Reguide project

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Legal Framework

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Introduction

Counter-terrorism has permeated the entire Belgian legal system and rules have been introduced out of counter-terrorism considerations throughout many branches of law.[1] In alignment with the scope of the rest of the Reguide project, this report focusses on the legal framework relevant to people returning from jihadist war zones such as Syria. The Reguide project aims to develop a holistic, restorative and gendered approach towards the reintegration of returnees and their families into the Belgian society, and by doing that directly addresses two interrelated societal challenges: security and returnee reintegration.[2] The issue of reintegration of returnees and their families is an important one for many countries and especially for Belgium, since it has one the highest ratios of returnees per capita in Europe. This report is one of the first steps in the Reguide project and has a double aim. Firstly, the goal is to describe the relevant legislation so as to set out the legal framework currently in force. This sets the stage for the rest of the project. Secondly, we will point out some inconsistencies and issues within the legislation and make suggestions for how the legal approach could be improved.

The first part of the report discusses the different terrorism offences in Belgian criminal law. Secondly, a few particularly relevant rules of criminal procedure are highlighted, being the competence of different courts, the rules on trials in absentia (*verstekprocedure; procédure par défaut*) and on immediate arrest warrants (*onmiddellijke aanhouding; arrestation immediate*). After this, we move on to sentencing with a focus on prison sentences, the additional sentence of being at the disposal of the sentence enforcement court (*terbeschikkingstelling van de strafuitvoeringsrechtbank; mise à la disposition du tribunal de l'application des peines*), alternative sentences and the possibility of suspension of sentence (*opschorting; suspension*) and postponement of the enforcement of sentences (*uitstel van tenuitvoerlegging; sursis*). The fourth part focusses specifically on the execution of the sentence which is imposed most often: imprisonment. This part discusses the rules specific to terrorist detainees within prison and also rules relevant to move beyond prison, the so called external legal position (*externe rechtspositie; statut juridique externe*). The fifth part describes other relevant measures related to people

[1] For an overview, see: Ana Laura Claes and Ward Yperman, 'Overzicht(elijk) – Recente Ontwikkelingen in de Contraterrorismewetgeving' [2022] Politie & Recht 69.

[2] For more information, see: https://reguide.be/.

returning from jihadist war zones such as asset freezing, revoking ID cards and passports and revoking nationality and finally the possibility of repatriation of those still present in the jihadist war zones.

At the end of parts one through three, we will briefly refer to a case law analysis. The analysis refered to is an analysis of the large majority of Correctional Court and Court of Appeal trial cases[3] concerning terrorism offences from their introduction in 2003 until the end of 2018.[4] Since there is no central database for case law, it is very likely that not all cases which fit these perametres were included. In total 192 cases were analysed. Within these cases a selection was made based on where the facts took place. If the list of charges did not include facts outside of the EU the case was disregarded. This way a total of 94 Correctional Court and 22 Court of Appeal cases were identified as relevant. In those cases a total of 336 people were prosecuted for terrorist offences.[5] In addition there were seven people whose case was retried (see part 2.2 below), bringing the total to 343 individual judgments.

In addition to this case law analysis, reference will be made throughout the report to an expert seminar. This seminar was organised at the Faculty of Law of KU Leuven in mid-October 2022. A group of 13 experts attended this seminar. The group consisted of a mix of practitioners and academics and all participants were selected because of their expertise on the counter-terrorism legislation.

With a view to the rehabilitation of people returning from a jihadist war zone, it is important to mention that since 2018 there is an instruction letter of the college of Prosecutors-General which gives guidance on the conditions which can be imposed upon people who are being prosecuted or have been convicted for terrorism offences or who are linked to violent extremism.[6] These instructions are mentioned here since they span the entire criminal process. They are applicable for example in case of conditional release during the execution of a prison sentence, but also when the

[3] Meaning that the youth courts were excluded, as well as the investigation supervision courts, Court of Cassation and Constitutional Court.

[4] Cases from 2019 onwards were not available to us.

[5] Note that one judgment was a retrial for a judgment *in absentia* which we could not find.

[6] COL10/2018 - Voorwaarden die opgelegd kunnen worden aan personen die vervolgd of veroordeeld worden voor feiten van terrorisme of die gelinkt worden aan gewelddadig extremisme, 28 June 2018.

judge imposes a postponement of sentence enforcement subject to probation or in case of provisional releases in the pre-trial phase.

Introduction to part I

Before 2003, there were no specific terrorist offences in Belgian criminal law and terrorism suspects were prosecuted under other 'ordinary' offences.[7] The introduction of terrorist offences into the criminal code (hereafter CC) was prompted by a host of international and European legal instruments.[8] For Belgium, the EU instruments are the most important and relevant ones. The EU has three major instruments regarding terrorist offences. In 2002 the EU issued a Framework Decision on Combatting Terrorism.[9] This Framework Decision was amended by another Framework Decision in 2008[10] and finally replaced by the EU Directive on Combatting Terrorism (hereinafter

[7] I De La Serna, 'Des Infractions Terroristes', *Les Infractions* (Larcier 2013) 170 and 173; Adrien Masset, 'Terrorisme' [2013] Postal Memorialis - Lexicon strafrecht, strafvordering en bijzondere wetten 411, T60/8-T60/11; Martin Moucheron, 'Délit politique et terrorisme en Belgique : du noble au vil' [2006] Cultures & conflits 77, paras 1 and 15; Anne Weyembergh and Laurent Kennes, 'Domestic Provisions and Case Law: The Belgian Case' in Francesca Galli and Anne Weyembergh (eds), *EU counter-terrorism offences: What impact on national elgislation and case-law?* (Editions de l'Université de Bruxelles 2012) 150; Anne Weyembergh and Laurent Kennes, 'Le Titre Iter Du Livre II Du Code Pénal: Des Infractions Terroristes', *Droit pénal spécial: tome 1* (Anthémis 2011) 103–104; Alain Winants, 'De invloed van terrorisme op de strafwetgeving: actualia materieel strafrecht' (2019) 14 Nullum Crimen 343, 345.

[8] See for example: UNSC Resolution 2178 of 24 September 2014; Council of Europe Treaty on the Prevention of Terrorism, Warsaw 16 May 2005, *Pb. EU* 2018, 159/3; Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, *OJ* 22 June 2002, L 164/3; Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism, *OJ* 9 December 2008, L 330/21; 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.

[9] Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, *OJ* 22 June 2002, L 164/3. For an analysis, see: De La Serna (n 7) 170–174; Elise Delhaise, *Infractions terroristes* (Larcier 2019) 15–17; Daniel Flore, 'La Loi Du 19 Décembre 2003 Relative Aux Infractions Terroristes: Genèse, Principes et Conséquences', *Questions d'actualité de droit pénal et de procédure pénale* (Bruylant 2005) 209; An Fransen and Jan Kerkhofs, 'Het Materieel Terrorismestrafrecht' in Jan Kerkhofs, Antoon Schotsaert and Philippe Van Linthout (eds), *Contra-terrorisme: De gerechtelijke aanpak van terrorisme in België* (Larcier 2018) 6–8; Sabine Gless, 'Fighting Terrorism in a "Rechtsstaat"' in Toine Sapens, Marc Groenhuijsen and Tijs Kooijmans (eds), *Universalis: Liber amicorum Cyrille Fijnaut* (Intersentia 2011) 931–939; Weyembergh and Kennes, 'Le Titre Iter Du Livre II Du Code Pénal: Des Infractions Terroristes' (n 7) 105–107; Anne Weyembergh, 'L'impact Du 11 Septembre Sur l'équilibre Sécurité/Liberté Dans l'espace Pénal Européen' 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) 161–173. See also: Jean-Christophe Martin, *Les Règles Internationales Relatives à La Lutte Contre Le Terrorisme* (Bruylant 2006) 109–110.

[10] Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism, *OJ* 9 December 2008, L 330/21-23. De La Serna (n 7) 174; Delhaise (n 9) 18; Fransen and Kerkhofs (n 9) 9–10; Gless (n 9) 934.

referred to as the Directive) in 2017[11]. Since the Belgian legislation was influenced by these (and a few other) instruments, the offences were introduced in waves, in step with the international and European evolutions. The first wave of terrorist offences came in 2003, adding a new title to the criminal code: Title I*ter*: Terrorist offences.[12] This new title contained articles 137 to 140 and 141 to 141*ter* CC.[13] Roughly a decade later, the offences of article 140*bis* to 140*quinquies* CC were added in what can be called a second wave. Subsequently, article 140*sexies* CC was introduced in 2015 and 140*septies* CC in the following year. That same piece of legislation in 2016 also rephrased the offence of article 141 CC. A, for the time being, last wave of changes was made in 2019, when the legislature introduced aggravating circumstances into many of the existing offences and added a new offence both to article 140 and article 140*quinquies* CC.

[11] 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. See also: Delhaise (n 9) 19; Fransen and Kerkhofs (n 9) 12–15.

[12] Weyembergh and Kennes, 'Le Titre Iter Du Livre II Du Code Pénal: Des Infractions Terroristes' (n 7) 102.

[13] Masset (n 7) T60/1; Weyembergh and Kennes, 'Domestic Provisions and Case Law: The Belgian Case' (n 7) 151.

Art. 137 and 138 CC

Actus Reus

The first terrorist offence in Title I*ter* is terrorism *sensu stricto*: the actual terrorist attack. This offence was introduced in the first wave of 2003, following the 2002 EU Framework Decision on Combating Terrorism.[14] The Belgian legislature adhered closely to the wording of the European instruments when transposing this offence into Belgian law. It is the core of the terrorism offences, since the *mens* rea (the mental element of a criminal act: *moreel element; élément moral du délit*) of all of the terrorism offences *sensu lato* refers (sometimes in combination with other terrorist offences *sensu lato*) to terrorism *sensu stricto*.

The *actus reus* (criminal act: *materiel element; élément matériel du délit*) of terrorism *sensu stricto* consists of two lists. Article 137, §2 CC contains the first list, which consists of criminal offences that are also punishable under Belgian law outside of the context of terrorism, for example murder or hostage taking.[15] Article 137, §3 CC contains the second list, which consists of acts that do not constitute criminal offences outside of a terrorism context, for example hijacking a vehicle other than an aircraft or a ship (hijacking those is a pre-existing offence featured in §2), or threatening to commit terrorism *sensu stricto*.[16] After its introduction in 2003, article 137 CC was amended three

[14] Art 1 Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, *OJ* 22 June 2002, L 164/5; art 3 wet van 19 december 2003 betreffende terroristische misdrijven, *BS* 29 december 2003, 61689. See also: Marie-Aude Beernaert, 'La Loi Du 19 Décembre 2003 Relative Aux Infractions Terroristes : Quand Le Droit Pénal Belge Évolue Sous La Dictée de l'Union Européenne' (2004) 24 Journal des tribunaux 585, 586; Bjorn Ketels, 'Titel Iter Terroristische Misdrijven' in Martine De Busscher and others (eds), *Strafrecht: Duiding* (Larcier 2018) 236. For a short analysis of this offence in the Framework Decision, see: Maria Luisa Cesoni, 'Terrorisme et Involutions Démocratiques' [2002] Rev Dr Pén Crim 141, 143–145; Stéphanie Bosly and Mathieu Van Ravenstein, 'L'harmonisation Des Incriminations' in Daniel Flore (ed), *Actualités de droit pénal Européen* (La Charte 2003) 47–48; Daniel Flore, *Droit Pénal Européen: Les Enjeux d'une Justice Pénale Européenne* (Larcier 2008) 140–143.

[15] 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; Ignacio De La Serna, 'Des infractions terroristes' in Christian De Valkeneer and Ignacio De La Serna, *À la découverte de la justice pénale : Paroles de juriste* (Larcier 2015) 207; Flore (n 9) 214–215; Johan Delmulle and Stefaan Guenter, 'Gerechtelijke Aanpak Inzake Terrorisme', *Strafrecht en Strafprocesrecht* (Wolters Kluwer 2006) 4; Véronique Hameeuw, 'Strafbaarstelling van terroristische misdrijven: van Europees Kaderbesluit tot het Belgische Strafwetboek' [2005] Tijdschrift voor Strafrecht 2, 5; Ketels (n 14) 237; Philip Traest, 'Ontwikkeling van nieuwe deelnemingsvormen' [2007] Nullum Crimen 241, 257; Weyembergh and Kennes, 'Domestic Provisions and Case Law: The Belgian Case' (n 7) 152; Weyembergh and Kennes, 'Le Titre Iter Du Livre II Du Code Pénal: Des Infractions Terroristes' (n 7) 108; Winants (n 7) 347.

[16] 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; Delhaise (n 9) 30; De La Serna (n 7) 167 and 180; De La Serna (n 15) 207; Delmulle and Guenter (n 15) 4; Alain De Nauw, 'Titel Iter: Terroristische misdrijven', *Inleiding tot het bijzonder Strafrecht* (sixth edition, Kluwer 2010) 7;

times. All three amendments added items to the aforementioned lists. Firstly, in 2009 piracy was added to the list of §2 of potential terrorist offences.[17] Secondly, in 2013 the legislature changed the reference to the arms legislation (which had been replaced in 2006)[18] and added a §2, 11°, which adds to the list attempts (strafbare *poging; tentative punissable*) of the standard offences (*wanbedrijven; délits*) on that list.[19] This mattered because attempted standard offences are only punishable in Belgium when the law explicitly states this (contrary to attempted felonies (*misdaden; crimes)*, which are always punishable).[20] Because of this standard rule certain attempted terrorist standard offences were not punishable, despite this being one of the obligations of the Framework Decision.[21] Thirdly, the statute of 5 May 2019 added a new §2, 4°/1, which adds the unlawful

Alain De Nauw and Franklin Kuty, *Manuel de Droit Pénal Spécial* (Wolters Kluwer 2014) 17; Filiep Deruyck and Alain De Nauw, *Inleiding Tot Het Bijzonder Strafrecht* (Kluwer 2020) 8; Flore (n 9) 216; Fransen and Kerkhofs (n 9) 19–20; Hameeuw (n 15) 5–6; Ketels (n 14) 237; Masset (n 7) T60/18; Traest (n 15) 257; Weyembergh and Kennes, 'Domestic Provisions and Case Law: The Belgian Case' (n 7) 152; Weyembergh and Kennes, 'Le Titre Iter Du Livre II Du Code Pénal: Des Infractions Terroristes' (n 7) 108; Winants (n 7) 347.

[17] Art 7 wet van 30 december 2009 betreffende de strijd tegen piraterij op zee, *BS* 14 januari 2010, 1485. See also: Ketels (n 14) 236.

[18] The 'wet van 8 juni 2006 houdende regeling van economische en individuele activiteiten met wapens (*BS* 9 juni 2006, 29840)' replaced the 'wet van 3 januari 1933 op de vervaardiging van, de handel in en het dragen van wapens en op de handel in munitie, gewijzigd bij de wetten van 30 januari en 5 augustus 1991, 9 maart 1995, 24 juni 1996, 18 juli 1997, 10 januari 1999 en 30 maart 2000'. See also: Caroline Van Deuren, 'Nieuwe Straffen Bij Terroristische Misdrijven' [2013] 2013 Rechtspraak Antwerpen Brussel Gent 508, 508.

[19] Art 2 wet van 18 februari 2013 tot wijziging van boek II, titel Iter van het Strafwetboek, *BS* 4 maart 2013, 13233. Article 3 of this statute amended article 138 CC to set the sentence for these attempted standard offences. See also: Delhaise (n 9) 81; Fransen and Kerkhofs (n 9) 19; Ketels (n 14) 236; Van Deuren (n 18) 508–509.

[20] Art 53 CC; Henri Berkmoes, 'De Niet-Strafbare Poging' in M De Busscher and others (eds), *Strafrecht: duiding* (Larcier 2018) 88; De La Serna (n 7) 207; Delhaise (n 9) 81; A De Nauw and F Deruyck, *Overzicht van het Belgisch algemeen strafrecht* (Die Keure / la Charte 2017) 51 and 72–73; Françoise Tulkens and others, *Introduction Au Droit Pénal* (10th edn, Wolters Kluwer 2014) 418–419; Chris Van den Wyngaert and Steven Vandromme, *Strafrecht en strafprocesrecht in hoofdlijnen* (Maklu 2014) 356; Chris Van den Wyngaert, Steven Vandromme and Philip Traest, *Strafrecht en strafprocesrecht in hoofdlijnen* (11th edn, Gompel&Svacina 2019) 197 and 367–368; Van Deuren (n 18) 509; Steven Vandromme and Chris De Roy, 'De Strafbaarheid van Voorbereidingshandelingen En Uitvoeringshandelingen: De Nieuwste Ontwikkelingen in Het Leerstuk van de Strafbare Poging En de Gevolgen Ervan Voor Het Strafprocesrecht', *Strafrecht en Strafprocesrecht* (Wolters Kluwer 2006) 512.

[21] Art 4.2 Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, *OJ* 22 June 2002, L 164/5. Now art 14.3 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. See also: 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) 10; Bosly and Van Ravenstein (n 14) 49–50; Ketels (n 14) 238–239; Weyembergh and Kennes, 'Domestic Provisions and Case Law: The Belgian Case' (n 7) 156; Winants (n 7) 350.

disturbance of (data in) an IT-system[22] to the list of possible terrorist offences. The same statute also expanded §3, 3° to radiological weapons.[23]

Almost all the listed acts require that human lives are put in danger. However, for offences of large-scale destruction or damage, causing significant economic damage is sufficient.[24] Where to draw the line between terrorism and other offences is often a difficult question to answer. Some academics have stated that offences which do not constitute violence against people or at least the threat thereof, should not be labelled terrorism.[25] The label "terrorist" can have far-reaching consequences, both within criminal law and criminal procedure[26] and outside of it[27]. However, the requirement that significant economic damage is caused, seems to us to suffice. Significant economic damage can have a large effect on the stability of a nation and can indirectly endanger human lives. In this sense the wording of the article could have been clearer if it reflected that idea. The Constitutional Court (*Grondwettelijk Hof; Cour constitutionnelle*) did not find the current wording in violation of the principle of legality (see below), nonetheless in our opinion a better

[22] Art 550*ter*, §1 – 3 CC.

[23] Art 74 wet van 5 mei 2019 houdende diverse bepalingen in strafzaken en inzake erediensten, en tot wijziging van de wet van 28 mei 2002 betreffende de euthanasie en van het Sociaal Strafwetboek, *BS* 24 mei 2019, 50023; Stéphanie De Coensel, 'De Wet Diverse Bepalingen in Strafzaken II: Terroristische misdrijven in lijn met de Europese verplichtingen?' (2019) 40 Panopticon 211, 212; Winants (n 7) 357.

[24] Art 137, §2, 4° CC; Fransen and Kerkhofs (n 9) 19.

[25] B Ganor, 'Defining Terrorism: Is One Man's Terrorist Another Man's Freedom Fighter?' [2002] Police Practice and Research 287, 294; B Hoffman, *Inside Terrorism, Revised and Expanded Edition* (Columbia University Press 2006) 40–41; R Jackson, 'In Defence of "Terrorism": Finding a Way through a Forest of Misconceptions' [2011] Behavioral Sciences of Terrorism and Political Aggression 116, 123; J Lutz and B Lutz, *Global Terrorism* (Routledge 2013) 8–9; Anthony Richards, 'Conceptualizing Terrorism' (2014) 37 Studies in Conflict & Terrorism 213, 230.

[26] Aggravated sentences, but also procedural exceptions. For an overview and analysis of some of these procedural consequence, see (in French and Dutch): Noémie Blaise and Elise Delhaise, 'La répression des voyages à visée terroriste à l'aune des droits fondamentaux' [2019] Journal Tribunaux 173; Masset (n 7) T60/20-T60/22; Jan Roelandt, 'De strijd tegen het terrorisme: een overzicht van de recente wetgevende ingrepen in het straf(proces)recht' [2017] Nullum Crimen 10; Ward Yperman, 'De bestrijding van terrorisme en strafprocesrecht: vele kleintjes maken een grote' [2019] Tijdschrift voor Strafrecht 8.

[27] In other branches of law, by for example the revocation of passports or asset freezing as an administrative measure (see below), but also outside of the law, for example through stigmatisation (W Mucha, 'Polarization, Stigmatization, Radicalization. Counterterrorism and Homeland Security in France and Germany' [2017] Journal for deradicalization 230; G Mythen, S Walklate and F Khan, '"Why Should We Have to Prove We're Alright?": Counter-Terrorism, Risk and Partial Securities' [2012] Sociology 383; S Samuel Justin and A Daniel, *The Psychology of Terrorism Fears* (Oxford University Press 2012) 14; Victor Tadros, 'Justice and Terrorism' [2007] New Criminal Law Review 658, 685).

alternative to "significant damage" would have been "damage that could endanger the stability of the country and the security of its citizens". Delhaise in turn points out that many sexual offences are not on the list, despite the fact that these offences, especially when committed in a systematic manner and on a large scale, are used as a weapon by terrorist organisations.[28]

Article 137 CC also requires that the offence may, given its nature or context, seriously damage a country or an international organisation. Legal doctrine calls this the 'contextual element' of the offence.[29] This requirement was copied from the 2002 EU Framework Decision on combating terrorism.[30] The damage does not need to have happened already, the possibility for damage is sufficient.[31] This 'contextual element' takes into account not just the nature of the offence but also its wider consequences for the organisation and government of a country.[32] However, viewing contextual information as a separate element is unnecessary. Taking into account contextual information (legal facts) when defining an offence is something that happens regularly and terrorism is in this respect not so special in comparison to other criminal offences. Contextual information is also part of the *actus reus* of other offences or serves as an aggravating circumstance.

[28] Delhaise (n 9) 30. Note that this is mainly the case in quasi-war situations outside of Europe (for example in the Middle East or Africa). It seems that the definition is mainly shaped by the type of terrorism that we have experienced in Europe so far.

[29] De La Serna (n 7) 177; De La Serna (n 15) 204–205; Delhaise (n 9) 28–29; Elise Delhaise and Coline Fievet, 'Frontières Intelligentes et Nouvelles Incriminations Pénales : L'Union Européenne Face à La Problématique Des « Foreign Terrorist Fighters »' (2017) 2017 Journal des tribunaux 113, 118; Flore (n 9) 213; Flore (n 14) 142; Fransen and Kerkhofs (n 9) 21; Traest (n 15) 257; Winants (n 7) 347. Ketels does not do so and discusses it as part of the *actus reus*, see: Ketels (n 14) 237–238. Hameeuw states that the wording of what others call the contextual element is so broad that it cannot constitute a part of an offence. However, she seems to be the only one in the literature taking this stance. See: Hameeuw (n 15) 6. When briefly discussing the offence, Moucheron mentions what is usually called the contextual element as part of the *mens rea*. However, he seems to be the only one to do so. See: Moucheron (n 7) para 20.

[30] Art 1.1 Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, *OJ* 22 June 2002, L 164/4. Now art 3.1 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. See also: Masset (n 7) 18. Borgers, however, argues that it is not clear at all that the Framework Decision actually requires this. See: Matthias Borgers, 'Een Gevaarzettingsvereiste Voor Terroristische Misdrijven?' in Toine Sapens, Marc Groenhuijsen and Tijs Kooijmans (eds), *Universalis: Liber amicorum Cyrille Fijnaut* (Intersentia 2011).

[31] Delhaise (n 9) 33; Ann Fransen and Jan Kerkhofs, 'Het Materieel Terrorismestrafrecht in België: De Misdrijven' (2018) 3 Tijdschrift voor Strafrecht 150, 21; Hameeuw (n 15) 6; Ketels (n 14) 238; Traest (n 15) 257.

[32] Verslag namens de commissie van justitie bij wetsontwerp van 6 oktober 2003 betreffende terroristische misdrijven, *Parl.St.* Kamer 2003, nr. 51-0258/004, 14; P De Hert and J Millen, 'Terrorisme' (2013) VIII.2013 Qualifications et Jurisprudence Penales 1, 3; De La Serna (n 15) 204–205; Delmulle and Guenter (n 15) 3; Fransen and Kerkhofs (n 31) 21; Ketels (n 14) 237.

For example, for the offences of larceny, the fact that it is committed by night[33] is an aggravating circumstance[34]; for the offence of raping a person who is less than fourteen years old[35], the age of the victim is part of the *actus reus* of the offence[36] and; for bankruptcy offences[37], the fact that the company is bankrupt is part of the *actus reus* as well. Legal facts such as these are part of the *actus reus* and there is no need to create a new and special 'contextual element'.[38] The Parliamentary preparatory works themselves call it an additional "objective element".[39]

Mens Rea

The required *mens rea* is a form of special intent.[40] The offence needs to be committed "with the aim of seriously intimidating a population, or unduly compelling a government or international organisation to perform or abstain from performing any act, or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation".[41] This phrasing is also a copy-paste from the 2002 EU Framework

[33] Art 471 CC.

[34] Patrick Arnou, 'Nacht', *Strafrecht en strafvordering. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer* (Wolters Kluwer 2010) 71–73; De Nauw and Kuty (n 16) 707–708.

[35] Art 375, section 6 CC.

[36] Cass. 10 maart 1930, *Pas.* 1930, I, 156; De Nauw and Kuty (n 16) 229; Gaëlle Marlier, *Familie in het straf- en strafprocesrecht: afbrokkelende hoeksteen van de samenleving?* (Wolters Kluwer 2018) 299.

[37] Art 489-489*sexies* CC.

[38] A difference is that the age of the victim and the time of the offence are relatively easy to establish after the fact, while this may not be the case for the context. However, this difference does not change the finding that the context is a legal fact which can be part of the *actus reus*.

[39] Memorie van Toelichting bij wetsontwerp van 6 oktober 2003 betreffende terroristische misdrijven, *Parl.St.* Kamer 2003, nr. 51-0258/001, (4) 10.

[40] 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) 586; De La Serna (n 7) 179; De La Serna (n 15) 207; Delhaise and Fievet (n 29) 118; De Hert and Millen (n 32) 3; Fransen and Kerkhofs (n 9) 20; Hameeuw (n 15) 5; Ketels (n 14) 238; Weyembergh and Kennes, 'Le Titre Iter Du Livre II Du Code Pénal: Des Infractions Terroristes' (n 7) 109; Winants (n 7) 347.

[41] Own translation, original in Dutch and French: "*met het oogmerk om een bevolking ernstige vrees aan te jagen of om de overheid of een internationale organisatie op onrechtmatige wijze te dwingen tot het verrichten of het zich onthouden van een handeling, of om de politieke, constitutionele, economische of sociale basisstructuren van een land of een internationale organisatie ernstig te ontwrichten of te vernietigen; dans le but d'intimider gravement une population ou de contraindre indûment des pouvoirs publics ou une organisation internationale à accomplir ou à s'abstenir d'accomplir un acte, ou de gravement déstabiliser ou détruire les structures fondamentales politiques, constitutionnelles, économiques ou sociales d'un pays ou d'une organisation internationale*" (Art

Decision on Combating Terrorism.[42] The three options are not cumulative and a political, religious or philosophical motive is not required.[43] The words "international organisation" only refer to international organisations under public international law and not to NGOs for example.[44] Belgium does not necessarily have to be a member of this organisation though.[45] Legal doctrine states that the words "a population" can refer to a nation's whole population, but to the populations of smaller areas such as a specific region or city as well.[46] It does imply that the aim of intimidating a single person or small group of people does not suffice.[47] "Government", refers not only to the Belgian government, but to any government, regardless of its democratic character.[48] For the offence of threatening a terrorist attack, it is irrelevant whether or not the perpetrator was planning to actually execute the attack.[49] What matters is whether the victims could reasonably feel threatened. [50]

Constitutional Court

137, §1 CC). Delhaise (n 9) 31–33; Masset (n 7) 18; Traest (n 15) 256; Weyembergh and Kennes, 'Le Titre Iter Du Livre II Du Code Pénal: Des Infractions Terroristes' (n 7) 109; Winants (n 7) 347.

[42] Art 1.1 Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, *OJ* 22 June 2002, L 164/4. Now art 3.2 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. See also: Flore (n 14) 140; Hameeuw (n 15) 5; Weyembergh and Kennes, 'Domestic Provisions and Case Law: The Belgian Case' (n 7) 153.

[43] Delhaise (n 9) 31; Flore (n 9) 211; Fransen and Kerkhofs (n 9) 20; Hameeuw (n 15) 6; Ketels (n 14) 238; Traest (n 15) 256.

[44] Verslag namens de commissie van justitie bij wetsontwerp van 6 oktober 2003 betreffende terroristische misdrijven, *Parl.St.* Kamer 2003, nr. 51-0258/004, 14; 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) 178; De La Serna (n 15) 206; Flore (n 9) 212; Flore (n 14) 141; Fransen and Kerkhofs (n 9) 21; Ketels (n 14) 237; Masset (n 7) T60/18.

[45] Ketels (n 14) 237.

[46] De La Serna (n 7) 178; De La Serna (n 15) 206; Delhaise (n 9) 32; Flore (n 9) 212; Flore (n 14) 141; Fransen and Kerkhofs (n 9) 20. Hameeuw wonders where to draw the line though. When is a group of people too small to be a population? See: Hameeuw (n 15) 6.

[47] De La Serna (n 7) 178; Flore (n 9) 212; Flore (n 14) 140.

[48] See the GICM case: Corr. Brussel 16 Februari 2006, *onuitg.*; Brussel 19 januari 2007, *T.Strafr.* 2008, 281, noot F Schuermans. See as well: De La Serna (n 7) 198–199; Fransen and Kerkhofs (n 9) 39; Ketels (n 14) 237; Christophe Marchand, 'Impact Des Nouvelles Infractions Terroristes Quant à La Qualification de Participation à Un Groupe Terroriste et à l'usage d'une Preuve Secrète Devant Le Tribunal: Commentaires d'un Avocat' in Francesca Galli and Anne Weyembergh (eds), *EU counter-terrorism offences: What impact on national elgislation and case-law?* (Editions de l'Université de Bruxelles 2012) 281; Traest (n 15) 257.

[49] Corr. West-Vlaanderen (afd. Brugge) (vakantiekamer) 14 juli 2016, TGR-TWVR 2016, afl. 5, 386; Ketels (n 14) 238.

[50] Corr. West-Vlaanderen (afd. Brugge) (vakantiekamer) 14 juli 2016, TGR-TWVR 2016, afl. 5, 386; Ketels (n 14) 238.

An appeal for nullification of part of the statute of 19 December 2003 was filed to the Constitutional Court, at the time still called Arbitration Court, by the *Ligue des droits de l'homme* and others. The appeal focussed on the introduction of articles 137 and 138 CC and the expansion of Belgium's territorial jurisdiction. The introduction of article 140 and 141 CC was not challenged before the Constitutional Court. The appeal, which was based on the legality principle and the prohibition of discrimination, led to the judgment of 13 July 2005. The appeal came as no surprise since the introduction of the offence was criticised by the doctrine, defence lawyers and NGOs.[51]

The introduction of article 137 CC was challenged on the basis of the principle of legality. The applicants considered that terrorism *sensu stricto* was defined too broadly and inaccurately, in particular because the 'contextual element' and parts of the *mens rea* were not sufficiently clear.[52] The Arbitration Court, referring to the case law of the European Court of Human Rights (ECtHR)[53], stated that the legality principle does not prohibit the judge from having a margin of appreciation. Laws have a general character and the situations to which they are applied are diverse and changeable.[54] The Arbitration Court reiterated that the definition of terrorism *sensu stricto* was inspired by the 2002 EU Framework Decision on Combating Terrorism. It admitted that the wording of the *mens rea* could, in certain cases give rise to difficulties of interpretation.[55] However, words such as "serious", "unlawful", and "destroy" together with the obligation of a strict interpretation of criminal offences mean that a certain seriousness is required and therefore the definition is

[51] Hameeuw (n 15) 6; Traest (n 15) 256–257; Weyembergh and Kennes, 'Domestic Provisions and Case Law: The Belgian Case' (n 7) 156. Flore, on the other hand, was of the opinion the offence did not violate the legality principle. See: Flore (n 9) 213–214.

[52] Arbitragehof 13 juli 2005, 125/2005, B.4. See also: De Hert and Millen (n 32) 3; Benoit Dejemeppe and Marie-Françoise Rigaux, 'Lutte contre le terrorisme moderne : le contrôle des droits fondamentaux entre le marteau et l'enclume' in R Leysen and others (eds), *Semper perseverans - Liber amicorum André Alen* (Intersentia 2020) 758; Jean Spreutels and Sylviane Velu, 'La Lutte Contre Le Terrorisme Dans La Jurisprudence de La Cour Consitutionnelle de Belgique' in Koen Lemmens, Stephan Parmentier and Louise Reyntjens (eds), *Human rights with a human touch: Liber amicorum Paul Lemmens* (Intersentia 2019) 132–133; Traest (n 15) 257; Weyembergh and Kennes, 'Le Titre Iter Du Livre II Du Code Pénal: Des Infractions Terroristes' (n 7) 127.

[53] *Müller v Switzerland* App no 10737/84 (ECHR, 24 May 1988) 29; *Kokkinakis v Greece* App no 14307/88 (ECHR, 25 May 1993) 40; *SW v UK* App no 20166/92 (ECHR, 22 November 1995) 36; *Cantoni v France* App no 17862/91 (ECHR, 11 November 1996) 31 and 35.

[54] Arbitragehof 13 juli 2005, 125/2005, B.6.2 – B.6.3. See for example as wel: Arbitragehof 30 juni 2005, 116/2005 B.3.2 – B.3.3 and GwH 19 maart 2019, 44/2019, B.19.1 – B.19.2.

[55] Arbitragehof 13 juli 2005, 125/2005, B.7.2.

sufficiently clear.[56] The applicants had also claimed some of the *actus reus* in §3 was not sufficiently clear, but the Arbitration Court similarly reasoned that words such as "large-scale" or "significant" ensure that it is impossible for judges to qualify acts of which the consequences are insignificant as terrorism. Finally, the Arbitration Court referred to articles 139, section 2 and 141*ter* CC, which are meant to keep the balance between efficiency and fundamental rights, before ruling that although the legislation leaves a wide margin of appreciation for the judge, it does not grant him an autonomous competence and therefore there is no legality issue.[57] This is in line with the opinion of the Council of State (*Raad van State;* Conseil d'Etat), which emphasised the importance of a restrictive interpretation.[58]

The applicants also argued that terrorism *sensu stricto* violated the principle of equality and non-discrimination. This argument was based on the difference in treatment between terrorism and other offences. The difference is apparent throughout a criminal trial, starting in the investigation phase, where more investigatory measures are possible for terrorism, throughout the trial phase, where anonymous witness testimony can be a full-fledged piece of evidence, until sentencing.[59] These differences are mainly to do with the aggravated sentences. Pre-trial detention (*voorlopige hechtenis détention preventive*), investigative measures, the impossibility of out-of-court settlement with the prosecution, etc. all have thresholds of sentences that have to be met. By raising the sentences in cases of terrorism, these requirements are met in cases where they would not be in general criminal law. The Arbitration Court stated that, taking into account Belgium's

[56] Arbitragehof 13 juli 2005, 125/2005, B.7.2; Delhaise (n 9) 34–35; De La Serna (n 7) 175–176; Fransen and Kerkhofs (n 9) 21; Traest (n 15) 257.

[57] Arbitragehof 13 juli 2005, 125/2005; De La Serna (n 7) 175–176; Delmulle and Guenter (n 15) 5; Ketels (n 14) 236; Masset (n 7) 18; Jos Silvis, 'Terrorism and Human Rights' in Koen Lemmens, Stephan Parmentier and Louise Reyntjens (eds), *Human Rights with a human touch: Liber amicorum Paul Lemmens* (Intersentia 2019) 132–133; Weyembergh and Kennes, 'Domestic Provisions and Case Law: The Belgian Case' (n 7) 157; Weyembergh and Kennes, 'Le Titre Iter Du Livre II Du Code Pénal: Des Infractions Terroristes' (n 7) 128–129; Winants (n 7) 347 en 349. Despite this ruling, Comité T argues that article 137 CC does in fact violate the legality principle. See: Comité T, 'Rapport 2019 : Le respect des droits humains dans le cadre de la lutte contre le terrorisme : Un chantier en cours', 15.

[58] Advies Raad van State bij wetsontwerp van 6 oktober 2003 betreffende terroristische misdrijven, *Parl.St.* Kamer 2003, nr. 51-0258/001, 30 – 31. See also: Flore (n 9) 214; Weyembergh and Kennes, 'Domestic Provisions and Case Law: The Belgian Case' (n 7) 156; Weyembergh and Kennes, 'Le Titre Iter Du Livre II Du Code Pénal: Des Infractions Terroristes' (n 7) 126.

[59] Arbitragehof 13 juli 2005, 125/2005, B.9. See also: Weyembergh and Kennes, 'Le Titre Iter Du Livre II Du Code Pénal: Des Infractions Terroristes' (n 7) 127–128.

international obligations, it is not up to the Court to decide whether it is opportune to increase the sentences.[60] Furthermore, enabling certain investigatory measures to be used, is justified by the need to effectively fight terrorism. Finally, the Arbitration Court refers to the constant care the legislature took not to detract from fundamental rights, as shown by article 139, section 2 and 141*ter* CC (see below) and the fact that the legislature decided not to introduce a system of sentence reduction in return for information on co-perpetrators, which was suggested by the 2002 EU Framework Decision on Combating Terrorism.[61] The introduction of extraterritorial jurisdiction for terrorism based on passive personality[62] was also deemed non-problematic by the Arbitration Court.[63] In conclusion, the Court did not see any problem in terms of equal treatment and discrimination.[64]

In subsequent cases in front of the lower courts, the defence has tried to argue that the legality principle was violated. However, lower courts have explicitly referred to this judgment of the Arbitration Court to support their conclusion that article 137 CC does not violate the legality principle.[65]

[60] Arbitragehof 13 juli 2005, 125/2005 B.11.1. See also : De La Serna (n 7) 176.

[61] Arbitragehof 13 juli 2005, 125/2005, B.11.2. Note that years later the legislature did in fact introduce such a system. See: Wet 22 juli 2018 tot wijziging van het Wetboek van strafvordering betreffende toezeggingen in het kader van de strafvordering, de strafuitvoering of de hechtenis wegens het afleggen van een verklaring in het kader van de strijd tegen de georganiseerde criminaliteit en het terrorisme, *BS* 7 augustus 2018, 62054.

[62] Meaning the jurisidiction is based on the nationality or resident status of the victim.

[63] Arbitragehof 13 juli 2005, 125/2005, B.11.3.

[64] Spreutels and Velu (n 52) 148–149; Winants (n 7) 349.

[65] Corr. Mechelen 5 december 2012, *onuitg.,* 37-40; Antwerpen 8 januari 2014, *onuitg.*, 26-28, annulled by Cass. 16 december 2014, P.14.1048.N for violating article 40 Taalwet Gerechtszaken; Gent 26 januari 2016, *onuitg.*, 31, annulled by Cass. 13 september 2016, *RW* 2017-2018, 421 for violating the right to contradiction. See also: Fransen and Kerkhofs (n 9) 21–22; Winants (n 7) 347.

Art. 139 and 140 CC

Terrorist groups

Article 140 CC contains three offences, all three of which criminalise conduct related to terrorist groups. An important question for these three offences is therefore when a group of people is considered to be a terrorist group. Article 139 CC defines a terrorist group as "any structured group of more than two persons, established over a period of time and acting in concert to commit terrorist offences, as meant in article 137."[66] The preparatory works add that a structured group is a group that "is not randomly formed and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure".[67] Both the definition of a terrorist group in article 139 CC and the definition of a structured group in the preparatory works, are almost literal copies of an article of the 2002 EU Framework Decision on Combating Terrorism.[68] While "acting in concert" suggests a form of mutual deliberation and coherence of actions,[69] the extent of the collaboration required is uncertain. For example, all members do not have to be informed about each other's actions or even know each other, as long as they all contribute to the existence of the group.[70] Nor does contact between members have to be in person, but can also be

[66] Own translation, original in Dutch and French: "*iedere gestructureerde vereniging van meer dan twee personen die sinds enige tijd bestaat en die in onderling overleg optreedt om terroristische misdrijven te plegen, als bedoeld in artikel 137; l'association structurée de plus de deux personnes, établie dans le temps, et qui agit de façon concertée en vue de commettre des infractions terroristes visées à l'article 137*" (art 139, section 1 CC). See also: Delmulle and Guenter (n 15) 4.

[67] Own translation, original in Dutch and French: "*Zulks onderstelt dat de vereniging niet toevallig tot stand is gekomen, zonder dat evenwel sprake moet zijn van formeel afgebakende taken voor de leden van de vereniging, noch van continuïteit in de samenstelling van de leden van een uitgewerkte structuur; Cela signifie que l'association ne s'est pas constituée fortuitement, sans pour autant que l'on doive parler de tâches formellement délimitées dans le chef des membres de l'association, ni de continuité dans la composition des membres d'une structure élaborée.*" (Memorie van Toelichting bij wetsontwerp van 6 oktober 2003 betreffende terroristische misdrijven, *Parl.St.* Kamer 2003, nr. 51-0258/001, (4) 12). See also: De Hert and Millen (n 32) 4; Delhaise (n 9) 36–37; Deruyck and De Nauw (n 16) 8; Hameeuw (n 15) 8; Ketels (n 14) 241; Vandromme and De Roy (n 16) 536; Winants (n 7) 347–348.

[68] Art 2 Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, *OJ* 22 June 2002, L 164/4. Now art 2.3 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. See also: 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; Bosly and Van Ravenstein (n 14) 49; De La Serna (n 7) 181–182; Delhaise (n 9) 35; Delhaise and Fievet (n 29) 118; Flore (n 9) 216–217; Flore (n 14) 144; 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) 106.

[69] De La Serna (n 15) 211; Fransen and Kerkhofs (n 9) 28; Winants (n 7) 348.

[70] De La Serna (n 7) 183; De La Serna (n 15) 209–211.

over the internet[71] or by other means of correspondence.[72] The legislature treats a terrorist group as a separate entity with its own intent, being the perpetration of terroristm *sensu stricto*. In the context of criminal organisations, Verbruggen has called this type of group with its own intent an 'illegal entity'.[73] To be able to judge the goal of a certain group, sometimes a good amount of geopolitical knowledge is required.[74] The situation on the ground can be chaotic and allegiances are not always clear, nor are the aims and origins of every group which is active in such areas. Furthermore, the fact that a group is part of a European or international list of terrorist organisations, does not automatically mean it qualifies as a terrorist group under article 139 CC or *vice versa*.[75] While the goal of a terrorist group has to be the perpetration of terrorist offences *sensu stricto*, it is not required that these offences have actually been committed[76], or even prepared already.[77] The mere act of conspiracy or collusion, or of making plans, is said to be sufficient. However, how does one prove that the intent of the illegal entity is the perpetration of a terrorist attack if the preparations for the attack have not even started yet? The danger of a broad interpretation arises where groups are labelled as 'terrorist' based on vague notions that they might intend to perpetrate a terrorist attack. Given that different types of involvement in the group constitute terrorist offences, this vague definition of a terrorist group can raise legal certainty issues.

[71] Which is used extensively. See: Sophie Lavaux, 'Terrorisme: La Stratégie de l'union Européenne En Matière de Radicalisation et de Recrutement (Troisième Partie)' [2015] Vigiles 114, 117–118.

[72] De La Serna (n 7) 183.

[73] In Dutch: "strafrechtspersoon". See: Frank Verbruggen, *Schaduwboksen in het donker: de dogmatische onderbouw van het strafrechtelijk overheidsoptreden tegen georganiseerde criminaliteit* (PhD at the Faculty of Law of KU Leuven 2001) 195.

[74] De La Serna (n 7) 184 and 201; De La Serna (n 15) 211.

[75] De La Serna (n 7) 186–187; De La Serna (n 15) 214; Fransen and Kerkhofs (n 9) 29. The council chamber and indictment chamber in Brussels for example ruled that the PKK was not a terrorist organisation, even though it is on the EU list of terrorist organisation. See: KI Brussel 14 september 2017, *RW* 2017-18, 1611, noot J Wouters and T Van Poecke; KI Brussel 8 maart 2019, *onuitg.*, 44; RK Brussel 3 november 2016, *onuitg.*, 11; Ketels (n 14) 242; Jan Wouters and Thomas Van Poecke, 'Van Strijdkrachten, Terroristen En Het Belgisch Strafrecht (Noot Onder KI Brussel 14 September 2017)' [2017–2018] Rechtskundig Weekblad 1616.

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

[77] Brussel 19 januari 2007, *T.Strafr.* 2008, 281, noot F Schuermans; Corr. Brugge 28 februari 2006, *T.Strafr.* 2006, 159, noot P De Hert; Emma Dekrem, 'Naar Een Veralgemeende Strafbaarheid van Voorbereidende Handelingen?' [2020] Nullum Crimen 133, 140; De La Serna (n 7) 186; De La Serna (n 15) 212–213; Delhaise (n 9) 38; Deruyck and De Nauw (n 16) 8–9; Fransen and Kerkhofs (n 9) 29; Hameeuw (n 15) 8; Ketels (n 14) 241; Traest (n 15) 257; Weyembergh and Kennes, 'Domestic Provisions and Case Law: The Belgian Case' (n 7) 159; Winants (n 7) 348.

The tenth consideration of the 2002 EU Framework Decision on Combating Terrorism states that "nothing in this Framework Decision may be interpreted as being intended to reduce or restrict fundamental rights or freedoms such as the right to strike, freedom of assembly, of association or of expression, including the right of everyone to form and to join trade unions with others for the protection of his or her interests and the related right to demonstrate".[78] The legislature decided to include this consideration in the legislation. First, the consideration was copied into article 139, section 2 CC but after some discussion, the commission for justice decided to move the consideration to a new article 141*ter* CC. This was done to make clear that the consideration is applicable to the entire title of the code.[79] In section two of article 139 CC, parliament then copied the second section of article 324*bis* CC about the criminal organisation, since this was considered the "least bad solution".[80] So, the second section of article 139 CC now contains an exclusion clause for organisations whose factual goal is exclusively political, professional organisational, humanitarian, philosophical, or religious or that exclusively pursue any other lawful purpose.[81]
What purpose article 139, section 2 CC serves, is unclear. According to the preparatory works "this section aims to provide clarification and protection against the misuse of the statute".[82] Whether it succeeds in doing so remains doubtful. The Council of State noted both for article 324*bis*, section 2

[78] Consideration 10 Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, *OJ* 22 June 2002, L 164/3. Now Consideration 35 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.
[79] Amendement nr. 15 bij het wetsontwerp betreffende terroristische misdrijven van 21 oktober 2003, *Parl.St.* Kamer 2003, nr. 51-0258/003, 5; verslag namens de commissie van justitie bij wetsontwerp betreffende terroristische misdrijven van 6 oktober 2003, *Parl.St.* Kamer 2003, nr. 51-0258/004, 16 – 20; 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) 588; De La Serna (n 7) 197.
[80] Amendement nr. 14 bij het wetsontwerp betreffende terroristische misdrijven van 21 oktober 2003, *Parl.St.* Kamer 2003, nr. 51-0258/003, 4; verslag namens de commissie van justitie bij wetsontwerp betreffende terroristische misdrijven van 6 oktober 2003, *Parl.St.* Kamer 2003, nr. 51-0258/004, 20; Delhaise (n 9) 23.
[81] Art 139, section 2 CC; Weyembergh and Kennes, 'Le Titre Iter Du Livre II Du Code Pénal: Des Infractions Terroristes' (n 7) 110.
[82] Own translation, original in Dutch and French: "*is dit lid erop gericht een verduidelijking en een bescherming tegen verkeerd gebruik van de wet te bieden; cet alinéa a pour objet de fournir des précisions et d'offrir une protection contre une utilisation abusive de la loi.*" (Memorie van Toelichting bij wetsontwerp van 6 oktober 2003 betreffende terroristische misdrijven, *Parl.St.* Kamer 2003, nr. 51-0258/001, (4) 12).

CC[83] and article 139, section 2 CC[84] that two interpretations were possible. Either this exclusion clause means that an organisation which pursues a legitimate aim has not been established for the purpose of committing offences in concert, or that investigating or prosecuting an organisation (also) pursuing a legitimate aim is not allowed. The latter interpretation would render the offences moot. The former interpretation therefore is the correct one[85], but it is in turn stating the obvious and does not belong in a criminal code.[86] Although some members of parliament were of the same mind, the majority ignored this criticism, claiming that it was better to be needlessly expressive than dangerously mute.[87] This claim was unjustified, in our opinion. Because of the lack of added value and the possibility for confusion, the legislature would do better to delete article 139, section 2 CC.[88] The same goes for article 141*ter* CC, which has no added value either.[89] It is worth noting that one participant of the expert seminar considered these clauses good for peace of mind.

Actus Reus: art. 140, §1 CC

The terrorist offence for which by far the most prosecutions are brought before the courts is participating in the activities of a terrorist group.[90] As was the case for article 137 CC, article 140 CC was introduced in 2003 [91] in response to the 2002 EU Framework Decision on Combating Terrorism[92]. Article 140, §1 CC targets any person who participates in the activities of a terrorist

[83] Advies 28.026/2, van de Raad van State bij wetsontwerp van 12 maart 1997 betreffende criminele organisaties, 96/97 nr. 49-954/24, 2; Verbruggen (n 73) 307.

[84] Advies 34.362/4 van de Raad van State bij wetsontwerp van 6 oktober 2003 betreffende terroristische misdrijven, *Parl.St.* Kamer 2003, nr. 51-0258/001, (22) 33; De La Serna (n 7) 197.

[85] De La Serna (n 7) 186; De La Serna (n 15) 213–214; Flore (n 9) 217–218; Fransen and Kerkhofs (n 9) 29–30; Winants (n 7) 348.

[86] Hameeuw (n 15) 8; Vandromme and De Roy (n 16) 531 and 536.

[87] Verslag namens de commissie van justitie bij wetsontwerp van 6 oktober 2003 betreffende terroristische misdrijven, *Parl.St.* Kamer 2003, nr. 51-0258/004, 11; 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) 588; De La Serna (n 7) 197.

[88] See also: Inneke Onsea, 'Wet Betreffende de Criminele Organisaties: Een Eerste Effectieve Stap in de Strijd Tegen Georganiseerde Criminaliteit?' [1999] Panopticon 278, 284.

[89] See also: De La Serna (n 7) 198; De La Serna (n 15) 228–230; Delhaise (n 9) 142; Hameeuw (n 15) 10; Traest (n 15) 258; Vandromme and De Roy (n 16) 538.

[90] Art 140, §1 CC; Fransen and Kerkhofs (n 9) 16; Winants (n 7) 349.

[91] Art 6 wet van 19 december 2003 betreffende terroristische misdrijven, *BS* 29 december 2003, 61689.

[92] Art 2 Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, *OJ* 22 June 2002, L 164/3. Now art 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.

group while they knew or should have known that their participation could contribute to the committal of a felony or standard offence by the terrorist group. The *actus reus* is the participation in any activity of a terrorist group. The Criminal Code, echoing the Directive, explicitly adds to this "be it by providing data or material resources to a terrorist group or any form of financing of any activity of a terrorist group".[93] However, this enumeration of actions is not exhaustive.[94] Furthermore, the contribution to the activities of the group does not need to be systematic, an occasional contribution suffices.[95] The action does not have to have a direct connection to the committal of the offence by the group either.[96]

The case law has given a broad interpretation to participating in any activity of a terrorist group, made possible by the broad wording of the legislation[97]. Article 140, §1 CC requires a concrete act of participation of a person but the case law considers almost anything a possible act of participation. This includes following military training with a terrorist group[98]; fighting for a terrorist group in a war zone[99]; sending a package of civilian clothes to a family member who is a member of a terrorist group[100]; cooking or being a driver for the group[101]; mentally encouraging fighters of the group by sending them messages from their families or promising them to join them[102]; providing

[93] Own translation, original in Dutch and French: "*zij het ook door het verstrekken van gegevens of materiële middelen aan een terroristische groep of door het in enigerlei vorm financieren van enige activiteit van een terroristische groep; y compris par la fourniture d'informations ou de moyens matériels au groupe terroriste, ou par toute forme de financement d'une activité du groupe terroriste*" (art 140, §1 CC).

[94] Memorie van Toelichting bij wetsontwerp van 6 oktober 2003 betreffende terroristische misdrijven, *Parl.St.* Kamer 2003, nr. 51-0258/001, (4) 13; Corr. Brussel 3 mei 2016, 35, *onuitg.*; De La Serna (n 7) 191; De La Serna (n 15) 219.

[95] Memorie van Toelichting bij wetsontwerp van 6 oktober 2003 betreffende terroristische misdrijven, *Parl.St.* Kamer 2003, nr. 51-0258/001, (4) 13; Corr. Brussel 10 mei 2019, *NjW* 2019, 663, noot W Yperman; De La Serna (n 7) 191; De La Serna (n 15) 219; Delhaise (n 9) 40; Fransen and Kerkhofs (n 9) 30; Hameeuw (n 15) 9; Ketels (n 14) 243; Weyembergh and Kennes, 'Le Titre Iter Du Livre II Du Code Pénal: Des Infractions Terroristes' (n 7) 111.

[96] Memorie van Toelichting bij wetsontwerp van 6 oktober 2003 betreffende terroristische misdrijven, *Parl.St.* Kamer 2003, nr. 51-0258/001, (4) 13; Corr. Brussel 10 mei 2019, *NjW* 2019, 663, noot W Yperman; Delhaise (n 9) 40–41; Delmulle and Guenter (n 15) 4; Deruyck and De Nauw (n 16) 9; Fransen and Kerkhofs (n 9) 30.

[97] Traest (n 15) 258; Weyembergh and Kennes, 'Le Titre Iter Du Livre II Du Code Pénal: Des Infractions Terroristes' (n 7) 129.

[98] Brussel 28 mei 2015, *onuitg.*, 29.

[99] Corr. Brussel 3 mei 2016, *onuitg.*, 52.

[100] Corr. Brussel 14 mei 2014, *onuitg.*

[101] Corr. Antwerpen (afd. Antwerpen) 11 februari 2015, *onuitg.*, 50; Corr. Antwerpen 30 maart 2015, *onuitg.*, 4; Corr. Antwerpen (afd. Antwerpen) 25 januari 2016, *onuitg.*, 3.

[102] Corr. Brussel 3 mei 2016, *onuitg.*, 38-39.

moral support[103] and marrying and having a sexual relationship with a fighter of the group[104]. If a suspect has travelled to Syria to join a terrorist group, it is not required that the exact assignments of the suspect for that group in Syria can be identified.[105] Because of this very wide interpretation of the *actus reus*, article 140, §1 CC has a very wide potential scope of application.[106]

An interesting note to make in this context concerns the offences regarding criminal organisations. In the context of a criminal organisation, mere involvement with the organisation is an offence, without it being required that the person participates in the activities of the organisation.[107] Involvement equals membership of the organisation (knowingly and willingly being part of it[108])[109] while participation in the activities requires an action. Consequently, for terrorist organisations an act of participation to the activities of the group is required and mere membership is not sufficient.[110] The Constitutional Court stated that this difference between criminal organisations and terrorist groups was justified because there is an objective difference in the nature of the

[103] Brussel 2 juni 2017, *onuitg.*, 22; Corr. Brussel 3 mei 2016, *onuitg.,* 36; Corr. Brussel 8 mei 2017, *onuitg.*, 5; Fransen and Kerkhofs (n 9) 32; Fransen and Kerkhofs (n 31) 159; Deruyck and De Nauw (n 16) 9; Ward Yperman and Sofie Royer, 'Veroordeling Jihadibruid' [2017] Nieuw Juridisch Weekblad 813.

[104] Corr. Oost-Vlaanderen (afd. Gent) 16 oktober 2017, *NjW* 2017, 805, noot W Yperman en S Royer. The right to marry and the right to respect for private and family life are both human rights enshrined in the ECHR (respectively articles 12 and 8 ECHR). These rights, however, are not absolute and can be limited. Eg the offence of bigamy (art 391 CC) which is not in violation of either article of the ECHR. See: *X v UK* App no 3898 (ECHR, 22 July 1970); *RB v UK* App no. 19628/92 (ECHR 29 June 1992); Marlier (n 36) 409–410.

[105] Corr. Brussel 10 mei 2019, *NjW* 2019, 663, noot W Yperman.

[106] Ketels also notes this, see: Ketels (n 14) 243.

[107] Art 324*ter*, §1 CC. See also: De La Serna (n 7) 191.

[108] This was the original phrasing of the statute. This phrasing was adapted in 2005 (art 5 wet van 10 augustus 2005 tot wijziging van diverse bepalingen met het oog op de versterking van de strijd tegen mensenhandel en mensensmokkel en tegen praktijken van huisjesmelkers, *BS* 2 september 2005, 38454), but with the explicit intention to keep the content of the offence unaltered (Amendementen bij wetsontwerp van 9 maart 2005 tot wijziging van diverse bepalingen met het oog op de versterking van de strijd tegen mensenhandel en mensensmokkel, *Parl.St.* Kamer 2004-2005, nr. 51-1560/004, 7-8).

[109] Memorie van Toelichting bij wetsontwerp van 12 maart 1997 betreffende criminele organisaties, *Parl.St.* Kamer 1996-1997, nr. 49-954/1, 1-2; amendementen bij wetsontwerp van 9 maart 2005 tot wijziging van diverse bepalingen met het oog op de versterking van de strijd tegen mensenhandel en mensensmokkel, *Parl.St.* Kamer 2004-2005, nr. 51-1560/004, 7-8; GwH 19 september 2014, 122/2014, *NjW* 2014, 840, B.4.2-B.4.3.

[110] Corr. Antwerpen (afd. Antwerpen) 11 februari 2015, *onuitg.*, 50; Corr. Antwerpen 30 maart 2015, *onuitg.*, 4; De La Serna (n 7) 191; De La Serna (n 15) 219; Delhaise (n 9) 40; Fransen and Kerkhofs (n 9) 30; Hameeuw (n 15) 9; Ketels (n 14) 243; Traest (n 15) 258; Weyembergh and Kennes, 'Le Titre Iter Du Livre II Du Code Pénal: Des Infractions Terroristes' (n 7) 111–112; Winants (n 7) 348.

offences the organisation or group aims to commit.[111] The aim of terrorist groups is to commit terrorist offences *sensu stricto* while that of criminal organisations is to commit crimes punishable by three years' imprisonment or more, in order to, directly or indirectly, obtain financial benefits. The offence of article 140, §1 CC, however, is interpreted so expansively that the distinction between participating in the activities and mere membership is illusory. When discussing the offence of membership in article 324*ter*, §1 CC, the representative of the secretary of justice gave the following examples when replying to the question what knowingly and willingly being part of an organisation is: the driver, house staff, and security personnel of the leader of the organisation and "the people who in are any form reimbursed by the criminal organisation to build a social network for the organisation, with the goal of apparent legitimate embedding and social implantation of the organisation in society".[112] Furthermore it is clarified that membership of a criminal organisation can be deduced from for example "frequently being present at meetings of the criminal organisation" or "being a shareholder in the corporate law structure the organisation uses as a cover".[113] It is striking that the abovementioned examples of membership, when transposed to the context of a terrorist group, in all probability would fall under article 140, §1 CC. It is safe to say that the alleged difference between the two does not actually exist in practice. The Council of State had in 1997 already stated that there is no difference between "knowingly and willingly being a part of" and "participating in". As it explains "only when a suspect has participated

[111] GwH 19 september 2014, 122/2014, *NjW* 2014, 840, B.7.1-B.7.2. See also : Ketels (n 14) 246–247; Eef Vandebroek, 'Eenvoudig lidmaatschap van criminele vereniging' [2014] Nieuw Juridisch Weekblad 846, 847.

[112] Own translation, original in French: "*personnes qui sont rémunérées sous une forme ou une autre par l'organisation pour constituer un cercle de relations sociales d'apparence licite*" (Advies van de Raad van State bij wetsontwerp van 12 maart 1997 betreffende criminele organisaties, 96/97 nr. 49-954/1, (13) 15-16). See as well: Arbitragehof 30 juni 2005, 116/2005, B.4.2; GwH 19 september 2014, 122/2014, *NjW* 2014, 840, B.4.3; Onsea (n 88) 282; Inneke Onsea, *De Bestrijding van Georganiseerde Misdaad: De Grens Tussen Waarheidsvinding En Grondrechten* (Intersentia 2003) 39.

[113] Own translation, original in Dutch and French: "*De minister is van oordeel dat in een concreet geval het geregeld aanwezig zijn op vergaderingen een feit is waaruit de aansluiting bij de organisatie zou kunnen worden afgeleid; Le ministre estime que, dans un cas concret, l'affiliation à une organisation pourrait être déduite de la présence régulière aux réunions.*" and "*Hetzelfde kan onder bepaalde omstandigheden het geval zijn voor een aandeelhouder van een vennootschapsrechtelijke structuur die door een criminele organisatie als dekmantel wordt gebruikt; Il pourrait en être de même, dans certaines circonstances, pour l'actionnaire d'une structure relevant du droit des sociétés, utilisée comme écran par une organisation criminelle.*" (Verslag namens de commissie voor Justitie bij wetsontwerp van 12 maart 1997 betreffende criminele organisaties, 96/97 nr. 49-954/6, 18). See also: Arbitragehof 30 juni 2005, 116/2005, B.4.2; GwH 19 september 2014, 122/2014, *NjW* 2014, 840, B.4.3.

in an activity of the organisation, can it be assumed and proved that he knows the organisation and knows that it is a criminal organisation."[114] Once again, the Council of State seems to have been right. In order to be able to meaningfully apply the concept of membership, an act of participation will almost always be required, however minimal it may be. The fact that the Constitutional Court found the distinction justified, does not mean it is a meaningful distinction as well.

This distinction between the concepts of membership and participation has also lead to a strange analogy made in some case law.[115] In several cases, the Brussels Correctional Court first refers to the preparatory works of the legislation on criminal organisation 'by analogy'. After quoting the abovementioned examples of membership (being the driver, etc.) from these preparatory works, it then refers to the preparatory works that compare a different offence, being participation in any permitted activity of a criminal organisation, with participation in a terrorist group. The court states that article 324*ter* CC envisions participation closely linked to the organisation's activities while article 140 CC targets all forms of participation, as long as the participant knows he will contribute to the commission of a standard offence or crime by the group. It is confusing that the court uses an analogy with an offence that is not comparable. The courts themselves state that mere membership of a terrorist organisation is not sufficient. This strange analogy, which is a recurring theme in the case law of the Brussels Correctional Court, shows the difficulty the courts have in clearly and consistently applying these concepts.

In 2019, the Brussels Correctional Court also ruled that the offence of participation in the activities of a terrorist offence was a continuous offence (*voortdurend misdrijf; infraction continue*).[116] The court decided so to solve an issue of the effect of legislative change over time (see below). However,

[114] Own translation, original in Dutch and French: "*Pas wanneer een verdachte aan een handeling van de organisatie heeft deelgenomen, kan ervan uit worden gegaan en worden bewezen dat hij de organisatie kent en weet dat het om een misdaadorganisatie gaat; La connaissance de l'organisation et de son caractère criminel ne peut se concevoir, dans le chef de l'inculpé, et ne peut être prouvée contre lui, que par la participation de celui-ci à un acte de l'organisation.*" (Advies van de Raad van State bij wetsontwerp van 12 maart 1997 betreffende criminele organisaties, 96/97 nr. 49-954/1, (13) 16).

[115] Corr. Brussel 25 november 2015, *onuitg.*, 8; Corr. Brussel 3 mei 2016, *onuitg.*, 35-36; Corr. Brussel 8 mei 2017, *onuitg.*, 5; Corr. Brussel 29 maart 2018, *onuitg.*, 21. The court states: "*Il faut néanmoins considérer que la participation au groupe terroriste est conçue plus largement que la participation à l'organisation criminelle dans la mesure où l'article 324ter du Code pénal envisage une participation étroitement liée aux activités de l'organisation criminelle tandis que l'article 140 vise toute forme de participation, pour autant que le participant soit conscient qu'il contribue à la commission d'un crime ou délit du groupe terroriste.*"

[116] Corr. Brussel 10 mei 2019, *NjW* 2019, 663, noot W Yperman.

since an act of participation is required, the offence in article 140, §1 CC seems to be an immediate offence, which takes place the moment the act of participation is performed (in combination with the required *mens rea*). Therefore, other courts, including the Brussels Court of Appeal, have not held that participation in the activities of a terrorist offence is a continuous offence.[117] If several acts of participation succeed each other and/or other offences, they can constitute a continued (*voortgezet misdrijf; infraction continuée*) or collective offence (*collectief misdrijf; infraction collective*)[118], but that does not make the participation a continuous one.

Actus Reus: art. 140, §1/1 CC

With the statute of 5 May 2019, the legislature added a new paragraph to article 140 CC. This paragraph was placed in between §1 and §2 and its sentence also neatly fits in between the sentences for those offences (see below).[119] The legislature even explicitly stated that he wanted to create an intermediate sentencing level.[120] Article 140, §1/1 punishes the participation in the taking of any decision in the context of the activities of the terrorist group.[121] Once more, the legislature was inspired by the pre-existing offences concerning the criminal organisation.[122]

However, this means that any criticism applicable to this offence in the context of a criminal organisation can also be applied to the terrorist offence. In the context of the offence of participating in the making of any decision in the framework of the activities of a criminal organisation, Verbruggen states that "making any decision" is not a suitable *actus reus* for an offence.[123] The same criticism can be levelled against article 140, §1/1 CC. We make a plethora of

[117] See for example: Brussel 21 december 2018, *onuitg.*; Corr. Oost-Vlaanderen (afd. Dendermonde) 14 december 2018, *onuitg.*; Corr. Antwerpen 17 december 2018, *onuitg.*; Corr. Luik 18 januari 2019, *onuitg.*

[118] This means there were several separate offences, but they were seen as intrinsically linked because they were part of a single criminal project.

[119] Maria Luisa Cesoni, 'Les "Infractions Terroristes": De La Répression Des Actes à La Police de La Pensée' in Christian De Valkeneer and Henri D Bosly (eds), *Actualités en droit pénal 2019* (Larcier 2019) 239; De Coensel (n 23) 214; Winants (n 7) 357.

[120] Wetsvoorstel van 6 februari 2019 houdende diverse bepalingen in strafzaken en inzake erediensten, *Parl.St.* Kamer 2018-2019, nr. 54-3515/001, 102-103.

[121] Art 75 wet van 5 mei 2019 houdende diverse bepalingen in strafzaken en inzake erediensten, en tot wijziging van de wet van 28 mei 2002 betreffende de euthanasie en van het Sociaal Strafwetboek, *BS* 24 mei 2019, 50023.

[122] Art 324*ter*, §3 CC; wetsvoorstel van 6 februari 2019 houdende diverse bepalingen in strafzaken en inzake erediensten, *Parl.St.* Kamer 2018-2019, nr. 54-3515/001, 102-103; De Coensel (n 23) 214; Winants (n 7) 357.

[123] Verbruggen (n 73) 347–348.

decisions every single day, making this criterion void. Deciding what to drink during a meeting, whether or not to open the window, where to sit, etc. Those are all decisions, which will lead a person to commit this offence when they are made in the context of the activities of a terrorist group. Since making a decision is almost inevitable, anyone who came within the ambit of the offence of participating in the activities of the group, will now come within the ambit of this new offence. As we have seen, this is a very broad category of people. The man who sent clothes to his brother who is a terrorist fighter decided to send those clothes, the woman who married the terrorist fighter decided to marry him, etc. Furthermore, not only making decisions is punishable, but also participating in the making of a decision. This means that a member of the group who voted against committing a terrorist attack, participated in the making of this decision and would therefore be liable for the higher sentence. Even an outsider, non-member, who tries to convince his friend who is a member of a group not to do something stupid, is participating in the making of this decision. Therefore, it is clear that the offence is too broad. While the legislature attempted to create an offence which targets members of terrorist organisations higher up the ladder, it created one with an *actus reus* which is almost as broad as the offence of participating in the activities of the group. This offence with its exceedingly broad *actus reus*, which is not part of the EU Directive, runs afoul of the legality principle and the legislature would do well to delete it again. The federal prosecution service has stated in the media that in future situations of foreign terrorist fighters, they will prosecute for the offence of article 140, §1/1 CC.[124] Statements such as these clearly show that this offence fails to target people higher up the ladder of the group.

Actus Reus: art. 140, §2 CC

The second paragraph of article 140 CC, criminalises leadership of a terrorist group. This offence was also introduced in 2003, in the wake of the Framework Decision and is still part of the Directive. While the Directive imposes on member states the obligation to criminalise directing a terrorist group, the definition of leadership and directing is ambiguous. The preparatory works define

[124] G.V.V., 'België gaat terroristen dubbel zo zwaar proberen te straffen: dit zijn de plannen' (2021) *De Morgen* 16 November 2021, https://www.demorgen.be/nieuws/belgie-gaat-terroristen-dubbel-zo-zwaar-proberen-te-straffen-dit-zijn-de-plannen~b4c41f42/; Guy Van Vlierden, 'België gaat terroristen dubbel zo zwaar proberen te straffen: van 5 naar 10 jaar voor 'welke beslissing dan ook"' (2021) *Het Laatste Nieuws* 16 November 2021, https://www.hln.be/binnenland/belgie-gaat-terroristen-dubbel-zo-zwaar-proberen-te-straffen-van-5-naar-10-jaar-voor-welke-beslissing-dan-ook~a4c41f42/.

leaders as "the people who take upon themselves the more important responsibilities within the group".[125] On top of that, they are "because of their central role within the terrorist group, better informed than anyone about the offences and take the final decisions".[126] The Council of State thought that the legislature should clarify the article so that it reflected this intention more clearly.[127] Despite this advice, the legislature decided not the change the article. With the introduction of the offence in §1/1, the question now also arises as to what the difference is between a final decision (taken by a leader) and any other decision. The offence of leadership does not require that the person himself had the intention of committing a terrorist offence or that he was involved in committing it.[128] Nor does it require that the person is the one, absolute leader of the entire group.[129] Having a central role, being able to speak for the group, coordinating actions, raising funds, etc. suffices.[130] The size and importance of the group are irrelevant as well, as long as it is a terrorist group.[131]

In practice, the jurisprudence interprets 'leadership' quite broad. For the Court of Appeal in Antwerp for example, close involvement in several meetings and not excluding that one would commit an attack themself, was enough to be a leader.[132] The fact that two other people were designated as respectively leader of the cell and spiritual leader, did not change this. The Court of Appeal in Brussels, in turn, convicted a person for leadership who provided material support to

[125] Own translation, original in Dutch and French: "*de personen die binnen de groep de belangrijkste verantwoordelijkheden op zich nemen; des personnes qui assument les principales responsabilités au sein du groupe*" (Memorie van Toelichting bij wetsontwerp van 6 oktober 2003 betreffende terroristische misdrijven, *Parl.St.* Kamer 2003, nr. 51-0258/001, (4) 14). See also: Ketels (n 14) 244.

[126] Own translation, original in Dutch and French: "*zij wegens hun centrale rol in de terroristische groep beter dan wie ook op de hoogte van de misdrijven en nemen ze de eindbeslissingen; du fait de leur rôle central dans le groupe terroriste, elles sont plus que quiconque au courant des infractions et parce qu'elles prennent les décisions finales*" (Memorie van Toelichting bij wetsontwerp van 6 oktober 2003 betreffende terroristische misdrijven, *Parl.St*. Kamer 2003, nr. 51-0258/001, (4) 14). See also: De Hert and Millen (n 32) 6; De La Serna (n 15) 215; Fransen and Kerkhofs (n 9) 35–36; Weyembergh and Kennes, 'Le Titre Iter Du Livre II Du Code Pénal: Des Infractions Terroristes' (n 7) 112; Winants (n 7) 348.

[127] Advies 34.362/4 van de Raad van State bij wetsontwerp van 6 oktober 2003 betreffende terroristische misdrijven, *Parl.St.* Kamer 2003, nr. 51-0258/001, (22) 40-41.

[128] Cass. 24 juni 2008, *Arr.Cass.* 2008, 1654; De Hert and Millen (n 32) 6; De La Serna (n 7) 188; De La Serna (n 15) 215–216; Delhaise (n 9) 44; De Nauw (n 12) 8; De Nauw and Kuty (n 16) 18; Deruyck and De Nauw (n 16) 9; Ketels (n 14) 244–245.

[129] Ketels (n 14) 244.

[130] De La Serna (n 7) 187–188; De La Serna (n 15) 215; Delhaise (n 9) 41; Fransen and Kerkhofs (n 9) 37; Winants (n 7) 348.

[131] Winants (n 7) 348.

[132] Antwerpen 8 januari 2014, *onuitg.*, 42.

terrorist fighters in Syria (who were departing or already on-site), who was an intermediary and facilitated communication between jihadists, jihadist candidates and their families, and who was an advisor when it came to indoctrination and exfiltration to Syria.[133] In our opinion, these actions make them active members of the group, but not necessarily leaders as well. The ambiguity of this definition is also evidenced by the Court of Appeal's jurisprudence which frequently overturns convictions for participation and converts them into leadership and *vice versa*.[134] All of this is caused by the lack of definition of leadership in article 140, §2 CC. The legislature should have probably thought twice before ignoring the advice of the Council of State.

Mens Rea

The *mens rea* of article 140 CC is: "while he knew or should have known that his participation could contribute to the committal of a felony or standard offence by the terrorist group".[135] This felony or standard offence does not necessarily have to be a terrorist offence, any felony or standard offence suffices and the participant does not need to know to which specific and concrete offence he is contributing.[136] Nor does the offence actually have to be committed.[137] The person also does not have to have the intention of committing this offence himself.[138] Committing offences is the intention of the 'illegal entity' but not necessarily of the individual people participating in its activities. Their connection to the committal of the offence by the group does not have to be a

[133] Brussel 2 juni 2017, *onuitg.*, 26-30.

[134] Brussel 19 januari 2007, *T.Strafr.* 2008, 281; Antwerpen 8 januari 2014, *onuitg.*; Brussel 18 november 2016, *onuitg.*; Brussel 31 maart 2017, *onuitg*.

[135] Own translation, original in Dutch and French: "*terwijl hij wist of moest weten dat zijn deelname zou kunnen bijdragen tot het plegen van een misdaad of wanbedrijf door de terroristische groep; en ayant eu ou en ayant dû avoir connaissance que cette participation pourrait contribuer à commettre un crime ou un délit du groupe terroriste*" (art 140, §1 CC).

[136] Memorie van Toelichting bij wetsontwerp van 6 oktober 2003 betreffende terroristische misdrijven, *Parl.St.* Kamer 2003, nr. 51-0258/001, (4) 13; Luik (6e kamer) 18 oktober 2017, *JLMB* 2017, 1878; De Hert and Millen (n 32) 5; De La Serna (n 7) 189; De La Serna (n 15) 216; De Nauw (n 12) 8; Deruyck and De Nauw (n 16) 8; Flore (n 9) 218; Flore (n 14) 144–145; Fransen and Kerkhofs (n 9) 30; Hameeuw (n 15) 9; Traest (n 15) 258; Vandromme and De Roy (n 16) 537; Weyembergh and Kennes, 'Le Titre Iter Du Livre II Du Code Pénal: Des Infractions Terroristes' (n 7) 111; Winants (n 7) 348.

[137] Flore (n 9) 218.

[138] De La Serna (n 7) 189; De La Serna (n 15) 213; Delhaise (n 9) 42–43; Flore (n 9) 218; Ketels (n 14) 243; Vandromme and De Roy (n 16) 537; Weyembergh and Kennes, 'Le Titre Iter Du Livre II Du Code Pénal: Des Infractions Terroristes' (n 7) 114.

direct one.[139] When article 140, §1 was introduced in 2003, the *mens rea* was "while he knows that his participation contributes to the committal of a felony or standard offence by the terrorist group". [140] This was copied from the Framework Decision and the Directive is still worded similarly.[141] In December 2016 the Belgian legislature changed this to "knew or should have known" and "could contribute".[142] He did this to make the article more repressive.[143] This is remarkable since at the introduction of the article in 2003, the explanatory memorandum still said that knowing that a person contributes to the committal of felonies and standard offences by the terrorist group was the decisive criterion. [144] The change was made with the Dutch concept of '*mogelijkheidsbewustzijn'*[145] in mind.[146] This *mogelijkheidsbewustzijn* is present when "somebody intentionally acts or refrains from acting, and in doing so has imagined a consequence of that behaviour (which is not in itself intended) as [possible], but does not allow himself to be deterred by it. This possibility is accepted by the perpetrator".[147] This closely resembles the Belgian concept

[139] Memorie van Toelichting bij wetsontwerp van 6 oktober 2003 betreffende terroristische misdrijven, *Parl.St.* Kamer 2003, nr. 51-0258/001, (4) 13; Delhaise (n 9) 40–41; Delmulle and Guenter (n 15) 4; Fransen and Kerkhofs (n 9) 30.

[140] Own translation, original in Dutch and French: "*terwijl hij weet dat zijn deelname bijdraagt tot het plegen van een misdaad of wanbedrijf door de terroristische groep; en ayant connaissance que cette participation contribue à commettre un crime ou un délit du groupe terroriste*" (Memorie van Toelichting bij wetsontwerp van 6 oktober 2003 betreffende terroristische misdrijven, *Parl.St.* Kamer 2003, nr. 51-0258/001, (4) 13). See also: Fransen and Kerkhofs (n 9) 28; Weyembergh and Kennes, 'Le Titre Iter Du Livre II Du Code Pénal: Des Infractions Terroristes' (n 7) 110–111; Winants (n 7) 348.

[141] Art 4 (b) 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.

[142] Art 2 wet van 14 december 2016 tot wijziging van het Strafwetboek wat betreft de bestraffing van terrorisme, *BS* 22 december 2016, 88017. See also: Deruyck and De Nauw (n 16) 8.

[143] As was acknowledged by the Correctional Court Limburg, see: Corr. Limburg (afd. Hasselt) 23 juni 2017, *Limburgs Rechtsleven* 2018, 51.

[144] Memorie van Toelichting bij wetsontwerp van 6 oktober 2003 betreffende terroristische misdrijven, *Parl.St.* Kamer 2003, nr. 51-0258/001, (4) 7. See also: Cesoni (n 119) 240; De Hert and Millen (n 32) 5; Weyembergh and Kennes, 'Domestic Provisions and Case Law: The Belgian Case' (n 7) 154; Winants (n 7) 348.

[145] Which literally translates to opportunity awareness. Another term for it can be translated as 'conditional intent'.

[146] Toelichting bij wetsvoorstel van 13 januari 2016 tot wijziging van het Strafwetboek wat betreft de bestraffing van terrorisme, *Parl.St.* Kamer 2015-2016, nr. 54-1579/001, 3; Fransen and Kerkhofs (n 9) 35; Winants (n 7) 355.

[147] Own translation, original in Dutch: "*iemand opzettelijk iets doet of nalaat en zich daarbij een (op zichzelf niet beoogd) gevolg van die gedraging heeft voorgesteld als [mogelijk], maar zich daardoor niet laat weerhouden. […] Deze mogelijkheid neemt de dader op de koop toe*" (Conclusie A-G Berger bij Hoge Raad 30 May 1975, ECLI:NL:PHR:1975:AC5594 (bierglasarrest)). See also: Gerechtshof Den Haag 27 October 2016, ECLI:NL:GHDHA:2016:3699; Gerechtshof Amsterdam 24 July 2018, ECLI:NL:GHAMS:2018:2580; JLM Boek, 'Een pleidooi voor het afschaffen van voorwaardelijk opzet' 2016 Strafblad 64, 439-444; AC 'T Hart, noot onder Hoge Raad 15

of potential intent.[148] Potential intent is a more flexible version of general intent ('knowingly and willingly') in two ways. First, the knowledge element ('knowingly') is relaxed to knowledge of the possibility of consequences instead of certainty. Second, the will element ('willingly') is relaxed to accepting the consequences instead of actually wanting them.[149] Despite it being more flexible, legal doctrine considers potential intent as a form of general intent.[150] Regarding article 140, §1 CC, commentators and the case law state that this is a form of special intent.[151] The original *mens rea* seems to be a special intent indeed.[152] Special intent is a specialisation of the 'will-element' (a specific goal or evil intention).[153] Knowing you are contributing to an offence by a terrorist group with your participation and still going ahead with it, implies the will to contribute to an offence by the group, which is more specific than just the will to participate in its activities. However, we still

oktober 1996, ECLI:NL:HR:1996:ZD0139; Nico Jörg, Constantijn Kelk and André Klip, *Strafrecht met mate* (14th edition, Wolters Kluwer 2019) 101-103; MJ Kronenberg and B de Wilde, *Grondtrekken van het Nederlandse strafrecht* (8th edition, Kluwer 2020) 60-62; AJ Machielsen, 'Materiële verweren', in MF Attinger et al (eds), *Handboek Strafzaken* (Wolters Kluwer 2018) 36.1.1.1; J Verboon and KAWM Schuurmans, 'Grenzen aan exonereren voor aansprakelijkheid' 2019 ORP 8, 15.

[148] Stéphanie De Coensel, *Counter-Terrorism & Criminal Law: A Normative Legitimacy Test of Terrorism-Related Offences on Expression, Information and Movement* (Maklu 2020) 105; J De Groote, 'De Bovengrens Der Fout En de Ondergrens van Het Opzet Met Bijzondere Aandacht Voor Het Eventueel Opzet: Een Doctrinale En Rechtsvergelijkende Analyse' (2017) special number April 2017 Nullum Crimen (NC) 66, 75–79; De Nauw and Deruyck (n 20) 42; Lieven Dupont, *Beginselen van Strafrecht, Deel I* (Acco 1983) 184; Bjorn Ketels, 'De Strafrechtelijke Context van Risicovol Seksueel Gedrag' [2008] Tijdschrift voor Strafrecht 354, 361; Van den Wyngaert, Vandromme and Traest (n 16) 331–332; V Vereecke, 'Het eventueel opzet bij de beoordeling van het oogmerk om te doden' (2019) 2019 Rechtspraak Antwerpen Brussel Gent (RABG) 25, 26–27; J Verhaegen, 'Le Dol Éventuel et Sa Place En Droit Pénal Belge', *Liber Amicorum Hermann Bekaert* (Snoeck-Ducaju & Zoon 1977) 441–442.

[149] Dupont states that potential intent is a weakening of the knowledge element and Vereecke states that it is a weakening of the will element. In my opinion both are correct and both elements are weakened.

[150] Dirk Dewandeleer, 'Opzettelijk Doden En Opzettelijk Toebrengen van Lichamelijk Letsel (Art. 392 t/m 417 Sw.), Algemeen', *Postal Memorialis - Lexicon strafrecht, strafvordering en bijzondere wetten* (2001) 8–10; Ketels (n 14) 366 and 368; Marlier (n 36) 732; Verhaegen (n 148) 445–446.

[151] This is the case post-2016: Corr. Brussel 8 mei 2017, *onuitg.*, 5; Delhaise (n 9) 42; Fransen and Kerkhofs (n 9) 30; Fransen and Kerkhofs (n 31) 158; An Fransen, Jan Kerkhofs and Pieter Verrest, *Terrorisme: Een analyse van het Belgische en Nederlandse Materieel Strafrecht* (Wolf Legal Publishers 2017) 46, as well as pre-2016: Ketels (n 14) 244; Weyembergh and Kennes, 'Le Titre Iter Du Livre II Du Code Pénal: Des Infractions Terroristes' (n 7) 111.

[152] Note that in the past one of the current authors has stated this was a general intent. They now believe this to be wrong. See: Ward Yperman, 'De terroristische misdrijven in de artikelen 137 en 140 Sw.: geen legistieke voltreffer' [2020] Tijdschrift voor Strafrecht 323; Ward Yperman, 'Terrorism Offences in Belgian Criminal Law: Is Less More?' [2021] Queen Mary Law Journal 150.

[153] De Nauw and Deruyck (n 20) 42; Dupont (n 148) 182; R Legros, *Opzet* (Larcier 1959) 13; Van den Wyngaert and Vandromme (n 16) 316–317.

need to factor in the changes made in 2016. If we look at both changes to the *mens rea* separately, we see that the second change ("could contribute") is a part of *mogelijkheidsbewustzijn*/potential intent: the knowledge element is being relaxed to knowledge of the possibility. The first change ("should have known"), by contrast, is not a relaxation of the knowledge element, nor of the will element. The Council of State described it as a 'potential knowing' instead of a 'real knowing'.[154] This 'potential knowing' can only be concluded based on concrete elements of the file and not from abstract criteria.[155] It is a way to prove intent rather than a form of intent[156], a type of 'he should have known so he knew'-reasoning.[157] If we combine both changes, we have a relaxation of the knowledge element and a rule of evidence.

The 2016 legislature made the *mens rea* broader so moved it further away from a special intent and toward negligence. Indeed, a phrase such as 'should have known' is reminiscent of negligence. This issue has already been discussed in the context of other offences. The legislation on money laundering contains similar[158] phrasing.[159] This phrasing has its origins in a judgement of the Court of Cassation.[160] Although the wording led to some confusion at first, it is by now generally accepted when it comes to the legislation on money laundering that general intent is required.[161] In the

[154] 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, 8.

[155] 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, 9; Fransen and Kerkhofs (n 9) 35; Winants (n 7) 355.

[156] For money laundering and the trade of animals in violation of the hormone regulation (both discussed below) see: De Nauw and Deruyck (n 20) 43.

[157] De Groote (n 148) 96–97; W Devroe and A Rombouts, 'Wissel Als Witsel. De Beteugeling van Het Witwassen van Gelden via Geldwissel in Het Belgisch Financieel En Strafrecht (Noot Onder Corr. Antwerpen 23 Februari 1993)' [1994] TRV 199, 204. Van den Wyngaert et al. wonder whether this actually does make difference in terms of proof, see: Van den Wyngaert, Vandromme and Traest (n 16) 336.

[158] In Dutch the wording is different, but the meaning is the same. Both Dutch phrases translate to the same thing in English: knew or should have known.

[159] Art 505, section 1, 2° and 4°CC; De Groote (n 148) 77. Van Den Wyngaert and Vandromme call it a potential knowing or a 'should have known test', just as the Council of State did for the terrorism legislation (Van den Wyngaert and Vandromme (n 16) 323.)

[160] Cass. 13 november 1983, *Arr.Cass.* 1984-85, 363.

[161] Corr. Antwerpen 23 februari 1993, *T.R.V.* 1994, 195, noot W Devroe and A Rombouts; corr. Antwerpen 14 april 1994, *T.R.V.* 1994, 285, noot F Hellemans; Cesoni (n 119) 256–257; Filiep Deruyck, 'Witwassen', *Strafrecht en strafvordering. Artikelsgewijze commentaar met overzicht van rechtspraak en rechtsleer* (Wolters Kluwer) 245–247; Devroe and Rombouts (n 157) 204; N Hustin-Denies, 'La Législation Belge Sur Le Blachiment de Capiteaux d'origine Criminelle: Un Instrument d'indemnisation Des Victimes et de

preparatory works members of parliament even explicitly refer to the concept of potential intent.[162] In the legislation on the trade of animals in violation of the hormone regulation, a similar wording is used to convey a heightened duty of care, which resembles negligence.[163] However, it is clear from the preparatory works of the terrorism legislation that the legislature had the intention of using the same form of intent as in the money laundering legislation, which is general intent.[164]
So, what kind of intent does the post-2016 article 140 CC require? The reasoning above which infers the specialisation of the will element from a more specific knowledge requirement, does not apply anymore. Acting while you know you could contribute to an offence does not seem to necessarily imply the will to contribute, since contribution is only a possibility and not a certainty anymore. Therefore, article 140, §1 CC in its current version has a general intent rather than a special one.[165] Although potential intent, as already discussed, is seen as a form of general intent, the relaxation of the knowledge element it entails, is not without danger in this context. The concept "contributing to the commission of a felony or standard offence by the group" is an abstract one in any case and

Lutte Contre La Criminalité Organisée?' [1995] Ann dr Louv 53, 62–63; Bart Spriet and Kristel De Schepper, 'De Nieuwe Witwas(Straf)Wet - Een Schematisch Overzicht' [2009–2010] T Fin R 21; Van den Wyngaert and Vandromme (n 16) 324; Van den Wyngaert, Vandromme and Traest (n 16) 335–336; Raf Verstraeten and Dirk Dewandeleer, 'Witwassen Na de Wet van 7 April 1995: Kan Het Nog Witter?' [1995] Rechtskundig Weekblad 689, 692–693 and 701. *Contra*: L Cornelis and R Verstraeten, 'Mag Er Nog Witgewassen Worden?' [1992] TBH 176, 203–204; D Devos, 'Le Blanchiment Des Capitaux d'origine Criminelle' [1992] Bank Fin 201, 202; F Hellemans, 'Witwassen: Een Strafbaar Maar Lonend Misdrijf? (Noot Onder Corr. Antwerpen 14 April 1994)' [1994] TRV 287, 290.

[162] Verslag namens de commissie voor de justitie van 20 juni 1990 bij het ontwerp van wet tot wijziging van de artikelen 42, 43 en 505 van het Strafwetboek en tot invoeging van een artikel 43*bis* in hetzelfde Wetboek, *Gedr.St.* Senaat 1989-90, nr. 890/2, 28; Cornelis and Verstraeten (n 161) 193–205; Verstraeten and Dewandeleer (n 161) 692–693.

[163] Antwerpen 18 oktober 1990, *RW* 1990-91, 856, noot B Spriet; Bart Spriet, 'Het Verhandelen van Dieren Waaraan Stoffen Met Hormonale of Antihormonale Werking Zijn Toegediend (Noot Onder Antwerpen 18 Oktober 1990)' [1990] Rechtskundig Weekblad 857, 858; M Sterkens, 'Hormonen: De Misdrijven', *Postal Memorialis - Lexicon strafrecht, strafvordering en bijzondere wetten* (2015) 8. The statute reads: "of whom it is reasonable to assume that he knows or should know" (own translation, original in Dutch and French: "*van wie men redelijkerwijze kan aannemen dat hij weet of moet weten; celui dont on peut raisonnablement admettre qu'il sait ou devrait savoir*" (art 10, §1, 2°, b wet van 15 juli 1985 betreffende het gebruik bij dieren van stoffen met hormonale, anti-hormonale, beta-adrenergische of produktie-stimulerende werking, *BS* 4 september 1985, 12669)).

[164] Verslag van de eerste lezing van 20 oktober 2016 namens de tijdelijke commissie "terrorismebestrijding" bij wetsvoorstel tot wijziging van het Strafwetboek wat betreft de bestraffing van terrorisme, *Parl.St.* Kamer 2015-16, nr. 54-1579/008, 9.

[165] See also: Cesoni (n 119) 256.

further relaxing the knowledge element to "could contribute" makes it even more abstract and thus more vague.[166]

In 2016 another amendment to the *mens rea* was proposed, but it was not passed: "while he knew or should have known that the group is a terrorist group".[167] The Council of State was rather critical for this amendment because it would significantly broaden the offence and give a very wide margin of appreciation to the judge.[168] This addition of a very broad *mens rea* to an already broad *actus reus*, which is mainly defined by the case law, could lead to legality issues, according to the Council of State.[169] It thought that at the very least the legislation should make clear that involvement in the criminal activities of the terrorist group is required.[170] The wording as it was eventually implemented, was less problematic in the eyes of the Council of State.[171] However, it is striking that a recurring sentence in judgments of French speaking courts is that participation in the activities of a group is punishable "provided that the participant is aware of the vocation of the movement"[172] With these words, the courts seem to refer to a more lenient *mens rea* which was not passed by the legislature.

It is clear that even without the further expansion of the *mens rea* by the legislature, the Council of State's fear of too extensive an application has become reality. The *actus reus* of the offence is so broad it can encompass pretty much any action and the *mens rea* is very open and vague as well. As a result, people who in any way support a member of a terrorist group, without supporting the

[166] For similar criticism, see: Cesoni (n 119) 240–241; Comité T, 'Raport 2022 : Évaluation des mesures visant à lutter contre le terrorisme à la lumière des droits humains', 51.

[167] Own translation, original in Dutch and French: "*terwijl hij wist of moest weten dat de groep een terroristische groep is; alors qu'elle savait ou devait savoir que le groupe est un groupe terroriste*".

[168] 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, 5 – 7; Fransen and Kerkhofs (n 9) 35; Winants (n 7) 355.

[169] 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; Winants (n 7) 355.

[170] 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. See also: Cesoni (n 119) 241.

[171] 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, 8 – 9.

[172] Own translation, original in French: "*pourvue que celui qui les apporte ait connaisance de la vocation du mouvement*". See for example: Corr. Brussel 9 maart 2016, *onuitg.*, 14; Corr. Brussel 3 mei 2016, *onuitg.*; Corr. Brussel 8 mei 2017, *onuitg.*; Corr. Brussel 29 maart 2018, *onuitg.*; Corr. Mons 14 mei 2018, *onuitg.*; Corr. Brussel 11 juni 2018, *onuitg.*

group itself and without wanting their actions to contribute to the committal of a felony or standard offence by the group, are being convicted anyway.[173] Support to a member of the group is being equated to support to the group itself.[174] This is regrettable because many of those people may not be supporters of a terrorist group. They could simply be people who want to help their brother, son or lover, even though the latter have made very questionable and illegal choices. Employing the criminal justice system against a person whose only action is sending clothes to their brother is not the best solution to say the least. As the Council of State feared in 2016, all this leads to a legality issue: it grants very wide discretion to the judge and creates uncertainty in the minds of the person committing these actions about whether or not they are committing an offence.[175] A couple of participants at the expert seminar were of the opinion that while the legislation is broad, prosecutors and judges are capable of limiting its application. They argued that those practitioners are best placed to make decisions on respectively who to prosecute and convict based on the legislation. We do not agree. The case law shows quite a broad application of the offences and it is the task of the legislature to abide by the legality principle and write clear legislation. The legislature should be clearer on what the offences entail and should not have to rely on the common sense of practitioners to limit the application of the legislation. We therefore believe it might be a good idea for the legislature to limit the *mens rea* again to its original wording, which is also what is required by the Directive. This will hopefully be a signal for the courts to require an actual link between the act of participation and the committal of a felony or standard offence by the group. These changes would bring the Belgian legislation back in line with the Directive and reduce the scope of the

[173] See also, dating as far back as 2012: Marchand (n 48) 281–282; Coline Moreau, 'Droit Pénal de l'ennemi versus Droit Pénal Du Citoyen: Réflexions Sur La Fonction Sécuritaire Du Système de Droit Criminel Mise En Avant Par Les Infractions Terroristes Incriminées Par Les Articles 140sexies et 140septies Du Code Pénal' [2021] Revue de Droit Pénal et de Criminologie (Rev. dr. pén.) 101, 113–114.

[174] This reduces a person to one aspect of their identity: that of member of the group. However, it could be sensible to emphasise other aspects of their identity (father, brother, etc.) which are not shared with the group, in order to make them break away from the group. If all 'healthy contacts' of a member of a terrorist group are being forced to keep a distance under threat of criminal action, the group member only has the group and its sympathisers to fall back on. This just strengthens their bond with the group and their break with the rest of society.

[175] 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. This was also stated by Comité T in 2019, see: Comité T, 'Rapport 2019 : Le respect des droits humains dans le cadre de la lutte contre le terrorisme : Un chantier en cours', 18-20. See also : Cesoni (n 119) 242.

offence. During the expert seminar, however, the view was expressed that this change would not noticeably alter the situation on the ground.

Art. 140*bis* CC

Actus Reus

Article 140*bis* CC was introduced in 2013, in response to the Council of Europe Convention on the Prevention of Terrorism[176] and the Council Framework Decision 2008/919/JHA[177]. At the moment of its introduction, the *actus reus* of the offence was the following: disseminating or otherwise making available to the public a message when such conduct, whether or not directly aimed at the commission of terrorist offences, carries a risk that one or more of these offences may be committed.[178] With this offence the legislature wanted to criminalise both direct and indirect incitement to commit a terrorist offence.[179] The general prohibition of public incitement, which is applicable to all felonies and standard offences, only criminalises direct incitement (to the relevant felonies and offences).[180] Several factors are important for the analysis of whether or not there is a risk that terrorist offences may be committed. These factors are: the perpetrator (e.g. whether he is a person of influence and charisma), the receiver (e.g. the amount of people who receive the message and how easy they are to influence), the nature of the message (e.g. whether the words themselves call for violence or hatred) and the context (e.g. political tension).[181] In the original bill, the risk that one or more terrorist offences is committed was not required.[182] However, the Council of State pointed out that this risk requirement was part of the Convention and Framework Decision

[176] See fn 8. Article 5 of this convention states that parties should criminalise public provocation to commit a terrorist offence.

[177] Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism *OJ* 9 December 2008, L 330/21-23. For an analysis of this offence in the Framework Decision and Directive, see: De Coensel (n 148) 197–206; Flore (n 14) 147–149. Currently it is article 5 of the Directive.

[178] Olivier Bonfond, 'Incitation au terrorisme: qui trop embrasse, mal étreint' (2018) 26 Jurisprudence de Liege, Mons et Bruxelles 1237, 1237–1238.

[179] 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) 11; Delhaise (n 9) 48; Ketels (n 14) 250–251; Winants (n 7) 350.

[180] Art 66 CC; 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) 11; Weyembergh and Kennes, 'Domestic Provisions and Case Law: The Belgian Case' (n 7) 151–152.

[181] 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) 12-13. Delhaise (n 9) 51; Fransen and Kerkhofs (n 9) 52–53; Ketels (n 14) 251; Van Deuren (n 18) 509; Winants (n 7) 350.

[182] 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, (19) 19-20; Winants (n 7) 354.

and that omitting it might lead the offence to violate the freedom of speech.[183] The legislature amended the bill to remedy this issue, stating that "it is imperative to specify that the criminalisation of public incitement to commit terrorist acts must not lead to the punishment of acts which have no connection whatsoever with terrorism and would thus create the danger of restricting the freedom of speech. Therefore, it is important to stress that these offences may only be aimed at those situations in which there are serious indications that a danger exists that a terrorist offence would be committed."[184]

Three years later, however, the legislature changed their mind again. In 2016, vaguely referring to the altered security situation, the foreign terrorist fighter problem and the role of social media in radicalisation, they decided to delete the risk requirement because it made it too difficult to provide the evidence required.[185] The Council of State suggested that because the new wording also included less serious cases, the legislature should verify whether the minimum sentence should not be lowered.[186] The legislature refused this because they thought it necessary to decisively tackle

[183] Advies nr. 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) 25-27. See also: Cesoni (n 119) 246; Jan Velaers, 'La Lutte Contre Le Terrorisme et Les Droits de l'homme: Dévelopements Récents En Belgique' in P D'Argent, D Renders and M Verdussen (eds), *Les Visages de L'Etat: Liber Amicorum Yves Lejeune* (Bruylant 2017) 778–779; Winants (n 7) 354.

[184] Own translation, original in Dutch and French: "*Er moet absoluut nader worden bepaald dat de strafbaarstelling van de publieke aanzetting tot het plegen van terroristische handelingen niet mag leiden tot de bestraffing van handelingen die geen enkel verband hebben met het terrorisme en waardoor de vrijheid van meningsuiting gevaar loopt aangetast te worden. Daarom is het belangrijk te beklemtonen dat deze strafbaarstelling slechts die situatie mag beogen waarin er ernstige aanwijzingen zijn dat een gevaar bestaat dat een terroristisch misdrijf gepleegd zou worden; Il est indispensable de préciser que l'incrimination de la provocation publique à commettre des actes de terrorisme ne peut pas aboutir à la répression d'actes n'ayant aucun rapport avec le terrorisme et risquant de porter atteinte à la liberté d'expression. C'est pourquoi, il est important de souligner que cette incrimination ne doit viser que la situation dans laquelle des indices sérieux indiquent qu'il existe un risque qu'une infraction terroriste soit commise.*" (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) 12).

[185] Memorie van Toelichting bij wetsontwerp van 6 juli 2016 houdende diverse bepalingen ter bestrijding van terrorisme (III), *Parl.St.* Kamer 2015-2016, nr. 54-1951/001, (4) 8; Bonfond (n 178) 1238–1239; Cesoni (n 119) 245; Delhaise (n 9) 49; Deruyck and De Nauw (n 16) 12; Fransen and Kerkhofs (n 9) 51; Winants (n 7) 353–354.

[186] Advies nr. 59 147/3 van de Raad van State van 22 april 2016 bij wetsontwerp van 6 juli 2016 houdende diverse bepalingen ter bestrijding van terrorisme (III), *Parl.St.* Kamer 2015-2016, nr. 54-1951/001, (19) 24-25; Bonfond (n 178) 1240; Fransen and Kerkhofs (n 9) 52.

the problem of public incitement to terrorism, especially in light of the development of social media.[187]

When article 140*bis* CC was introduced into the Criminal Code, an appeal for annulment was filed with the Constitutional Court (see as well below). One of the arguments made for annulment was based on freedom of expression. The Constitutional Court stated that freedom of expression is one of the pillars of a democratic society and therefore exceptions need to be interpreted strictly.[188] Article 140*bis* CC is one of those exceptions and must comply with article 10.2 ECHR.[189] It must thus be demonstrated that the restrictions are necessary in a democratic society, that they correspond to an overriding societal need and that they remain proportionate to the legitimate objectives they pursue.[190] The Court stated that it is necessary to protect society against those who would undercut it through violence and terrorism. The government may limit freedom of expression to attain that goal. The legislature had stated it did not aim to punish actions that are not connected to terrorism. This, in combination with the special intent required and the fact that the judge needs to take into account the person who spreads the message, the person who receives it, and the nature and the context of the message, makes that although the judge has a wide margin of appreciation, article 140*bis* CC does not violate the freedom of expression.[191] After the deletion of the risk requirement, however, the article was brought before the Constitutional Court again. The Court made the same analysis of limitations to the freedom of expression. However, this time around the Court's conclusion was that article 140*bis* CC did violate the freedom of expression and the article deleting the risk requirement was annulled.[192] The need to facilitate the proof of the offence does not justify the imposition of an imprisonment and fine when there are no serious indications that there is a

[187] Memorie van Toelichting bij wetsontwerp van 6 juli 2016 houdende diverse bepalingen ter bestrijding van terrorisme (III), *Parl.St.* Kamer 2015-2016, nr. 54-1951/001, (4) 8; Deruyck and De Nauw (n 16) 11; Fransen and Kerkhofs (n 9) 52.

[188] GwH 28 januari 2015, 9/2015, *TVW* 2015, 179, B.24.

[189] GwH 28 januari 2015, 9/2015, *TVW* 2015, 179, B.25.3.

[190] GwH 28 januari 2015, 9/2015, *TVW* 2015, 179, B.24 and B.25.3.

[191] GwH 28 januari 2015, 9/2015, *TVW* 2015, 179, B.25.4-B.25.5. See also: Comité T, 'Rapport 2019 : Le respect des droits humains dans le cadre de la lutte contre le terrorisme : Un chantier en cours', 16; Bonfond (n 178) 1238; Dejemeppe and Rigaux (n 52) 765–766; Ketels (n 14) 252–253; Spreutels and Velu (n 52) 141–142; Velaers (n 183) 779.

[192] GwH 15 maart 2018, 31/2018, *NjW* 2018, 477, B.8. See also: Comité T, 'Rapport 2019 : Le respect des droits humains dans le cadre de la lutte contre le terrorisme : Un chantier en cours', 16; De Coensel (n 148) 207; Dejemeppe and Rigaux (n 52) 765–766; Deruyck and De Nauw (n 16) 12; Fransen and Kerkhofs (n 9) 53–54; Ketels (n 14) 248–250; Winants (n 7) 354.

risk of a terrorist offence. Therefore, article 140*bis* CC, without the risk requirement is not necessary in a democratic society and limits the freedom of expression unduly.[193] In closing the Court remarks that both the Framework Decision and the new Directive include such a risk requirement.[194] Because of the annulment of the part of the article that deleted the risk requirement, the risk requirement was revived and is part of article 140*bis* CC again.[195]

This raises questions under the principle of non-retroactivity, which is enshrined within the legality principle.[196] The principle entails that new legislation which elevates sentences, creates new offences or expands the scope of an existing offence cannot be applied to facts that took place before this legislation was in force, even if it is in force when those facts are tried.[197] For article 140*bis* CC this means that the deletion of the risk requirement should not work retroactively. Annulment, on the other hand, works retroactively. Once annulled, a piece of legislation disappears from the legal order *ex tunc* (meaning that the provision ought legally to be considered to never having existed). Anybody who was convicted under this legislation, can start a procedure of repeal.[198]

The Criminal Code criminalises the dissemination or otherwise making available of a message to the public. This implies a positive action and refraining from undertaking a certain action can therefore not suffice.[199] In order to be punishable, the incitement does not have to be aimed at a specific person or group of people (*intuitu personae*).[200] Therefore, incitement can easily happen over the

[193] GwH 15 maart 2018, 31/2018, *NjW* 2018, 477, B.7.6. See also: Bonfond (n 178) 1239–1240; Cesoni (n 119) 246; Delhaise (n 9) 49; Spreutels and Velu (n 52) 143; Winants (n 7) 354; Ward Yperman, 'Terro III dan toch een stap te ver' [2018] Nieuw Juridisch Weekblad 480.

[194] GwH 15 maart 2018, 31/2018, *NjW* 2018, 477, B.7.7. See also: Bonfond (n 178) 1240; Cesoni (n 119) 246; Delhaise (n 9) 50; Winants (n 7) 354.

[195] Ketels (n 14) 250; J Petersen, 'Naar nieuwe verbale uitingsmisdrijven in de strijd tegen terreur?' (2019) 14 Nullum Crimen (NC) 50, 56.

[196] De Nauw and Deruyck (n 20) 22; Franklin Kuty, *Principes Généraux Du Droit Pénal Belge. Tome 1: La Loi Pénale* (3rd edn, Larcier 2018) 69; Tulkens and others (n 16) 274.

[197] De Nauw and Deruyck (n 20) 22–23; N De Nil, F Deruyck and J Meese, 'Misdrijven', *Strafrecht geannoteerd* (die Keure 2020) 273–274; Kuty (n 195) 297–301; Tulkens and others (n 16) 274–280; Van den Wyngaert, Vandromme and Traest (n 16) 110–118.

[198] Raoul Declercq, *Beginselen van Strafrechtspleging* (6de herwerkte ed., Kluwer 2014) 1839–1845; Yperman, 'Terro III dan toch een stap te ver' (n 193) 481.

[199] Delhaise (n 9) 50.

[200] Fransen and Kerkhofs (n 9) 55; Ketels (n 14) 253; Winants (n 7) 350.

internet as well, as long as it is public.[201] Any mode of dissemination can be punishable.[202] The message has to be made available to the public, which means that a conversation between two people is probably not covered.[203] According to the case law, however, even individual messages to people can be public because the internet allows them to spread and multiply quickly.[204] In addition, the incitement does not have to be aimed at the committal of a concrete offence.[205] Nor does the incited offence actually have to take place.[206] The term 'message' is not defined, so it must be interpreted in its general sense: as a form of communication that is transmitted, be that orally or written.[207]

Mens Rea

A special intent is required, being "the intention of inciting the commission of one of the offences referred to in article 137 or 140sexies, with the exception of the offence referred to in article 137, § 3, 6°".[208] The article thus refers to terrorism *sensu stricto*, with the exception of threatening a terrorist offence, and the offence of traveling for terrorist purposes (see below). This corresponds to the Directive, except for traveling, which is not part of the *mens rea* in the Directive. Traveling for terrorist purposes was not part of the original *mens rea* in the Belgian legislation either, since

[201] 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) 13; Deruyck and De Nauw (n 16) 11; Fransen and Kerkhofs (n 9) 55; Winants (n 7) 350.

[202] Delhaise (n 9) 50.

[203] Delhaise (n 9) 50–51.

[204] Corr. West-Vlaanderen (afd. Brugge) 26 juli 2018, *onuitg.,* 10; Fransen and Kerkhofs (n 9) 60–61.

[205] Delhaise (n 9) 52; Fransen and Kerkhofs (n 9) 55–56; Ketels (n 14) 253; Winants (n 7) 350.

[206] 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, 6; Deruyck and De Nauw (n 16) 11; Van Deuren (n 18) 508; Winants (n 7) 350.

[207] According to Van Dale, the official Dutch dictionary (boodschap: mondeling of schriftelijk bericht; bericht: overgebrachte mededeling, inlichting). According to Delhaise, the French definition is: "*une information, une nouvelle transmise à une persone*" (Delhaise (n 9) 51.). These two definitions match and are translated in the text above.

[208] Own translation, original in Dutch and French: "*met het oogmerk aan te zetten tot het plegen van één van de in de artikelen 137 of 140sexies bedoelde misdrijven, met uitzondering van het in artikel 137, § 3, 6°, bedoelde misdrijf; avec l'intention d'inciter à la commission d'une des infractions visées aux articles 137 ou 140sexies, à l'exception de celle visée à l'article 137, § 3, 6°*" (art 140bis CC). See also: 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) 13; Delhaise (n 9) 52; Fransen and Kerkhofs (n 9) 56; Ketels (n 14) 251; Winants (n 7) 350.

the offence did not exist yet in 2013. It was added when the offence was amended in 2016.[209] In doing so, the Belgian legislature took a more repressive approach than the Directive. Since the traveling offence has a very broad *mens rea* itself, the *mens rea* of article 140*bis* CC is broad too, and significantly broader than the Directive's. In 2016, the legislature also added the words 'directly or indirectly' after the word intention. They did this because when deleting the risk requirement, they also deleted the reference to indirect incitement. To clarify this was still covered by the offence, they explicitly inserted it into the *mens rea*.[210] However, after the Constitutional Court judgment which reinstated the risk requirement, this idea of "direct or indirect incitement" was part of the offence twice.[211] Therefore, the legislature deleted it from the *mens rea* again in 2019, returning to the original text of 2013.[212]

Constitutional Court

As explained above, the introduction of article 140*bis* CC was challenged in front of the Constitutional Court based on the freedom of expression and freedom of association. In its judgment of 28 January 2015, the Court dismissed this claim.

In that same judgment, the Court also had to rule on the application of the legality principle on article 140*bis* CC. The applicants thought that words such as 'indirectly incite', 'indirectly provoke' and 'risk' were insufficiently clear.[213] The Constitutional Court explains the legality principle and reiterates that it does allow for the judge to have a margin of appreciation.[214] The Court then notes that the wording of article 140*bis* CC is identical to that of the Framework Decision on which the

[209] Memorie van Toelichting bij wetsontwerp van 6 juli 2016 houdende diverse bepalingen ter bestrijding van terrorisme (III), *Parl.St.* Kamer 2015-2016, nr. 54-1951/001, (4) 7; Delhaise (n 9) 49; Deruyck and De Nauw (n 16) 12; Fransen and Kerkhofs (n 9) 51; Petersen (n 195) 56.

[210] Memorie van Toelichting bij wetsontwerp van 6 juli 2016 houdende diverse bepalingen ter bestrijding van terrorisme (III), *Parl.St.* Kamer 2015-2016, nr. 54-1951/001, (4) 8; Delhaise (n 9) 49; Fransen and Kerkhofs (n 9) 57.

[211] Fransen and Kerkhofs (n 9) 54–55; Winants (n 7) 354; Yperman, 'Terro III dan toch een stap te ver' (n 193).

[212] Art 76 wet van 5 mei 2019 houdende diverse bepalingen in strafzaken en inzake erediensten, en tot wijziging van de wet van 28 mei 2002 betreffende de euthanasie en van het Sociaal Strafwetboek, *BS* 24 mei 2019, 50023; 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; Deruyck and De Nauw (n 16) 13; Winants (n 7) 357.

[213] GwH 28 januari 2015, 9/2015, *TVW* 2015, 179, B.9.

[214] GwH 28 januari 2015, 9/2015, *TVW* 2015, 179, B.13.

article is based.[215] It is true that the legislature did not define the aforementioned terms. The Court of Cassation has already stated that if that is the case, terms need to be interpreted according to their usual meaning.[216] The Constitutional Court explains that the usual meanings of 'incite', 'aim' and 'risk' are clear.[217] Finally, once more referring to articles 139, section 2 and 141*ter* CC as proof of the constant care the legislature takes to protect fundamental freedoms when fighting terrorism, the Court states that article 140*bis* CC grants judge a large margin of appreciation, but no autonomous competence.[218] Therefore, the legality principle has not been violated.[219]

As also explained above, the Constitutional Court had to rule on article 140*bis* CC again about three years later. The disputed piece of legislation[220] had made three changes to article 140*bis* CC. Its second article introduced the words 'directly or indirectly' in the *mens rea* (1°), added the offence of article 140*sexies* CC to the *mens rea* (2°) and deleted the risk requirement (3°). The introduction of article 140*sexies* CC into the *mens rea* (2°) was not challenged by the appellants and therefore, the Court did not rule on this part of the article. The other two sections (1° and 3°) were challenged. The deletion of the risk requirement was found in violation of the freedom of expression and therefore annulled (see above). The appellant also alleged a violation of the freedom of association, but since the section (3°) of the article was already annulled based on the freedom of expression, the Court did not analyse the freedom of association.[221] Breaches of the legality principle and proportionality principle were also put forward, but the Court likewise ruled that they required no analysis since the section (3°) had already been annulled.[222] The applicants also claimed that the section of the article that introduced 'directly or indirectly' into the *mens rea* (1°) violated the legality principle. The Court, however, stated that it was only a formal adjustment which did not change the interpretation of the article. Therefore, the legality principle had not been violated.[223]

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[215] GwH 28 januari 2015, 9/2015, *TVW* 2015, 179, B.15 – B.16.

[216] Cass. 27 april 1999, *Arr.Cass.* 1999, 568; Cass. 8 oktober 2014, P.14.0955.F.

[217] GwH 28 januari 2015, 9/2015, *TVW* 2015, 179, B.17.1 –B.17.3.

[218] GwH 28 januari 2015, 9/2015, *TVW* 2015, 179, B.18 – B.19.

[219] GwH 28 januari 2015, 9/2015, *TVW* 2015, 179, B.20. See also: Dejemeppe and Rigaux (n 52) 762–763; Ketels (n 14) 252; Spreutels and Velu (n 52) 133–135; Winants (n 7) 351. For criticism on this conclusion, see: Cesoni (n 119) 234–235.

[220] Wet van 3 augustus 2016 houdende diverse bepalingen ter bestrijding van terrorisme (III), *BS* 11 augustus 2016, 50973.

[221] GwH 15 maart 2018, 31/2018, *NjW* 2018, 477, B.9.

[222] GwH 15 maart 2018, 31/2018, *NjW* 2018, 477, B.12 and B.15.

[223] GwH 15 maart 2018, 31/2018, *NjW* 2018, 477, B.13.2 – B.14.

Art. 140*ter* CC

Actus Reus

Article 140*ter* CC criminalises recruitment for terrorist purposes. It was also introduced in 2013, in the wake of the Council of Europe Convention and the update of the Framework Decision.[224] The article criminalises anybody who recruits another person to commit or contribute to the commission of one of the offences in article 137, 140 or 140*sexies* CC, with the exception of article 137, §3, 6° CC. So this is terrorism *sensu stricto*, with the exception of threatening terrorism, the offences relating to terrorist groups, and traveling for terrorist purposes (see below).[225] The preparatory works mention recruitment to become a member of a terrorist group.[226] However, membership in itself is not punishable under article 140 CC (see above). The reference to article 140*sexies* CC was added in 2016, after this offence was created.[227] As was the case for article *140bis* CC, the Belgian legislature expanded upon the Directive by this addition. The part reading 'or contribution to the commission', was added in 2019.[228] This wording is part of the Directive on combatting terrorism, but was not part of the Belgian legislation yet.[229] If necessary, these actions could be prosecuted under article 140 CC or as aiding and abetting (*strafbare deelneming; participation punissable*).[230] However, since 2016 it was part of the offence in article 141 CC (see

[224] Art 6 Council of Europe Convention on the Prevention of Terrorism. Article 5 of which states that parties should criminalise public provocation to commit a terrorist offence. Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism, *OJ* 9 December 2008, L 330/21-23; 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) 14; Ketels (n 14) 254. For a short analysis of this offence in the Framework Decision, see: Flore (n 14) 149–150.

[225] Delhaise (n 9) 55; Fransen and Kerkhofs (n 9) 61; Winants (n 7) 351. It is now article 6 of the Directive.

[226] 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) 14. See also: De La Serna (n 15) 223.

[227] Art 3 wet van 3 augustus 2016 houdende diverse bepalingen ter bestrijding van terrorisme (III), *BS* 11 augustus 2016, 50973; Deruyck and De Nauw (n 16) 12; Fransen and Kerkhofs (n 9) 62; Ketels (n 14) 256; Winants (n 7) 353.

[228] Art 77, 1° wet 5 mei 2019 houdende diverse bepalingen in strafzaken en inzake erediensten, en tot wijziging van de wet van 28 mei 2002 betreffende de euthanasie en van het Sociaal Strafwetboek, *BS* 24 mei 2019, 50023; De Coensel (n 23) 212.

[229] Art 6 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 – L 88/21; Winants (n 7) 357.

[230] 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; Comité T, 'Rapport 2020 : Evaluation des mesures visant à lutter contre le terrorisme à la lumière des droits humains', 15.

below) and to maintain uniformity, the legislature decided to also introduce it in article 140*ter* CC.[231] This addition maintained uniformity at the cost of increased overlap between offences.[232] There will be very few situations of recruiting a person to contribute to the commission of a terrorist offence, which are not covered by article 140 CC. This situation will always involve three people (the recruiter, the contributor to the ultimately intended offence and its perpetrator) and three people is the threshold for a terrorist group. Even if there is no terrorist group, the rules on aiding and abetting apply both to the recruitment offence and to the ultimately intended terrorist offence. Instead of criminalising new situations, the addition of this phrase predominantly brought situations within the ambit of this offence which were already covered by other terrorist offences. An exact definition of recruitment has not been provided by the legislature. In the context of human trafficking, the Court of Cassation has stated that recruitment is enlisting recruits or getting someone to join a group.[233] For the offence of recruitment to take place, it is not required that the recruited person actually commits one of the offences they were recruited for.[234] What is required, is that the recruiter successfully approaches the other person, meaning they convinced them to perpetrate the offence.[235]

The usefulness of including article 140 CC in the list of offences the recruitment of which is punishable, can be questioned. Will recruiting somebody to participate in the activities of a terrorist group not always also be a participation in the activities of that group? This inclusion therefore

[231] 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) 104-105; Comité T, 'Rapport 2020 : Evaluation des mesures visant à lutter contre le terrorisme à la lumière des droits humains', 15.

[232] See also: Cesoni (n 119) 246–247.

[233] Cass. 8 oktober 2014, P.14.0955.F; Delhaise (n 9) 55.

[234] 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) 14; 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, 6; De La Serna (n 15) 223; Delhaise (n 9) 55; Deruyck and De Nauw (n 16) 11; Fransen and Kerkhofs (n 9) 61; Van Deuren (n 18) 508; Winants (n 7) 351.

[235] 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) 14; De La Serna (n 15) 223–224; Fransen and Kerkhofs (n 9) 61; Deruyck and De Nauw (n 16) 11; Ketels (n 14) 254; Winants (n 7) 351. Delhaise talks about the proposal being received ("*la proposition du recruteur est accueillie par la personne approchée*" (Delhaise (n 9) 55.)).

seems a bit pointless. The Court of Appeal of Liège for example had a case of recruitment to join a terrorist group (taking place after 2013), which was only prosecuted under article 140 CC.[236]

Mens Rea

Article 140*ter* CC does not explicitly include a *mens rea*. However, this does not mean that there is no *mens rea*. Under Belgian criminal law, offences always require both *actus reus* and *mens rea*.[237] The Directive states that the offence must be committed intentionally but the Belgian legislation requires special intent for almost all of the terrorist offences, so it would be logical to also require special intent here. It is therefore generally accepted that "recruitment to commit" one of the offences mentioned above, actually means "recruitment with the aim of seeing one of these offences being committed".[238] This is a type of special intent.[239] As was explained above, the traveling offence was added to the *mens rea* in 2016, expanding it beyond the scope of offence in the Directive. The Belgian offence is therefore broader than the one in the Directive.

Constitutional Court

In the same judgement of 28 January 2018 in which the Constitutional Court ruled on article 140*bis,* it also ruled on article 140*ter* CC. With regard to article 140*ter* CC, the applicants claimed it violated the legality principle for two reasons. Firstly, the wording of the article was not clear enough. Secondly, sentencing was unforeseeable because an offence of recruiting people for foreign armies already existed with a sentence of three months to two years imprisonment.[240] The Constitutional Court first refers to the Council of Europe Treaty and the Framework Decision on which the article is based. It then reiterates that article 140*ter* CC requires that the proposal was accepted by the

[236] Luik (6e kamer) 18 oktober 2017, *JLMB* 2017, 1878.

[237] Cass. 12 mei 1987, *Arr.Cass.* 1986-87, 1194, concl. Du Jardin; Cass. 13 december 1994, *RW* 1995-96, 533, noot B Spriet; De Nil, Deruyck and Meese (n 197) 269; Bart Spriet, 'Elk Misdrijf- Ook Dat Uit Het Bijzonder Strafrecht - Vereist Een Moreel of Schuldbestanddeel (Noot Onder Cass. 13 December 1994)' (1995) 1995–96 Rechtskundig Weekblad 533; Tulkens and others (n 16) 474–475; Van den Wyngaert, Vandromme and Traest (n 16) 192; Winants (n 7) 359. In special criminal statues, it is possible, however, that indications of the existence of the *mens rea* are derived from the proven existence of the *actus reus*. See: Cass. 24 februari 2014, S.13.0031.N; Cass. 8 april 2008, P.08.0006.N; Cass. 12 mei 1987, *Arr.Cass.* 1986-87, 1194, concl. Du Jardin; Spriet, 'Elk Misdrijf- Ook Dat Uit Het Bijzonder Strafrecht - Vereist Een Moreel of Schuldbestanddeel (Noot Onder Cass. 13 December 1994)' 536–537.

[238] Delhaise (n 9) 56; Fransen and Kerkhofs (n 9) 62–63; Winants (n 7) 351.

[239] Ketels (n 14) 256.

[240] Art 1 wet 1 augustus 1979 betreffende diensten bij een vreemde leger- of troepenmacht die zich op het grondgebied van een vreemde Staat bevindt, *BS* 24 augustus 1979, 9272.

person being recruited. Therefore, the article does not make it possible to convict every person who approaches another person with a discourse that is considered unlawful, radical or extreme by the prosecuting authority.[241] Article 140*ter* CC is sufficiently accurate and clear so anyone can know which conduct is punishable and which sentence is provided for. The fact that it can be difficult for the prosecuting authorities to furnish the evidence does not change this, nor does the fact that the same conduct can be punished under a different article of the Criminal Code.[242] Hence, there is no violation of the legality principle.[243] The second argument does not change this. The circumstances of the two offences are different and even then, concurrence (*samenloop; concours*) is possible.[244] A person who recruits another person for a foreign army in circumstances that fall within the scope of article 140*ter* CC, can therefore know he can be sentenced to the higher sentence.

The applicants also alleged that article 140*ter* CC violated both the freedom of expression and the freedom of association. The Court stated that the article did not even restrict the freedom of expression and therefore did not need to be analysed in this regard.[245] As to the freedom of association, while it is restricted by the article, this restriction is necessary in a democratic society in order to protect national security, public safety and public order, to prevent criminal offences, or to protect the rights and freedoms of others.[246] The Court is thus of the opinion that the restriction of the right to association is justified.[247]

[241] GwH 28 januari 2015, 9/2015, *TVW* 2015, 179, B.30.1.

[242] GwH 28 januari 2015, 9/2015, *TVW* 2015, 179, B.30.2.

[243] GwH 28 januari 2015, 9/2015, *TVW* 2015, 179, B.33. See also: Ketels (n 14) 254–255; Spreutels and Velu (n 52) 136; Winants (n 7) 351.

[244] GwH 28 januari 2015, 9/2015, *TVW* 2015, 179, B.31.2 – B.31.3.

[245] GwH 28 januari 2015, 9/2015, *TVW* 2015, 179, B.36.

[246] GwH 28 januari 2015, 9/2015, *TVW* 2015, 179, B.37. See also: Ketels (n 14) 255–256.

[247] Spreutels and Velu (n 52) 144; Winants (n 7) 351–352.

Art. 140*quater* CC

Actus Reus

Article 140*quater* CC was also introduced in 2013, in the wake of the Council of Europe Convention and the update of the Framework Decision.[248] For both the *actus reus* and *mens rea* of this offence, the Belgian legislature passed wording very similar to the European instruments.[249] The *actus reus* of article 140*quater* CC is to instruct or provide training in the manufacturing or use of explosives, firearms or other weapons or harmful or dangerous substances or in other specific methods and techniques.[250] This is a non-exhaustive list, so any training or instruction that is provided with the required *mens rea* can fall within the scope of this article. The preparatory works provide as extra examples of training in the sense of article 140*quater* CC flying or driving lessons, or lessons on how to hack a website.[251] The training provided can be theoretic or practical.[252] Both 'instruct' and 'provide' imply an action on behalf of the perpetrator.[253]

Mens Rea

The *mens rea* is a special intent, being: with a view to commit or contribute to the commission of one of the offences referred to in article 137, with the exception of the offence referred to in article 137, §3, 6° CC.[254] So the training has to be provided with the view to commit or contribute to the commission of terrorism *sensu stricto*, once more with the exception of threatening a terrorist attack. This is the same as in the

[248] Art 1 Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism, *OJ* 9 December 2008, L 330/21-23; art 7 Council of Europe Convention on the Prevention of Terrorism; Ketels (n 14) 256.

[249] Art 7 Directive (EU) 2017/541 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. See also: Fransen and Kerkhofs (n 9) 63.

[250] Art 140*quater* CC. See also: Flore (n 14) 150.

[251] 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) 15; De La Serna (n 15) 224; Deruyck and De Nauw (n 16) 11; Fransen and Kerkhofs (n 9) 64; Ketels (n 14) 257; Winants (n 7) 351.

[252] Delhaise (n 9) 58.

[253] Delhaise (n 9) 57.

[254] Art 140*quater* CC; 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) 15; De La Serna (n 15) 224; Delhaise (n 9) 58; Fransen and Kerkhofs (n 9) 65; Ketels (n 14) 257.

Framework Decision.[255] Here too, the part 'or contribute to the commission of' was added in 2019[256], because this is part of the wording of the Directive and the legislature wanted to increase coherence.[257] Concreteness is not required, so the person providing the training does not need to know the exact terrorist offence for which he is providing training.[258] He does need to know, however, that the aim is to perpetrate one of the aforementioned offences.[259] Then again, it is not required that the offence for which the training was provided actually takes place.[260]

Constitutional Court

The case which led to the aforementioned Constitutional Court judgment of 28 January 2015 also concerned article 140*quater* CC. The applicants deemed the wording of article 140*quater* CC unclear. The Court again started by referring to the Council of Europe Treaty and the Framework Decision.[261] The Court notes that the preparatory works stated that the article does not only cover providing training for methods specific for terrorist purposes, such as weapons training, but also other methods such as flying or driving lessons or hacking websites. The Framework Decision, however, only targets training for specific methods and techniques, meaning, according to the Court, methods and techniques specific to committing terrorist offences. The Court considers the wording of the article: "training in the manufacturing or use of explosives, firearms or other weapons or harmful or dangerous substances or in other specific methods and techniques, with a view to commit or contribute to the commission of one of the offences referred to in article 137, with the exception of the offence referred to in article 137, §3, 6° CC". It finds the *actus reus* sufficiently accurate and clear, since the potential ambiguity of the preparatory works, cannot have precedence over the clear wording of the statute. [262] The *mens rea* is also sufficiently accurate and

[255] Fransen and Kerkhofs (n 9) 64.

[256] Art 78, 1° wet 5 mei 2019 houdende diverse bepalingen in strafzaken en inzake erediensten, en tot wijziging van de wet van 28 mei 2002 betreffende de euthanasie en van het Sociaal Strafwetboek, *BS* 24 mei 2019, 50023; De Coensel (n 23) 212.

[257] Art 7 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; 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) 104-105; Winants (n 7) 357.

[258] Delhaise (n 9) 58 and 78; Fransen and Kerkhofs (n 9) 65; Winants (n 7) 351.

[259] GwH 28 januari 2015, 9/2015, B.41.3; Ketels (n 14) 257.

[260] Deruyck and De Nauw (n 16) 11; Van Deuren (n 18) 508.

[261] GwH 28 januari 2015, 9/2015, *TVW* 2015, 179, B.40.1 –B.40.3.

[262] GwH 28 januari 2015, 9/2015, *TVW* 2015, 179, B.41.2.

clear. The offence only exists when the person providing the training knows the training is provided with the intention to commit one of the offences mentioned.[263] The Court concludes that as long as this last interpretation is adhered to, there is no violation of the legality principle.[264]
Regarding the alleged violation of the freedom of expression and freedom of association, the Court followed the same reasoning as for article 140*ter* CC. It states that article 140*quater* CC does not make it possible to convict every person who approaches another person with a discourse that is considered unlawful, radical or extreme by the prosecuting authority.[265] Therefore article 140*quater* CC does not restrict the freedom of expression.[266] It does restrict the freedom of association, but this restriction is necessary in a democratic society in order to protect national security, public safety and public order, to prevent criminal offences, or to protect the rights and freedoms of others.[267] Therefore, there is no violation of the freedom of association.[268]

[263] GwH 28 januari 2015, 9/2015, *TVW* 2015, 179, B.42.3.
[264] GwH 28 januari 2015, 9/2015, *TVW* 2015, 179, B.42. See also: Ketels (n 14) 257; Spreutels and Velu (n 52) 137–138; Winants (n 7) 351.
[265] GwH 28 januari 2015, 9/2015, *TVW* 2015, 179, B.44.
[266] GwH 28 januari 2015, 9/2015, *TVW* 2015, 179, B.45. See also: Ketels (n 14) 257–258.
[267] GwH 28 januari 2015, 9/2015, *TVW* 2015, 179, B.46.
[268] Ketels (n 14) 257–258; Spreutels and Velu (n 52) 144–145; Winants (n 7) 351–352.

Art. 140*quinquies* CC

Actus Reus

Together with the offence of providing instruction or training, the legislature introduced the offence of receiving training for terrorism.[269] He stated that it made operational and logical sense to also criminalise the person who receives the training.[270] The wording of this offence also closely resembles that of the Directive.[271] Article 140*quinquies* CC criminalises anybody who, in Belgium or abroad, receives instruction or training as described in article 140*quater* CC. The article explicitly refers to article 140*quater* CC with regard to the type of instruction or training, so anything said there is also applicable here.[272] The training can be in person or via the internet for example.[273]
The legislature added a new section to article 140*quinquies* CC in 2019 containing a second offence.[274] The *actus reus* of this offence is: in Belgium or abroad, acquiring knowledge yourself or educating yourself in the matters referred to in article 140*quater* CC. Because of the wording of the first section, it is generally accepted that its scope only covers people receiving training from somebody else.[275] Because the considerations to the Directive state that training should also include self-study[276], the legislature decided to introduce this second section, focusing on just

[269] Art 7 wet van 18 februari 2013 tot wijziging van boek II, titel Iter van het Strafwetboek, *BS* 4 maart 2013, 13233. See also: De La Serna (n 15) 225.
[270] 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.
[271] Art 8 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.
[272] Delhaise (n 9) 60; Winants (n 7) 351.
[273] Delhaise and Fievet (n 29) 118.
[274] Art 79, 2° wet 5 mei 2019 houdende diverse bepalingen in strafzaken en inzake erediensten, en tot wijziging van de wet van 28 mei 2002 betreffende de euthanasie en van het Sociaal Strafwetboek, *BS* 24 mei 2019, 50023. A similar proposal was already tabled once before, in 2018. See: Wetsvoorstel van 18 januari 2018 tot wijziging van het Strafwetboek teneinde zelfinstructie in het kader van terrorisme strafbaar te stellen, *Parl.St.* Kamer 2017-2018, nr. 54-2900/001.
[275] 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) 106; Delhaise (n 9) 60–61; Winants (n 7) 357.
[276] Consideration 11 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; 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) 106. Cesoni argues that this is not binding upon member states, however. See: Cesoni (n 119) 238.

that.[277] In the preparatory works, he emphasises that occasionally visiting a website, or visiting it for academic purposes does not suffice to be punishable. There needs to be an active and conscious action of the perpetrator.[278] Cesoni argues that this is insufficient and warns for a reversal of the burden of proof, violations of the presumption of innocence and the possibility of thought police.[279] Both sections explicitly state that the training is received or undertaken in Belgium or abroad.[280] This is not specified in the offence of providing training, nor in many of the other terrorist offences. It is unclear why the legislature decided to specify this in article 140*quinquies* CC.[281] It is highly unlikely that the Belgian legislature wanted to imply that the other offences, such as providing training, are not punishable if they did not take place on Belgian soil. As imposed by the Framework Decision[282] and the Directive[283], Belgian legislation includes grounds of extraterritorial jurisdiction for terrorism.[284] The Preceding Title to the Code of Criminal Procedure states that any Belgian or person who has his main residence in Belgium can be prosecuted in Belgium when he commits a

[277] Cesoni (n 119) 237–238; De Coensel (n 23) 213–214.

[278] 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) 106. See also: Comité T, 'Rapport 2019 : Le respect des droits humains dans le cadre de la lutte contre le terrorisme : Un chantier en cours', 17; Deruyck and De Nauw (n 16) 13; Winants (n 7) 357.

[279] Cesoni (n 119) 238–239.

[280] Ketels (n 14) 258; Winants (n 7) 351.

[281] Fransen and Kerkhofs (n 9) 67.

[282] Art 9 Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism, *OJ* 22 June 2002, L 164/3. See also: 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) 588; Gless (n 9) 938.

[283] Art 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.

[284] See: De La Serna (n 7) 209; De Nauw (n 12) 8–9; Hameeuw (n 15) 10–11; R Malagnini, 'La poursuite en Belgique des infractions terroristes commises à l'étranger' [2018] Revue de Jurisprudence de Liège, Mons et Bruxelles (JLMB) 1423; Weyembergh and Kennes, 'Domestic Provisions and Case Law: The Belgian Case' (n 7) 155; Weyembergh and Kennes, 'Le Titre Iter Du Livre II Du Code Pénal: Des Infractions Terroristes' (n 7) 122–123. In addition, an offence is a territorial offence as soon as one constituent element of the offence took place in Belgium (see among other cases: Cass. 4 februari 1986, *Pas*., 1986, I, 671; Cass. 4 oktober 2017, *NC* 2018, 303). So for example a Frenchman residing in France recruiting a Frenchman residing in Belgium over the internet for a terrorist attack in France, would be a Belgian territorial offence. In a recent case, the Court of Cassation went even further and stated that a material act which prepares one of the constituent elements of the offence taking place in Belgium is sufficient for the offence to be a Belgian territorial offence. (Cass. 10 maart 2021, *JLMB* 2021, 1122, noot F Kuty).

terrorist offence (*sensu lato* or *sensu stricto*) outside of Belgium (active personality principle).[285] Furthermore, it also states that anybody who commits a terrorist offence (*sensu stricto* or *sensu lato*) outside of Belgium can be prosecuted in Belgium if this offence was aimed at a Belgian subject or institution or against an institution of the European Union or of a body established in accordance with the Treaty establishing the European Community or the Treaty on the European Union, which is located in Belgium.[286] Furthermore, as a general rule, to prosecute a person who commits an extraterritorial offence for which the statute allows prosecution in Belgium, it is required that the suspect can be found in Belgium.[287] However, in case of prosecutions for terrorism *sensu stricto*,[288] this rule does not apply.[289] In this case, if the suspect is not Belgian and cannot be found on Belgian soil, the prosecution can only take place after the complaint has been evaluated by the public prosecution service.[290] In addition to the grounds of extraterritorial jurisdiction, it is noteworthy that one of the examples in the preparatory works of article 140*quater* explicitly refers to training provided abroad.[291]

[285] Art 6, 1°*ter* PTCCP. See also: 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) 588; De Hert and Millen (n 32) 11–12; De La Serna (n 7) 209; Deruyck and De Nauw (n 16) 16; Flore (n 9) 222; Hameeuw (n 15) 10; Kuty (n 195) 455; Malagnini (n 283) 1425–1426; Tulkens and others (n 16) 302–303; Van den Wyngaert, Vandromme and Traest (n 16) 170; Winants (n 7) 349.

[286] Art 10*ter*, section 1, 4° PTCCP. See also: 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) 588; De Hert and Millen (n 32) 12; De La Serna (n 7) 209; Deruyck and De Nauw (n 16) 16; Flore (n 9) 222; Hameeuw (n 15) 10; Kuty (n 195) 457–458; Malagnini (n 283) 1425; Tulkens and others (n 16) 303–304; Van den Wyngaert, Vandromme and Traest (n 16) 170; Winants (n 7) 349.

[287] Art 12, section 1 PTCPP BE. See also: 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) 588; Kuty (n 195) 447; Tulkens and others (n 16) 301.

[288] Some commentators suggest that this is the case for all terrorist offences. See: Deruyck and De Nauw (n 16) 16; Malagnini (n 283) 1426–1428. However, other commentators do not agree.

[289] Art 12, 1° and 4° PTCCP. See also: Deruyck and De Nauw (n 16) 16; Kuty (n 195) 449; Van den Wyngaert, Vandromme and Traest (n 16) 170. Before this statute was adapted in 2012, there was discussion about whether or not this general rule applied to terrorism offences. See: Weyembergh and Kennes, 'Le Titre Iter Du Livre II Du Code Pénal: Des Infractions Terroristes' (n 7) 123. The majority of commentators seemed to be of the opinion that the rule did apply. For example: 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) 588; De La Serna (n 7) 210; Delmulle and Guenter (n 15) 5; Flore (n 9) 222–223; Hameeuw (n 15) 11.

[290] Art 10*ter*, section 2 PTCCP. See also: Van den Wyngaert, Vandromme and Traest (n 16) 170.

[291] 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.

Mens Rea

The *mens rea* for both offences in article 140*quinquies* CC is a form of special intent as well: with a view to commit or contribute to the commission of one of the offences referred to in article 137, with the exception of the offence referred to in article 137, § 3, 6°.[292] So here too the training has to be received or undertaken with the view to commit or contribute to the commission of terrorism *sensu stricto*, with the exception of threatening a terrorist attack. In section 1 of the article, the part 'or contribute to the commission of' was added in 2019[293], because this is part of the wording of the Directive and the legislature wanted to increase coherence.[294] Section 2 of the article was only introduced in 2019, with this phrase already in it. Concreteness is not required, so the person receiving or undertaking the training does not need to know the exact terrorist offence for which he is training, nor does this offence actually have to be committed.[295]

Constitutional Court

The final terrorist offence discussed in the Constitutional Court judgment of 28 January 2015 was article 140*quinquies* CC. Regarding this article, a violation of the principle of legality and the freedoms of expression and association was alleged as well. However, the Court refers to the inextricable link between articles 140*quinquies* and 140*quater* CC and refers to its reasoning for the latter article to conclude that the former also does not violate the legality principle.[296] It then does the same for the freedom of expression and freedom of association.[297]

[292] Art 140*quinquies* CC; Delhaise (n 9) 62; Delhaise and Fievet (n 29) 118; Fransen and Kerkhofs (n 9) 68; Ketels (n 14) 258–259.

[293] Art 79, 1° wet 5 mei 2019 houdende diverse bepalingen in strafzaken en inzake erediensten, en tot wijziging van de wet van 28 mei 2002 betreffende de euthanasie en van het Sociaal Strafwetboek, *BS* 24 mei 2019, 50023; De Coensel (n 23) 212; Winants (n 7) 357.

[294] Art 8 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; 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) 106.

[295] Delhaise (n 9) 62; Fransen and Kerkhofs (n 9) 68; Ketels (n 14) 259; Van Deuren (n 18) 508; Winants (n 7) 351.

[296] GwH 28 januari 2015, 9/2015, *TVW* 2015, 179, B.49. See also: Ketels (n 14) 259; Spreutels and Velu (n 52) 138; Winants (n 7) 351.

[297] GwH 28 januari 2015, 9/2015, *TVW* 2015, 179, B.53. See also: Ketels (n 14) 259; Winants (n 7) 351–352.

Art. 140*sexies* CC

Actus Reus

When the issue of foreign terrorist fighters took the foreground, the UN Security Council stated in a resolution "that all States shall ensure that their domestic laws and regulations establish serious criminal offences sufficient to provide the ability to prosecute and to penalize in a manner duly reflecting the seriousness of the offence: (a) their nationals who travel or attempt to travel to a State other than their States of residence or nationality, and other individuals who travel or attempt to travel from their territories to a State other than their States of residence or nationality, for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training;"[298] After this resolution, the Council of Europe included a similar provision in an additional protocol to the Convention on the Prevention of Terrorism.[299] The EU also included a comparable provision in its Directive on combating terrorism.[300] However, on top of outbound travel, the Directive also covers inbound travel. With regard to inbound travel the member states have two options: criminalise inbound travel as the mirror image of outbound travel or criminalise preparatory acts undertaken by a person entering the member state with the intention to commit or contribute to the commission of terrorism *sensu stricto*.[301] The second option thus requires a stronger link between the inbound travel and the intended terrorist offence (*sensu stricto*). The Belgian legislature went with the first option and fulfilled its international obligations by introducing article 140*sexies* into the Criminal Code.[302] The *actus reus* of this offence

[298] UNSC Resolution 2178 of 24 September 2014, 6(a). See also: Memorie van Toelichting bij wetsontwerp van 22 juni 2015 tot versterking van de strijd tegen terrorisme, *Parl.St.* Kamer 2014-15, nr. 54-1198/001, 5; Blaise and Delhaise (n 26) 173–174; Lavaux (n 71) 124.

[299] Art 4 Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, 2015, CETS 217; Alejandro Sánchez Frías, 'Public Security Derogations to the Free Movement of EU Citizens and Preventive Criminal Law: A Collision between Ever-Expanding Concepts?' [2019] European Journal of Crime, Criminal Law and Criminal Justice 293, 298–303; Guy Stessens, 'Terroristen Op Reis: Over de Strafbaarstelling van Reizen Met Terroristisch Oogmerk En Andere Maatregelen Ter Beperking van de Reisvrijheid van (Vermeende) Terroristen' in Steven Dewulf (ed), *La [CVDW] Liber Amicorum Chris Van den Wyngaert* (Maklu 2017) 443–445.

[300] Art 9 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.

[301] Art 9.2 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; De Coensel (n 148) 245; Stessens (n 299) 446–448.

[302] Art 2 wet van 20 juli 2015 tot versterking van de strijd tegen het terrorisme, *BS* 5 augustus 2015, 49326; Memorie van Toelichting bij wetsontwerp van 22 juni 2015 tot versterking van de strijd tegen terrorisme, *Parl.St.* Kamer 2014-15, nr. 54-1198/001, 5; Marie-

is leaving[303] or entering[304] the national territory. This is an everyday action, which makes the *mens rea* the core of this offence.[305] The wording of the article implies the *actus reus* is present once the person crosses the Belgian border, not when he starts or ends his journey.[306]

Mens Rea

The *mens rea* is the aim to commit or contribute to the commission, in Belgium or abroad, of one of the offences meant in article 137, 140 to 140*quinquies* and 141 CC, with the exception of the offence in article 137, §3, 6°. This covers all terrorist offences under Belgian law, except for threatening a terrorist offence (*sensu stricto*)[307] and preparing a terrorist offence (*sensu stricto*)[308] (see below). This is broader than the Directive, which does not include incitement and recruitment but at the same time it is also slightly narrower since the Directive does not exclude threatening. This aim, which is a special intent, needs to be present simultaneously with the *actus reus*, meaning at the time of leaving or entering the national territory.[309] Concreteness is not required, so the traveller does not need to know exactly which terrorist offence he will commit.[310] *A fortiori* it is not required that the intended offence is actually committed.[311] The danger in the case of an offence that revolves almost exclusively around the *mens rea* is that mere thoughts become punishable,

Aude Beernaert, 'Renforcement de l'arsenal législatif anti-terroriste: entre symboles et prévention' [2015] Journal des tribunaux 833, 834; Deruyck and De Nauw (n 16) 13; Velaers (n 183) 786–787. De Coensel points out that when applied to a Belgian national, this offence violates the right to enter that person's own country. See: De Coensel (n 148) 264.

[303] Art 140*sexies*, 1° CC.

[304] Art 140*sexies*, 2° CC.

[305] Advies 57.127/AV van de Raad van State van 24 maart 2015, *Parl.St.* Kamer 2014-15, nr. 54-1198/001, 17; Beernaert, 'Renforcement de l'arsenal législatif anti-terroriste: entre symboles et prévention' (n 302) 834; Delhaise (n 9) 65; Ward Yperman, 'Heiligt het doel de middelen?' [2018] Nieuw Juridisch Weekblad 304.

[306] Delhaise (n 9) 63–64.

[307] Art 137, §3, 6° CC. See also: Ketels (n 14) 259.

[308] Art 140*septies* CC.

[309] Advies 57.127/AV van de Raad van State van 24 maart 2015, *Parl.St.* Kamer 2014-15, nr. 54-1198/001, 18; Delhaise (n 9) 65; Deruyck and De Nauw (n 16) 13; Fransen and Kerkhofs (n 31) 179–180; Fransen and Kerkhofs (n 9) 70–71; Ketels (n 14) 260; Winants (n 7) 352.

[310] Fransen and Kerkhofs (n 31) 180; Fransen and Kerkhofs (n 9) 72; Ketels (n 14) 260; Winants (n 7) 352.

[311] Memorie van Toelichting bij wetsontwerp van 22 juni 2015 tot versterking van de strijd tegen terrorisme, *Parl.St.* Kamer 2014-15, nr. 54-1198/001, 6; Blaise and Delhaise (n 26) 174; Beernaert, 'Renforcement de l'arsenal législatif anti-terroriste: entre symboles et prévention' (n 302) 834; Delhaise (n 9) 65; Deruyck and De Nauw (n 16) 13; Fransen and Kerkhofs (n 9) 70; Moreau (n 173) 107; Winants (n 7) 352.

whereas in Belgium the principle is that only acts are punishable.[312] The Council of State noted in this respect that the offence is situated on the border between the material and the intentional by criminalising an everyday action.[313] The Council pointed towards the need for sufficient concrete, objective and material indications for the intention of the perpetrator.[314] The use of stereotypes and presumptions has to be avoided.[315] The explanatory memorandum explicitly states that the evidence and the facts of the case will be of crucial importance for the assessment of the *mens rea*.[316]

In 2019, the scope of article 140*sexies* CC was further extended. As with the other terrorist offences, the Directive requires member states to criminalise not only travel to commit a terrorist offence, but also travel to contribute to the commission of such an offence.[317] As a result, the legislature inserted the words 'or contributing to the commission' twice (both for leaving and for entering the national territory) in article 140*sexies* CC.[318] Many, if not all, of these actions are already punishable under (attempted) article 140 CC or (participation in) one of the other terrorist offences *sensu lato*. Nevertheless, the legislature wanted to increase coherence and legal certainty and therefore thought the addition necessary.[319]

Constitutional Court

[312] Fransen and Kerkhofs (n 31) 179; Fransen and Kerkhofs (n 9) 71.

[313] Advies 57.127/AV van de Raad van State van 24 maart 2015, *Parl.St.* Kamer 2014-15, nr. 54-1198/001, 17; Blaise and Delhaise (n 26) 174; Velaers (n 183) 787–788; Winants (n 7) 352.

[314] Advies 57.127/AV van de Raad van State van 24 maart 2015, *Parl.St.* Kamer 2014-15, nr. 54-1198/001, 17; Fransen and Kerkhofs (n 31) 179; Moreau (n 173) 107–108; Velaers (n 183) 787–788.

[315] Beernaert, 'Renforcement de l'arsenal législatif anti-terroriste: entre symboles et prévention' (n 302) 834; Delhaise (n 9) 65–66; Moreau (n 173) 107–108; Velaers (n 183) 787–788.

[316] Memorie van Toelichting bij wetsontwerp van 22 juni 2015 tot versterking van de strijd tegen terrorisme, *Parl.St.* Kamer 2014-15, nr. 54-1198/001, 5.

[317] Art 9 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.

[318] Art 80 wet van 5 mei 2019 houdende diverse bepalingen in strafzaken en inzake erediensten, en tot wijziging van de wet van 28 mei 2002 betreffende de euthanasie en van het Sociaal Strafwetboek, *BS* 24 mei 2019, 50023; Memorie van 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) 106–107; De Coensel (n 23) 212; Winants (n 7) 357.

[319] Memorie van 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) 104–105.

The introduction of article 140*sexies* CC was appealed as well. This appeal was based on the principle of legality and the free movement of persons, but was rejected by the Constitutional Court.[320] The argumentation resembles the discussion that had already taken place before the Council of State. Firstly, the question was raised as to whether article 140*sexies* CC complies with the principle of legality. The Constitutional Court replied that the provision was drafted in a sufficiently precise and clear manner and thus provided sufficient legal certainty.[321] With regard to the *mens rea*, the Court stressed that a person can reasonably determine whether he intends to commit one of the listed offences and that the court must consider objective elements, taking into account the specific circumstances of each case.[322] The fact that the *mens rea* refers to another offence, with its own particular special intent, does not prevent a person from assessing what the criminal consequence of his conduct will be.[323] All this is in line with what the Council of State had said.

Subsequently, it was argued that article 140*sexies* CC did not criminalise anything that was not already punishable. On this point, the explanatory memorandum had already clarified that not all terrorists travel to follow a training course before committing an attack (article 140*quinquies* CC) or to join a terrorist group (article 140CC).[324] Either way, concurrence is possible[325], so any potential overlap would not be a problem.[326] The Council of State inquired about this overlap too and stated that the government had not given a concrete example of a situation that does not fall under other terrorist offences (and specifically article 140 CC).[327] However, the Council of State agreed that from a legal point of view this was not a problem. Wanting absolute certainty that all the targeted

[320] GwH 18 januari 2018, 8/2018, *NjW* 2018, 299-304, noot W Yperman. See also: Spreutels and Velu (n 52) 138–139; Winants (n 7) 352–353.

[321] GwH 18 januari 2018, 8/2018, *NjW* 2018, 300-301, B.7; Dejemeppe and Rigaux (n 52) 763–764; Delhaise (n 9) 67.

[322] GwH 18 januari 2018, 8/2018, *NjW* 2018, 301-302, B.9.1; Blaise and Delhaise (n 26) 174; Delhaise (n 9) 67.

[323] GwH 18 januari 2018, 8/2018, *NjW* 2018, 302-303, B.9.3.

[324] Memorie van Toelichting bij wetsontwerp tot versterking van de strijd tegen terrorisme, *Parl.St.* Kamer 2014-15, nr. 54-1198/001, 6-7; See also: Blaise and Delhaise (n 26) 175; Delhaise (n 9) 66; Ketels (n 14) 261.

[325] There is ideal concurrence when several qualifications are applicable to the same set of facts. In such cases, only the most severe penalty is applied (art 65, section 1 CC).

[326] Memorie van Toelichting bij wetsontwerp tot versterking van de strijd tegen terrorisme, *Parl.St.* Kamer 2014-15, nr. 54-1198/001, 7; Blaise and Delhaise (n 26) 175.

[327] Advies 57.137/AV van de Raad van State bij wetsontwerp houdende diverse bepalingen ter bestrijding van terrorisme, *Parl.St.* Kamer 2014-2015, nr. 54-1198/001, (13) 18-19; Fransen and Kerkhofs (n 9) 70–71.

situations would be punishable is a sufficient reason to introduce a new offence.[328] In line with its aforementioned judgment of 28 January 2015, the Constitutional Court ruled that the principle of legality has not been violated if two provisions criminalise the same conduct.[329]

Secondly, the applicant stated that article 140*sexies* CC is contrary to the free movement of persons. The Constitutional Court did not agree with this argument either. Without further explanation, the Court referred to the fact that the provision was introduced to combat terrorism within the framework of UN Security Council Resolution no. 2178 and therefore does not violate the free movement of persons.[330] The Council of State, however, explicitly stated in its opinion, referring to European case law[331], that this does not exempt states from their obligations to protect fundamental rights.[332] Article 2 of the Fourth Protocol to the ECHR, which protects the free movement of persons, states that restrictions on free movement must be provided for by law, be necessary in a democratic society and be proportionate to the objective pursued.[333] For the assessment of whether the restriction is provided for by law, the Council of State referred to the discussion of the principle of legality.[334] The Council furthermore stated that the restriction is necessary for national security, public safety, the maintenance of public order and the protection

[328] Advies 57.137/AV van de Raad van State van 24 maart 2015 bij wetsontwerp houdende diverse bepalingen ter bestrijding van terrorisme, *Parl.St.* Kamer 2014-15, nr. 54-1198/001, (13) 19.

[329] GwH 18 januari 2018, 8/2018, *NjW* 2018, 302-303, B.9.3; Blaise and Delhaise (n 26) 175; Delhaise (n 9) 66–67. Moreover, both the sentences and the procedural regime are the same.

[330] GwH 18 januari 2018, 8/2018, *NjW* 2018, 304, B.13.4. See also: Spreutels and Velu (n 52) 145; Winants (n 7) 353. On this point the comparison with the UN Human Rights Committee case Sayadi can prove interesting. In this case the Committee did analyse Belgium's compliance with human rights and found it lacking, depite the fact that the measures were based on a UN Security Council resolution. See: *Sayadi v. Belgium* UN Doc CCPR/C/94/D/1472/2006 (Official Case No) IHRL 3216 (UNHRC 2008). See also: F Krenc, 'La Belgique "Condamnée" Pour La Première Fois Par Le Comité Des Droits de l'homme Sur Fond de Lutte Contre Le Terrorisme – Cap Sur Genève!' [2009] Journal des tribunaux 621, 622–624.

[331] *Al-Dulimi and Montana Management Inc v Switzerland* App no 5809/08 (ECHR Grand Chamber, 21 June 2016) §95-96; *Nada v Switzerland* App no 10593/08 (ECHR Grand Chamber, 12 September 2012) §168-171; *Al-Jedda v UK* App no 27021/08 (ECHR Grand Chamber, 7 July 2011) §101-102; Case C-584/10 , C-593/10 and C-595/10 *European Commission et al v Yassin Abdullah Kad*i [2013] CJEU ECLI:EU:C:2013:518; Case C-402/05 and C-415/05 *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities* [2008] CJEU ECLI:EU:C:2008:461.

[332] Advies 57.127/AV van de Raad van State van 24 maart 2015, *Parl.St.* Kamer 2014-15, nr. 54-1198/001, 14-15.

[333] Art 2 ECHR Fourth Protocol; advies 57.127/AV van de Raad van State van 24 maart 2015, *Parl.St.* Kamer 2014-15, nr. 54-1198/001, 20.

[334] Advies 57.127/AV van de Raad van State van 24 maart 2015, *Parl.St.* Kamer 2014-15, nr. 54-1198/001, 20.

of the rights and freedoms of others and is therefore necessary in a democratic society.[335] The proportionality analysis is less straightforward. The sentence in article 140*sexies* CC is the same as for many other terrorist offences. The Council of State stated that the compatibility with the principle of proportionality "must be assessed and justified in a comprehensive manner, in the light of the possible coherence of that article with other draft legislative provisions aimed at restricting, in a similar manner but by other means, the free movement of persons in the context of the fight against terrorism". [336] The Council of State referred to the legislation governing the refusal, withdrawal or invalidation of passports, travel documents and identity cards (see below). This way, however, the Council of State does not address the specific situation of article 140*sexies* CC and therefore does not actually give its opinion on the issue of proportionality.

This is a shame since the question of proportionality is essential. Article 140*sexies* CC is a felony, meaning the attempt is also punishable.[337] Article 140*sexies* CC furthermore criminalises not only travelling to commit an attack, but also, for example, travelling to follow a training course (article 140*quinquies* CC). Therefore, a start of execution (attempt) of an act of preparation (travelling) for an act of preparation (attending training) for an actual attack can be punished.[338] The Constitutional Court stated, referring to a statement by the secretary of justice in the House of Representatives, that, for example, buying an airplane ticket after having openly announced the intention to kill people is sufficient.[339] We can ask ourselves whether this should be punishable.

[335] Advies 57.127/AV van de Raad van State van 24 maart 2015, *Parl.St.* Kamer 2014-15, nr. 54-1198/001, 20; Blaise and Delhaise (n 26) 175; Velaers (n 183) 787.

[336] Own translation, original in Dutch and French: "*op een alomvattende manier beoordeeld en gerechtvaardigd [moet] worden, in het licht van de mogelijke samenhang van dat artikel met andere ontworpen wetgevende bepalingen die op een soortgelijke wijze maar met andere middelen het vrij verkeer van personen in het kader van de strijd tegen het terrorisme beogen te beperken; doit être appréciée et justifiée de manière globale, à la lumière de sa combinaison possible avec d'autres dispositifs législatifs en projet qui semblablement visent à restreindre par d'autres biais la liberté de circulation des personnes dans le cadre de la lutte contre le terrorisme.*" See: Advies 57.127/AV van de Raad van State van 24 maart 2015, Parl.St. Kamer 2014-15, nr. 54-1198/001, 21.

[337] Art 52CC; GwH 18 januari 2018, 8/2018, *NjW* 2018, 302, B.9.2.

[338] Yperman, 'Heiligt het doel de middelen?' (n 305).

[339] GwH 18 januari 2018, 8/2018, *NjW* 2018, 302, B.9.2.

Art. 140*septies* CC

Actus Reus

In 2016, the legislature wanted to crack down further on terrorism.[340] In this context, they decided to criminalise preparatory actions, because a terrorist offence is often impossible without these actions. [341] The Directive does not contain a similar offence. Indeed, it simply states that criminalising preparatory acts undertaken by a person entering a member state with the intention to commit or contribute to the commission of terrorism *stricto sensu* is a way to respond to terrorist travel.[342] Article 140*septies* CC criminalises anybody who prepares a terrorist offence meant in article 137 CC, with the exception of article 137, §3, 6°. This means every terrorist offence *sensu stricto* except for threatening terrorism. The second paragraph of the article includes a list of actions that can be preparation:

> *1° Gathering information on locations, occurrences, events or people which makes it possible to carry out an action on those locations or during those occurrences or events or to cause damage to those people, and observe those locations, occurrences, events or people;*
> *2° The possession, purchase, transport or manufacture of or search for objects or substances which are of such a nature that they can be dangerous to other people or cause substantial economic damage;*
> *3° The possession, purchase, transport or manufacture of or search for financial or material resources, false or illegally obtained documents, information carriers, means of communication, means of transport;*
> *4° The possession or acquisition of or search for premises that acts as a hideout, meeting place, place for gathers or shelter;*
> *5° The prior claiming of a terrorist offence, with the exception of the offence of article 137, §3, 6° CC, regardless of the form or means of the claim.*

[340] Samenvatting van 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, 1. See also: Cesoni (n 119) 251–252.
[341] Toelichting bij wetsvoorstel van 13 januari 2016 tot wijziging van het Strafwetboek wat betreft de bestraffing van terrorisme, *Parl.St.* Kamer 2015-2016, nr. 54-1579/001, (3) 4.
[342] Art 9.2 (b) Directive (EU) 2017/541 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.

The Criminal Code states that preparation can mean these five things "among others". In other words, this list is non-exhaustive.[343] Anything can be preparation, including an omission[344]. The Council of State found that a non-exhaustive list does not necessarily violate the legality principle, on the condition that the general description of the offence is sufficiently detailed, clear and predictable.[345] On the one hand the list needed to be non-exhaustive because terrorism is a changeable form of criminality.[346] On the other hand, a kind of list was needed in order to delimit the offence and to indicate the type of conduct particularly intended.[347] The preparatory works state that it is not the intention to target people who provide limited and non-decisive help.[348] However, that help can be considered as aiding and abetting the preparation of a terrorist offence or financing terrorism (art. 141 CC, see below).[349] In the preparatory works, it is also explained that point 1° on the list is mainly aimed at observing people or locations, including via the internet.[350] As an example for point 2°, purchasing explosives, or materials to create explosives is cited.[351] The

[343] 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, 26; Delhaise (n 9) 69; Deruyck and De Nauw (n 16) 14–15; Fransen and Kerkhofs (n 9) 75; Winants (n 7) 356.

[344] 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, 10; Deruyck and De Nauw (n 16) 15; Fransen and Kerkhofs (n 9) 76; Winants (n 7) 356.

[345] 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, 13; 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, 28; Fransen and Kerkhofs (n 9) 75; Delhaise (n 9) 69.

[346] Fransen and Kerkhofs (n 9) 75.

[347] 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, 10.

[348] 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, 3; Fransen and Kerkhofs (n 9) 75.

[349] 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, 3.

[350] 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, 9; Fransen and Kerkhofs (n 9) 76.

[351] 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, 9; Fransen and Kerkhofs (n 9) 76.

words ‘means of communication’ in point 3° cover new technologies and their evolutions and an example of point 5° can be a video claiming an attack yet to be committed.[352]
Preparation is not to be confused with an attempted offence. Under Belgian criminal law, there is an attempted offence, if the intention to commit the offence has been manifested by external acts which constitute the beginning of the commission of that offence and which have ceased or have missed their effect solely as a result of circumstances beyond the control of the perpetrator.[353] In general criminal law, preparatory actions that are not the beginning of the commission of the offence are not punishable.[354] To ascertain the difference between a mere act of preparation and the beginning of the commission of the offence, one must ask whether the action is susceptible to multiple interpretations. If there can be no doubt about the intention of the perpetrator and the act will necessarily lead to the commission of the offence, the action is the beginning of the commission of the offence.[355] The fact that actions are required that constitute the beginning of the commission of the offence, is an expression of the traditional objective doctrine within Belgian criminal law.[356] The idea behind criminalising preparatory acts, is to not wait for the beginning of

[352] 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, 9; Fransen and Kerkhofs (n 9) 76.
[353] Art 51 CC; Cass. 3 november 2004, *RW* 2005-06, 1583, noot C De Roy; Henri Berkmoes, ‘Bestanddelen van de Strafbare Poging’ in M De Busscher and others (eds), *Strafrecht: duiding* (Larcier 2018) 85–88; Delhaise (n 9) 81; De Nauw and Deruyck (n 20) 69–71; C De Roy, ‘De strafbare poging als klassiek leerstuk in het raam van de hedendaagse strijd tegen het terrorisme (noot onder Cass. 3 november 2004)’ (2005–2006) 69 Rechtskundig Weekblad 1584, 1585; Onsea (n 112) 41; Bart Spriet, ‘Poging Tot Misdaad of Tot Wanbedrijf’, *Strafrecht geannoteerd* (die Keure 2020) 336–338; Tulkens and others (n 16) 420–424; Van den Wyngaert, Vandromme and Traest (n 16) 362–367; Vandromme and De Roy (n 16) 511.
[354] Berkmoes (n 353) 86; De Nauw and Deruyck (n 20) 67 and 70; Onsea (n 112) 41; Spriet, ‘Poging Tot Misdaad of Tot Wanbedrijf’ (n 348) 337; Tulkens and others (n 16) 421; Van den Wyngaert, Vandromme and Traest (n 16) 363; Winants (n 7) 355. Other statutes that criminalise preparatory actions are the statute on combating piracy at sea and the statute on the trade of narcotics. See: art 3, § 1, c), wet van 30 december 2009 betreffende de strijd tegen piraterij op zee, *BS* 14 januari 2010, 1485; art 2*bis*, §6 and 2*quater*, 6° wet van 7 februari 2014 tot wijziging van de wet van 24 februari 1921 betreffende het verhandelen van gifstoffen, slaapmiddelen en verdovende middelen, psychotrope stoffen, ontsmettingsstoffen en antiseptica en van de stoffen die kunnen gebruikt worden voor de illegale vervaardiging van verdovende middelen en psychotrope stoffen, *BS* 6 maart 1921, 1834; 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, 6.
[355] Cass. 3 november 2004, *RW* 2005-06, 1583, noot C De Roy; Berkmoes (n 353) 86; Dekrem (n 77) 138; De Nauw and Deruyck (n 20) 70; De Roy (n 353) 1585; Tulkens and others (n 16) 421–422; Van den Wyngaert, Vandromme and Traest (n 16) 364; Vandromme and De Roy (n 16) 514.
[356] Van den Wyngaert, Vandromme and Traest (n 16) 364; Vandromme and De Roy (n 16) 513.

the commission of the offence but intervene sooner.[357] However, the preparatory works explain that sometimes actions listed as preparation can be a beginning of the commission of the offence as well, depending on the circumstances of the case.[358] An excellent example of this is the Verviers case, which took place before article 140*septies* CC existed.[359] In this case, acts such as forging documents, searching a safe house, renting vehicles to transport jihadists, weapons and parts of explosives, buying phones, buying ingredients for bombs, and buying weapons and police uniforms were ruled to be attempted terrorism *sensu stricto*, although they are all listed as possible acts of preparation in article 140*septies* CC as well.

Mens Rea

Once more, the *mens rea* is not explicit in the text of the article. The preparatory works explain that next to the *actus reus* the intention to commit a terrorist offence as described in article 137 CC is necessary.[360] The action in itself never suffices. This intention is a form of special intent[361] and for this offence there is a requirement of concreteness: the prosecution has to prove which offence was intended.[362] The Council of State emphasised the importance of concrete and consistent

[357] 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, 5; 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, 25; Comité T, 'Rapport 2019 : Le respect des droits humains dans le cadre de la lutte contre le terrorisme : Un chantier en cours', 18; Fransen and Kerkhofs (n 9) 76; Ketels (n 14) 262; Moreau (n 173) 109–110; Onsea (n 112) 41–42.

[358] 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, 5; Fransen and Kerkhofs (n 9) 76; Ketels (n 14) 262.

[359] Corr. Brussel 5 juli 2016, *onuitg*. This was confirmed by the Court of Appeal for one of them after he appealed (Brussel 31 maart 2017, *onuitg*., 34-36). See also: Fransen and Kerkhofs (n 9) 24–25; Moreau (n 173) 114–115.

[360] 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; Fransen and Kerkhofs (n 9) 77.

[361] Ketels (n 14) 262.

[362] 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, 54-1579/006, 14; 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; verslag van de eerste lezing van 20 oktober 2016 namens de tijdelijke commissie "terrorismebestrijding" bij wetsvoorstel tot wijziging van het Strafwetboek wat betreft de bestraffing van terrorisme, *Parl.St* Kamer 2015-2016, nr. 54-1579/008, 5-6; Delhaise (n 9) 71; Fransen and Kerkhofs (n 9) 77.

factual elements that provide proof of the intention to commit a terrorist offence.[363] However, this intent was not quite clear. On the one hand, the preparatory works state that an offence prepared by one person can also be executed by another.[364] On the other hand, they say that the *mens rea* is the intention to commit a terrorist offence. If someone prepares a terrorist offence for somebody else, he does not have the intention of committing one himself. The Council of State pointed towards this inconsistency and asked for clarification.[365] The legislature did not change the article, but did explain to the Council of State that article 140*septies* CC is only meant to target people who prepare their own terrorist offence.[366] People preparing another's terrorist offence, are potentially liable as accomplices.[367] This raises an interesting question under the proportionality principle however. The sentences for accomplices are higher than the sentences for preparation in article 140*septies* CC.[368] So preparing a terrorist offence committed by somebody else is punished harsher than preparing your own.[369] As the legislature points out in the preparatory works, it is impossible

[363] 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, 12; 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, 27; Fransen and Kerkhofs (n 9) 77.

[364] 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, 3.

[365] 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, 12; advies 59.147/3 van de Raad van State State bij wetsontwerp van 6 juli 2016 houdende diverse bepalingen ter bestrijding van terrorisme (III), *Parl.St.* Kamer 2015-16, nr. 54-1951/001, (19) 27-28.

[366] 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, 17; verslag van de eerste lezing van 20 oktober 2016 namens de tijdelijke commissie "terrorismebestrijding" bij wetsvoorstel tot wijziging van het Strafwetboek wat betreft de bestraffing van terrorisme, *Parl.St* Kamer 2015-2016, nr. 54-1579/008, 5; Dekrem (n 77) 157; Deruyck and De Nauw (n 16) 14; Fransen and Kerkhofs (n 9) 75; Winants (n 7) 356. *Contra*: Delhaise (n 9) 70–71.

[367] Art 67 CC; De Nauw and Deruyck (n 20) 95–96; Tulkens and others (n 16) 511–512; Van den Wyngaert, Vandromme and Traest (n 16) 388–389; Jan Vanheule, 'Daden van Deelneming Die Worden Omschreven in Artikel 67 Sw.' in M De Busscher and others (eds), *Strafrecht: duiding* (Larcier 2018) 139–141; Patrick Waeterinckx, 'Samenloop van Verscheidene Misdrijven', *Strafrecht geannoteerd* (die Keure 2020) 376–377.

[368] Art 69 CC. See also: De Nauw and Deruyck (n 20) 96; Tulkens and others (n 16) 512–513; Van den Wyngaert, Vandromme and Traest (n 16) 394.

[369] 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, 19-20.

to punish preparation less harsh than attempt, but on the same level as aiding and abetting, since attempt and aiding and abetting have the same sentence.[370] Furthermore, prosecution for aiding and abetting an offence implies that the offence (or at least its attempt) has actually taken place[371], which is not the case for preparatory actions.[372] It is possible to aid and abet the attempted offence, but then the sentence goes down another level compared to the aiding and abetting of the offence itself.

[370] Verslag van de eerste lezing van 20 oktober 2016 namens de tijdelijke commissie "terrorismebestrijding" bij wetsvoorstel tot wijziging van het Strafwetboek wat betreft de bestraffing van terrorisme, *Parl.St* Kamer 2015-2016, nr. 54-1579/008, 6.

[371] Delhaise (n 9) 85; Tulkens and others (n 16) 505–506; Van den Wyngaert, Vandromme and Traest (n 16) 386; Vanheule (n 366) 124.

[372] Verslag van de eerste lezing van 20 oktober 2016 namens de tijdelijke commissie "terrorismebestrijding" bij wetsvoorstel tot wijziging van het Strafwetboek wat betreft de bestraffing van terrorisme, *Parl.St* Kamer 2015-2016, nr. 54-1579/008, 7.

Art. 141 CC

Actus Reus

Article 141 CC is a first-generation terrorist offence, introduced in 2003.[373] This offence was not included in the Framework Decision but in the International Convention for the Suppression of the Financing of Terrorism, signed by Belgium on 27 September 2001.[374] It was not part of the first draft bill of the 2003 statute because article 140, §1 CC already explicitly refers to the financing of terrorism. However, the Council of State noted that article 140 CC only covered a certain form of financing, namely the financing of a terrorist group.[375] The legislature also wanted to tackle the financing of individual terrorists and therefore added article 141 CC to plug this gap.[376] The offence introduced in 2003 criminalised "Any person who except in the cases referred to in article 140, provides material resources, including financial assistance, with a view to committing a terrorist offence referred to in article 137."[377] However, in its recommendations, the Financial Action Task Force (hereafter FATF) stressed that terrorist financing offences should not require that the funds

[373] Art 7 wet van 19 december 2003 betreffende terroristische misdrijven, *BS* 29 december 2003, 61689.

[374] Art 2 International Convention for the Suppression of the Financing of Terrorism, New York 9 December 1999; 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) 588; De Hert and Millen (n 32) 10; De La Serna (n 7) 193; De La Serna (n 15) 225–226; Flore (n 9) 219; Hameeuw (n 15) 9; Ketels (n 14) 263; Traest (n 15) 258; Weyembergh and Kennes, 'Domestic Provisions and Case Law: The Belgian Case' (n 7) 154; Weyembergh and Kennes, 'Le Titre Iter Du Livre II Du Code Pénal: Des Infractions Terroristes' (n 7) 120; Winants (n 7) 349. Currently, article 11 of the Directive includes the offence of terrorist financing.

[375] Advies 34.362/4 van de Raad van State bij wetsontwerp van 6 oktober 2003 betreffende terroristische misdrijven, *Parl.St.* Kamer 2003, nr. 51-0258/001, (22) 40. See also: Delhaise and Fievet (n 29) 119.

[376] Memorie van Toelichting bij wetsontwerp van 6 oktober 2003 betreffende terroristische misdrijven, *Parl.St.* Kamer 2003, nr. 51-0258/001, (4) 9 en 14–15; verslag namens de commissie van justitie bij wetsontwerp van 6 oktober 2003 betreffende terroristische misdrijven, *Parl.St.* Kamer 2003, nr. 51-0258/004, 23; 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) 588; De La Serna (n 7) 192–193; De La Serna (n 15) 225; Deruyck and De Nauw (n 16) 10; Hameeuw (n 15) 9; Ketels (n 14) 263; Weyembergh and Kennes, 'Domestic Provisions and Case Law: The Belgian Case' (n 7) 154; Weyembergh and Kennes, 'Le Titre Iter Du Livre II Du Code Pénal: Des Infractions Terroristes' (n 7) 120; Winants (n 7) 348.

[377] Own translation, original in Dutch and French: "*Iedere persoon die, behalve in de gevallen bedoeld in artikel 140, materiële middelen verstrekt, daaronder begrepen financiële hulp, met het oog op het plegen van een terroristisch misdrijf bedoeld in artikel 137; Toute personne qui, hors les cas prévus à l'article 140, fournit des moyens matériels, y compris une aide financière, en vue de la commission d'une infraction terroriste visée à l'article 137*" (Art 141 CC as introduced by art 7 wet van 19 december 2003 betreffende terroristische misdrijven, *BS* 29 December 2003, 61689). See also: Fransen and Kerkhofs (n 9) 78.

are linked to a specific terrorist act.[378] According to the FATF, collecting or providing funds to one or two people (i.e. outside of the situation of article 140 CC) does not seem to be covered by article 141 CC, if the connection to a specific terrorist offence cannot be established. Therefore, article 141 did not fully comply with this recommendation.[379] In order to resolve this issue, the article was replaced in 2016.[380] Three slightly different amendments were proposed, but in the end the third one made it because it resembled the EU Directive, which does include a similar offence, the most closely.[381]

The current version of article 141 CC criminalises the direct or indirect provision or collection of material resources, including financial assistance, by any means.[382] Compared to the original article, article 141 is now not only aimed at people who provide resources but also those who collect them.[383] The legislature notes that the wording of the new article is broader than the original one, but that this does not necessarily mean that the original article did not encompass the elements that were made more specific in the new wording.[384] For example, the Directive includes providing

[378] Recommendation 5 FATF international standards on combating money laundering and the financing of terrorism & proliferation, updated June 2019, 11, <http://www.fatf-gafi.org/media/fatf/documents/recommendations/pdfs/FATF%20Recommendations%202012.pdf>. See in the original recommendations as well: FATF IX Special Recommendations, October 2001, 5, <https://www.fatf-gafi.org/media/fatf/documents/reports/FATF%20Standards%20-%20IX%20Special%20Recommendations%20and%20IN%20rc.pdf>.

[379] FATF, *Anti-money laundering and counter-terrorist financing measures -Belgium, Fourth Round Mutual Evaluation Report* (2015) 160, <http://www.fatf-gafi.org/publications/mutualevaluations/documents/mer-belgium-2015.html>.

[380] Amendement nr. 2 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, 11-12. See also: Deruyck and De Nauw (n 16) 10; Ketels (n 14) 263.

[381] Verslag van de eerste lezing van 20 oktober 2016 namens de tijdelijke commissie "terrorismebestrijding" bij wetsvoorstel tot wijziging van het Strafwetboek wat betreft de bestraffing van terrorisme, *Parl.St.* Kamer 2015-16, nr. 54-1579/008, 14; amendement nr. 3 van 6 oktober 2016 bij wetsvoorstel tot wijziging van het Strafwetboek wat betreft de bestraffing van terrorisme, *Parl.St.* Kamer 2015-2016, nr. 54-1579/007, 2-3; Fransen and Kerkhofs (n 9) 79; Winants (n 7) 356.

[382] Art 141 CC; Delhaise (n 9) 72.

[383] Amendement nr. 3 van 6 oktober 2016 bij wetsvoorstel tot wijziging van het Strafwetboek wat betreft de bestraffing van terrorisme, *Parl.St.* Kamer 2015-2016, nr. 54-1579/007, 4; Deruyck and De Nauw (n 16) 10; Fransen and Kerkhofs (n 9) 79; Winants (n 7) 356.

[384] Amendement nr. 3 van 6 oktober 2016 bij wetsvoorstel tot wijziging van het Strafwetboek wat betreft de bestraffing van terrorisme, *Parl.St.* Kamer 2015-2016, nr. 54-1579/007, 3-4.

or collecting funds, by "any means, directly or indirectly".[385] The legislature copied this to the new article 141 CC, but explicitly stated that this does not mean it was not already covered in the original article.[386] The words 'material resources, including financial assistance' were not altered. According to the FATF they were already sufficiently broad.[387] It is not required that the resources are actually used to commit or contribute to the commission of an offence.[388]

Mens Rea

The *mens rea* allows for two options. The resources have to be provided or collected with the intention that they be used, or in the knowledge that they are to be used, in full or in part, (1°) to commit or contribute to the commission of a terrorist offence *sensu stricto* or *senu lato*, or (2°) by another person when the person providing or collecting the resources knows that this other person is committing or will commit terrorism *sensu stricto*.[389] This is significantly broader than the *mens rea* from 2003. 1° is a copy from the EU Directive.[390] Compared to the original article, it expanded the offences of which the financing is criminalised from terrorism *sensu stricto* to all terrorist offences, including participating in the activities of a terrorist group and preparing a terrorist offence.[391] Furthermore, the legislature wanted to make sure no connection with a specific terrorist act was required. The new wording had to make clearer that it is not necessary the resources are

[385] Art 11.1 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.

[386] Amendement nr. 3 van 6 oktober 2016 bij wetsvoorstel tot wijziging van het Strafwetboek wat betreft de bestraffing van terrorisme, *Parl.St.* Kamer 2015-2016, nr. 54-1579/007, 4; Fransen and Kerkhofs (n 9) 79.

[387] FATF, *Anti-money laundering and counter-terrorist financing measures -Belgium, Fourth Round Mutual Evaluation Report* (2015) 159, <http://www.fatf-gafi.org/publications/mutualevaluations/documents/mer-belgium-2015.html>. See also: Fransen and Kerkhofs (n 9) 79; Winants (n 7) 356.

[388] Fransen and Kerkhofs (n 31) 184; Ketels (n 14) 263–264.

[389] Art 141 CC. See also: Deruyck and De Nauw (n 16) 10.

[390] Art 11.1 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; amendement nr. 3 van 6 oktober 2016 bij wetsvoorstel tot wijziging van het Strafwetboek wat betreft de bestraffing van terrorisme, *Parl.St.* Kamer 2015-2016, nr. 54-1579/007, 5.

[391] Amendement nr. 3 van 6 oktober 2016 bij wetsvoorstel tot wijziging van het Strafwetboek wat betreft de bestraffing van terrorisme, *Parl.St.* Kamer 2015-2016, nr. 54-1579/007, 5; Fransen and Kerkhofs (n 9) 80.

actually used or that the perpetrator knows which specific offences they will be used for.[392] This is explicitly required by the Directive when the financing concerns terrorism *sensu stricto*, terrorist offences relating to a terrorist group or traveling for terrorist purposes.[393] Belgium, however, thought this was too restrictive and the legislature made clear that this also applies for the other terrorist offences.[394] In 2° the legislature wanted to emphasise that helping an individual terrorist is also an offence, as required by the FATF.[395] Strangely enough the legislature hereby states that the Council of State had not expressed any objections about this.[396] This is strange because the Council of State had questioned the distinction between 1° and 2°. According to the Council, 1° already includes financing an individual terrorist.[397] The legislature never replied to this observation. Despite this lack of reply, the Council of State had a point. Providing resources in the knowledge that they are to be used to commit a terrorist offence *sensu stricto* (1°) or providing them in the knowledge that they are to be used by another person when the person providing or collecting the resources knows that this other person is committing or will commit terrorism *sensu stricto* (2°) is the same thing.[398] Therefore, 1° includes 2°, making the latter moot.

[392] Amendement nr. 3 van 6 oktober 2016 bij wetsvoorstel tot wijziging van het Strafwetboek wat betreft de bestraffing van terrorisme, *Parl.St.* Kamer 2015-2016, nr. 54-1579/007, 5-6; Deruyck and De Nauw (n 16) 10; Fransen and Kerkhofs (n 9) 79; Winants (n 7) 356. Although under the old wording, it was not required that the terrorist act was committed either. See: De La Serna (n 7) 194.

[393] Art 11.2 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.

[394] Amendement nr. 3 van 6 oktober 2016 bij wetsvoorstel tot wijziging van het Strafwetboek wat betreft de bestraffing van terrorisme, *Parl.St.* Kamer 2015-2016, nr. 54-1579/007, 6.

[395] Amendement nr. 3 van 6 oktober 2016 bij wetsvoorstel tot wijziging van het Strafwetboek wat betreft de bestraffing van terrorisme, *Parl.St.* Kamer 2015-2016, nr. 54-1579/007, 6; 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, 12.

[396] Amendement nr. 3 van 6 oktober 2016 bij wetsvoorstel tot wijziging van het Strafwetboek wat betreft de bestraffing van terrorisme, *Parl.St.* Kamer 2015-2016, nr. 54-1579/007, 6.

[397] 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, 21-22; advies 59 147/3 van de Raad van State van 22 april 2016 bij wetsontwerp van 6 juli 2016 houdende diverse bepalingen ter bestrijding van terrorisme (III), *Parl. St.* Kamer 2015-2016, nr. 54-1951/001, (19) 31-32; Delhaise (n 9) 73; Fransen and Kerkhofs (n 9) 80.

[398] Delhaise (n 9) 73.

Most literature simply states the *mens rea* is a special intent.[399] This seems to be the case, but is not as obvious as the literature makes it out to be. The article states "the intention that they be used, or in the knowledge that they are to be used". The part about the intention would be a special intent, since this is a specification of the intent element. However, the article also provides another option since it uses "or". At first glance, the knowledge part does not entail a special intent since it is a specification of the knowledge element and not of the intent at all.[400] This observation in turn, needs to be nuanced. Similarly to the reasoning for article 140 CC, if somebody provides means in the knowledge they will be used to perpetrate a certain terrorist attack, it would seem they also provide those means with the intention that they be used for this goal. Since they have the knowledge of the goal and act regardless, the intention is implied. Therefore, article 141 CC does require a special intent and the wording that seems to refer to a kind of general intent is redundant and slightly confusing.

[399] Delhaise (n 9) 72–73; Winants (n 7) 356; Yperman, 'Terrorism Offences in Belgian Criminal Law' (n 152) 177. Note that Comité T does question whether this is a general or a special intent, without answering the question. See: Comité T, 'Raport 2022 : Évaluation des mesures visant à lutter contre le terrorisme à la lumière des droits humains', 52.

[400] See also: Cesoni (n 119) 254. Note that Cesoni states that the combination of the intention to 2° reverts back to a general intent. However, as explained above we feel 2° is redundant as it is fully part of 1°.

Case law analysis

As discussed in this part, there are quite a lot of terrorism offences. However, in practice we see that this variety of offences is not reflected in prosecutions. Of the 343 individual first instance judgments, only six did not include prosecution for one of the offences in article 140 CC.[401] These six concerned a case in which six people were prosecuted for terrorism *sensu stricto* and one person for terrorism *sensu stricto* and participation in the activities of a terrorist group. The former six people were all acquitted and the latter was convicted on both counts. This means that not a single case was brought under articles 140*bis* to 141 CC which was not also prosecuted under article 140 CC. In total 28 people were prosecuted for terrorism *sensu stricto*, 266 for the offence in article 140, §1 CC, ten for the attempt to this offences, 65 for 140, §2 CC, four for 140*bis*, one for 140*ter*, one for attempted 140*ter*, five for 140*quater*, one for 140*quinquies*, seven for 140*sexies* and none for the offences in articles 140*septies* and 141 CC.[402] It is important to note that in addition to terrorist offences, a good number of defendants was also prosecuted for non-terrorist offences, which were not included in the analysis. On the total of 343 individual first instance judgments, one was declared inadmissible, 27 people were acquitted, including the one person who was prosecuted for article 140*quinquies* CC, and 315 people were convicted.

The numbers of the case law analysis clearly show that because of the broadness of the offences in article 140 CC, the other terrorist offences *sensu lato* have very limited added value. They were only invoked a total of nineteen times (or roughly 5,5% of cases) and never without being in conjunction with article 140 CC. The offence in article 141 CC was invoked by the prosecution only once, despite having existed since 2003 and in that one case it was requalified to 140 CC by the court.

[401] Being art 140, §1 and/or §2 CC, since §1/1 did not exist yet.

[402] Note that these numbers do not add up to the total of 343 since people can be prosecuted and convicted for more than one offence.