are deradicalisation consultants within the CAW and the justice houses, which have a multidisciplinary team to tackle radicalization, received a mandate to already work within prison in order to facilitate reintegration. Within the French community all organisations competent for the follow up of detainees are organised within the '*Administration Générale des Maisons de*

[663] Art 3, section 1 decreet van 8 maart 2013 betreffende de organisatie van hulp- en dienstverlening aan gedetineerden, *BS* 11 april 2013, 22460.

[664] Art 8 decreet van 8 maart 2013 betreffende de organisatie van hulp- en dienstverlening aan gedetineerden, *BS* 11 april 2013, 22460.

[665] Vlaams strategisch plan hulp- en dienstverlening aan gedetineerden en geïnterneerden 2020-2025, VR 2020 1311 DOC.1230/3BIS, 33-36.

[666] Art 10 and 11 decreet van 8 maart 2013 betreffende de organisatie van hulp- en dienstverlening aan gedetineerden, *BS* 11 april 2013, 22460.

[667] Comité T, 'Rapport 2021 : Evaluation des mesures visant à lutter contre le terrorisme à la lumière des droits humains', 102.

[668] Vlaams strategisch plan hulp- en dienstverlening aan gedetineerden en geïnterneerden 2020-2025, VR 2020 1311 DOC.1230/3BIS, 34.

Justice' (AGMJ).[669] Within the AGMJ a group of partner services exists which are accredited and subsidised by the French community. In a 2016 decree six goals are listed for these partners, among which are psychological and societal support.[670] Within the AGMJ a sub-body exists called the '*Centre d'Aide et de Prise en charge des Personnes concernées par les Radicalismes et les Extrémismes Violents*' (CAPREV). [671] CAPREV was created in 2017 [672] and is focused on disengagement both within and outside of prison. CAPREV is even allowed to accompany detainees on a day release (see below). At the expert seminar, the overall opinion was that reintegration after a conviction for terrorism is often difficult. There is no abundance of good programmes specifically tailored to those people and the stigma of a terrorist conviction often sticks. To make matters worse, waiting lists for the available programmes are long, as are the waiting lists for support and follow-up outside of prison. On the other hand, one participant pointed out that the (ex-)convicted people also have a responsibility to try to reintegrate. If they do not do their part, successful reintegration is impossible.

[669] Coline Remacle and Olivia Nederlandt, 'Het Institutionele Landschap van de Sociale Hulpverlening Aan Rechtzoekenden En Gedetineerden in Het Franstalig Landsgedeelte' [2018] FATIK: Tijdschrift voor Strafbeleid en Gevangeniswezen 29, 31; Olivia Nederlandt and Coline Remacle, 'L'aide Sociale Aux Justiciables et Aux Détenus : Un Secteur Invisibilisé Par La Complexité Institutionnelle Belge ?' [2019] Revue de Droit Pénal et de Criminologie (Rev. dr. pén.) 379, 387.

[670] Art 5-14 Décret du 13 octobre 2016 relatif à l'agrément et au subventionnement des partenaires apportant de l'aide aux justiciables, *BS* 22 december 2016, 88082. See also: Nederlandt and Remacle (n 669) 389–390; Sandra Reisse, Benedicte Van Boven and Vauthier Anne, 'Désistance et Maisons de Justice : Construction d'un Modèle Par et Pour l'administration' [2019] Revue de Droit Pénal et de Criminologie (Rev. dr. pén.) 1213, 1218–129; Remacle and Nederlandt (n 669) 32. This decree was implemented by the Arrêté du Gouvernement de la Communauté française du 17 mai 2017 portant exécution du décret du 13 octobre 2016 relatif à l'agrément et au subventionnement des partenaires apportant de l'aide aux justiciables, *BS* 7 juni 2017, 62217 in turn implemented by the Arrêté ministériel du 17 mai 2017 portant exécution de l'arrêté du Gouvernement de la Communauté française du 17 mai 2017 portant exécution du décret du 13 octobre 2016 relatif à l'agrément et au subventionnement des partenaires apportant de l'aide aux justiciables, *BS* 9 juni 2017, 63351.

[671] Comité T, 'Rapport 2021 : Evaluation des mesures visant à lutter contre le terrorisme à la lumière des droits humains', 102; Reisse, Van Boven and Vauthier (n 670) 1218.

[672] Comité T, 'Rapport 2020 : Evaluation des mesures visant à lutter contre le terrorisme à la lumière des droits humains', 39.

Beyond prison: external legal position

Several modalities of sentence execution exist. These entail the possibility for the convicted detainee to spend time outside of the prison walls during his sentence. There are two categories of modalities, the first are granted by the secretary of justice, the second in principle (see below) by the sentence enforcement court (*strafuitvoeringsrechtbank; tribunal de l'application des peines*) or sentence enforcement judge (*strafuitvoeringsrechter; juge de l'application des peines*). The secretary of justice can grant four modalities: a day release (*uitgaansvergunning; permission de sortie*), penitentiary leave (*penitentiair verlof; congé pénitentiaire*), placement in a transition house (*transitiehuis; maison de transition*) and interruption of sentence enforcement (*onderbreking van de strafuitvoering*; *interruption de l'exécution de la peine*). The sentence enforcement court or judge can grant three modalities as well: limited detention (*beperkte detentie; détention limitée*), electronic tagging and conditional release (*voorwaardelijke invrijheidsstelling; libération conditionnelle*).

A day release can last a maximum of sixteen hours.[673] It can be granted occasionally at any point during detention so the detainee can undergo medical treatment or if his presence outside of prison is required to further his social, moral, legal, family, training or professional interests.[674] A day release can also be granted periodically during the two years before a detainee can be conditionally released, in order to prepare his social reintegration.[675] A day release will be granted if there are no indications that the person would flee, commit serious offences or bother the victim which cannot be mitigated by imposing special conditions.[676] Finally, the detainee has to agree with the general

[673] Art 4, §1 WERP. See also: Beernaert, *Manuel de droit pénitentiaire* (n 530) 239; Benjamin Mine and others, 'Permissions de Sortie et Congés Pénitentiaires : Des Sorties En Toute Discrétion ?' [2021] Revue de droit pénal et de criminologie 723, 728; Olivia Nederlandt and Thierry Moreau, 'Évolution Dans Le Champ de l'exécution Des Peines Depuis La Loi Pot-Pourri II', *La loi Pot-Pourri II: un an après* (Larcier 2017) 301; Boris Reynaerts, 'Wet 17 Mei 2006' in Tom Decaigny and others (eds), *Duiding Strafuitvoering* (Larcier 2014) 93; Scheirs (n 531) 673.

[674] Art 4, §2 WERP. See also: Beernaert, *Manuel de droit pénitentiaire* (n 530) 240; Mine and others (n 673) 728; Reynaerts (n 673) 93; Scheirs (n 531) 673.

[675] Art 4, §3 WERP. See also: Beernaert, *Manuel de droit pénitentiaire* (n 530) 240–241; Mine and others (n 673) 728 and 730; Reynaerts (n 673) 94; Scheirs (n 531) 673.

[676] Art 5, 2° WERP. See also: Beernaert, *Manuel de droit pénitentiaire* (n 530) 242; Mine and others (n 673) 733–734; Reynaerts (n 673) 94; Scheirs (n 531) 673.

condition that he will not commit any criminal offences and any specific conditions which may be imposed.[677]

Penitentiary leave allows a detainee to leave prison for 36 hours, three times each trimester.[678] The aim of a penitentiary leave is to allow the detainee to maintain and strengthen his family, affective and social ties or to prepare his reintegration.[679] Penitentiary leave can be granted starting one year before the detainee can be conditionally released.[680] It will be granted if there are no indications that the person would flee, commit serious offences or bother the victim, which cannot be mitigated by imposing special conditions.[681] Finally, the detainee has to agree with the general condition that he will not commit any criminal offences and any specific conditions which may be imposed.[682]

Placement in a transition house is not a form of temporary release, but rather a change of type of detention.[683] It means a placement plan is established[684] and the detainee is transferred to a

[677] Art 5, 3° *j.* 11, §3 WERP. See also: Beernaert, *Manuel de droit pénitentiaire* (n 530) 242; Mine and others (n 673) 734; Reynaerts (n 673) 95; Scheirs (n 531) 673.

[678] Art 6, §1 WERP. See also: Beernaert, *Manuel de droit pénitentiaire* (n 530) 248; Mine and others (n 673) 728; Reynaerts (n 673) 95; Scheirs (n 531) 674.

[679] Art 6, §2 WERP. See also: Beernaert, *Manuel de droit pénitentiaire* (n 530) 248; Mine and others (n 673) 728; Reynaerts (n 673) 95; Scheirs (n 531) 674.

[680] Art 7, 1° WERP. See also: Beernaert, *Manuel de droit pénitentiaire* (n 530) 249; Mine and others (n 673) 730; Reynaerts (n 673) 96; Scheirs (n 531) 674.

[681] Art 7, 2° WERP. See also: Beernaert, *Manuel de droit pénitentiaire* (n 530) 249; Mine and others (n 673) 733–734; Reynaerts (n 673) 96; Scheirs (n 531) 674.

[682] Art 7, 3° *j.* 11, §3 WERP. See also: Beernaert, *Manuel de droit pénitentiaire* (n 530) 249; Mine and others (n 673) 734; Reynaerts (n 673) 96; Scheirs (n 531) 674.

[683] Collectieve brief DG EPI nr. 150 van 22 augustus 2019 over pilootproject Transitiehuizen, 1; Olivia Nederlandt and An-Sofie Vanhouche, 'Les Maisons de Transition : Miroir Aux Alouettes Ou Pied Dans La Porte ?' in Christine Guillain and Damien Scalia (eds), *Les coûts du système pénal* (La Charte 2020) 36; An-Sofie Vanhouche and Olivia Nederlandt, 'De Belgische transitiehuizen: nood aan een terugkeer naar het originele concept van detentiehuizen' [2020] FATIK: Tijdschrift voor Strafbeleid en Gevangeniswezen 6, 7. This is a fairly new sentence modality, which was also suggested by the parliamentary research committee which was established after the Brussels terrorist attacks. See: Vierde tussentijds verslag van 23 oktober 2017 over het onderdeel "radicalisme" namens de parlementaire onderzoekscommissie belast met het onderzoek naar de omstandigheden die hebben geleid tot de terroristische aanslagen van 22 maart 2016 in de luchthaven Brussel-Nationaal en in het metrostation Maalbeek te Brussel, met inbegrip van de evolutie en de aanpak van de strijd tegen het radicalisme en de terroristische dreiging, *Parl.St.* Kamer 2017-2018, nr. 54-1752/009, 106.

[684] Art 9/1 WERP.

transition house.[685] This is a recognised institution in which detainees can undergo their sentence in a more small-scale environment which is not as detached from society. The placement plan contains the programme a detainee has to follow, including obligatory activities aimed at reintegration.[686] This placement can be granted to detainees who are within eighteen months of being able to be conditionally released.[687] This is only possible for detainees who have the ability to stay in an open communal regime and for who no indications exist that they would flee, commit serious offences or bother the victim, which cannot be mitigated by imposing special conditions.[688] Finally, the detainee has to agree with the placement plan, the household rules of the transition house and the general condition that he will not commit any criminal offences and any specific conditions which may be imposed.[689]

If the detainee does not abide by any of the conditions imposed with the modalities discussed above, or if new indications as mentioned above arise, the secretary of justice can decide to change the conditions, pause the execution of the modality for maximum three months (this is not possible for placement in a transition house) or revoke the modality.[690] If the detainee has seriously endangered the physical or psychological safety of other people, the public prosecutor can also

[685] Nederlandt, 'Actualités En Droit de l'exécution Des Peines Privatives de Liberté : Un État de Crise Permanent?' (n 633) 132; Olivia Nederlandt, '15 Jaar Strafuitvoeringsrechtbanken : Teenagers under Control?' [2022] FATIK: Tijdschrift voor Strafbeleid en Gevangeniswezen 4, 11; Nederlandt and Vanhouche (n 683) 36.

[686] Art 9/3, §2 WERP. See also: Collectieve brief DG EPI nr. 150 van 22 augustus 2019 over pilootproject Transitiehuizen, 2; Beernaert, *Manuel de droit pénitentiaire* (n 530) 256; Nederlandt, 'Actualités En Droit de l'exécution Des Peines Privatives de Liberté : Un État de Crise Permanent?' (n 633) 132; Nederlandt, '15 Jaar Strafuitvoeringsrechtbanken : Teenagers under Control?' (n 685) 11; Nederlandt and Vanhouche (n 683) 38; Vanhouche and Nederlandt (n 683) 9.

[687] Art 9/3, §1, 1° WERP. See also: Collectieve brief DG EPI nr. 150 van 22 augustus 2019 over pilootproject Transitiehuizen, 3; Beernaert, *Manuel de droit pénitentiaire* (n 530) 256; Nederlandt, 'Actualités En Droit de l'exécution Des Peines Privatives de Liberté : Un État de Crise Permanent?' (n 633) 135; Nederlandt and Vanhouche (n 683) 38; Vanhouche and Nederlandt (n 683) 8.

[688] Art 9/3, §1, 2° and 3° WERP. See also: Collectieve brief DG EPI nr. 150 van 22 augustus 2019 over pilootproject Transitiehuizen, 3; Beernaert, *Manuel de droit pénitentiaire* (n 530) 256; Nederlandt, 'Actualités En Droit de l'exécution Des Peines Privatives de Liberté : Un État de Crise Permanent?' (n 633) 135–136; Nederlandt and Vanhouche (n 683) 38; Vanhouche and Nederlandt (n 683) 8–9.

[689] Art 9/3, §1, 4° and 5° *j.* 11, §3 WERP. See also: Collectieve brief DG EPI nr. 150 van 22 augustus 2019 over pilootproject Transitiehuizen, 3-4; Beernaert, *Manuel de droit pénitentiaire* (n 530) 256; Nederlandt, 'Actualités En Droit de l'exécution Des Peines Privatives de Liberté : Un État de Crise Permanent?' (n 633) 136; Nederlandt and Vanhouche (n 683) 38.

[690] Art 12, §1, §2 and §2*bis* WERP. See also: Beernaert, *Manuel de droit pénitentiaire* (n 530) 246, 253 and 257; Reynaerts (n 673) 101–102.

decide to order his temporary arrest, after which the secretary will decide on the continuation of the modality.[691]

Something the secretary of justice can allow which is not really a sentencing modality but rather a suspension of the sentence, is the interruption of the enforcement of custodial sentences. In this case the execution of the sentence is paused for maximum three months, which can be renewed.[692] This can only be granted for serious and extraordinary family reasons[693] and no indications can exist that the person would flee, commit serious offences or bother the victim, which cannot be mitigated by imposing special conditions.[694] In this case as well, If the detainee has seriously endangered the physical or psychological safety of other people, the public prosecutor can decide to order his temporary arrest while allowing time for the secretary to decide on the suspension of the sentence.[695]

Before going into the sentencing modalities which the sentence enforcement court or judge can impose, an important *caveat* has to be made. According to the law on the external legal position the sentence enforcement judge is competent for all sentences up to three years imprisonment while the sentence enforcement court is competent for all longer sentences.[696] As we will see, in addition to this difference in judicial forum, there are other rules which differ between these two categories of sentences. However, the part of the legislation on the external legal position governing the limited detention, electronic tagging and conditional release for detainees sentenced to less than three years has not entered into force yet. The entry into force of this part of the legislation has been pushed back several times.[697] Currently it is set to enter into force on 1

[691] Art 14 WERP. See also: Beernaert, *Manuel de droit pénitentiaire* (n 530) 247, 254 and 258; Reynaerts (n 673) 102.

[692] Art 15, §1 WERP. See also: Beernaert, *Manuel de droit pénitentiaire* (n 530) 259; Reynaerts (n 673) 103; Scheirs (n 531) 675.

[693] Art 15, §2 WERP.

[694] Art 16 WERP. See also: Beernaert, *Manuel de droit pénitentiaire* (n 530) 259–260; Scheirs (n 531) 675.

[695] Art 19 WERP. See also: Beernaert, *Manuel de droit pénitentiaire* (n 530) 262–263; Reynaerts (n 673) 106; Scheirs (n 531) 675.

[696] JF Funck, 'Le tribunal de l'application des peines aujourd'hui et demain : nouvelles compétences (peines de trois ans ou moins), conditions d'octroi des mesures et révocation', *Actualités en procédure pénale : de l'audition à l'exécution* (Anthemis 2020) 203; Mine and others (n 673) 732; Nederlandt, '15 Jaar Strafuitvoeringsrechtbanken : Teenagers under Control?' (n 685) 4; Scheirs (n 531) 670.

[697] See: art 14 wet 23 november 2015; art 317 wet 6 juli 2017; art 23 wet 5 mei 2019; art 100 wet 31 juli 2020; art 2 wet 16 maart 2021; art 92 wet 28 november 2021. See also: Comité T, 'Rapport 2021 : Evaluation des mesures visant à lutter contre le terrorisme à la lumière des droits humains', 97; Beernaert, *Manuel de droit pénitentiaire* (n 530) 273; Mine and others (n 673) 732; Eric Maes, 'De Lange "Weg Naar Echternach" Nog Steeds Niet Afgelegd… Over de Strafuitvoering Bij Veroordeelden Tot Een "Korte"

September 2022 and therefore it will be discussed below,[698] but the question remains whether this date will be pushed back once again or not. This means that the rules for sentences of up to three years set out below do not actually apply yet in practice. Until they do, these sentences are subject to a different regime, being one of electronic tagging and automatic early release.[699]
The rules on electronic tagging in this context are set out in Circulare nr. ET/SE-2 of the secretary of justice[700] which dates back to 2013 but has since been changed several times[701].[702] Since 2015 all terrorist offences[703] have been excluded from this Circulare.[704] Since the rules on electronic tagging

Vrijheidsstraf, 15 Jaar Na Datum' [2022] FATIK: Tijdschrift voor Strafbeleid en Gevangeniswezen 19, 19; Nederlandt, 'Actualités En Droit de l'exécution Des Peines Privatives de Liberté : Un État de Crise Permanent?' (n 633) 177; Nederlandt, '15 Jaar Strafuitvoeringsrechtbanken : Teenagers under Control?' (n 685) 10; Scheirs (n 531) 691–692.

[698] Art 109 WERP. See also: Maes (n 697) 19; Nederlandt, '15 Jaar Strafuitvoeringsrechtbanken : Teenagers under Control?' (n 685) 10.

[699] Ministeriële omzendbrief nr. 1817 van 15 juli 2015 over de voorlopige invrijheidstelling van veroordeelden die één of meer vrijheidsstraffen ondergaan waarvan het uitvoerbaar gedeelte drie jaar of minder bedraagt; Ministeriële omzendbrief nr. 1817bis van 29 april 2016 over de voorlopige invrijheidstelling van veroordeelden die één of meer vrijheidsstraffen ondergaan waarvan het uitvoerbaar gedeelte drie jaar of minder bedraagt. See also: Van Den Berge (n 464) 14 and 16; Yves Van Den Berge and Frank Verbruggen, 'Langzaam Maar Onzeker: Het Wettelijk Kader Voor Een Geleidelijke Terugkeer Naar de Maatschappij' in Kristel Beyens, Tom Daems and Eric Maes (eds), *Exit gevangenis? De werking van de strafuitvoeringsrechtbanken en de wet op de externe rechtspositie van veroordeelden tot een vrijheidsstraf* (Maklu 2014) 41.

[700] Ministeriële omzendbrief nr. ET/SE-2 van 17 juli 2013 over de reglementering inzake het elektronisch toezicht als strafuitvoeringsmodaliteit voor gevangenisstraffen wanneer het totaal in uitvoering zijnde gevangenisstraffen drie jaar niet overschrijdt.

[701] Ministeriële omzendbrief nr. ET/SE-2bis van 26 november 2015 over de reglementering inzake het elektronisch toezicht als strafuitvoeringsmodaliteit voor gevangenisstraffen wanneer het totaal in uitvoering zijnde gevangenisstraffen drie jaar niet overschrijdt; Ministeriële omzendbrief nr. ET/SE-2ter van 29 april 2016 over de reglementering inzake het elektronisch toezicht als strafuitvoeringsmodaliteit voor gevangenisstraffen wanneer het totaal in uitvoering zijnde gevangenisstraffen drie jaar niet overschrijdt; Ministeriële omzendbrief nr. ET/SE-2quater van 4 juli 2017 over de reglementering inzake het elektronisch toezicht als strafuitvoeringsmodaliteit voor gevangenisstraffen wanneer het totaal in uitvoering zijnde gevangenisstraffen drie jaar niet overschrijdt.

[702] See also: Beernaert, *Manuel de droit pénitentiaire* (n 530) 274; Scheirs (n 531) 693.

[703] The Circulare states: art. 135 to 141 CC (terrorist offences). This is odd since articles 135-136octies CC do not contain terrorist offences. It is clear, however, that the terrorist offences are excluded.

[704] Chapter I Ministeriële omzendbrief nr. ET/SE-2 van 17 juli 2013 over de reglementering inzake het elektronisch toezicht als strafuitvoeringsmodaliteit voor gevangenisstraffen wanneer het totaal in uitvoering zijnde gevangenisstraffen drie jaar niet overschrijdt, as amended by Ministeriële omzendbrief nr. ET/SE-2bis van 26 november 2015 over de reglementering inzake het elektronisch toezicht als strafuitvoeringsmodaliteit voor gevangenisstraffen wanneer het totaal in uitvoering zijnde

for sentences of up to three years in the legislation have not yet entered into force, the only conclusion is that electronic tagging as a sentence modality is not possible for terrorist offences of up to three years.

For the automatic early release, detainees are put into different categories. The first are detainees who exclusively have a prison sentence which replaces a fine which was not paid. These detainees are immediately, automatically and irrevocably released.[705] The same goes for detainees whose prison sentence (which was their main sentence) does not exceed four months, with the difference that this release is revocable in case of a new standard offence or felony within two years[706].[707] Detainees sentenced to four to six months are released after one month and this can be revoked for the same reason.[708] Sentences of six to maximum seven months fall under the same regime while the term for sentences of seven to maximum eight months is two months and the term for

gevangenisstraffen drie jaar niet overschrijdt. See also: Beernaert, *Manuel de droit pénitentiaire* (n 530) 275; Maes (n 697) 22; Nederlandt, 'Actualités En Droit de l'exécution Des Peines Privatives de Liberté : Un État de Crise Permanent?' (n 633) 191.

[705] Ministeriële omzendbrief nr. 1817 van 15 juli 2015 over de voorlopige invrijheidstelling van veroordeelden die één of meer vrijheidsstraffen ondergaan waarvan het uitvoerbaar gedeelte drie jaar of minder bedraagt, 2. See also: Beernaert, *Manuel de droit pénitentiaire* (n 530) 283; Maes (n 697) 20–21; Nederlandt, 'Actualités En Droit de l'exécution Des Peines Privatives de Liberté : Un État de Crise Permanent?' (n 633) 187.

[706] According to the instructions mentioned below, this would be one year (See fn 709).

[707] Ministeriële omzendbrief nr. 1817 van 15 juli 2015 over de voorlopige invrijheidstelling van veroordeelden die één of meer vrijheidsstraffen ondergaan waarvan het uitvoerbaar gedeelte drie jaar of minder bedraagt, 2-3. See also: Beernaert, *Manuel de droit pénitentiaire* (n 530) 282 and 288; Maes (n 697) 20–21; Nederlandt, 'Actualités En Droit de l'exécution Des Peines Privatives de Liberté : Un État de Crise Permanent?' (n 633) 185 and 187–188; Scheirs (n 531) 692.

[708] Ministeriële omzendbrief nr. 1817 van 15 juli 2015 over de voorlopige invrijheidstelling van veroordeelden die één of meer vrijheidsstraffen ondergaan waarvan het uitvoerbaar gedeelte drie jaar of minder bedraagt, 3. Note that this term of one month is not applicable to sentences which received force of res judicata before 1 February 2014. See also: Beernaert, *Manuel de droit pénitentiaire* (n 530) 288; Maes (n 697) 20–21; Nederlandt, 'Actualités En Droit de l'exécution Des Peines Privatives de Liberté : Un État de Crise Permanent?' (n 633) 185; Scheirs (n 531) 692–693.

sentences of eight months to maximum one year is three months[709].[710] Detainees who are sentenced to more than one year (and maximum three years) are released after they have served one third of their sentence[711] if the prison warden decides there are no indications the detainee will not be able to provide for his own material needs or represents a manifest risk for the physical integrity of others.[712] Individualised conditions can be imposed if they are absolutely necessary to avoid recidivism. The release of this category of detainees can be revoked in case of not abiding by these conditions or in case of new standard offences or felonies within two years.[713] Note that there is a more elaborate procedure in case of sentences of more than one year for detainees convicted for sexual offences against minors.[714] Since 2016, the same goes for detainees convicted to more than one year (but maximum three) for terrorist offences. These detainees can also be released after one third of their sentence,[715] but in addition to the two indications mentioned above, there must also be no indications that there is a risk of the detainee leaving the country or bothering the

[709] Note that prominent commentators mention instructions from the Secretary dating 16 May 2017 which temporarily derogate from this arrangement. According to these instructions the term is two months for all sentences of seven months to one year. However, we have failed to find these instructions so it is impossible to verify how long this derogation would apply. Therefore we have included the time limits as imposed by the Circular Letter in the text. See: Beernaert, *Manuel de droit pénitentiaire* (n 530) 282; Maes (n 697) 20–21; Nederlandt, 'Actualités En Droit de l'exécution Des Peines Privatives de Liberté : Un État de Crise Permanent?' (n 633) 185.

[710] Ministeriële omzendbrief nr. 1817 van 15 juli 2015 over de voorlopige invrijheidstelling van veroordeelden die één of meer vrijheidsstraffen ondergaan waarvan het uitvoerbaar gedeelte drie jaar of minder bedraagt, 4. See also: Maes (n 697) 20–21; Scheirs (n 531) 693.

[711] See footnote 709: These instructions also state the term is four months for sentences of more than one year up to two years and eight months for sentences of more than two years (and maximum three years).

[712] Ministeriële omzendbrief nr. 1817 van 15 juli 2015 over de voorlopige invrijheidstelling van veroordeelden die één of meer vrijheidsstraffen ondergaan waarvan het uitvoerbaar gedeelte drie jaar of minder bedraagt, 5. See also: Scheirs (n 531) 693.

[713] See also: Beernaert, *Manuel de droit pénitentiaire* (n 530) 288.

[714] Ministeriële omzendbrief nr. 1817 van 15 juli 2015 over de voorlopige invrijheidstelling van veroordeelden die één of meer vrijheidsstraffen ondergaan waarvan het uitvoerbaar gedeelte drie jaar of minder bedraagt, 5-6. See also: Beernaert, *Manuel de droit pénitentiaire* (n 530) 283; Scheirs (n 531) 693.

[715] Note that in its 2021 report, Comité T states that terrorist detainees convicted for less than three years imprisonment are not eligible for provisional release. However, this is not supported by the text of the Circulares. See: Comité T, 'Rapport 2021 : Evaluation des mesures visant à lutter contre le terrorisme à la lumière des droits humains', 98-99.

victims.[716] In addition, the decision is not made by the prison warden but by the direction for detention management, after having received all the necessary information from the prison warden, which can include an analysis from the psychosocial services.[717] Individualised special conditions are possible when absolutely necessary to avoid recidivism or when necessary in the interests of the victim.[718] Revocation is possible in case of non-compliance with the conditions, which last two years or in case of new standard offences or felonies within two years.[719] If the detainee was convicted to an electronic tagging sentence, community service or an autonomous probation sentence and the prison sentence is imposed in replacement of this principal sentence, there are slightly different rules again. In case of a prison sentence of up to four months he is automatically released after fifteen days.[720] For sentences of up to seven months this is one month, sentences up to eight months make the term two months and for sentences of maximum one year the term is three months.[721] Again revocation is possible in case of a new standard offence or felony within two years. In case of prison sentences which replace the electronic tagging sentence, community service or autonomous probation sentence and which are longer than one year, the

[716] Ministeriële omzendbrief nr. 1817bis van 29 april 2016 over de voorlopige invrijheidstelling van veroordeelden die één of meer vrijheidsstraffen ondergaan waarvan het uitvoerbaar gedeelte drie jaar of minder bedraagt, 2. See also: Beernaert, *Manuel de droit pénitentiaire* (n 530) 283.

[717] Ministeriële omzendbrief nr. 1817bis van 29 april 2016 over de voorlopige invrijheidstelling van veroordeelden die één of meer vrijheidsstraffen ondergaan waarvan het uitvoerbaar gedeelte drie jaar of minder bedraagt, 2-3. See also: Beernaert, *Manuel de droit pénitentiaire* (n 530) 286–287; Nederlandt, 'Actualités En Droit de l'exécution Des Peines Privatives de Liberté : Un État de Crise Permanent?' (n 633) 185–186.

[718] Ministeriële omzendbrief nr. 1817bis van 29 april 2016 over de voorlopige invrijheidstelling van veroordeelden die één of meer vrijheidsstraffen ondergaan waarvan het uitvoerbaar gedeelte drie jaar of minder bedraagt, 3. See also: Beernaert, *Manuel de droit pénitentiaire* (n 530) 286-287; Nederlandt 'Actualités En Droit de l'exécution Des Peines Privatives de Liberté : Un État de Crise Permanent?' (n 633) 186.

[719] Ministeriële omzendbrief nr. 1817bis van 29 april 2016 over de voorlopige invrijheidstelling van veroordeelden die één of meer vrijheidsstraffen ondergaan waarvan het uitvoerbaar gedeelte drie jaar of minder bedraagt, 3-4.

[720] See also: Beernaert, *Manuel de droit pénitentiaire* (n 530) 283; Maes (n 697) 21; Nederlandt, 'Actualités En Droit de l'exécution Des Peines Privatives de Liberté : Un État de Crise Permanent?' (n 633) 187.

[721] Ministeriële omzendbrief nr. 1817 van 15 juli 2015 over de voorlopige invrijheidstelling van veroordeelden die één of meer vrijheidsstraffen ondergaan waarvan het uitvoerbaar gedeelte drie jaar of minder bedraagt, 7; Ministeriële omzendbrief nr. 1817bis van 29 april 2016 over de voorlopige invrijheidstelling van veroordeelden die één of meer vrijheidsstraffen ondergaan waarvan het uitvoerbaar gedeelte drie jaar of minder bedraagt, 4-5; Maes (n 697) 21; Nederlandt, 'Actualités En Droit de l'exécution Des Peines Privatives de Liberté : Un État de Crise Permanent?' (n 633) 187.

general rules for these sentences set out above in this paragraph apply.[722] In case of a sentence of maximum three years imprisonment in combination with being at the disposal of the sentence enforcement court, the detainee is not released early.[723] Finally, there are separate rules for foreigners who have been convicted for maximum three years imprisonment, depending on whether or not they will be deported.[724]

Limited detention is a type of execution of a prison sentence in which the detainee can on a regular basis leave prison for up to sixteen hours a day.[725] This can be granted in order to further his professional, training or family interests which require his presence outside of prison.[726] A second modality granted by the sentence enforcement court or judge is electronic tagging. As explained above, an electronic tagging sentence can be a full fledged sentencing alternative to a prison sentence. However, it is also possible for the sentence enforcement court or judge to grant electronic tagging as a modality of a prison sentence.[727] This entails the detainee undergoing (part

[722] Ministeriële omzendbrief nr. 1817 van 15 juli 2015 over de voorlopige invrijheidstelling van veroordeelden die één of meer vrijheidsstraffen ondergaan waarvan het uitvoerbaar gedeelte drie jaar of minder bedraagt, 7; Ministeriële omzendbrief nr. 1817bis van 29 april 2016 over de voorlopige invrijheidstelling van veroordeelden die één of meer vrijheidsstraffen ondergaan waarvan het uitvoerbaar gedeelte drie jaar of minder bedraagt, 5. See also: Maes (n 697) 21.

[723] Ministeriële omzendbrief nr. 1817 van 15 juli 2015 over de voorlopige invrijheidstelling van veroordeelden die één of meer vrijheidsstraffen ondergaan waarvan het uitvoerbaar gedeelte drie jaar of minder bedraagt, 8. See also: Beernaert, *Manuel de droit pénitentiaire* (n 530) 284.

[724] See Ministeriële omzendbrief nr. 1817 van 15 juli 2015 over de voorlopige invrijheidstelling van veroordeelden die één of meer vrijheidsstraffen ondergaan waarvan het uitvoerbaar gedeelte drie jaar of minder bedraagt, 8-9. See also: Beernaert, *Manuel de droit pénitentiaire* (n 530) 284–285.

[725] Art 21, §1 WERP. See also: Derde tussentijds verslag over het onderdeel "veiligheidsarchitectuur" van 15 juni 2017 van de parlementaire onderzoekscommissie belast met het onderzoek naar de omstandigheden die hebben geleid tot de terroristische aanslagen van 22 maart 2016 in de luchthaven Brussel-Nationaal en in het metrostation Maalbeek te Brussel, met inbegrip van de evolutie en de aanpak van de strijd tegen het radicalisme en de terroristische dreiging, *Parl.St.* Kamer 2016-2017, nr. 54-1752/008, 394; Beernaert, *Manuel de droit pénitentiaire* (n 530) 291–292; Van Den Berge (n 464) 16. For detail as to the implementation of this sentencing modality, see: Ministeriële omzendbrief nr. 1804 van 25 juli 2008 betreffende samenwerkingsafspraken tussen het directoraat-generaal Penitentiaire Inrichtingen en het directoraat-generaal Justitiehuizen betreffende de uitvoering van beperkte detentie.

[726] Art 21, §2 WERP. See also: Beernaert, *Manuel de droit pénitentiaire* (n 530) 292; Reynaerts (n 673) 107; Scheirs (n 531) 676; Van Den Berge and Verbruggen (n 699) 59.

[727] See also: Beernaert, *Manuel de droit pénitentiaire* (n 530) 292; Reynaerts (n 673) 107. For details as to the implementation of this sentencing modality, see: Ministeriële omzendbrief nr. 1803 (III) van 25 juli 2008 betreffende de reglementering van elektronisch toezicht als strafuitvoeringsmodaliteit.

of) his prison sentence outside of prison according to an execution plan which is enforced by electronic tagging.[728] Limited detention and electronic tagging can be granted to detainees who are either within six months of being able to be conditionally released[729] or whose prison sentence does not exceed three years[730].[731] There are additional conditions regarding to certain contra-indications depending on the duration of the prison sentence which are the same as for conditional release (see below).[732]

Conditional release allows a detainee to leave prison and continue his sentence on the outside, as long as he abides by certain conditions.[733] The possibility of conditional release is dependent on time limits. For sentences under three years, conditional release is possible after 1/3 of the sentence has been executed.[734] For longer sentences the limit is also 1/3 of the sentence, but there are several exceptions.[735] First, if the convicted person is a recidivist, the legislation sets the limit at

[728] Art 22 WERP. See also: Derde tussentijds verslag over het onderdeel "veiligheidsarchitectuur" van 15 juni 2017 van de parlementaire onderzoekscommissie belast met het onderzoek naar de omstandigheden die hebben geleid tot de terroristische aanslagen van 22 maart 2016 in de luchthaven Brussel-Nationaal en in het metrostation Maalbeek te Brussel, met inbegrip van de evolutie en de aanpak van de strijd tegen het radicalisme en de terroristische dreiging, *Parl.St.* Kamer 2016-2017, nr. 54-1752/008, 394; Beernaert, *Manuel de droit pénitentiaire* (n 530) 292; Reynaerts (n 673) 107; Scheirs (n 531) 676; Van Den Berge and Verbruggen (n 699) 59.

[729] Scheirs (n 531) 677; Van Den Berge and Verbruggen (n 699) 60.

[730] Nederlandt, 'Actualités En Droit de l'exécution Des Peines Privatives de Liberté : Un État de Crise Permanent?' (n 633) 197–198.

[731] Art 23, §1 WERP. See also: Beernaert, *Manuel de droit pénitentiaire* (n 530) 297 and 303; Funck (n 696) 205; Reynaerts (n 673) 106–107.

[732] Scheirs (n 531) 678–679; Van Den Berge and Verbruggen (n 699) 60–61.

[733] Art 24 WERP. See also: Derde tussentijds verslag over het onderdeel "veiligheidsarchitectuur" van 15 juni 2017 van de parlementaire onderzoekscommissie belast met het onderzoek naar de omstandigheden die hebben geleid tot de terroristische aanslagen van 22 maart 2016 in de luchthaven Brussel-Nationaal en in het metrostation Maalbeek te Brussel, met inbegrip van de evolutie en de aanpak van de strijd tegen het radicalisme en de terroristische dreiging, *Parl.St.* Kamer 2016-2017, nr. 54-1752/008, 394; Beernaert, *Manuel de droit pénitentiaire* (n 530) 293; Reynaerts (n 673) 110; Scheirs (n 531) 676; Van Den Berge (n 464) 16; Van Den Berge and Verbruggen (n 699) 42.

[734] Art 25, §1 WERP. See also: Funck (n 696) 205; Nederlandt, 'Actualités En Droit de l'exécution Des Peines Privatives de Liberté : Un État de Crise Permanent?' (n 633) 197–198; Reynaerts (n 673) 111.

[735] Art 25, §2, a) WERP. See also: Collectieve brief DG EPI nr. 121 van 29 maart 2013 betreffende wijziging van de Wet Externe Rechtspositie, 1; Beernaert, *Manuel de droit pénitentiaire* (n 530) 298; Reynaerts (n 673) 112; Van Den Berge (n 464) 17; Van Den Berge and Verbruggen (n 699) 44.

2/3, with a maximum of fourteen years.[736] The application of this time limit, however, has been frought with legal issues and in November 2021 the Court of Cassation ruled that it cannot not be applied.[737] Second, for convictions to a custodial sentence of thirty years or life, the term is set to fifteen years.[738] Third, for these same convictions, the term is nineteen years if the convicted person had previously been convicted to a correctional prison sentence of at least three years for a number of listed offences, which includes articles 137, 138, 140 and 141 CC,[739] and less than ten years have passed since the end of that sentence.[740] Finally, again for convictions to thirty years or life felony imprisonment, 23 years if it is apparent from the judgment that the convicted person had previously already been convicted to a criminal sentence.[741] For sentences of up to three years, once the time

[736] Art 25, §2, b) WERP. See also: Collectieve brief DG EPI nr. 121 van 29 maart 2013 betreffende wijziging van de Wet Externe Rechtspositie, 1; Beernaert, *Manuel de droit pénitentiaire* (n 530) 298; Reynaerts (n 673) 112; Van Den Berge (n 464) 17; Van Den Berge and Verbruggen (n 699) 44.

[737] Cass. 3 november 2021, P.21.1302.F. This was the, for the moment, last decision in a long legal saga. The start of which were three Constitutional Court decisions in which the Court held that the rule was discriminatory. See: GwH 18 december 2014, 185/2014; GwH 26 juli 2017, 102/2017; GwH 7 februari 2018, 15/2018. In response, the legislature changed the rules on recidivism in 2019. See: Art 2 wet van 5 mei 2019 tot invoeging van een artikel 55bis in het Strafwetboek, wat de herhaling betreft, *BS* 28 mei 2019, 51916. However, as the Court of Cassation noted, this change did not fully remedy the discrimination. Note that a case was also brought before the Constitutional Court to have the legislation annulled but the Court dismissed the case since the discrimination did not follow from the change in legislation. See: GwH 14 oktober 2021, 138/2021, *Rev.dr.pén.* 2022, 29, noot Beernaert. For a more detailed analysis of the situation, see: Marie-Aude Beernaert, 'Correctionnalisation Des Crimes et Récidive Légale : Les Problèmes Subsistent, Les Solutions Aussi…' [2022] Revue de Droit Pénal et de Criminologie (Rev. dr. pén.) 38.

[738] Art 25, §2, c) WERP. See also: Collectieve brief DG EPI nr. 121 van 29 maart 2013 betreffende wijziging van de Wet Externe Rechtspositie, 1; Beernaert, *Manuel de droit pénitentiaire* (n 530) 301; Reynaerts (n 673) 112; Van Den Berge (n 464) 17; Van Den Berge and Verbruggen (n 699) 44. The so called 'Potpourri II' reform also made a change here (art 151 and 155). As explained above (see fn nr. 579), part of this reform was the elevation of sentences after correctionalisation to up to fourty years and therefore this article in the WERP was changed accordingly. However, the Constiutitonal Court annulled the elevation of sentences after correctionalisation and thus also annulled this change to the rules on the external legal position. See: GwH 21 december 2017, 148/2017.

[739] This is odd for two reasons. First, article 138 CC is listed but this article does not contain any offences. Second, articles 140*bis* to 140*quinquies* CC were introduced roughly a month earlier, but are not included in the list.

[740] Art 25, §2, d) WERP. See also: Collectieve brief DG EPI nr. 121 van 29 maart 2013 betreffende wijziging van de Wet Externe Rechtspositie, 1-2; Beernaert, *Manuel de droit pénitentiaire* (n 530) 301; Reynaerts (n 673) 112–113; Van Den Berge (n 464) 17–18; Van Den Berge and Verbruggen (n 699) 44–45.

[741] Art 25, §2, e) WERP. See also: Collectieve brief DG EPI nr. 121 van 29 maart 2013 betreffende wijziging van de Wet Externe Rechtspositie, 2-3; Beernaert, *Manuel de droit pénitentiaire* (n 530) 301; Reynaerts (n 673) 113; Van Den Berge (n 464) 18; Van Den Berge and Verbruggen (n 699) 45.

requirement has been met, the detainee will be conditionally released if there are no indications he (1) cannot meet his own basic needs, (2) poses a manifest threat to the physical integrity of others, (3) would bother the victim, (4) has a negative attitude towards the victim or (5) did not make an effort to financially compensate the civil party.[742] For convictions of more than three years, there must be no indications he (1) has no prospect of social rehabilitation, (2) poses a risk of committing new serious offences,[743] (3) would bother the victim, (4) has a negative attitude towards the victim or (5) did not make an effort to financially compensate the civil party.[744]

Finally, provisional release with the aim of removing the detainee from the Belgian territory (*voorlopige invrijheidstelling met het oog op verwijdering van het grondgebied of met het oog op overlevering; mise en liberté provisoire en vue de l'éloignement du territoire ou de la remise*) is possible. This is possible when a detainee does not have the right to stay in the country. He can then be removed from the territory and undergo the rest of his sentence abroad under certain conditions.[745] The time limits are the same as for regular conditional release.[746] Once these time limits are met, a detainee convicted to less than three years can be provisionally released with the aim of removing him from the territory if there are no indications he (1) poses a manifest threat to the physical integrity of others, (2) would bother the victim or (3) did not make an effort to financially compensate the civil party.[747] For convictions of more than three years, there must be

[742] Art 28, §1 WERP. See also: Funck (n 696) 205; Nederlandt, 'Actualités En Droit de l'exécution Des Peines Privatives de Liberté : Un État de Crise Permanent?' (n 633) 199; Reynaerts (n 673) 117–118.

[743] The seriousness of which must be apparent from the judgment. See: Cass. 13 juni 2007, P.07.0704.F.

[744] Art 47, §1 WERP. See also: Derde tussentijds verslag over het onderdeel "veiligheidsarchitectuur" van 15 juni 2017 van de parlementaire onderzoekscommissie belast met het onderzoek naar de omstandigheden die hebben geleid tot de terroristische aanslagen van 22 maart 2016 in de luchthaven Brussel-Nationaal en in het metrostation Maalbeek te Brussel, met inbegrip van de evolutie en de aanpak van de strijd tegen het radicalisme en de terroristische dreiging, *Parl.St.* Kamer 2016-2017, nr. 54-1752/008, 395; Beernaert, *Manuel de droit pénitentiaire* (n 530) 303–304; Funck (n 696) 214–218; Reynaerts (n 673) 134–136; Scheirs (n 531) 678–682; Van Den Berge (n 464) 19–20; Van Den Berge and Verbruggen (n 699) 47–49.

[745] Art 25/3 WERP. See also: Beernaert, *Manuel de droit pénitentiaire* (n 530) 295; Van Den Berge (n 464) 16; Van Den Berge and Verbruggen (n 699) 42.

[746] Art 26 WERP. See also: Beernaert, *Manuel de droit pénitentiaire* (n 530) 297; Reynaerts (n 673) 114.

[747] Art 28, §2 WERP. See also: Nederlandt, 'Actualités En Droit de l'exécution Des Peines Privatives de Liberté : Un État de Crise Permanent?' (n 633) 199.

no indications he (1) poses a risk of committing new serious offences, (2) would bother the victim or (3) did not make an effort to financially compensate the civil party.[748]

In 2017 the legislature introduced the so-called security period.[749] This period provides the opportunity for the judge who imposes the sentence to extend the time limits after which conditional release or provisional release with the aim of removing the detainee from the territory is possible.[750] This security period can be imposed in two situations. The first being a conviction of minimum three but less than thirty years for certain offences, which include all terrorist offences. In this case the security period ranges from one third to two thirds of the sentence.[751] The second situation is one of convictions to thirty years or more, including life felony imprisonment. Here the security period ranges from fifteen to 25 years.[752]

Conditional release, limited detention or electronic tagging can only be granted after a written advice by the prison warden based on a file he makes.[753] If the detainee was convicted for a terrorist offence or shows signs of violent extremism, this file must include a report of a service specialised

[748] Art 47, §2 WERP. See also: Beernaert, *Manuel de droit pénitentiaire* (n 530) 305; Van Den Berge (n 464) 20.

[749] This introduction was challenged before the Constitutional Court, which dismissed the appeal. See: GwH 19 november 2020, 147/2020, *NjW* 2021, 265, noot Careel.

[750] Beernaert, *Manuel de droit pénitentiaire* (n 530) 301–302; Horseele and others (n 456) 137; Funck (n 696) 213; Franklin Kuty, 'La Loi Du 21 Décembre 2017 Modiiant Diverses Dispositions En Vue d'instaurer Une Période de Sûreté. La Peine Irrémédiable, La Loi de La Désillusion ?' [2018] Revue de Droit Pénal et de Criminologie (Rev. dr. pén.) 573, 573; Nederlandt, '15 Jaar Strafuitvoeringsrechtbanken : Teenagers under Control?' (n 685) 11; Van Den Berge (n 464) 18–19.

[751] Art 195, section 4 and art 344, section 4 CCP. See also: Beernaert, *Manuel de droit pénitentiaire* (n 530) 302; Horseele and others (n 456) 138; Kuty (n 750) 589–591; Van Den Berge (n 464) 19. A literal reading of the legislation would make it seem that the security period in this case has to be two thirds and cannot be lower. However, in the preparatory works it is explicitly stated that less than two thirds is also possible. See: Memorie van Toelichting van 23 oktober 2017 bij wetsontwerp tot wijziging van de wet van 20 juli 1990 betreffende de voorlopige hechtenis voor wat de onmiddellijke aanhouding betreft en tot invoering van de beveiligingsperiode, *Parl.St.* Kamer 2017-2018, nr. 54-2731/001, 6.

[752] Art 195, section 5 and art 344, section 5 CCP. See also: Beernaert, *Manuel de droit pénitentiaire* (n 530) 302; Horseele and others (n 456) 138; Kuty (n 750) 590–591; Van Den Berge (n 464) 19.

[753] Art 30, §2 *j.* art 49 and 50 WERP. See also: Collectieve brief DG EPI nr. 121 van 29 maart 2013 betreffende wijziging van de Wet Externe Rechtspositie, 3; Reynaerts (n 673) 121; Van Den Berge and Verbruggen (n 699) 50–51 and 62.

in terrorism or violent extremism[754] on the necessity of a customised guidance programme.[755] In addition, the advice of the public prosecution service is necessary.[756]

All modalities include three general conditions: (1) not committing any criminal offences, (2) having a fixed address and immediately informing the government if this changes (not applicable to day release or provisional release with the aim of removing the detainee[757]) and (3) answering summons of the public prosecutor's office or the probation service.[758] In addition, specific conditions can be imposed. For sentences of up to three years these conditions must be deemed absolutely necessary to reduce the risk of recidivism or necessary in the interest of the victim.[759] In case the detainee was convicted for a terrorist offence or shows signs of violent extremism, these special conditions can include following a customised guidance programme with a service which is specialised in these issues.[760] For convictions of more than three years the conditions need to either be necessary in

[754] Defined in the article as "Promoting, encouraging or committing acts that may lead to terrorism and which advocate an ideology to proclaim racial, national, ethnic or religious supremacy or which is contrary to the fundamental values and principles of democracy" (own translation).

[755] Art 31, §1 and art 32, §2 *j.* art 49, §3 WERP. See also: Beernaert, *Manuel de droit pénitentiaire* (n 530) 313–314; Nederlandt, 'Actualités En Droit de l'exécution Des Peines Privatives de Liberté : Un État de Crise Permanent?' (n 633) 154–155; Nederlandt, '15 Jaar Strafuitvoeringsrechtbanken : Teenagers under Control?' (n 685) 16.

[756] Art 51 WERP. See also: Derde tussentijds verslag over het onderdeel "veiligheidsarchitectuur" van 15 juni 2017 van de parlementaire onderzoekscommissie belast met het onderzoek naar de omstandigheden die hebben geleid tot de terroristische aanslagen van 22 maart 2016 in de luchthaven Brussel-Nationaal en in het metrostation Maalbeek te Brussel, met inbegrip van de evolutie en de aanpak van de strijd tegen het radicalisme en de terroristische dreiging, *Parl.St.* Kamer 2016-2017, nr. 54-1752/008, 396; Collectieve brief DG EPI nr. 121 van 29 maart 2013 betreffende wijziging van de Wet Externe Rechtspositie, 4; Beernaert, *Manuel de droit pénitentiaire* (n 530) 314–315; Van Den Berge and Verbruggen (n 699) 52 and 62.

[757] Note that this is not explicitly mentioned for sentences under three years, but it is for sentences over three years.

[758] Art 39 and art 55 WERP. See also: Derde tussentijds verslag over het onderdeel "veiligheidsarchitectuur" van 15 juni 2017 van de parlementaire onderzoekscommissie belast met het onderzoek naar de omstandigheden die hebben geleid tot de terroristische aanslagen van 22 maart 2016 in de luchthaven Brussel-Nationaal en in het metrostation Maalbeek te Brussel, met inbegrip van de evolutie en de aanpak van de strijd tegen het radicalisme en de terroristische dreiging, *Parl.St.* Kamer 2016-2017, nr. 54-1752/008, 397; Reynaerts (n 673) 121 and 142; Scheirs (n 531) 689; Van Den Berge (n 464) 20; Van Den Berge and Verbruggen (n 699) 54. For sentences over three years, the legislation also states that conditional release with the view of removing the person from the Belgian territory is conditional upon actually leaving the Belgian territory and not returning during the probationary period without permission of the sentence enforcement court (and without being in violation with any other laws or regulations). See: art 55, 4° WERP.

[759] Art 40 WERP. See also: Reynaerts (n 673) 129; Scheirs (n 531) 689.

[760] Art 41, §2 WERP. See also: Beernaert, *Manuel de droit pénitentiaire* (n 530) 325; Nederlandt, 'Actualités En Droit de l'exécution Des Peines Privatives de Liberté : Un État de Crise Permanent?' (n 633) 162–165.

the interest of the victims, necessary to counter any of the abovementioned indications or offer the possibility of implementing a social rehabilitation plan.[761] Specifically for conditional release the sentence execution court also has to state whether or not the detainee is allowed to leave the Belgian territory and if so, for how long, how frequent and whether or not he has to inform the public prosecution service before doing so.[762] In cases of convictions for terrorism or when there are concrete elements of violent extremism, the sentence execution court has to especially motivate the permission to leave the territory.[763] If a modality is refused, the judgment states on which date the detainee can request one again. For sentences of up to five years, this term has a maximum of six months and for longer sentences one year.[764]

The probation period for a conditional release equals the remainder of the sentence the person still had to undergo, with a minimum of one year. For correctional sentences of more than five years and criminal sentences of less than thirty years, this period is five to ten years. Finally, for sentences of thirty years or more, the probation period is ten years.[765]

[761] Art 56, §1 WERP. See also: Reynaerts (n 673) 143; Van Den Berge and Verbruggen (n 699) 55.

[762] Art 56, §3 WERP. See also: Beernaert, *Manuel de droit pénitentiaire* (n 530) 325; Nederlandt, 'Actualités En Droit de l'exécution Des Peines Privatives de Liberté : Un État de Crise Permanent?' (n 633) 165–166; Nederlandt, '15 Jaar Strafuitvoeringsrechtbanken : Teenagers under Control?' (n 685) 16.

[763] Art 56, §4 WERP. See also: Beernaert, *Manuel de droit pénitentiaire* (n 530) 326; Nederlandt, 'Actualités En Droit de l'exécution Des Peines Privatives de Liberté : Un État de Crise Permanent?' (n 633) 165–166; Nederlandt, '15 Jaar Strafuitvoeringsrechtbanken : Teenagers under Control?' (n 685) 16. This was introduced at the advice of the parliamentary research committee established after the Brussels terrorist attacks. See: Derde tussentijds verslag over het onderdeel "veiligheidsarchitectuur" van 15 juni 2017 van de parlementaire onderzoekscommissie belast met het onderzoek naar de omstandigheden die hebben geleid tot de terroristische aanslagen van 22 maart 2016 in de luchthaven Brussel-Nationaal en in het metrostation Maalbeek te Brussel, met inbegrip van de evolutie en de aanpak van de strijd tegen het radicalisme en de terroristische dreiging, *Parl.St.* Kamer 2016-2017, nr. 54-1752/008, 399.

[764] Art 45 and art 57 WERP. Also note there is a term of minimum six months and maximum eighteen months for custodial sentences of thirty years or more which were combined with being at the disposal of the sentence enforcement court. See: Art 54, §2 WERP. See also: Collectieve brief DG EPI nr. 121 van 29 maart 2013 betreffende wijziging van de Wet Externe Rechtspositie, 4; Beernaert, *Manuel de droit pénitentiaire* (n 530) 308; Reynaerts (n 673) 143–144; Scheirs (n 531) 690; Van Den Berge (n 464) 21; Van Den Berge and Verbruggen (n 699) 57.

[765] Art 71 WERP. See also: Beernaert, *Manuel de droit pénitentiaire* (n 530) 329; Reynaerts (n 673) 160; Scheirs (n 531) 689–690; Van Den Berge (n 464) 21–22; Van Den Berge and Verbruggen (n 699) 58.

Asset freezing

Asset freezing is usually done at the instigation of the UN or the EU. This is an administrative measure which takes place independent of any potential criminal procedures.[766] In 1999 and 2000, the UN Security Council (UNSC) issued Resolutions 1267 and 1333, which imposed upon states the obligation to freeze funds and other financial assets of the Taliban, Usama bin Laden and his associates, including those in Al-Qaida.[767] In the following years, the Security Council reaffirmed and expanded upon these Resolutions.[768] Since 2015, ISIS and their associates were added to these resolutions as well.[769] The freezing of assets is based on a list.[770] In addition to this system based on a list the Security Council issued Resolution 1373, mere weeks after 9/11.[771] This Resolution imposes a more general obligation on states to freeze funds of suspected terrorist, without targeting specific groups or individuals.[772] The EU measures take a similar form. First of all, the EU has implemented the UN list, stating that all funds and other assets of persons or other entities on

[766] See for example: UNSC Resolution 2368 of 20 July 2017, 64. See also: Circulaire van 7 september 2015 inzake de tenuitvoerlegging van de artikelen 3 en 5 van het koninklijk besluit van 28 december 2006 inzake specifieke beprekende maatregelen tegen bepaalde personen en entiteiten met het oog op de strijd tegen de financiering van het terrorisme; Elspeth Guild, 'The Uses and Abuses of Counter-Terrorism Policies in Europe: The Case of the "Terrorist Lists"' (2008) 46 JCMS: Journal of Common Market Studies 173, 177; Anthony Rizzo, *La Confiscation et Le Gel Préventif d'avoirs Terroristes: Quelle Place Pour Les Droits Fondamentaux Dans La Lutte Contre Le Crime et Le Terrorisme* (Larcier 2021) 320.

[767] UNSC Resolution 1267 of 15 October 1999; UNSC Resolution 1333 of 19 December 2000. See also: Melissa Broek, Monique Hazelhorst and Wouter de Zanger, 'Asset Freezing: Smart Sanction or Criminal Charge?' (2010) 27 Merkourios : Utrecht Journal of International and European Law 18, 20; Anne L Clunan, 'The Fight against Terrorist Financing' (2006) 121 Political Science Quarterly 569, 575–576; Guild (n 766) 182; Sameer Hossain, 'Freezing Terrorism Assets: Increasing International Cooperation by Observing Procedural Due Process Notes & Comments' (2010–2011) 54 Howard Law Journal 437, 444; Andrew Hudson, 'Not a Great Asset: The UN Security Council's Counter-Terrorism Regime: Violating Human Rights' (2007) 25 Berkeley Journal of International Law 203, 205–206; Jean-Christophe Martin, 'Le respect des droits fondamentaux dans la lutte contre le terrorisme : le contentieux des mesures restrictives antiterroristes devant le juge de l'Union européenne', *L'Union européenne et la lutte contre le terrorisme* (Larcier 2010) 111–112; Rizzo (n 766) 317–318.

[768] For example: UNSC Resolution 1390 of 16 January 2002; UNSC Resolution 1904 of 17 December 2009; UNSC Resolution 1988 of 17 June 2011; UNSC Resolution 1989 of 17 June 2011; UNSC Resolution 2368 of 20 July 2017. See also: Hossain (n 767) 444; Hudson (n 767) 206; Rizzo (n 766) 317–326.

[769] UNSC Resolution 2253 of 17 December 2015.

[770] For the most recent version of this list, see: <https://www.un.org/securitycouncil/content/un-sc-consolidated-list>. See also: Broek, Hazelhorst and de Zanger (n 767) 20; Rizzo (n 766) 319–320.

[771] UNSC Resolution 1373 of 28 September 2001.

[772] Clunan (n 767) 577–578; Yoram Danziger, 'Changes in Methods of Freezing Funds of Terrorist Organisations since 9/11' [212] Journal of Money Laundering Control 210; Martin (n 767) 112; Rizzo (n 766) 326–332.

the UN list will be frozen.[773] In addition to this, however, the EU introduced its own rules on asset freezing targeting Al-Qaida and ISIS with its own list in 2016.[774] Secondly, the EU has adopted several Common Positions regarding the implementation of Resolution 1373.[775]
These UN and EU instruments are binding upon Belgium. In 1995 the Belgian legislature had already given the government the possibility of issuing Royal Decrees necessary for the execution of Security Council Resolutions.[776] However, Belgium was internationally criticised by the FATF for being too passive and its procedure taking too long, as it waited until the EU had implemented the UN Resolutions to enforce them itself.[777] As a reaction to the criticism, the right to freeze assets of people on the UN list was conferred on the secretary of finances in 2015.[778] In 2019, the regime was

[773] See originally: Council Common Position 2002/402/CFSP of 27 May 2002 concerning restrictive measures against Usama bin Laden, members of the Al-Qaida organization and the Taliban and other individuals, groups, undertakings and entities associated with them and repealing Common Positions 96/746/CFSP, 1999/727/CFSP, 2001/154/CFSP and 2001/771/CFSP, *OJ EU* 29 May 2002, L 139. Now: Art 3, §1 and 2 Council Decision (CFSP) 2016/1693 of 20 September 2016 concerning restrictive measures against ISIL (Da'esh) and Al-Qaeda and persons, groups, undertakings and entities associated with them and repealing Common Position 2002/402/CFSP, *OJ EU* 21 September 2016, L 255. See also: Broek, Hazelhorst and de Zanger (n 766) 20; Martin (n 767) 112; Rizzo (n 766) 337.

[774] Art 3, §3 Council Decision (CFSP) 2016/1693 of 20 September 2016 concerning restrictive measures against ISIL (Da'esh) and Al-Qaeda and persons, groups, undertakings and entities associated with them and repealing Common Position 2002/402/CFSP, *OJ EU* 21 September 2016, L 255. See also: Broek, Hazelhorst and de Zanger (n 766) 20; Rizzo (n 766) 337–341.

[775] Council Common Position 2001/930/CFSP of 27 December 2001 on combating terrorism, *OJ EU* 28 December 2001, L 344; Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism, *OJ EU* 28 December 2001, L 344. See also: Guild (n 766) 179; Martin (n 767) 112–113. Rizzo (n 766) 341–350.

[776] Art 1 wet van 11 mei 1995 inzake de tenuitvoerlegging van de besluiten van de Veiligheidsraad van de Organisatie van de Verenigde Naties, *BS* 29 Juli 1995, 20444. See also: COL 13/2016 - Administratieve bevriezing van tegoeden en economische middelen van personen en entiteiten met het oog op de strijd tegen de financiering van het terrorisme – nationale en internationale lijsten, 26 May 2016, 4; Rizzo (n 766) 374–375.

[777] Amendementen van 24 november 2015 bij wetsontwerp houdende diverse financiële bepalingen, houdende de oprichting van een administratieve dienst met boekhoudkundige autonomie "Sociale activiteiten", en houdende een bepaling inzake de gelijkheid van vrouwen en mannen, *Parl.St.* Kamer 2015-16, nr. 54-1459/002; Verslag namens de Commissie voor de Financiën en de Begroting van 7 december 2015 bij wetsontwerp houdende diverse financiële bepalingen, houdende de oprichting van een administratieve dienst met boekhoudkundige autonomie "Sociale activiteiten", en houdende een bepaling inzake de gelijkheid van vrouwen en mannen, *Parl.St.* Kamer 2015-16, nr. 54-1459/005, 11-13; Francis Desterbeck and Jan Van Droogbroek, *De Inbeslagneming En Verbeurd¬verklaring in Strafzaken in België* (Wolters Kluwer 2017) 13.

[778] Art 1/1 and 1/2 wet van 11 mei 1995 inzake de tenuitvoerlegging van de besluiten van de Veiligheidsraad van de Organisatie van de Verenigde Naties, *BS* 29 Juli 1995, 20444, as introduced by art 69 and 70 wet 18 december 2015 houdende diverse financiële bepalingen, houdende de oprichting van een administratieve dienst met boekhoudkundige autonomie "Sociale activiteiten", houdende wijziging van de wet van 11 mei 1995 inzake de tenuitvoerlegging van de besluiten van de Veiligheidsraad van de

changed again, this time to one of automatic implementation of UNSC asset freezing measures.[779] This was done in order to make the system even quicker after the FATF had found the existing system lacking still.[780]

In addition, the EU Council Regulations based on the aforementioned Common Position of 2001 which transpose UNSC Resolution 1373 are directly applicable in the Belgian legal order.[781] However, this alone does not suffice. Therefore, a further possibility to freeze assets was introduced in 2006.[782] That year, a Royal Decree made it possible to freeze the assets of suspected terrorists whose names are on the list of the common position but not covered by the Council Regulations[783] as well as people listed on a newly created national Belgian list, independent of the EU or UN lists.[784] The assets of people or entities who, it is suspected, "commit or attempt to commit terrorist offences, who facilitate the committal or cooperate with the committal of those offences" and who

Organisatie van de Verenigde Naties en houdende een bepaling inzake de gelijkheid van vrouwen en mannen, *BS* 20 december 2015, 79809. See also: COL 13/2016 - Administratieve bevriezing van tegoeden en economische middelen van personen en entiteiten met het oog op de strijd tegen de financiering van het terrorisme – nationale en internationale lijsten, 26 May 2016, 4-6; Rizzo (n 766) 375–376.

[779] Art 236-238 wet 2 mei 2019 houdende diverse financiële bepalingen, *BS* 21 mei 2019, 48120. Note that there is a second piece of legislation which may be relevant: wet 13 mei 2003 inzake de tenuitvoerlegging van de beperkende maatregelen die genomen worden door de Raad van de Europese Unie ten aanzien van Staten, sommige personen en entiteiten, *BS* 13 juni 2003, 31293. However, no relevant Royal Decrees have been adopted based on this statute. See: Rizzo (n 766) 378.

[780] Amendementen van 14 maart 2019 bij wetsvoorstel houdende diverse financiële bepalingen, *Parl.St.* Kamer 2018-19, nr. 54-3624/002, 23; Verslag namens de Commissie voor de Financiën en de Begroting van 27 maart 2019 bij wetsvoorstel houdende diverse financiële bepalingen en wetsvoorstel tot wijziging van de wet van 22 februari 1998 tot vaststelling van het organiek statuut van de Nationale Bank van België, teneinde het College van Censoren af te schaffen, *Parl.St.* Kamer 2018-19, nr. 54-3624/004, 22; Rizzo (n 766) 376–377.

[781] Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, *OJ EU* 28 December 2001, L 344. See also: Rizzo (n 766) 379.

[782] KB 28 december 2006 inzake specifieke beperkende maatregelen tegen bepaalde personen en entiteiten met het oog op de strijd tegen de financiering van het terrorisme, *BS* 17 januari 2007, 1898, confirmed by art 115 wet van 25 april 2007 houdende diverse bepalingen (IV), *BS* 8 mei 2007, 25103); Sofie Lavaux, 'Recente Overheidsmaatregelen i.v.m. de "Foreign Fighters"' [2016] Panopticon 355.

[783] Note that no Royal Decrees have been issued based on this article yet. See: Rizzo (n 766) 383.

[784] Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism, *OJ EU* 28 December 2001, L 344; Art 2 and 3 KB 28 december 2006 inzake specifieke beperkende maatregelen tegen bepaalde personen en entiteiten met het oog op de strijd tegen de financiering van het terrorisme, *BS* 17 januari 2007, 1898. See also: C Remacle, 'Le gel administratif des avoirs dans la lutte contre le financement du terrorisme.' (2019) 2019 Revue de Droit Pénal et de Criminologie (Rev. dr. pén.) 123, 125; Rizzo (n 766) 380–381.

appear on a list, drafted by the Belgian National Security Council, have to be frozen.[785] No Belgian list was created for almost ten years, but one was eventually drafted in 2016[786] and has since been updated several times, as is required by the Royal Decree. The most recent update dates back to 25 October 2021 (published 29 October 2021) when 27 names were deleted from the list and four names were added.[787] The list was created and is updated based on evaluations made by the Coordination Unit for Threat Analysis (*OCAD; OCAM*) after recommendations from the federal prosecution service and approval by the council of ministers.[788] At least every six months the list is re-evaluated by the National Security Council. A Circulare from the secretaries of justice and finances states there needs to be a criminal investigation into a person in order for them to be included on the list.[789] This is supported by the fact that the Royal Decree explicitly refers to terrorist 'offences'.[790] However, it is hard to verify whether this is applied that way since people are not

[785] Art 3 KB 28 december 2006 inzake specifieke beperkende maatregelen tegen bepaalde personen en entiteiten met het oog op de strijd tegen de financiering van het terrorisme, *BS* 17 januari 2007, 1898; Circulaire van 7 september 2015 inzake de tenuitvoerlegging van de artikelen 3 en 5 van het koninklijk besluit van 28 december 2006 inzake specifieke beprekende maatregelen tegen bepaalde personen en entiteiten met het oog op de strijd tegen de financiering van het terrorisme; Lavaux (n 782) 355; Remacle (n 784) 125–126; Frank Verbruggen, 'Terrorristenlijsten: Oorsprong, Functie En Spanning Met Mensenrechten' in Jan Wouters and Cedric Ryngaert (eds), *Mensenrechten: actuele brandpunten* (Acco 2008) 98.

[786] KB 30 mei 2016 tot vaststelling van de lijst van personen en entiteiten bedoeld in artikelen 3 en 5 van het koninklijk besluit van 28 december 2006 inzake specifieke beperkende maatregelen tegen bepaalde personen en entiteiten met het oog op de strijd tegen de financiering van het terrorisme, *BS* 1 juni 2016, 33913.

[787] KB 25 oktober 2021 tot wijziging van de lijst van personen en entiteiten bedoeld in artikelen 3 en 5 van het Koninklijk besluit van 28 december 2006 inzake specifieke beperkende maatregelen tegen bepaalde personen en entiteiten met het oog op de strijd tegen de financiering van het terrorisme, *BS* 29 oktober 2021, 110606.
For an up to date version of this list, see: <https://financien.belgium.be/nl/thesaurie/financiele-sancties/nationale-financi%c3%able-sancties-%e2%80%98de-nationale-lijst%e2%80%99>.

[788] Circulaire van 7 september 2015 inzake de tenuitvoerlegging van de artikelen 3 en 5 van het koninklijk besluit van 28 december 2006 inzake specifieke beprekende maatregelen tegen bepaalde personen en entiteiten met het oog op de strijd tegen de financiering van het terrorisme; COL 13/2016 - Administratieve bevriezing van tegoeden en economische middelen van personen en entiteiten met het oog op de strijd tegen de financiering van het terrorisme – nationale en internationale lijsten, 26 May 2016, 3; Remacle (n 784) 130–131; Rizzo (n 766) 381.

[789] Circulaire van 7 september 2015 inzake de tenuitvoerlegging van de artikelen 3 en 5 van het koninklijk besluit van 28 december 2006 inzake specifieke beprekende maatregelen tegen bepaalde personen en entiteiten met het oog op de strijd tegen de financiering van het terrorisme; See also: Remacle (n 784) 129–130; Rizzo (n 766) 381–382.

[790] Art 3 KB 28 december 2006 inzake specifieke beperkende maatregelen tegen bepaalde personen en entiteiten met het oog op de strijd tegen de financiering van het terrorisme, *BS* 17 januari 2007, 1898. See also: Circulaire van 7 september 2015 inzake de

always aware they are the subject of a criminal investigation.[791] If the person whose name is added to the list is in prison, CelEx will notify the prison warden, who will also freeze the person's individual account in prison.[792] He is then limited to spending maximum €200 per month on expenses in prison.

The UN and EU systems have their own ways of legal recourse. So does the Belgian system. It is unclear on what evidence these decisions are based,[793] but the person included on the Belgian list can at any time request reconsideration of their inclusion on the list by the National Security Council.[794] This is a form of organised administrative review, but the legislation does not provide for any judicial review.[795] An option for a person subject to the freezing of assets is to appeal the decision to the Council of State (Belgium's highest administrative judicial body), since it is the standard Court of Appeal for administrative decisions.[796] There is currently one such case.[797] In this case the inclusion of one man on the list was challenged before the Council of State. The man in question had travelled to Syria and joined a terrorist group (probably IS). The case was brought by his mother, who did not even know if her son was still alive. The Council of State declared the case inadmissible because it was filed three days late. One participant of the expert seminar had personal

tenuitvoerlegging van de artikelen 3 en 5 van het koninklijk besluit van 28 december 2006 inzake specifieke beprekende maatregelen tegen bepaalde personen en entiteiten met het oog op de strijd tegen de financiering van het terrorisme; Remacle (n 784) 126.

[791] See also: Remacle (n 784) 129; Rizzo (n 766) 382. The Federal Prosecution Service would usually not agree to an asset freezing measure against a person who is unaware of the criminal investigation, since this would tip them off. See: Circulaire van 7 september 2015 inzake de tenuitvoerlegging van de artikelen 3 en 5 van het koninklijk besluit van 28 december 2006 inzake specifieke beprekende maatregelen tegen bepaalde personen en entiteiten met het oog op de strijd tegen de financiering van het terrorisme.

[792] Collectieve brief DG EPI nr. 149 van 24 juni 2019 over de bevriezing van tegoeden van gedetineerden; Collectieve brief DG EPI nr. 154 van 18 mei 2020 over de bevriezing van tegoeden van gedetineerden.

[793] Rizzo (n 766) 384–385.

[794] Art 5 KB 28 december 2006 inzake specifieke beperkende maatregelen tegen bepaalde personen en entiteiten met het oog op de strijd tegen de financiering van het terrorisme, *BS* 17 januari 2007, 1898. See also: Remacle (n 784) 132; Rizzo (n 766) 379.

[795] Remacle (n 784) 133; J Vande Lanotte, J Dujardin and M Van Damme, 'De Administratieve En Jurisdictionele Beroepen' in J Dujardin and others (eds), *Overzicht van het Belgisch Administratief Recht* (Wolters Kluwer 2014) 855 and 860.

[796] Art 14 RvS statute; Sabien Lust, 'Volle Rechtsmacht, Substitutie, Injunctie En Herstel' in Sabien Lust, Peter Schollen and Stijn Verbist (eds), *Actualia rechtsbescherming tegen de overheid* (Intersentia 2014) 10; Remacle (n 784) 133; Frederic Vanneste, 'Het Recht Op Toegang Tot de Rechter En de Financiële Strijd Tegen Het Terrorisme' in Bernard Tilleman and Alain Laurent Verbeke (eds), *Actualia vermogensrecht, Liber Alumnorum KULAK* (die Keure 2005) 758.

[797] Raad van State, 29 November 2917, nr. 239.266, *Bensouda Koraïchi Amal v. the Belgian state*.

experience with the delisting procedure. They stated the process was overly complicated and unclear.

Revoking ID cards and passports

The Consular Code contains provisions on the refusal, repeal or invalidation of passports or other travel documents. First of all, this is possible when the person is subject to a freedom-restricting judicial measure.[798] In terrorism cases, the public prosecutor systematically informs the federal government service Foreign Affairs of any freedom-restricting judicial measures[799] with a view to refusing, repealing or invalidating a passport or travel document.[800] In addition to this procedure, it is also possible to refuse, repeal or invalidate a passport or travel document of people not subject to a freedom-restricting judicial measure. This is possible after the motivated advice of the competent body (in terrorism cases this is OCAD/OCAM),[801] if the person clearly represents a significant risk or threat to public order or public security.[802] This may be applicable to cases of terrorism. When the Consular Code was introduced in 2014, this was a ground for refusal of a passport or travel document,[803] but not for repeal or invalidation.[804] In 2015, "manifestly representing a significant risk to the maintenance of law and order or to the safeguarding of national security or public safety"[805] was introduced as a ground for repeal or invalidation.[806] The reason for this was the fight against terrorism and more specifically the situation of people traveling

[798] Art 63, §1, 1° *j.* 65, Section 1 Consular Code.

[799] For example an arrest warrant or a conditional release with the prohibition of leaving the national territory.

[800] Omzendbrief van de minister van Justitie, de minister van Binnenlandse Zaken, de minister van Buitenlandse Zaken en de minister van Defensie van 29 april 2016 betreffende het overmaken van informatie aan de FOD Buitenlandse Zaken met het oog op de toepassing van de regels inzake de weigering van afgifte en de intrekking van reisdocumenten, 4; COL 12/2016 - Weigering van afgifte en intrekking van reisdocumenten (paspoorten) van personen die het voorwerp uitmaken van strafdossiers, 26 May 2916, 6.

[801] See: Toelichting bij wetsvoorstel van 20 februari 2019 tot wijziging van de wet van 21 december 2013 houdende het Consulair Wetboek en van de wet van 10 februari 2015 met betrekking tot geautomatiseerde verwerkingen van persoonsgegevens die noodzakelijk zijn voor de Belgische paspoorten en reisdocumenten, *Parl.St.* Kamer 2018-2019, nr. 54-3574/001, 20; Omzendbrief van de minister van Justitie, de minister van Binnenlandse Zaken, de minister van Buitenlandse Zaken en de minister van Defensie van 29 april 2016 betreffende het overmaken van informatie aan de FOD Buitenlandse Zaken met het oog op de toepassing van de regels inzake de weigering van afgifte en de intrekking van reisdocumenten, 6.

[802] Art 63, §2 *j.* art 65, section 2 Consular Code. See also: Els Leemans and Laura De Schryver, 'Flankerende Maatregelen', *Contra-terrorisme: De gerechtelijke aanpak van terrorisme in België* (Larcier 2018) 263.

[803] Art 65, section 2 Consular Code, as introduced in 2014 (*BS* 21 January 2014, 4987).

[804] Beernaert, 'Renforcement de l'arsenal législatif anti-terroriste: entre symboles et prévention' (n 302) 836.

[805] Own translation, original in Dutch and French: "*klaarblijkelijk een aanzienlijk risico [vertegenwoordigen] voor de handhaving van de openbare orde of de bescherming van de nationale of openbare veiligheid;* [*présenter] manifestement un risque substantiel pour le maintien de l'ordre public ou la protection de la sécurité nationale ou publique.*"

[806] Art 65/1 Consular Code, as introduced by art. 4 Wet van 10 augustus 2015 tot wijziging van het Consulair Wetboek, *BS* 24 augustus 2015, 54497. See also: Leemans and De Schryver (n 802) 261.

to areas where IS was active at the time.[807] In 2019, the rules were further finetuned and some of the articles were rearranged[808] in order to meet some issues which had arisen in application.[809] An appeal to the Council of State is possible, but this appeal does not suspend the measure.[810]
The refusal, repeal or invalidation of ID cards is possible as well. The most common situation will be the refusal, repeal or invalidation of an ID card which was issued by a Belgian municipality. The legislation provides this possibility in case of well-founded and very serious indications that the person wants to go to an area where terrorist groups are active. These indications must concern the individual conduct of the person and general circumstances do not suffice.[811] In addition, the circumstances need to be such that upon their return to Belgium they could represent a serious threat of terrorist offences *sensu stricto* or that they intend to commit terrorism offences *sensu stricto* abroad.[812] Refusing, repealing or invalidating an ID card happens after a motivated advice by

[807] Memorie van Toelichting bij wetsontwerp van 23 juni 2015 tot wijziging van het Consulair Wetboek, *Parl.St.* Kamer 2014-2015, nr. 54-1200/001, (4) 5. See also: Louise Reyntjens and Ward Yperman, 'Terrorisme En Internationale Mobiliteit Een Coherent Beleid of Nattevingerwerk' [2019] Politie & Recht 99, 107.
[808] Wet van 3 juli 2019 tot wijziging van de wet van 21 december 2013 houdende het Consulair Wetboek en van de wet van 10 februari 2015 met betrekking tot geautomatiseerde verwerkingen van persoonsgegevens die noodzakelijk zijn voor de Belgische paspoorten en reisdocumenten, *BS* 22 augustus 2019, 80419.
[809] Toelichting bij wetsvoorstel van 20 februari 2019 tot wijziging van de wet van 21 december 2013 houdende het Consulair Wetboek en van de wet van 10 februari 2015 met betrekking tot geautomatiseerde verwerkingen van persoonsgegevens die noodzakelijk zijn voor de Belgische paspoorten en reisdocumenten, *Parl.St.* Kamer 2018-2019, nr. 54-3574/001, 14.
[810] Art 4 wet van 29 juli 1991 betreffende de uitdrukkelijke motivering van de bestuurshandelingen, *BS* 12 september 1991, 19976; Toelichting bij wetsvoorstel van 20 februari 2019 tot wijziging van de wet van 21 december 2013 houdende het Consulair Wetboek en van de wet van 10 februari 2015 met betrekking tot geautomatiseerde verwerkingen van persoonsgegevens die noodzakelijk zijn voor de Belgische paspoorten en reisdocumenten, *Parl.St.* Kamer 2018-2019, nr. 54-3574/001, 18; Leemans and De Schryver (n 802) 265.
[811] Memorie van Toelichting bij het wetsontwerp van 16 juni 2015 houdende wijziging van de wet van 19 juli 1991 betreffende de bevolkingsregisters, de identiteitskaarten, de vreemdelingenkaarten en de verblijfsdocumenten en tot wijziging van de wet van 8 augustus 1983 tot regeling van een Rijksregister van de natuurlijke personen, *Parl.St.* Kamer 2014-15, nr. 54-1170/001, (4) 6.
[812] Art 6, §10, section 1 wet van 19 juli 1991 betreffende de bevolkingsregisters, de identiteitskaarten, de vreemdelingenkaarten en de verblijfsdocumenten, *BS* 3 september 1991, 19075. See also: COL 11/2016 - Weigering van afgifte, intrekking en ongeldigverklaring van identiteitskaarten van Belgen die het voorwerp uitmaken van strafdossiers, 26 May 2016, 4; Bruggeman (n 620) 41–42; Leemans and De Schryver (n 802) 267; F Van Konnegem, 'Identiteitskaart', *Postal Memorialis. Lexicon strafrecht, strafvordering en bijzondere wetten* 10/37. The legislation defines 'terrorist offences' in this article as ofences described in article 137 CC. Therefore this does not cover all terrorist offences discussed above. This definition came to be after the advice of the Council of State.

OCAD/OCAM after consultation with the prosecution service.[813] A certificate valid only in Belgium is issued to replace the ID card.[814] The decision is valid for 25 days. The person concerned is informed within two working days and can react in writing within five working days. Thereafter, the secretary must confirm his decision, again within five working days. If there is no confirmation within 25 days or if the person concerned is not notified within two working days, the decision is lifted.[815] The maximum duration of the measure is three months (including the initial 25 days), renewable once upon reasoned advice of the OCAD/OCAM.[816] This measure was also introduced in 2015 in response to the terrorist attacks in France and police operations in Belgium.[817] Appeal to the Council of State is possible but this appeal does not suspend the measure. In summary proceedings before the Council of State, the suspension of the measure can be requested and in cases of extreme urgency, a procedure of exceptionally urgent necessity is also a possibility. The possibilities of appeal against the decision must be clearly stated in the notification.[818] A decision to refuse, repeal or invalidate an ID card, automatically leads to the decision to refuse, repeal or invalidate the Belgian passport or travel document of that person as well.[819] ID cards issued to

[813] See also: COL 11/2016 - Weigering van afgifte, intrekking en ongeldigverklaring van identiteitskaarten van Belgen die het voorwerp uitmaken van strafdossiers, 26 May 2016, 5; Beernaert, 'Renforcement de l'arsenal législatif anti-terroriste: entre symboles et prévention' (n 302) 835; Bruggeman (n 620) 42.

[814] Art 6, §10, section 4 wet van 19 juli 1991 betreffende de bevolkingsregisters, de identiteitskaarten, de vreemdelingenkaarten en de verblijfsdocumenten, *BS* 3 september 1991, 19075. See also: COL 11/2016 - Weigering van afgifte, intrekking en ongeldigverklaring van identiteitskaarten van Belgen die het voorwerp uitmaken van strafdossiers, 26 May 2016, 5.

[815] Art 6, §10, section 3 wet van 19 juli 1991 betreffende de bevolkingsregisters, de identiteitskaarten, de vreemdelingenkaarten en de verblijfsdocumenten; Van Konnegem (n 812) 10/39-10/40.

[816] Art 6, §10, *in fine* wet van 19 juli 1991 betreffende de bevolkingsregisters, de identiteitskaarten, de vreemdelingenkaarten en de verblijfsdocumenten; COL 11/2016 - Weigering van afgifte, intrekking en ongeldigverklaring van identiteitskaarten van Belgen die het voorwerp uitmaken van strafdossiers, 26 May 2016, 5; Bruggeman (n 620) 42.

[817] Memorie van Toelichting bij het wetsontwerp van 16 juni 2015 houdende wijziging van de wet van 19 juli 1991 betreffende de bevolkingsregisters, de identiteitskaarten, de vreemdelingenkaarten en de verblijfsdocumenten en tot wijziging van de wet van 8 augustus 1983 tot regeling van een Rijksregister van de natuurlijke personen, *Parl.St.* Kamer 2014-2015, nr. 54-1170/001, (4) 4; Reyntjens and Yperman (n 807) 109.

[818] Memorie van Toelichting bij het wetsontwerp van 16 juni 2015 houdende wijziging van de wet van 19 juli 1991 betreffende de bevolkingsregisters, de identiteitskaarten, de vreemdelingenkaarten en de verblijfsdocumenten en tot wijziging van de wet van 8 augustus 1983 tot regeling van een Rijksregister van de natuurlijke personen, *Parl.St.* Kamer 2014-15, nr. 54-1170/001, (4) 8; Leemans and De Schryver (n 802) 270.

[819] Art 65/2, lid 1 Consular Code. See also: Beernaert, 'Renforcement de l'arsenal législatif anti-terroriste: entre symboles et prévention' (n 302) 836.

Belgians registered in the consular registers abroad can also be refused, repealed or invalidated. These rules, which were introduced in 2019,[820] we can find in the Consular Code and they are the same as those for passports and travel documents.[821]

[820] Wet van 3 juli 2019 tot wijziging van de wet van 21 december 2013 houdende het Consulair Wetboek en van de wet van 10 februari 2015 met betrekking tot geautomatiseerde verwerkingen van persoonsgegevens die noodzakelijk zijn voor de Belgische paspoorten en reisdocumenten, *BS* 22 augustus 2019, 80419.

[821] Art 39/1 – 39/4 Consular Code. See also: Toelichting bij wetsvoorstel van 20 februari 2019 tot wijziging van de wet van 21 december 2013 houdende het Consulair Wetboek en van de wet van 10 februari 2015 met betrekking tot geautomatiseerde verwerkingen van persoonsgegevens die noodzakelijk zijn voor de Belgische paspoorten en reisdocumenten, *Parl.St.* Kamer 2018-2019, nr. 54-3574/001, 15.

Revoking nationality

Revoking a person's Belgian nationality is a measure that has existed for a long time.[822] It is possible for several reasons, two of which are of particular importance in the fight against terrorism. Firstly, it is possible to revoke certain people's (see below) nationality if that person seriously failed to meet his obligations as a Belgian citizen.[823] Involvement in terrorism could be brought under this heading.[824] Secondly, since 2012[825] there is a specific ground for revocation for terrorism. Revocation was possible if a person was sentenced to a term of imprisonment of at least five years (not suspended) for the offences mentioned in articles 137, 138, 139, 140 and 141 CC.[826] However, this was only possible if they had committed the offences within ten years from the day they acquired Belgian nationality.[827] The choice of these offences was logical because at the time, they were the only existing terrorist offences. The mention of articles 138 and 139 CC is somewhat surprising since they do not contain any offences.

[822] Christelle Macq, 'Contours et enjeux de la déchéance de la nationalité': (2022) n° 2515-2516 Courrier hebdomadaire du CRISP 5, 16–40; Louise Reyntjens, *Ex-Citizens and the European Convention on Human Rights: Citizenship deprivation examined under the ECHR* (PhD at the Faculty of Law of KU Leuven 2022) 17-59; Reyntjens and Yperman (n 807) 100; M Van De Putte, 'Terrorisme als grond voor vervallenverklaring van de Belgische nationaliteit' (2021) 2021 Tijdschrift voor Vreemdelingenrecht (T. Vreemd.) 6, 6; Steven Vandromme, 'De Vervallenverklaring van de Belgische Nationaliteit Anno 2017' in Steven Dewulf (ed), *La [CVDW] Liber Amicorum Chris Van den Wyngaert* (Maklu 2017) 535; P Wautelet, 'Deprivation of Citizenship for "Jihadists"' <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2713742>.

[823] Art 23, §1, 2° Code of Belgian Nationality. See also: Antwerpen 14 december 2021, *RW* 2021-22, 955; Comité T, 'Raport 2022 : Évaluation des mesures visant à lutter contre le terrorisme à la lumière des droits humains', 59; Beernaert, 'Renforcement de l'arsenal législatif anti-terroriste: entre symboles et prévention' (n 302) 834; Macq (n 822) 10; Reyntjens (n 822) 63.

[824] See for example: Antwerpen 23 oktober 2018, *RW* 2019-20, nr. 27, 1070; Antwerpen 14 december 2021, *RW* 2021-22, 955. See also: Comité T, 'Raport 2022 : Évaluation des mesures visant à lutter contre le terrorisme à la lumière des droits humains', 59; Reyntjens (n 822) 63-66; Wautelet (n 822).

[825] Art 20 wet van 4 december 2012 tot wijziging van het Wetboek van de Belgische nationaliteit teneinde het verkrijgen van de Belgische nationaliteit migratieneutraal te maken, *BS* 14 december 2012, 79998.

[826] Art 23/1, §1, 1° Code of Belgian Nationality, as introduced by art 20 wet van 4 december 2012 tot wijziging van het Wetboek van de Belgische nationaliteit teneinde het verkrijgen van de Belgische nationaliteit migratieneutraal te maken, *BS* 14 december 2012, 79998. See also: Comité T, 'Raport 2022 : Évaluation des mesures visant à lutter contre le terrorisme à la lumière des droits humains', 59; Beernaert, 'Renforcement de l'arsenal législatif anti-terroriste: entre symboles et prévention' (n 302) 834; Bruggeman (n 620) 43–44; Reyntjens (n 822) 67-68; Van De Putte (n 822) 7.

[827] Art 23/1, §1, 1° Code of Belgian Nationality; Comité T, 'Raport 2022 : Évaluation des mesures visant à lutter contre le terrorisme à la lumière des droits humains', 59-60; Reyntjens and Yperman (n 807) 101.

This second ground for revocation was replaced by a new, broader ground in 2015.[828] Since then, revocation of the Belgian nationality is possible for Belgians who have been sentenced to a term of imprisonment of at least five years (not suspended) for any terrorist offence.[829] Together with the extension to all terrorist offences, the legislature also dropped the time condition of ten years from the day of acquiring the nationality.[830] The legislature found this justified because "terrorism affects the entire country in a very general and wide-ranging way and can therefore be interpreted as a form of rejection of the country, its institutions and its values".[831] Despite this, revocation of nationality remained a measure which was relatively rarely employed. According to the secretary of justice,[832] only four cases of revocation of nationality for terrorism[833] took place in the ten-year period between 2007 and 2017. He did add he could not guarantee the exact number. In recent years the number of cases seems to have gone up significantly,[834] with a total number of around fifty in the last few years.

Revocation of nationality is not possible for all Belgians.[835] It is dependent on the way they acquired their Belgian nationality. If a person acquired the Belgian nationality from a parent or adoptive

[828] Art 6 and 7 wet van 20 juli 2015 tot versterking van de strijd tegen het terrorisme, *BS* 5 augustus 2015, 49326.

[829] Art 23/2, §1 Code of Belgian Nationality. See also: Comité T, 'Raport 2022 : Évaluation des mesures visant à lutter contre le terrorisme à la lumière des droits humains', 59-60; Macq (n 822) 12; Reyntjens (n 822) 70-71; Van De Putte (n 822) 7–8.

[830] See also: Comité T, 'Raport 2022 : Évaluation des mesures visant à lutter contre le terrorisme à la lumière des droits humains', 59-60; Beernaert, 'Renforcement de l'arsenal législatif anti-terroriste: entre symboles et prévention' (n 302) 834–835; Leemans and De Schryver (n 802) 243–244; Reyntjens (n 822) 71; Reyntjens and Yperman (n 807) 101; Van De Putte (n 822) 10; Vandromme (n 822) 537.

[831] Own translation, original in Dutch and French: "*terrorisme op een zeer algemene en brede manier effecten ressorteert op het volledige land en dus mag worden geïnterpreteerd als een vorm van verwerping van het land, zijn instellingen en zijn waarden; le fait que le terrorisme produit des effets d'une manière très générale et large sur le pays tout entier et donc peut être interprété comme une forme de rejet du pays, de ses institutions et de ses valeurs.*" See: Memorie van Toelichting bij wetsontwerp van 22 juni 2015 tot versterking van de strijd tegen terrorisme, *Parl.St.* Kamer 2014-2015, nr. 54-1198/001, (4) 8.

[832] Beknopt Verslag Commissie voor de Justitie van 1 februari 2017, CRABV 54 COM 581, 17.

[833] Revocation of nationality can also be based on the fraudulent acquisition of Belgian nationality. According to the Secretary of Justice's answer to the parliamentary question mentioned in the previous footnote, this possibility has been used six times in the those ten years.

[834] Comité T, 'Rapport 2021 : Evaluation des mesures visant à lutter contre le terrorisme à la lumière des droits humains', 78-79.

[835] See also: Comité T, 'Rapport 2021 : Evaluation des mesures visant à lutter contre le terrorisme à la lumière des droits humains', 76; Beernaert, 'Renforcement de l'arsenal législatif anti-terroriste: entre symboles et prévention' (n 302) 835; Van De Putte (n 822) 6–7.

parent who is a Belgian national, their nationality cannot be revoked.[836] The same applies to people born in Belgium from non-Belgian (adoptive) parents who were also born in Belgium or had their principal residence in Belgium for at least five years in the preceding ten years.[837] Specifically for the ground of deprivation in article 23, there is a third protected category, being people who were born in Belgium and have had their principal residence there since birth. They can acquire Belgian nationality when their (adoptive) parents, at least one of whom has the right to stay in Belgium indefinitely, have had their principal residence in Belgium for at least ten years and issue a statement before the child has reached the age of twelve.[838] This leaves people who have acquired the Belgian nationality based on other procedures, which typically happen later in somebody's life, the ones vulnerable to being deprived of their nationality.[839] Finally, in addition to the protected categories discussed above, nobody can be deprived of their Belgian nationality if they are not dual-nationals, meaning they also have another nationality.[840]

In its reports, Comité T expressed concern about these rules which could create a sort of 'second class' citizenship.[841] During the seminar, some experts expressed the same opinion. The majority of those present questioned the usefulness of the measure in general and were pessimistic about its negative influence on potential reintegration. They would prefer to see the measure abolished. A minority of participants agreed that it should be considered carefully on a case by case basis, but saw the measure as a form of severe punishment and censure which was suitable in the most extreme cases.

When a person's Belgian nationality is revoked, he gets the status of alien in the sense of the Belgian legislation.[842] Although case law states that revocation of nationality should not serve the sole

[836] Art 23, §1, section 1 and art 23/1, §1, section 1 Code of Belgian Nationality. See also: Macq (n 822) 10 and 12; Reyntjens (n 822) 75-76.

[837] Art 11, 1° and 2° Code of Belgian Nationality. See also: Macq (n 822) 10 and 12; Reyntjens (n 822) 76.

[838] Art. 11*bis* Code of Belgian Nationality. See also: Macq (n 822) 9–10; Reyntjens (n 822) 76.

[839] Reyntjens (n 822) 78-79.

[840] See also: Reyntjens (n 822) 78.

[841] Comité T, 'Rapport 2020 : Evaluation des mesures visant à lutter contre le terrorisme à la lumière des droits humains', 57; Comité T, 'Rapport 2021 : Evaluation des mesures visant à lutter contre le terrorisme à la lumière des droits humains', 76-77.

[842] Vreemdelingenwet 15 december 1980; Raad voor Vreemdelingenbetwistingen 21 december 2020, *T.Vreemd.* 2021, 226; Comité T, 'Rapport 2020 : Evaluation des mesures visant à lutter contre le terrorisme à la lumière des droits humains', 59; Comité T, 'Rapport 2021 : Evaluation des mesures visant à lutter contre le terrorisme à la lumière des droits humains', 80; Macq (n 822) 14–16; Vandromme (n 822) 556.

purpose of enabling deportation, and deportation is certainly not an automatic consequence of it,[843] the ultimate deportation of the person nevertheless seems to be an important motive.[844] Therefore, in 2017, the legislation on asylum and migration was also amended in order to be able to conduct the fight against terrorism at that level as well.[845] Deportation of aliens is divided into three categories, depending on their status. The first category is deportation based on "reasons of public order or national security", the second for "serious reasons" and the third for "compelling reasons".[846] Depending on the status of the alien, more serious reasons need to be present. For example, a European Union citizen who has spent at least ten years in Belgium can only be deported based on compelling reasons of public order or national security[847] while a third country national in the same situation can be deported for serious reasons[848]. The same goes for a Union citizen who has spent at least five years in Belgium.[849] Before 2017 there were certain categories of aliens who were protected. For example, third country nationals who were born in Belgium or who had arrived before the age of 12 could never be deported. In 2017 these protected categories were removed.[850] Finally, the actual order to leave the Belgian territory can be given by the secretary or the Service for Alien's Affairs.[851]

[843] Antwerpen 23 oktober 2018, *RW* 2019-20, nr. 27, 1070; Antwerpen 14 december 2021, *RW* 2021-22, 955; Raad voor Vreemdelingenbetwistingen 21 december 2020, *T.Vreemd.* 2021, 226; Comité T, 'Rapport 2020 : Evaluation des mesures visant à lutter contre le terrorisme à la lumière des droits humains', 58-59; Macq (n 822) 90; Van De Putte (n 822) 12–13. See also concerning extradition: GwH 7 februari 2018, 16/2018.

[844] Macq (n 822) 95; Reyntjens and Yperman (n 807) 102; Vandromme (n 822) 556–557.

[845] Memorie van Toelichting bij wetsontwerp van 12 december 2016 tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, met het doel de bescherming van de openbare orde en de nationale veiligheid te versterken, *Parl.St.* kamer 2016-2017, nr. 54-2215/001, 4; Comité T, 'Raport 2022 : Évaluation des mesures visant à lutter contre le terrorisme à la lumière des droits humains', 67-68; Reyntjens and Yperman (n 807) 102–104.

[846] For third country nationals, see art 21-22 Vreemdelingenwet and for EU nationals, see art 44*bis* Vreemdelingenwet. See also: Comité T, 'Raport 2022 : Évaluation des mesures visant à lutter contre le terrorisme à la lumière des droits humains', 68-69.

[847] Art 44bis, §3, °1 Vreemdelingenwet.

[848] Art 22, §1, °3 Vreemdelingenwet.

[849] Art 42*quinquies*, §1 *j.* 44*bis*, §2 Vreemdelingenwet.

[850] Comité T, 'Rapport 2020 : Evaluation des mesures visant à lutter contre le terrorisme à la lumière des droits humains', 51-52.

[851] Art 7 Vreemdelingenwet. There were a few cases of the council for alien litigation which ruled that under the 2017 legislation, the secretary could not delegate this. However, this was not the legislature's intention so it amended the legislation in 2019 in order to clarify this. See: Wet 8 mei 2019 tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, *BS* 9 Juli 2019, 69181; Toelichting van 27 februari 2019 bij wetsvoorstel

Repatriation

One specific situation which should be briefly discussed is that of children and mothers in the conflict zone. Quite a few Belgian children, often very young, were taken to the conflict zone by their parents or were born there.[852] Their parents have often committed terrorist offences and the legislation discussed in the rest of this report is applicable to them. However, since children cannot be held criminally liable, they have not committed any criminal offences.[853] Following the fall of the Caliphate, many of these children were placed into camps.[854] The question thus arose what to do with these Belgian children. Should they be repatriated to their home country or not?
In December 2017 the National Security Council had stated that Belgian children under ten had the right to return to Belgium[855] and children aged ten to seventeen would be decided upon on a case by case basis.[856] However, they had to travel to the nearest Belgian embassy or consulate, located

houdende diverse bepalingen inzake asiel en migratie en tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, *Parl.St.* Kamer 2018-2019, nr. 54-3618/001, 10-17; Verslag van de eerste lezing namens de commissie voor de binnenlandse zaken, de algemene zaken en het openbaar ambt van 25 maart 2019 bij wetsvoorstel houdende diverse bepalingen inzake asiel en migratie en tot wijziging van de wet van 15 december 1980 betreffende de toegang tot het grondgebied, het verblijf, de vestiging en de verwijdering van vreemdelingen, *Parl.St.* Kamer 2018-2019, nr. 54-3618/003, 3-5.

[852] Evelien Wauters and Jan Wouters, 'Moeders En Kinderen van Syriëstrijders: Over de Volkenrechtelijke Verplichtingen van de Belgische Staat' 80, 80; Axel Winkel, 'Les enfants belges du califat' (2019) 387 Centre Permanent pour la Citoyenneté et la Participation 24, 4–5.

[853] Cass. 11 maart 2009, *Rev.dr.pén.* 2009, 748; De Nauw and Deruyck (n 436) 110–111; Tulkens and others (n 16) 442; Van den Wyngaert, Traest and Vandromme (n 433) 302.

[854] Laurens De Brucker, 'Het Recht Op Consulaire Bijstand Vanuit Nationaal-, Europees- En Internationaalrechtelijk Perspectief. Naar Een Subjectief Recht Op Repatriëring Voor Kinderen van Syriëstrijders?' [2020] Tijdschrift Jeugd- en Kinderrechten 194, 194; Elise Delhaise, Coline Remacle and Chloé Thomas, 'Rapatriement Des Enfants Belges Du Califat : Droit et Sécurité En Tension' (2022) 49 La revue internationale de l'éducation familiale 41, 42; Winkel (n 852) 4. Even more children, however, simply disappeared off the radar. See: Thomas Renard and Rik Coolsaet, 'Children in the Levant: Insights from Belgium on the Dilemmas of Repatriation and the Challenges of Reintregration' (2018) 98 Security Policy Brief 5.

[855] Beknopt Verslag Commissie voor de binnenlandse zaken, de algemene zaken en het openbaar ambt 28 februari 2018, CRABV 54 COM 830, 30; De Brucker (n 854) 194; Wauters and Wouters (n 852) 80; Winkel (n 852) 12.

[856] Voorstel van Resolutie van 22 oktober 2019 betreffende het terughalen van kinderen van Syriëstrijders, *Parl.St.* Kamer 2019-2020, nr. 55-674/001, 3 and 4; Verslag namens de commissie voor buitenlandse betrekkingen van 10 januari 2020 betreffende de veiligheidssituatie in de kampen in noord-syrië en het lot van de belgische foreign terrorist fighters, gelet op het turkse militaire offensief, *Parl.St.* Kamer 2019-2020, nr. 55-926/001, 19; Renard and Coolsaet (n 854) 6.

in Turkey.[857] In October 2019[858] a proposal for a resolution was tabled in parliament to request the federal government to repatriate all Belgian children regardless of age from Syria under the condition of explicit consent from a Belgian parent and significant indications of the identity of the child, including the children born in Syria.[859] For the latter a DNA test would have to be done, but the resolution proposes to do this after their arrival in Belgium.[860] In addition, for children aged ten to eighteen an individual threat assessment would be undertaken.[861] The reasoning behind this resolution was twofold, first the inhumane circumstances in the camps in Syria and second the fact that it would actually be beneficial to security not to have these children (and their mothers) under radicalising influences in these camps.[862] Parliament has not yet voted on this resolution.
In the meantime, in March 2021 the Belgian federal government decided to repatriate all children under twelve years old who were born in Belgium. In addition, after a threat analysis, the repatriation of their mothers will be decided upon on a case by case basis.[863] Children born in the

[857] Delhaise, Remacle and Thomas (n 451) 53; Delhaise, Remacle and Thomas (n 854) 46; Renard and Coolsaet (n 854) 6.
[858] Note that a proposal for a resolution on this same topic was also tabled in 2018. However, this proposal has expired with new parliamentary elections. See: Voorstel van resolutie van 27 november 2018 tot actief opsporen en repatriëren van de kinderen van Belgische Syriëstrijders, *Parl.St.* Kamer 2018-2019, nr. 54-3399/001.
[859] Voorstel van Resolutie van 22 oktober 2019 betreffende het terughalen van kinderen van Syriëstrijders, *Parl.St.* Kamer 2019-2020, nr. 55-674/001. See also: Delhaise, Remacle and Thomas (n 451) 54.
[860] Voorstel van Resolutie van 22 oktober 2019 betreffende het terughalen van kinderen van Syriëstrijders, *Parl.St.* Kamer 2019-2020, nr. 55-674/001, 3.
[861] Voorstel van Resolutie van 22 oktober 2019 betreffende het terughalen van kinderen van Syriëstrijders, *Parl.St.* Kamer 2019-2020, nr. 55-674/001, 3 and 8. See also: Delhaise, Remacle and Thomas (n 451) 55.
[862] Voorstel van Resolutie van 22 oktober 2019 betreffende het terughalen van kinderen van Syriëstrijders, *Parl.St.* Kamer 2019-2020, nr. 55-674/001, 3-4. See also: Verslag namens de commissie voor buitenlandse betrekkingen van 10 januari 2020 betreffende de veiligheidssituatie in de kampen in noord-syrië en het lot van de belgische foreign terrorist fighters, gelet op het turkse militaire offensief, *Parl.St.* Kamer 2019-2020, nr. 55-926/001, 4, 9 and 15-16; Delhaise, Remacle and Thomas (n 451) 52; Thomas Renard and Rik Coolsaet, 'From Bad to Worse: The Fate of European Foreign Fighters and Families Detained in Syria, One Year after the Turkish Offensive' (2020) 130 Security Policy Brief 3 and 7; Winkel (n 852) 11. See also in the media: Bruno Struys, 'Opnieuw 6 IS-vrouwen en 16 kinderen uit Syrië naar België gerepatrieerd: '"Voor de nationale veiligheid"' (2022) *De Morgen*, <https://www.demorgen.be/nieuws/opnieuw-6-is-vrouwen-en-16-kinderen-uit-syrie-naar-belgie-gerepatrieerd-voor-de-nationale-veiligheid~b1a5c5af/>; Inge Vrancken, 'Tweede groep Belgische vrouwen en kinderen van IS-strijders gerepatrieerd naar ons land' (2022) *vrtNWS* 21 June 2022, <https://www.vrt.be/vrtnws/nl/2022/06/20/tweede-groep-belgische-vrouwen-en-kinderen-van-is-strijders-gere/>.
[863] Beknopt verslag plenumvergadering Kamer van volksvertegenwoordigers 4 maart 2021, CRABV 55 PLEN 90, 12-13. See also: Delhaise, Remacle and Thomas (n 854) 43.

conflict zone on the other hand would not be repatriated.[864] The Belgian authorities eventually did send experts to the Kurdish camps in order to take DNA tests and establish the parentage of these children. Apparently, when they arrived for a first attempt, the children could not be found and their parentage, and therefore nationality, could not be established.[865] A second attempt seems to have had more success (see below). The government decided adults will not be repatriated, presumably barring the mothers mentioned above.[866]

The children have certain rights which should be protected. One consideration at the foundations of this protection is the obligation to ensure the best interests of the child are the primary consideration in all actions concerning children, which is enshrined in article 3 of the Convention on the Rights of the Child.[867] The rights to life and physical integrity of the children in a (post-)conflict zone such as Syria are clearly endangered.[868] In addition, states should take appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of armed conflict.[869] Moreover, they should ensure that children shall not be separated from their parents against their will unless necessary for the best interests of the child.[870] Based on these rights, several authors conclude that Belgium is under the obligation to repatriate children and their parents from

[864] Delhaise, Remacle and Thomas (n 854) 43.

[865] Delhaise, Remacle and Thomas (n 854) 47–48.

[866] Beknopt Verslag Commissie voor de binnenlandse zaken, de algemene zaken en het openbaar ambt 28 februari 2018, CRABV 54 COM 830, 30. See also: De Brucker (n 854) 195; Delhaise, Remacle and Thomas (n 854) 46.

[867] Art 3 Convention on the Rights of the Child, 20 November 1989. See also: Delhaise, Remacle and Thomas (n 451) 57; Delhaise, Remacle and Thomas (n 854) 49–50.

[868] Art 19 Convention on the Rights of the Child; art 2 ECHR. See also: Verslag namens de commissie voor buitenlandse betrekkingen van 10 januari 2020 betreffende de veiligheidssituatie in de kampen in noord-syrië en het lot van de belgische foreign terrorist fighters, gelet op het turkse militaire offensief, *Parl.St.* Kamer 2019-2020, nr. 55-926/001, 10; Delhaise, Remacle and Thomas (n 451) 56; Delhaise, Remacle and Thomas (n 854) 50–51; Winkel (n 852) 11.

[869] Art 39 Convention on the Rights of the Child. See also: Verslag namens de commissie voor buitenlandse betrekkingen van 10 januari 2020 betreffende de veiligheidssituatie in de kampen in noord-syrië en het lot van de belgische foreign terrorist fighters, gelet op het turkse militaire offensief, *Parl.St.* Kamer 2019-2020, nr. 55-926/001, 10; Delhaise, Remacle and Thomas (n 854) 51; Winkel (n 852) 11.

[870] Art 9 Convention on the Rights of the Child. See also: Delhaise, Remacle and Thomas (n 451) 56; Delhaise, Remacle and Thomas (n 854) 50.

the conflict zone.[871] This is in line with the recommendation of the child's rights commissioner and the 'délégué général de la Communauté française aux droits de l'enfant'.[872]

While the abovementioned debate was ongoing, several mothers wanted their children, including some who were born in Syria, to be repatriated and introduced summary proceedings before the Belgian courts in this sense.[873] In 2018, the Brussels Court of First Instance and then Court of Appeal ruled on a summary proceedings case of two Belgian women who wanted their children, four of which were born in Belgium, two in Syria, to be repatriated. Their claim was based on the prohibition of torture and the right to liberty and security. Both in first instance and on appeal, the courts dismissed the case as unfounded because the children were not under Belgian jurisdiction and Belgium could thus not be held to ensure their human rights.[874] The courts held that while there is a moral obligation for the Belgian state, there are no subjective rights for the mothers or children. The same mothers brought another summary proceedings case, once more seeking the repatriation of their children based on the same grounds. The Court of First Instance held that the circumstances had changed and it could rule on the case.[875] The court subsequently reasoned that the children were entitled to consular protection, while the mothers had lost their right to consular protection by travelling to a war zone. The government had argued that it could not repatriate the children because the Kurdisch authorities did not want to let the children go without the mothers, whom the Belgian state did not want or have to repatriate. The court dismissed this argument, based on the rights of the child and several reasons to do with the mothers themselves, such the prohibition of refusing entry into the country of nationals and security considerations. Concretely the court imposed the obligation upon the Belgian government to provide travel documents for the children and their mothers, reach an agreement with local authorities and provide an escort. In two other cases, a claim succeeded in first instance as well and the Belgian state was convicted.[876] In a summary case from 2019 which concerned a woman without children, the court followed similar

[871] Delhaise, Remacle and Thomas (n 854) 51–53; Winkel (n 852) 12 and 15.

[872] Verslag namens de commissie voor buitenlandse betrekkingen van 10 januari 2020 betreffende de veiligheidssituatie in de kampen in noord-syrië en het lot van de belgische foreign terrorist fighters, gelet op het turkse militaire offensief, *Parl.St.* Kamer 2019-2020, nr. 55-926/001, 10 and 31. See also: Renard and Coolsaet (n 854) 6.

[873] Delhaise, Remacle and Thomas (n 451) 58–61; Delhaise, Remacle and Thomas (n 854) 47.

[874] Brussel 12 September 2018, *TJK* 2019, 72; kortgeding Brussel 29 juli 2018, *onuitg*.

[875] Kortgeding Brussel 26 december 2018, *onuitg*.

[876] See: De Brucker (n 854) 195–198.

reasoning concerning the woman and dismissed her claims.[877] The court held she had no right to consular protection, although Belgium was willing to provide consular assistance if she presented herself at a diplomatic or consular post. In addition, Belgium could not be held to protect her human right, for lack of jurisdiction. Another case was brought that same year by an eighteen year old woman, who had been taken to Syria by her father when she was still a minor. The court held once again that the Belgian state had no human rights jurisdiction in Syria and there was no right to consular assistance, however, the court did accept a claim based on the principle that the interest of the child should be the primary consideration.[878] Based on this principle, the Belgian state does have to provide assistance to the woman and aid her in returning to Belgium. Finally, two relvant judgments of the Court of Appeal from 2020 were published. In those judgment, the court stated that Belgian children have a subjective right to be repatriated. This right is based on the explicit statement the government made regarding children under 10[879] and for older children on the consular code and the fact that the child's best interests should be the primary consideration. However, the court then held that the women claiming to be mothers were not the legal representatives of the children. The lineage of the children was not proven and therefore the claims regarding the children were inadmissible.[880] Regarding the mothers themselves, the claims were dismissed as unfounded since the legislation excludes Belgians who travelled to a war zone from consular aid. [881] Regarding Belgian jurisdiction, the court followed its abovementioned jurisprudence. Human rights organisations also brought a case before the Belgian courts, but this case was rejected as well.[882] These cases make clear that for children whose lineage can be proven, such as is the case for those who were born in Belgium and taken to Syria by their parents, a right to repatriation exists.

[877] Kortgeding Brussel 7 juni 2019, *onuitg*.

[878] Kortgeding Brussel 11 juni 2019, *onuitg.*

[879] Note that Wauters and Wouters had already defended this point after the 2018 case, see: Wauters and Wouters (n 852) 85.

[880] Brussel 5 maart 2020, nr. 2019/KR/60, *TJK* 2020, 186; Brussel 5 maart 2020, nr. 2019/KR/3, *TJK* 2020, 192; See also: De Brucker (n 854) 199–200; Delhaise, Remacle and Thomas (n 451) 62; Delhaise, Remacle and Thomas (n 854) 47.

[881] Brussel 5 maart 2020, nr. 2019/KR/60, *TJK* 2020, 186; Brussel 5 maart 2020, nr. 2019/KR/3, *TJK* 2020, 192. See also: De Brucker (n 854) 200.

[882] Delhaise, Remacle and Thomas (n 854) 47.

Eventually, three major repatriation operations took place. In June 2019, six children were repatriated after an agreement with the Kurdish authorities.[883] In 2021 a Belgian delegation travelled to Syria to administer DNA tests and conduct interviews and in July of that year ten more children were repatriated. This time six mothers were repatriated together with the children.[884] Roughly a year later, in June 2022, a second group consisting of six women (five mothers and one grandmother) and sixteen children was repatriated.[885] This leaves only a small group of Belgian women and children in the camps. This group consists of women who either stay voluntarily (and keep their children there) or do not have children. One case is a woman whose nationality was revoked and therefore is not allowed to return to Belgium, who refuses to let her child leave without her.

[883] Verslag namens de commissie voor buitenlandse betrekkingen van 10 januari 2020 betreffende de veiligheidssituatie in de kampen in noord-syrië en het lot van de belgische foreign terrorist fighters, gelet op het turkse militaire offensief, *Parl.St.* Kamer 2019-2020, nr. 55-926/001, 19; Delhaise, Remacle and Thomas (n 451) 53; Delhaise, Remacle and Thomas (n 854) 46; Renard and Coolsaet (n 862) 3; Winkel (n 852) 3.

[884] Inge Vrancken, 'België haalt voor het eerst IS-vrouwen terug uit Syrië, ook kinderen komen mee' (2021) *vrtNWS* 16 July 2021, <https://www.vrt.be/vrtnws/nl/2021/07/16/belgie-haalt-voor-het-eerst-is-vrouwen-en-hun-kinderen-terug-uit/>.

[885] Bruno Struys, 'Opnieuw 6 IS-vrouwen en 16 kinderen uit Syrië naar België gerepatrieerd: '"Voor de nationale veiligheid"' (2022) *De Morgen*, <https://www.demorgen.be/nieuws/opnieuw-6-is-vrouwen-en-16-kinderen-uit-syrie-naar-belgie-gerepatrieerd-voor-de-nationale-veiligheid~b1a5c5af/>; Inge Vrancken, 'Tweede groep Belgische vrouwen en kinderen van IS-strijders gerepatrieerd naar ons land' (2022) *vrtNWS* 21 June 2022, <https://www.vrt.be/vrtnws/nl/2022/06/20/tweede-groep-belgische-vrouwen-en-kinderen-van-is-strijders-gere/>.

Conclusions

In this report we have attempted to provide a succinct yet accurate overview of the most important Belgian legislation applicable to people returning from jihadist war zones. A first point of focus are the terrorist offences which may have been committed by those people. Belgian criminal law criminalises terrorism *sensu stricto*, being actual terrorist attacks, but also several offences of terrorism *sensu lato*, such as participation in the activities of a terrorist group or traveling for terrorist purposes. As explained throughout part 1 of this report, these offences are not always worded clearly and the offences relating to terrorist groups are interpreted (too) broadly. Despite this, the Constitutional Court has found the terrorism offences to be constitutional. Therefore, almost everybody returning from jihadist war zones faces prosecution for one or more of these terrorist offences. An analysis of case law has shown that despite the broad spectrum of terrorist offences available, prosecution is almost always reliant on the offences pertaining to terrorist groups. The first opinion in its report on the impact of EU Directive 2017/541 on combatting terrorism on fundamental rights and freedoms of the EU Agency for Fundamental Rights (FRA), is that member states should take steps to ensure that criminal law offences are foreseeable and clear. The FRA explicitly recommends to avoid overlap between different offences and avoid the use of broad, all-encompassing provisions.[886]

In part 2 a few key procedural topics which are relevant for these criminal prosecutions were discussed. The terrorist offences are tried by the Correctional Courts, with only a few exceptional cases being tried by the Assize Courts. These exceptions are the most serious terrorism offences *sensu stricto* and any terrorist offences which qualify as press offences. The Court of Cassation seems to have dismissed the idea of terrorism offences as political offences, which would also lead to the competence of the Assize Courts, but we believe that under the right circumstances, a terrorist offences could still be a mixed political offence, which would thus have to be tried before the Assize Court. In cases of people being in a jihadist war zone, usually a trial will already have taken place *in absentia* after which an immediate arrest warrant has been issued. This means that upon returning to Belgium the person can be arrested and detained. If they meet certain conditions, however, they can ask for a retrial.

[886] European Union Agency for Fundamental Rights, Report on the impact on fundamental rights and freedoms of Directive (EU) 2017/541 on combating terrorism (2021) 6.

As explained in part 3, there are quite a few possibilities in terms of sentences. While alternative sentences such as the electronic tagging sentence, community service and autonomous probation sentences exist and are possible for a fair amount of the terrorism offences, they do not seem to be used.[887] The sentence usually imposed is a prison sentence at the higher end of the sentencing bracket. The prevalence of prison sentences is belied by the issues pertaining to the wording and proportionality of the sentences as explained in part 3.1. A possibility which is used only slightly more often than alternative sentences is that of a suspension of sentence. The postponement of enforcement of a prison sentence on the other hand, being possible for sentences of up to five years, is more prevalent. Finally, upon convictions for terrorism *sensu stricto* for a prison sentence of at least five years it is obligatory to place the defendant at the disposal of the sentence enforcement court, if the offence caused the death of a victim. This additional sentence can prolong the imposed prison sentence or the supervision of a convicted person outside of prison. Proposals are pending to expand the scope of this sentence to other terrorist offences as well. In the current case law we see that because of the narrow scope of application of this additional sentence, it is not imposed often.

Within prison, terrorist detainees are either integrated within the general population or separated into satellite wings or D-Rad:Ex sections. These have been relatively recently introduced and especially the D-Rad:Ex sections have received criticism for being in violation of prisoners' rights. This matter will undoubtedly evolve further. The majority of terrorist detainees are in the general prison population. The general rules on the external legal position of prisoners are applicable to all terrorist detainees (regardless of which section they are detained in). The main differences with other detainees are that currently electronic tagging as a sentence modality is not possible for people convicted of up to three years for terrorist offences, that a security period is usually possible, that a report of a service specialised in terrorism or violent extremism is necessary in the procedure for the sentencing modalities granted by the sentence enforcement court and that the sentence execution court has to especially motivate the permission to leave the territory upon conditional release.

While parts 1 to 4 dealt with criminal law in the broad sense of the word, part 5 groups some non-criminal measures which can be relevant for returnees. First of all, it is possible their assets have

[887] See also: Moreau (n 173) 117–118.

been frozen, with recourse against this being difficult. In addition, their ID cards and passports can be revoked and in some cases even their Belgian nationality (which may be a criminal sentence or not depending on the circumstances). In its report on the impact of the EU Directive on human rights and freedoms, the FRA emphasises that member states should ensure proportionate use of administrative measures and access to an effective remedy.[888] In the final section of part 5, the issue of repatriation is discussed. Many people are still trapped in zones which used to be jihadist war zones. The Belgian government's inaction has led to a lot of criticism. Recently, repatriations of mothers with children took place. However, the situation of others remains the same and they remain in prison camps in Syria and Iraq.

The Belgian legislature has been expanding the counter-terrorism legislation for the last twenty years. These expansions were often driven by current events and international or European prompts. This led to a patchwork of incident-driven legislation. In these two decades, the legislature never stopped to review the situation before adding extra legislation. A thorough evaluation of the existing legislation seems to be in order. This was the main point of consensus among all the experts at the seminar as well. After twenty years, it is time to stop and evaluate the counter-terrorism legislation.

[888] European Union Agency for Fundamental Rights, Report on the impact on fundamental rights and freedoms of Directive (EU) 2017/541 on combating terrorism (2021) 11.