International Commission of Jurist – European Institutions

JUSTICE PROJECT

Summary :
Baseline Studies on The Legislative implementation and application of Directive 2017/541

(Belgium, Spain, Germany, The Netherlands and Italy)

Background research material
Justice project
June 2019

Table of Contents

PART I. BELGIUM

I. Applicable legal framework

a. National legal framework of counterterrorism laws

1. In general

The first terrorist attack in Belgium linked to ISIS was in 2014, when four people were shot in the Jewish Museum in Brussels. In January 2015, right after the attack on Charlie Hebdo, the government announced 12 counterterrorism measures to strengthen security.[1]In the aftermath of the November 2015 terrorist attacks in Paris, the Belgian Council of Ministers communicated to the Parliament that extra measures would be taken to counter terrorism. On 19 November 2015, the Prime Minister Charles Michel declared that the government would take the following measures:[2]

- Amendment of the national budget 2016: 400 million euro for extra security and the fight against terrorism (in 2015 it was a total budget of 200 million, 40 million for State Security and 100 million euro for Defense).
- Strengthening border controls by police.
- Deployment of 520 soldiers to increase security.
- Revision of the Code of Criminal Procedure: Need for new special investigation methods with new technologies for intelligence services, such as voice recognition, extension of possibilities of telephone taps, e.g. in case of weapon trading).
- Revision of the Code of Criminal Procedure: allow 24/24h house searches instead of only between 5am and 9pm.
- Revision of the Constitution: Amendment to article 12 to change the administrative detention of max 24 hours to 72 hours for terrorist offences.
- Deprivation of liberty for foreign terrorist fighters upon return.
- Electronic ankle band for registered persons who pose a terrorist threat (adversarial procedure for wearing the band and threat analysis by specialised service).
- Belgian PRN: registration of data of passenger in transportation services (aircrafts and high-speed trains).

---

[1] 12 measures announced in January 2015:
1. Insertion in the penal code of a new terrorist offense, relating to travel abroad for terrorist purposes
2. Extension of the list of offenses leading to the use of specific research methods
3. More options for withdrawal of Belgian citizenship
4. Temporary withdrawal of the identity card, refusal to issue and withdrawal of passports
5. Structural reform of the Intelligence and security structures. Establishment of a National Security Council
6. Activation of the legal mechanism to identify persons involved in financing of terrorism (assets will be frozen)
7. Revision of the "Foreign Fighters" circular note of 25 September 2014
8. Optimization of exchanges of information between the authorities and the administrative and judicial services
9. Revision of the 2005 plan against radicalization
10. Fight against radicalism in prisons
11. Calling in the Belgian army for specific monitoring missions
12. Strengthening of the capacity of the State Security Service and transfer of the VIP protection to federal police
See:http://www.egmontinstitute.be/content/uploads/2016/10/Egmont-Paper-89_OFFICIAL-FINAL.pdf?type=pdf

[2] Chambre des représantants de Belgique, Compte Rendu Integral de séance plenière, 19 November 2015, http://www.dekamer.be/doc/PCRI/pdf/54/ip081.pdf .

- Exclusion of hate preachers by screening them and imposing home detention curfew/residence surveillance or deprivation of liberty or expulsion.
- Closure of websites that incite to hatred.
- Dismantling of unrecognised places of worship that contribute to spreading violent jihadism.
- Prohibition of anonymous prepaid cards.
- Molenbeek: Action plan focusing on prevention and repression
- Strengthening screenings for access to sensitive job positions.
- Expansion of camera network and license plate recognition.
- Adaption of the law regarding the national state of emergency: Possibility of temporary and exceptional measures to ensure public safety.
- Participation in international action against ISIS.

After the attacks in Brussels on 22 March 2016, the pressure on the political authorities increased even more and many propositions for counter terrorism measures were put forward in the Parliament. Some proposals were adopted by the Parliament, but many were rejected. The most important legislative measures are discussed below.

2. Criminal Law

In 2003 the Belgian Criminal Code (CC) introduced a new Title Iter: "Terrorist infractions." The definitions of a terrorist offence and a terrorist group have therefore entered into force since 2004 with minor amendments later on. The title currently consists of 13 counter-terrorism provisions (articles 137-141ter CC).[3]

Following the expansion international and regional frameworks and given the obligation to implement those frameworks on a national level, the Belgian law expanded its counter-terrorism laws as well. In 2013 a new series of articles were introduced in the Criminal Code, penalising the public incitement to commit terrorist offences, recruiting and training for terrorist purposes. In 2015, in response of the terrorist attacks in Paris and Brussels of the year before, there were again provisions added to Title Iter CC. The law of 20 July 2015 introduced the penalisation of travelling with a terrorist purpose[4] and modified the law on the revocation of the Belgian nationality in case of conviction for a terrorist infraction.[5] The law of 14 December 2016 eventually added the offence of preparation of a terrorist offence and a specific provision on the financing of terrorism.[6]

---

[3] For a clear chronological overview on the legislative evolution of counter terrorism laws, see Comité T, Rapport 2019: Le respect des droits humains dans le cadre de la lute contre le terrorisme: Un chantier en cours, 14-18.

[4] "Several measures can be classified in the "criminal policy" category, which is defined here as all repressive measures used in the fight against terrorism but which are not strictly juridical. Here again, few of these measures have at this stage been fully implemented. The first subgroup mainly targets the "returnees", Belgian citizens who've gone abroad to fight with Islamic State (ISIS) and now want to come back and, more generally, those individuals who are registered by the security services. In the case of "returnees", the Belgian government has declared it wants to systematically deprive them of their liberty upon their return to Belgium. For those who are more generally registered as "threats" to national security and who have not necessarily been implicated in "foreign terrorism fighting", the rule would involve placing them under electronic surveillance", See: http://www.egmontinstitute.be/content/uploads/2016/10/Egmont-Paper-89_OFFICIAL-FINAL.pdf?type=pdf.

[5] Loi visant à renforcer la lutte contre le terrorisme, 20 July 2015, entered into force on 15 August 2015, http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2015072008&table_name=loi .

[6] Loi modifiant le Code Penal en ce qui concerne la répression du terrorisme, 14 December 2016, entered into force on 1 January 2017, http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2016121409&table_name=loi

3. Other measures

Criminal procedures

Since the enforcement of the new counter-terrorism legislation,[7] the police have allegedly carried out hundreds of raids and searches, of which many took place in Molenbeek.[8] The intelligence services are strengthened with new special investigative methods such as voice recognition and wiretapping for arms trafficking. The Parliament also heavily discussed the possibility to allow house searches 24/24h and prolong the administrative detention from 24h to 72h.[9] The Chambre did eventually vote in favour of an extension from 24h to 48h of preventive detention, but did not allow an exceptional prolongation to 72h in terrorism-related cases.[10]

PNR

The Directive of 21 April 2016 harmonised the use of passenger name record data in the EU Member States.[11] On 25 January 2017, the Belgian law on PNR data was officially published. This legal framework allows the law enforcement agencies to have access to this data in order to make analyses and threat assessments. There are several safeguards embedded in the law to protect the privacy of passengers. In this sense, there is a strict determination of certain sensitive categories of data that cannot be processed in any way, such as racial or ethnic origin, political or religious background, health and sexual orientation.[12]

Detention

There is no legal basis for this practice, but *de facto* terrorist convicts are detained in a highly secured section of the prison. There is a strict regime of solitary confinement, limited contact with family members and high surveillance.[13] There have been several initiatives to set up "deradicalisation programs" in prisons, but without many successful results.[14]

---

[7] See : http://counterterrorismethics.com/the-belgian-counter-terrorism-landscape/#_ftn5

[8] HRW, Report 2016, https://www.hrw.org/report/2016/11/03/grounds-concern/belgiums-counterterror-responses-paris-and-brussels-attacks#

[9] See: http://www.egmontinstitute.be/content/uploads/2016/10/Egmont-Paper-89_OFFICIAL-FINAL.pdf?type=pdf

[10] Loi 31 Octobre 2017 modifiant la loi du 20 juillet 1990 relative à la détention préventive, la loi du 7 juin 1969 fixant le temps pendant lequel il ne peut être procédé à des perquisitions, visites domiciliaires ou arrestations, la loi du 5 août 1992 sur la fonction de police et la loi du 19 décembre 2003 relative au mandat d'arrêt européen, MB 29 Novembre 2017, 104136. See also : https://legalworld.wolterskluwer.be/fr/nouvelles/domaine/droit-penal/le-delai-de-detention-de-suspects-est-porte-a-48-heures-maximum-pour-toutes-les-infractions/ .

[11] Directive (EU) 2016/681 on the use of passenger name record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime, 27 April 2016, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L0681&rid=4 . European Council and Council of the EU, Policy on fight against terrorism, https://www.consilium.europa.eu/en/policies/fight-against-terrorism/passenger-name-record/

[12] Loi 25 Decembre 2017 relative au traitement des données des passagers, MB 25 Janvier 2017, 12905, http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&table_name=loi&cn=2016122543. See also:
https://www.stibbe.com/en/news/2017/february/belgian-act-on-passenger-name-records-published
https://lib.ugent.be/fulltxt/RUG01/002/479/406/RUG01-002479406_2018_0001_AC.pdf
https://ec.europa.eu/home-affairs/news/list-member-states-applying-pnr-directive-intra-eu-flights_en .
http://www.europarl.europa.eu/doceo/document/E-8-2017-006210-ASW_EN.html?redirect

[13] HRW, report 2016, https://www.hrw.org/report/2016/11/03/grounds-concern/belgiums-counterterror-responses-paris-and-brussels-attacks# .

[14] "The particular question of the relationship between prison and radicalisation is also on the radar in Belgium. Authorities have opened prison sections specifically dedicated to housing radicalised detainees

Administrative revocation of identity cards

One of the proposals to prevent Belgian citizens to travel to Iraq or Syria to join ISIS, was to revoke the identity cards of those people in order to decrease the risk of them travelling abroad. The Royal Resolution of 10 August 2015 introduced this preventive measure regarding "foreign terrorist fighters,"[15] individuals who travel abroad to join a terrorist group or participate in its activities.[16] In the first six months following the entry into force of this measure, there were only nine cases wherein the measure was actually taken.[17]

State of emergency

There was a proposal to introduce a legal framework to install a state of emergency in Belgium, following the example of France and the Netherlands. However, there was a lot of uncertainty about the constitutionality of this measure as the Belgian Constitution (art. 187) prohibits that the Constitution can be, in whole or in part, suspended. The proposal was never adopted by the Parliament.

Deprivation of nationality

Many proposals have been made to amend the legislation on deprivation of Belgian nationality in case of a criminal conviction for terrorist offences.[18] The Special Rapporteur on protection of human rights while countering terrorism raised serious concerns about the amendments in the Belgian legislation installing a *de facto* discrimination between citizens.[19]

b. Implementation of the Directive 2017/541

(See Annex I for table of comparison.)

There is a separate title on terrorist offences in the Belgian Criminal Code, which implemented all the provisions of the Directive 2017/541 in a manner very similar to the terms of the Directive.

---

to keep them from spreading their ideas to others. Prison personnel are now being trained to improve both their awareness of the risk of radicalisation during imprisonment and the efficiency of professional care for those convicted of terrorism", http://www.egmontinstitute.be/content/uploads/2016/10/Egmont-Paper-89_OFFICIAL-FINAL.pdf?type=pdf. See also Comité T, Rapport 2019: Le respect des droits humains dans le cadre de la lute contre le terrorisme: Un chantier en cours, 29-43.

[15] Arrêté royal, 26 December 2015, entered into force on 5 May 2016, http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2015122625&table_name=loi .

[16] Definition according to the UN Security Council: "Individuals who travel 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, including in connection with armed conflict." See: Resolution 2178 UN Security Council (24 september 2014), UN Doc. S/RES/2178(2014),
For more background on FTFs see: KARSKA, E. en KARSKI, K., "Introduction: The Phenomenon of Foreign Fighters and Foreign Terrorist Fighters, an international law and human rights perspective", International community law review, nr 18, 2016.

[17] Questions & Answers Chambre 2015-16, 29 June 2016, nr. 24.01, 47-48 (V. Yüksel).

[18] One proposal did make it in parliament and was implemented in the legislation in 2016. After this amendment again a new proposal was published to amend article 23 (1) and (2) of the Code of Belgian Nationality, but this one did not make it.

[19] "The Special Rapporteur echoes concerns about the potential discriminatory effects of such measures that may lead to the *de facto* establishment of a two-tier citizenship system." See Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 27 February 2019, A/HRC/40/52/Add.5, 14.

The Belgian definition of a "terrorist group" (art. 139 CC) is almost identical to the European one (art. 2 CT Dir.), but adds a clarification of which groups do not fall within the definition of a terrorist group. This exception is: *"an organisation whose real purpose is solely of a political, trade union or philanthropic, philosophical or religious nature, or which solely pursues any other legitimate aim".* It is positive that the legislator tried to clarify and narrow the positive definition of a terrorist group by adding a negative definition as well. However, it is open to question how much this clarifies the concept in practice.

The definition of terrorist offences (art. 137 CC) is identical to the Directive in terms of defining the terrorist aim, but the list of offences differs slightly. Offences are divided in two categories, adding offences against tombs, statues etc. and penalising the attempt to commit those offences in one category and threatening to commit the offences in the other category.

Regarding the offences relating to a terrorist group (art. 4 CT Dir.), the Belgian law implemented the Directive in articles 140 (directing a terrorist group and participating in activities) and 141 CC (financing). The provision was already problematic, as it does not define the level of participation or involvement in the activities of a terrorist group. On 14 December 2016 the legislator decided to broaden the scope even more by adding as grounds for criminal liability circumstances not only where an individual knew but also where they "should have known" that their participation would "or could contribute" to the criminal activities of the terrorist group. This means that the subjective element of the offence can be interpreted in an extremely broad manner, which was not even foreseen by the Directive.

Also for the public provocation to commit a terrorist offence (art. 5 CT Dir.), the Belgian legislator implemented the provision in a very broad way. Art. 140bis CC is neither referring to glorification, nor to online/offline incitement, but refers to "indirect" incitement. On one hand, it is a bit stricter than the Directive as it refers to the terrorist offences of article 137 CC, but excludes the offence of threatening to commit such acts, while the Directive did not exclude that. On the other hand, the threshold to commit this offence is low, as the Directive only requires that the incitement causes danger that terrorist offences may be committed. In 2016, the Belgian legislator tried to even delete this condition. Nevertheless, the Belgian Constitutional Court annulled changes to this provision on 15 March 2018.

Article 140ter CC penalises the recruitment for terrorism (art. 6 CT Dir.). There is no need to proof the terrorist intention, although this is required in article 6 of the Directive.

Articles 140quater and quinquies CC prohibit providing or receiving terrorist training (art. 7 and 8 CT Dir.), as far as the intent can be proven. The wording is slightly different, but covers the same objective elements.[20]

Regarding the travelling with a terrorist purpose (art. 9 CT Dir.), the Belgian law emphasises the terrorist intent, rather than using the wording of the Directive ("with knowledge"). The objective element of the offence is leaving and entering the Belgian

[20]Directive : «dispenser/fournir des instructions» and «recevoir des instructions» vs. Belgian Criminal Code : « donner des instructions » and « suivre/se faire donner des instructions ».

territory, rather than travelling abroad. Regarding the subjective element, article 140sexies CC refers to a limited number of offences (art. 37, 140, 140quinquies and 141 CC), while explicitly excluding the offence of threatening, opposed to what is stipulated in the Directive.

Article 10 CT Dir. on organizing or otherwise facilitating travelling for the purpose of terrorism is not explicitly implemented in Belgian law, but it is covered by articles 140bis (incite to travel f.e.), 140ter (recruit to travel) and 141 (finance or facilitate travel) CC.

Financing terrorism (art. 11 CT Dir.) is penalized in article 141 CC and is broadly defined, like the Directive. Having the intention to finance terrorism or having knowledge that this will lead to the commission of crimes or contribute to the commission of crimes suffice to be punished.

Preparation of terrorist attacks or activities in relation to terrorist offences (art. 13 CT Dir.) is also penalized in article 140septies CC. It is not required that the terrorist offence actually took place and thus in accordance with the Directive.

Lastly, regarding the support to victims (art. 25-26 CT Dir.) the Belgian law established a procedure where victims can claim compensation with the Committee for Financial Aid to Victims of Acts of Violence.

II. The most pertinent challenges/issues faced by the judges/experts in applying counterterrorism measures in line with human rights law

(This and next section mainly reflect information gained through the interviews.)

a. The main gaps identified

As in many Member States, Belgium has tried to comply with the European Directive and other international obligations regarding counterterrorism measures. The main gap in this legislation is the lack of legal certainty and the definitions that are vague, too broad and too much focused on the subjective element[21] of the crimes, rather than the objective criminal elements.[22] This concern was mainly voiced by lawyers and partly confirmed by the investigative judge. The latter, together with the other interviewed judge (on the merits) highlighted that many provisions in the criminal and civil code are in fact broadly defined and relying on concepts that need interpretation of a judge. Laws are the product of parliamentary debates, reviewed by the Council of State and the Constitutional Court if necessary. The judge applies the law and interprets the provisions. This (broad provisions, interpretation of the judge) does not have to be seen as a threat to legal certainty, but in his opinion, it is necessary for a judge to be able to confront the law to the evolution of society.[23]

[21] F.e. Case of Salah Abdeslam : He shot at the police forces who wanted to arrest him, after the Paris attacks. But the crimes committed in Paris will be judged by a French judge, the shooting incident with Belgian police forces was judged in Belgium. Here, the interviewed judge was of the opinion that the shooting incident has no terrorist intent, because it was mere resistence to be arrested than installing terror. This distinction should be made. Interview Judge A3 (anonymous), conducted on 26 March 2019.
[22] Kati Verstrepen, President of Human Rights League ('Liga voor Mensenrechten'), speech at debate organised by Comité T on counter-terrorism measures and human rights on 12 March 2019.
[23] Interview Judge A3 (anonymous), conducted on 26 March 2019.

A recurrent issue raised about the Belgium legal system is the detention regime in general. Not only did the ECtHR rule that the conditions in Belgian prisons were inhumane, the interviewees also repeatedly addressed this issue.[24] The detention regime is a particular issue in terrorism matters, where the individual will in practice be treated differently than the other detainees, facing a very strict regime of solitary confinement and limited contact with family members.

Another gap identified by interviewees is the lack of access to judgments in terrorism related cases. Belgian judgments and decisions are not automatically published or easily accessible to the general public or to the legal community beyond the lawyers and parties involved in the case.[25] This lack of transparency could have consequences for legal certainty and the consistent development of the jurisprudence, as well as for the right of the general public to information on matters of public interest.

An interviewed judge indicated as a general issue that in practice, the security level for judges dealing with terrorism related cases as well as the security level for accessing files in those cases is similar to that for ordinary crimes, i.e. not very high. In relation to the latter, the judge mentions the practice in England, where even the lawyer cannot tell his client what information is enclosed in the criminal file. Regarding the security level for judges, the judge illustrates this with an example of a recent case that lasted several months where the judges and defendants would use the same bathroom in the court building. This is something that in the judge's view would not occur in other countries.

b. Possible problems with legal certainty

1. Participation in activities of terrorist group

Article 140 §1 CC penalises participation in the activities of a terrorist group. For one judge interviewed, the interpretation of this article is so broad, that even cooking meals for IS combatants is considered as a contribution to the activities of the terrorist groups.[26] As this was one of the first counter-terrorism provisions, the definition has been very broadly interpreted over the years. This idea is however not shared by everyone. Another judge stressed that participation in activities of a terrorist group is based on the knowledge of the participant rather than his intent. For that judge, proving that someone had the knowledge of the link with a terrorist group is clearer than proving the intentions of that person. This is also valid in other cases such as money laundering, where the will of the legislator is to incriminate anyone who acts knowingly. In terrorism cases, if a person is driving to the airport to drop off a relative, genuinely believing the latter is going on a holiday in Turkey, there is no knowledge and there will be no penalty, as the presumption of innocence could not be refuted.[27] Nevertheless, the Belgian law provides that the conduct is also penalised in case the person "should have known", which indicates that the scope of this provision can be interpreted very broadly. Even though judges give a limited interpretation to the legal provision now, the potential of an excessively broad interpretation is still there to stay. Both judges indicated that the definition of a terrorist organisation itself is indeed quite broad and there are many problems with the political aspect in the definition (e.g. PKK).

[24] Interview Judge A2 (anonymous), conducted on 27 February 2019.
[25] Interview Expert A1 (anonymous), conducted on 21 January 2019.
[26] Interview Judge A2 (anonymous), conducted on 27 February 2019.
[27] Interview Judge A3 (anonymous), conducted on 26 March 2019.

The same issue arises for the other provisions (added later), whose definitions are also vague and broadly interpretable. For financing terrorism (art. 141 CC) it is enough to send money, for example to your family member or child in Syria in order for them to come back to Belgium, because you should know that it could contribute to terrorist activities.[28] In the case of article 140sexies CC, there has been a young child accused of travelling for a terrorist purpose, although the article was not yet implemented by law on the moment he travelled. In these cases, the prosecution is often based on article 140 §1 CC.[29] Interviewees noted that it is key that all principles of criminal procedures are complied with, such as the presumption of innocence, the burden of proof, the role and competences of the investigative judge and the rules of procedure during the investigation.[30]

2. Impact of terrorism investigation on individual

Interviewees noted that an important secondary effect of the lack of legal certainty is that once a person is suspected of terrorism offences, his or her life is severely affected by the investigations that will take place. During the investigation, the assets of the person can be frozen, they cannot open a bank account, the passport or identity card can be withdrawn. In the Belgian system, as the interviewee noted, there is also little differentiation in the treatment of the accused or convicted person according to the seriousness of the offence. A terrorist offence is a terrorist offence and that means solitary confinement already for every suspect.[31]

3. Application of IHL

There has been discussion ongoing on the role of international humanitarian law in the cases of foreign terrorist fighters and IS combatants.[32] According to the exclusion clause enshrined in article 141 bis of the Criminal Code, if they are qualified as members of an armed group, counter-terrorism laws do not apply and their cases should be judged according to IHL. However, there is a serious lack of knowledge in this field.[33]

In 2019, the Brussels Court of Appeal analysed the application of this provision in a case regarding the participation in terrorist activities of PKK members. In this case, the Court considered that the conflict opposing Turkey with the PKK fighters was a non-international armed conflict. According to the Prosecutor, the accused were not direct participants in the conflict in Turkey and could therefore, not invoke the exclusion ground of article 141bis CC, nor argue that the national terrorism legislation was not applicable to their situation. The Court did not agree with this point of view and ruled that these persons were directly involved in the armed conflict because of their deeds of directing the PKK in Turkey – even though they were based in Belgium.[34] It decided that the PKK was thus a party in a non-international armed conflict with the Turkish State

[28] Interview Expert A1 (anonymous), conducted on 21 January 2019.
[29] Interview Expert A1 (anonymous), conducted on 21 January 2019.
[30] Interview Judge A3 (anonymous), conducted on 26 March 2019.
[31] Interview Judge A2 (anonymous), conducted on 27 February 2019.
[32] See Comité T, Rapport 2019: Le respect des droits humains dans le cadre de la lute contre le terrorisme: Un chantier en cours, 55-69.
[33]Interview Expert A1 (anonymous), conducted on 21 January 2019.
[34] Court of Appeal, 8 March 2019, no. 2019/939, 27: "In other words, and other than what the Public Prosecutor's office upholds, for the application of article 141bis Criminal Code it is not the deed of participating in activities of a terrorist group, nor the leadership of this group, that needs to show a sufficient clear connection ("nexus"), but the acts that allow the organisation to be seen as a terrorist group, i.e. the criminal acts as described in article 137 Criminal Code." (non-official translation)

and therefore the terrorism provisions of the Belgian law did not apply. In this manner, the Court also avoided analysing whether PKK is a terrorist group.[35]

4. Freedom of expression (and of thought)

In the amendment of 2016, the legislator expanded the scope of the provision on public incitement to "direct and indirect" incitement, as in the wording of the Directive.[36] In the same amendment the criterion of "a serious risk" on the commission of terrorist offences was deleted in the law. The Constitutional Court ruled that this deletion was not in accordance with the principle of legality, nor with the principle of proportionality and found this amendment "not necessary in a democratic society".[37] The deleted criterion however is still not back into the text of article 140bis CC. The Constitutional Court further decided that the explicit inclusion of indirect incitement into the Belgian law is in accordance with the obligation to implement the Directive. Nevertheless, as Prof. Cesoni mentioned, other countries chose to not refer to indirect incitement in the national legislation, which should be taken as an example for Belgium since it broadens the scope of the provision in a manner that leads to disproportionate interference with freedom of expression.[38]

Recently the court in Ghent had to decide on the execution of a European arrest warrant (EAW) concerning a Spanish rapper who is convicted in Spain for, inter alia, the glorification of terrorism. The Belgian court refused to execute this EAW, relying on the requirement of double incrimination for offences that are not included on the list in the Framework Decision 2002/584/JBZ. While 'terrorism' is on that list, the court however makes two distinctions. Firstly, it finds that glorification of terrorism, as an "opinional offence", does not fall under the "general active terrorist offences" and therefore, it does not fall under the category of 'terrorism' as mentioned in the list of the Framework Decision. Secondly, it finds the timeframe in which the Framework Decision was agreed on (right after 9/11) decisive to distinguish the interpretation of 'terrorism' according to the Framework Decision and to the Spanish Audiancia Nacional. The term should be interpreted as "contemporary international terrorism" and not, as the Spanish authorities claim, as also including "historical national terrorism". The court gave no further information on how it came to this distinction. Subsequently, the court continues its reasoning with examining the requirement of double incrimination. It concludes that glorification of terrorism is not included in the Belgian criminal offence of article 140bis CC, which penalises (in)direct incitement to terrorism – again without providing many details on what is exactly understood by the various terms. The court found that the conduct of the Spanish rapper is thus not criminalized according to the Belgian law and therefore, the EAW should not be executed by the Belgian authorities. The case is now under appeal.

---

[35] Court of Appeal, 8 March 2019, no. 2019/939, 36: "The question whether the PKK/HPG is a terrorist organisation in international norms, is after all not relevant now it is determined that this organisation is not punishable as a terrorist group under Belgian criminal law in the light of the given circumstances." (non-official translation)

[36] Loi 3 Aout 2016 portant des dispositions diverses en matière de lutte contre le terrorisme (III), MB 11 Aout 2016, 50973. http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&table_name=loi&cn=2016080315.

[37] Cour Constitutionelle, 2018/201412, arrêt n° 31/2018 du 15 mars 2018, http://www.ejustice.just.fgov.be/cgi_loi/loi_a.pl?=&sql=(text+contains+(%27%27))&rech=1&language=fr&tri=dd+AS+RANK&numero=1&table_name=loi&F=&cn=2016080315&caller=image_a1&fromtab=loi&la=F&pdf_page=18&pdf_file=http://www.ejustice.just.fgov.be/mopdf/2018/06/13_1.pdf.

[38] Maria-Luisa Cesoni, speech at the public debate of Comité T at the Senate, 12 March 2019, Brussels.

c. Particular problems related to prosecution of children

1. Juvenile justice

The juvenile court has the exclusive competence[39] to deal with minors who are accused of committing terrorist offences. Even in criminal cases, the juvenile judge does not impose penalties, but orders "measures to be taken", such as placement in foster families or juvenile institutions, obligation to undertake community service and in exceptional cases and if older than 16, imprisonment. When an accused minor is 16 years old, the juvenile court may decline jurisdiction, so that the minor is brought before a special branch in the juvenile court that will act as a criminal court.[40] Because of this separate juvenile justice system, the judges interviewed could not provide much information on specific issues in juvenile cases.

2. Child soldiers

One interviewee considered that it should become a custom of international law not to prosecute children for criminal offences, including for war crimes. Theories of child soldiers as victims rather than agents are being invoked to protect minors from prosecution for terrorist offences.[41]

However, the interviewee noted that this is always a complex exercise to balance the best interest of the child with the seriousness of offences that they (possibly) committed.[42] In a recent case, the youth branch of the Court of Appeal decided on a case of a 15-year-old boy who was influenced by the recruiter Jean-Louis Denis[43] and travelled to Syria in 2013. He was prosecuted for participation in terrorist activities. The defense lawyer relies on the IHL exception in article 141bis CC to argue that he cannot be punished for joining an armed group, as he was a minor and therefore, falling under the protection of child soldiers. International customary law prohibits the criminal prosecution of child soldiers as they were forced to join the armed groups and should be considered as victims, rather than perpetrators. This argument was rejected by the court as the boy was found to be free from any threat or force or violence and deliberately chose to travel to Syria, knowing the implications of this journey.[44] The Court found his participation established, even though the Court cannot criminally sanction him as he was minor during the acts. Some criticize this decision, as e.g. parents and persons within the religious community have repeatedly alerted the police services to the aggressive recruiting practices of Denis without the latter being arrested.[45]

---

[39] Only in very exceptional cases, when the offences are particularly serious, the minor can be sent to the Assize court.

[40] European e-Justice, Belgium : Juvenile Court, https://e-justice.europa.eu/content_ordinary_courts-18-be-en.do?member=1 (last accessed on 3 June 2019).

[41] Interview Expert A1 (anonymous), conducted on 21 January 2019.

[42] Interview Judge A2 (anonymous), conducted on 27 February 2019. Also see in detail the case on child soldiers that was sent by Judge A2.

[43] This recruiter is well-known for his recruiting of minors to travel to Syria and Iraq for terrorist purposes. See https://www.ft.com/content/ec698aca-2745-11e6-8ba3-cdd781d02d89 (last accessed on 3 June 2019).

[44] Court of Appeal Brussels, 25 February 2019, no. 2018/PJ/4.

[45] After many youngsters have left Belgium, Jean-Louis Denis was arrested and sentenced in appeal in 2016 as member of a terrorist network for 5 years of imprisonment. See https://www.ft.com/content/ec698aca-2745-11e6-8ba3-cdd781d02d89; https://www.rtbf.be/info/societe/detail_terrorisme-jean-louis-denis-condamne-en-appel-a-cinq-ans-de-prison-au-lieu-de-dix?id=9458090 (last accessed on 3 June 2019).

3. Return of children of FTF parents

Belgium has difficulties, like many other countries, with the policy regarding the return of their citizens who are still in Syria or Iraq, often captured by Kurdish authorities after IS was defeated. Should they be actively repatriated with their children and brought to trial before Belgian Courts, or is this outside Belgium's legal responsibility? The question is still currently debated. It was also indicated that it is sometimes not in the best interest of the child to return to their parents, although the authorities decided this in the best interest of the child.[46]

d. Discriminatory way of implementing the CT provisions

1. Political

According to the experience of the judge interviewed, there is a political element embedded in the legislation, which should not be there. There is a real risk of arbitrariness in the decision whether a group is considered to be a terrorist group or not. This is a very dangerous aspect about the counter-terrorism laws.[47]There is a "blacklist" of the UN and another list of the EU, but the question is who holds the pen? Further, almost all cases in Belgium are linked to Islamic terrorism.

2. Procedural

Once an offence or behaviour is qualified as a terrorist offence, a whole new regime of procedural rules applies (telephone taps, house searches, pretrial detention, solitary confinement etc.). This might be useful however, if it facilitates the investigations. But for one judge interviewed, "making our work easier" is not enough to justify any different procedural measure. Legislators need to guard our principles of the rule of law and non-discrimination, exactly because this is what terrorism tries to undermine.[48]

3. Extra-judicial

One interviewee noted that there are many discriminatory effects outside the judicial proceedings, e.g. a man who got fired from his job in Zaventem airport because one of his brothers was involved in one of the terrorist attacks or not being able to get a job at STIB (public transportation) because his/her name is mentioned in a file because of the arrest of a friend. This type of discrimination is widespread and has a serious impact on individuals.[49]

e. The role of gender

One interviewee observed that there used to be the assumption of women and girls being the victims, rather than agents of terrorist activities. Nevertheless, this assumption has be proven wrong, according to the interviewee's experiences, as well as any other assumption regarding "the profile" of a foreign terrorist fighter.[50] Since 2016,

[46] Interview Judge A3 (anonymous), conducted on 26 March 2019.
[47]Interview Judge A2 and Expert A1.
[48] This is also not only in terrorism related cases but also in the trafficking of narcotics f.e. (Interview Judge A3 (anonymous), conducted on 26 March 2019.)
[49] Interview Judge A3 (anonymous), conducted on 26 March 2019.
[50] Interview Judge A2 (anonymous), conducted on 27 February 2019.

there is no distinction made between men and women in terrorism related cases.[51] Nevertheless, it should be noted that women are less likely to be subject of arrest warrants / pre-trial detention than men (but this is true for all types of crimes).[52]

III. Specific challenges in national law and practice

a. Definitions

(*Supra*)

b. Freedom of expression

For one of the judges interviewed, speech must be acknowledged to be a powerful weapon that can cause a lot of harm. Therefore, it should be punishable to use the freedom of speech in such way that it harms others in a clear disproportional way. However, there is a thin line between recruiting youngsters for a terrorist organisation and sharing ideas publicly. The judge concluded that luckily, in many cases it is quite clear how to proof the intentions of the individual.[53] The other judge interviewed is more critical towards the legal limitation of freedom of expression and believes speech should only be criminalised if it falls under "recruitement" for terrorist purposes. There should also always be a link with a concrete terrorist offence, so the penalisation of propaganda should only be punished if the propaganda is in favor of something that is in itself forbidden.[54]

c. Specific terrorist offences (Articles 6-11 CT Dir) and burden of proof

According to one expert interviewed, the burden of proof for "terrorist intent" is very low in practice. Someone who shares videos on Facebook or sympathises with certain ideologies is not *per se* ready to kill citizens in a terrorist attack.[55] The judges who were interviewed do not however subscribe to this statement. According to them, the proof of the intent or knowledge should always be solid – in terrorist cases as in for ordinary crimes. Assessing the weight of the evidence is the job of the criminal judge in all criminal cases.[56]

d. Special procedures

As has been noted above, there are different investigative, criminal and penitentiary procedures applicable in terrorism related cases.

Another serious concern that was raised was in absentia trials of FTFs.[57] The right to fair trial is being undermined if the prosecuted person cannot attend his or her criminal

[51] OSCE Guidelines on Foreign Terrorist Fighters, p14, footnote 29.
[52] Interview Judge A3 (anonymous), conducted on 26 March 2019.
[53] Interview Judge A2 (anonymous), conducted on 27 February 2019.
[54] Interview Judge A3 (anonymous), conducted on 26 March 2019.
[55] Interview Expert A1 (anonymous), conducted on 21 January 2019.
[56] Interview Judge A3 (anonymous), conducted on 26 March 2019.
[57] Interview Expert A1 (anonymous), conducted on 21 January 2019.

trial.[58] A Judge interviewed for this study also highlighted the importance of seeing the suspect in court, to make a proper case by case interpretation.[59]

e. Sanctions

Sanctions for terrorist offences are higher than those for other offences such as homicide. The interviewees have different opinions about the proportionality of sanctions imposed in cases of terrorism. According to the legal expert interviewed, they are too high, but the judges strongly disagree and would rather have more differentiation or margin of appreciation according to the severity of the terrorist offences – in particular for the offence of participating to activities of a terrorist group for which the penalty is 1 month to 5 years which does not leave much margin of appreciation to the judge to make a distinction between someone that drives terrorists to the airport and the leader of the group.[60] One interviewee considered that, in comparison to other European countries, Belgium has quite low penalties.[61]

For deprivation of nationality, see *supra.*[62]

IV. Conclusions: the most important challenges

As a country which has suffered significant terrorist attacks, and which has a relatively large number of "foreign terrorist fighters" (per capita) who joined IS in Syria/Iraq, Belgium has responded with comprehensive counter-terrorism legislation, including legislation implementing the Directive. From this preliminary study, several of the main challenges in implementing this legislation in compliance with Belgium's human rights obligations can be identified.

Firstly, there is a continuous ambiguity embedded in the criminal law as the provisions remain too broad and too little defined. In addition there are many offences that (almost) exclusively rely on the subjective element of the "terrorist intent". This results in the serious risk of arbitrary interpretations, while the criminal provisions should be interpreted restrictively.

Secondly, the different investigative and penitentiary procedures in terrorism related cases are based on a narrative that disproportionally prioritises security over liberty and freedom. It also increases the pressure on authorities to qualify persons and situations as terrorism related, so that these different procedures become available for the investigative authorities for example.

Thirdly, there is the complex debate in Belgium ongoing on the returnees from Syria and Iraq, especially concerning children, including on whether or in what circumstances they should be prosecuted, and the extent to which international humanitarian law or Belgian

[58] OSCE guidelines on FTF, p41, fn 132.
[59] Interview Judge A2 (anonymous), conducted on 27 February 2019.
[60] Interview Judge A2 (anonymous), conducted on 27 February 2019 and interview Judge A3 (anonymous), conducted on 26 March 2019.
[61] Federal Prosecutor Frédéric Van Leeuw also highlights this in his observations and compares Belgium with France, where sanctions for the same conduct can differentiate between 5 and 25 years. Frédéric Van Leeuw, Public debate of Comité T at the Senate, 12 March 2019, Brussels.
[62] Also see OSCE guidelines on FTF, fn 171 + Amnesty International.

counter-terrorism law applies to their actions. This will remain an important point of discussion.

Finally, limitations on public access to judgments of courts, including in counter terrorism cases, raise problems of legal certainty, and of the right of access to information on matters of public interest concerning security and human rights.

ANNEX : Table of comparison

EU Directive 2017/541	Belgian Criminal Code (Code pénal)
Definition of a Terrorist Group (Article 2) The Directive defines a '*terrorist group*' as '*a structured group of more than two persons, established for a period of time and acting in concert to commit terrorist offences*.' A '*structured group*' means '*a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure*.'	Article 139 of the Criminal Code defines a terrorist group in terms similar to those in the Directive as "an organised association of more than two people, established on a lasting basis and taking concerted action with a view to the commission of terrorist offences covered by Article 137." The article also stipulates that an "organisation whose real purpose is solely of a political, trade union or philanthropic, philosophical or religious nature, or which solely pursues any other legitimate aim, cannot, as such, be considered a terrorist group".
Definition of a Terrorist Offence (Article 3) The Directive requires states to criminalize certain intentional acts as well as threats to commit those acts when committed with the aim of one or more of the following aims: *(a) seriously intimidating a population; (b) unduly compelling a government or international organisation to perform or abstain from performing any act; and (c) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation*.	Belgian law (article 137 Criminal Code) defines terrorist offences in the same way as the directive and includes some additional elements such as offences against tombs, statutes, etc.
Offences Relating to a Terrorist Group (Article 4) The Directive requires states to criminalize *a) directing a terrorist group* and *b) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group*.	The Belgian provision is to some extent identical to the Directive, thus also lacking clarification as to the required level of participation or involvement. However it could be said that recent amendments to Article 140 go even further than the Directive as you can be convicted because you knew or should have known that your participation would or could contribute to the criminal activities of a terrorist group. **Inserted to Article 140 by Law 2016-12-14/09, art.2, 120, in force from 1 January 2017**
Public Provocation to Commit a Terrorism Offence (Article 5) The Directive requires states to criminalise "*the distribution, or otherwise making available by any means, whether on or offline, of a message to the public, with the intent to incite the commission of one of the offences listed in Article 3(1)(a) to (i), where such conduct, directly or indirectly, such as by the glorification of terrorist acts, advocates the commission of terrorist offences, thereby causing a danger that one or more such offences may be committed*." It	The Belgian Criminal Code is very similar to the Directive but does not explicitly refer to the glorification of terrorist acts, nor that provocation both online and offline is equally covered. Similarly, a very low threshold is set out in the Belgian Criminal Code.

requires such acts are punishable when committed intentionally. A very low threshold is set by considering an act punishable when it causes danger that an offence may be committed and criminalizes conduct directly or indirectly advocating terrorist offences.	
Recruitment for terrorism (Article 6) The Directive requires States to criminalise "soliciting another person to commit or contribute in the commission of" offences listed as a terrorist offence or offences relating to a terrorist group. The Directive explicitly states that recruitment is punishable only when committed intentionally.	Belgian law (article 140ter) criminalises the act of recruiting a third person to commit a terrorist offence. The criminal code does not explicitly require that the recruitment be committed intentionally. Like the Directive, the criminal code prohibits threatening to commit a terrorist act.
Providing Training for Terrorism (Article 7)	Implemented in : Art 140quater
Receiving Training for Terrorism (Article 8) The newly introduced Article 8 requires states to criminalize the receipt of instruction, from another person, "*in the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or in other specific methods or techniques*", for the purpose of committing a terrorist offence (excluding the threat to commit a terrorist offence). The training must be undertaken intentionally.	The Belgian criminal code is largely identical to the Directive, punishing the receipt of "instruction" and "teaching" (*formation*). (Art 140quinquies)
Travelling Abroad for the Purpose of Terrorism (Article 9) Article 9 of the Directive introduces another new offence which requires States to criminalize "*travelling to a country other than that Member State for the purpose of the commission or contribution to a terrorist offence referred to in Article 3, for the purpose of the participation in the activities of a terrorist group with knowledge of the fact that such participation will contribute to the criminal activities of such a group as referred to in Article 4, or for the purpose of the providing or receiving training for terrorism referred to in Articles 7 and 8*". Subparagraph (a) of paragraph 2 requires states to criminalize travelling to their territories for the above purposes. Subparagraph (b) punishes "*preparatory acts undertaken by a person entering that Member State with the intention to commit or contribute to a terrorist offence, as referred to in Article 3*". For all these acts to be punished, they must be committed intentionally.	The Belgian Criminal Code criminalizes traveling for terrorism when the individual leaves the national territory with the intention to commit a terrorism offence in Belgium or any other country. The criminal code does the same for anyone who returns to Belgium with the intent to commit a terrorist offence in Belgium or any other country.However, the two provisions that cover these crimes explicitly exclude the threat to commit a terrorist offence, as opposed to the Directive which refers to the entire Article 3 without the exception of threatening to commit a terrorist offence. Art 140sexies para 1 (para 140septies, **Inserted to Article 140 by Law 2016-12-14/09, art.2, 120, in force from 1 January 2017**)

Organising or otherwise facilitating travelling for the purpose of terrorism (Article 10)	
Financing of terrorism (Article 11) In a newly introduced provision, the Directive requires States to criminalize '*providing and collecting funds, by any means, directly or indirectly, with the intention that they be used, or in the knowledge that they are to be used, in full or in part, to commit or to contribute to any of the offences referred to in Articles 3 to 10*.'There is no requirement that the funds in fact be used, in full or in part, to commit or to contribute to a terrorist offence, nor that the offender knows for which specific offence(s) the funds are to be used.	The law criminalizes the financing of terrorism or of a terrorist group's activity as an act of participation. It covers any form of financing, thus also covering indirect financing. Belgian law does require the knowledge that this participation (i.e. the financing) contributes to the commission of a crime by a terrorist group.
Relationship to Terrorist Offences (Article 13) In a newly introduced provision, the Directive states that preparatory / non-principle offences (membership of a terrorist group, travelling, financing, provocation, facilitating travel) it is not necessary that a principle offence be actually committed.	The Belgian Code does not contain a specific provision and does not require that a specific terrorist offence actually happened. Instead, the incriminated act is punishable if committed with the general objective of the commission of a terrorist offence, meaning one of the offences listed together with one of the aims necessary to make such offence a terrorist offence.
Support to Victims (Title V Articles 25-26) The Directive includes a whole section on the rights of victims of terrorism and the support services that should be available. This builds on the Victims Directive 2012/29/EU which details the provision of victim support services. Member states had until 2015 to implement the Victims Directive but as many states had limited services in place, it is likely that effective implementation will take some time.	The status of victim of terrorism and the rights related are created by the L. 18.07.2017. Victims of acts of terrorism may lodge a compensation claim with the Committee for Financial Aid to Victims of Acts of Violence. The Committee is responsible for ruling on requests for financial assistance from all victims of deliberate acts of violence, not just acts of terrorism.

What might still be transposed is:

- self-training (looking up info on the internet on how to make a bomb, for instance // receiving and giving training is already in Belgian law) – IS NOT IN THE DIRECTIVE?
- Glorification /apology of terrorism – for the moment under direct and indirect incitement – as such not existing as specific offence, but might be in the future
- State of emergency
- Administrative control measures – limitation of freedom of movement – not yet possible in Belgium, but exists now in the neighbouring countries, so it might be a question of time when these will materialize

PART II. SPAIN

I. Applicable legal framework

a. National legal framework of counterterrorism laws

Spain's legal framework is affected by the history of its Constitution and relatively recent transition to democracy, which has been tainted by a decade-long conflict with certain groups in the Basque countries that has been addressed in the frame of counter-terrorism.

Because of this heritage, which lasted until a couple of years ago when ETA dismantled, Spain is rather unique among EU Member States in having a reference to terrorism in its own Constitution.

Article 55 of the Constitution deals with the derogations to constitutional rights. After listing those that can be derogated from under a state of emergency in paragraph 1, it states in paragraph 2:

> *2. An organic law may determine the manner and the circumstances in which, on an individual basis and with the necessary participation of the Courts and proper Parliamentary control, the rights recognised in Articles 17, clause 2, and 18, clauses 2 and 3, may be suspended as regards specific persons in connection with investigations of the activities of armed bands or terrorist groups.* [63]

The derogation refers[64] to the length of preventive detention and its judicial review (article 17.2 Constitution) and the right to respect for the home, restrictions on searches, seizure of post and surveillance of communications (article 18.2 and 3 Constitution).

The Criminal Code has undergone a major reform in 2015 with the Organic Law 2/2015 of 30 March that completely reformed, in particular, its section on counter-terrorism offences. Finally, Organic Law 1/2019 of 20 February inserted some modifications to bring the legislation in line with EU law, including the EU Directive 2017/541.

Criminal law

With regard to criminal offences, the general part of the criminal code includes criminal responsibility for attempt[65] unless the author openly desisted from the execution of the offence and impeded its outcome.[66]

---

[63] Official translation : http://www.congreso.es/portal/page/portal/Congreso/Congreso/Hist_Normas/Norm/const_espa_texto_ingles_0.pdf

[64] "Among the rights subject to derogation are the 72-hour cap on preventive detentions, id. art. 17(2); the warrant requirement for domiciliary searches, id. art. 18(2); and the warrant requirement for surveillance of postal, telegraphic, and telephonic communications, id. art. 18(3)." https://www.nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-82-2-MacKinnon.pdf

[65] Article 16.1 CC: Hay tentativa cuando el sujeto da principio a la ejecución del delito directamente por hechos exteriores, practicando todos o parte de los actos que objetivamente deberían producir el resultado, y sin embargo éste no se produce por causas independientes de la voluntad del autor.

[66] Article 16.3 CC: 3. Cuando en un hecho intervengan varios sujetos, quedarán exentos de responsabilidad penal aquél o aquéllos que desistan de la ejecución ya iniciada, e impidan o intenten impedir, seria, firme y

As in all criminal systems, conspiracy exists when two or more persons plan the execution of a criminal offence and agree to its execution.[67] Proposition, or inviting a person to commit a crime, also triggers criminal liability. These two forms of criminal liability must be expressly provided for in the contested criminal offence.

Of interest for its potential interference with freedom of expression is the possibility to have criminal liability triggered for "provocation" of an offence, under article 18 of the Criminal Code:

> ***1.*** *Provocation exists when a direct incitation is present by means of the printing press, radio broadcasting or any other means with a similar effectiveness, affording publicity, or when persons have gathered, inciting the perpetration of a crime.*
> *Conniving at a criminal act by expressing approval thereof, for the purposes of this Code, is presentation, before an assembly of persons, or by any means of diffusion, of ideas or doctrines that defend the offence or praise the principal. Connivance at a criminal act by expressing approval thereof shall only be criminal as a form of provocation and if, due to its nature and circumstances, it constitutes a direct incitement to commit a crime.*
> ***2.*** *Provocation shall be punished exclusively in cases in which the Law foresees this. If the provocation has been followed by perpetration of the offence, it shall be punished as induction.*

Sanctions and accessory penalties

Persons convicted of terrorist offences may be subject, at the decision of the judge or tribunal that convicted them, to control orders placing restrictions on their activities or freedom of movement, prohibition or requirement of residence in certain places or prohibition of proximity to certain people[68] and may be ordered to provide their DNA to the authorities for their database, though only for identification of identity and gender.[69]

Crimes of terrorism are not subject to a statute of limitations, if they caused the death of a person.[70]

Criminal offences

Criminal offences are enshrined in the code that punishes the acts of causing explosion or causing destruction, regardless of the motive (article 346 CC), as well as those that provide the means for such acts including in case of negligence (article 348 CC).

An association is unlawful if:

- it has the objective of committing a criminal offence or, after having been set up, promotes the commission of an offence
- despite having a lawful scope, uses violent means or changes or control personality for its execution
- paramilitary organisations

---

decididamente, la consumación, sin perjuicio de la responsabilidad en que pudieran haber incurrido por los actos ejecutados, si éstos fueren ya constitutivos de otro delito.

[67] Article 17.1 CC.

[68] Article 54 and 48 CC.

[69] Article 129 bis CC.

[70] Article 133.2 CC.

- it fosters, promotes or incites directly or indirectly hatred, hostility, discrimination or violence against people, groups or associations on grounds of ideology, religion, or belief, membership of an ethnic group, race or national group, gender, sexual orientation, family situation, illness or disability.[71]

Provocation, conspiracy and proposition to commit the criminal offence of unlawful association is also punished.[72]

Organised crime and terrorism

According to article 570bis of the criminal code, a person can be criminally liable if he or she promotes, constitutes, organises, co-ordinates or directs a criminal organisation, with heightened punishment if this has the purpose of committing serious criminal offences. Also criminally liable are those that participate actively in the organisation, are members of it or cooperate financially or in any other way with it, with heightened punishment if the purpose of the organisation is the commission of serious crimes.

A criminal organisation is defined in paragraph 1 as a stable group formed by one or more persons, for an indefinite term, in collusion and coordination to distribute diverse tasks or duties in order to commit criminal offences.

Setting up, financing or being part of a criminal group is also punished under article 570ter. A criminal group is the union of more than two persons who, without having one or any of the requirements of the criminal organisation, have as a purpose the joint (*concertada*) commission of criminal offences.

It is symptomatic that crimes relating to terrorist organisations are placed immediately after organised crime groups in the criminal code.

Indeed, article 571 CC considers terrorist organisations or groups, those that, fulfill respectively the requirements of articles 570bis or 570ter (criminal organisation and criminal group) and have the aim to commit one of the criminal offences of terrorism inserted in Chapter VII, subchapter 2 of the Criminal Code.

These offences include explosions or other destructive acts, as well as arson (article 572.

More generally, terrorism offences are considered by article 573 the commission of any criminal offence against life or physical integrity, freedom, moral integrity, sexual integrity and freedom (*libertad e indemnidad sexuales*), patrimony, natural resources or the environment, public health, offences of catastrophic risks, arson, offences against the Crown, attempted murder and holding, trafficking or deposit of weapons, ammunition or explosives, as provided for in the criminal code, and the hijkacking of airplanes, ships or any other means of transport of people or goods, as well as certain informatic offences, when they are committed for one of the following purposes:

> *1) Subverting the constitutional order, or seriously supress or destabilise the functioning of political institutions or of the social or economical structures of the State, or to force public powers to realise an act or abstain from an act*
> *2) Seriously disrupting public peace*
> *3) Seriously destabilising the functioning of an international organisation*

[71] Article 515 CC.
[72] Article 519 CC.

4) Provoke a state of terror in the population or part of it.[73]

Apart from this definition, the Criminal Code enshrines other "terrorist crimes". [74]

Article 574 CC criminalises the deposit or holding of weapons or ammunition, explosives, inflammable substances, as well as their fabrication, trafficking, transport or distribution or the use or development of such substances, as well as of nuclear, radiological, chemical or biological weapons, if committed with the purpose of terrorism.

Article 575 CC punishes with imprisonment from two to five years any person that, with the aim of pursuing any of the offences enshrined in the Code's Chapter on terrorism (listed in this paper), receives training (*adoctrinamiento o adiestramiento*) whether military or in fighting, or in techniques to develop chemical or biological weapons, in the elaboration or preparation of explosives or other substances enlisted in article 574 (para. 1). This applies even when the person tries to train him- or herself with the same purpose (para 2).

This provision introduces a presumption of having committed such criminal offence of training if the person, with the purpose enshrined in article 575 CC, connects ordinarily (*de manera habitual*) to one or more communication services that are accessible to the public online or to content available on the internet or to a service of electronic communication whose content is aimed at or capable of inciting to join a terrorist organisation or group, or to cooperate with any of them or in the pursuance of their goals. These acts are considered to have occurred in Spain if the access to the content took place from Spain.[75] The criminal offence is committed as well when a person, with the same purpose, acquires or holds documents that are directed or, because of their content, are capable of inciting to join a terrorist organisation or group, or to cooperate with any of them or in the pursuance of their goals.

Also criminalised in article 575 CC is travel, with the same purpose, to a foreign territory controlled by a terrorist group or organisation, in order to cooperate with a terrorist

[73] 1. Se considerarán delito de terrorismo la comisión de cualquier delito grave contra la vida o la integridad física, la libertad, la integridad moral, la libertad e indemnidad sexuales, el patrimonio, los recursos naturales o el medio ambiente, la salud pública, de riesgo catastrófico, incendio, contra la Corona, de atentado y tenencia, tráfico y depósito de armas, municiones o explosivos, previstos en el presente Código, y el apoderamiento de aeronaves, buques u otros medios de transporte colectivo o de mercancías, cuando se llevaran a cabo con cualquiera de las siguientes finalidades:
1.ª Subvertir el orden constitucional, o suprimir o desestabilizar gravemente el funcionamiento de las instituciones políticas o de las estructuras económicas o sociales del Estado, u obligar a los poderes públicos a realizar un acto o a abstenerse de hacerlo.
2.ª Alterar gravemente la paz pública.
3.ª Desestabilizar gravemente el funcionamiento de una organización internacional.
4.ª Provocar un estado de terror en la población o en una parte de ella.

[74] Article 573.3.

[75] Se entenderá que comete este delito quien, con tal finalidad, acceda de manera habitual a uno o varios servicios de comunicación accesibles al público en línea o contenidos accesibles a través de internet o de un servicio de comunicaciones electrónicas cuyos contenidos estén dirigidos o resulten idóneos para incitar a la incorporación a una organización o grupo terrorista, o a colaborar con cualquiera de ellos o en sus fines. Los hechos se entenderán cometidos en España cuando se acceda a los contenidos desde el territorio español.
Asimismo se entenderá que comete este delito quien, con la misma finalidad, adquiera o tenga en su poder documentos que estén dirigidos o, por su contenido, resulten idóneos para incitar a la incorporación a una organización o grupo terrorista o a colaborar con cualquiera de ellos o en sus fines.

organisation or group, or in order to commit any of the offences enshrined in this Code's chapter on terrorism (para 3).

The financing of terrorism is punished by article 576 CC with imprisonment from five to ten years and a fine of three to five times the value of the financing. The financing can be executed "directly or indirectly" and by "*receiving, acquiring, owning, using, converting, transferring or performing any other activity*" with goods or values of any sort with the intent that they be used, or knowing that they will be used, wholly or in party, to commit any of the criminal offences enshrined" in the Code's terrorism Chapter (para. 1). If the goods or funds are effectively given to a person responsible for a terrorism offence, the maximum penalty is applied (para2). If they are used in the execution of concrete terrorist acts, this fact will be punished as co-authorship or conspiracy, as provided by the Code. If the financing of terrorism involved a crime against patrimony, e.g. extortion, false documents, or any other crime, the punishment will be at its maximum (para 3). Persons that are charged by law to prevent terrorist financing may be convicted if, by gross negligence, they cause the lack of detection or the blockage of any of these activities (para. 4). Legal persons can be responsible for this offence (para. 5)

Any person that accomplishes, claims or facilitates any act of cooperation with the activities or purposes of a terrorist organisation, group or element, or to commit any offence enshrined in the Chapter on terrorism, is liable to five to ten years of imprisonment.[76] Article 577.1 CC lists examples of cooperation such as information on or surveillance of persons, goods or buildings; the building, adaptation, selling or use of accommodation or storage facilities; the hiding, fostering or transfer of persons; the organisation of training practices or assisting in them; the provision of IT services; or any other form of equivalent cooperation or assistance to the activities of terrorist groups or organisations.

If any injury or damage to life, physical integrity, freedom or patrimony occurs from these activities, these will be punished as co-authorship or conspiracy depending on the circumstances.

The same punishment as for cooperation in terrorism offences is foreseen for those that accomplish activities of recruitment, indoctrination or training that are directed to or that, because of their content, are capable of inciting to join a terrorist group or organisation or to commit any of the crimes in this Chapter of the Code.[77] The same is the case for those facilitating training (*adiestramiento o instruccion*) on fabrication or use of explosives, weapons or other dangerous weapons or substances, or on methods or techniques especially apt to the commission of an act of terrorism, with the intent or knowledge that they be used for this act.[78]

If cooperation in any of the activities or purposes of a terrorist organisation or group, or in the commission of any of the criminal offences enshrined in the terrorism Chapter of

[76] Articel 577.1 CC
[77] Article 577.2 CC.
[78] Furthermore : Las penas se impondrán en su mitad superior, pudiéndose llegar a la superior en grado, cuando los actos previstos en este apartado se hubieran dirigido a menores de edad o personas con discapacidad necesitadas de especial protección o a mujeres víctimas de trata con el fin de convertirlas en cónyuges, compañeras o esclavas sexuales de los autores del delito, sin perjuicio de imponer las que además procedan por los delitos contra la libertad sexual cometidos.

the Criminal Code is the result of gross negligence, the punishment will be of six to eighteen months of imprisonment and a fine of six to twelve months.[79]

Throughout the years of the confrontation with ETA and its terrorist attacks, there was criticism of the use and abuse of the offence of glorification of terrorism (*entalecimiento*). The 2015 reform of the Criminal Code has modified this provision, yet it has not addressed the main concerns against its disproportionate interference with the rights of freedom of expression and opinion.

Article 578 of the criminal code prohibits the public glorification (*entalecimiento*) or justification (*justificacion*) of the criminal offences enshrined in the terrorism Chapter of the Criminal Code or of the persons that have participated in their execution. Equally criminalised are the realisation of acts that brings discredit, despise or humiliation to victims of terrorist crimes or their family members. The punishment is imprisonment of one to three years and a fine of 12 to 18 months.

The use of media, internet, electronic communications or IT are an aggravating circumstance (para 2) as well as the fact that the acts, depending on the context, are apt to seriously disrupt public peace or to create a serious sense of insecurity or fear in society or part of it (para 3).

The judge can order the destruction or deletion of the documents or files used for the glorification or justification as well as withdrawal of the online content, including by forcing providers, search engines and IT services when this is proportionate to the seriousness of the acts and necessary to avoid diffusion of the information (para 4).

Incitement or solicitation to commit any of the offences enshrined in the Chapter on terrorism of the Criminal Code, by public messages or directives, or diffusion of such a messages capable to provoke such incitement is punished with one or two degrees less than that of the principal offence.[80]

Any other act of provocation, conspiracy or proposition to commit any of the offences of the Terrorism Chapter is liable to the same punishment.[81]

The offences enshrined in the Terrorism Chapter of the Criminal Code carry with them the accessory punishments of prohibition on public service, and on the exercise of certain professions or educational offices for a time between six and 20 years in addition to the punishment of imprisonment. These accessory sanctions can be issued based on an assessment of their proportionality to the seriousness of the crimes, the number of crimes committed and the individual situation of the offender.[82] Surveillance measures may also be imposed (para 2).

It is a mitigating circumstance that affects the calculation of the punishment if the concerned person has voluntarily abandoned his or her criminal activities, has presented him- or herself to the authorities confessing his or her deeds and actively cooperates with the authorities to avoid the realisation of the crime, or assists in the

[79] Article 577.3 CC.
[80] Article 579.1-2 CC.
[81] Article 579.3 CC.
[82] Article 529bis.1 CC.

identification or capture of those responsible or to impede the development of a terrorist group, organisation or other element of which he or she was part. [83]

Investigative measures

The Code of Criminal Procedure (*Ley de Enjuiciamiento Criminal – LEC*) gives power to law enforcement authorities under judicial authorisation to carry out undercover operations (article 282bis) in cases of organised crime and terrorism.

In the period of confrontation with ETA, there was a lot of controversy about violations of human rights in Spain because of the so-called *"incommunicado"* detention. [84] Nowadays, this preventive detention regime is not used as frequently as in that period, according to the interviewees.[85]

In the reformed text of 2015, *incommunicado* detention may be ordered by an investigative judge when there is urgent necessity to avoid serious consequences that could put in danger the life, freedom or physical integrity of a person; or the urgent necessity of an immediate action by the investigative judges to avoid that the criminal trial be seriously compromised. It cannot last more than ten days[86] and cannot be applied to persons below 16 years of age.[87] However, the Spanish Constitutional Court decided in 1987 that this practice was unconstitutional.[88] Hereafter, the Parliament shortened the period of ten days to five days in case of suspicion of terrorism.[89] The maximum period for preventive detention in normal circumstances is 72 hours.[90]

Under this regime, the investigative judge may seize some of the detainee's personal belongings if that is strictly necessary to the purpose of not communicating with the outside world. Only communications that will not frustrate the purpose of the *incommunicado* nature of the detention can be authorised. The detainee can ask to be examined by a second physician than the one ordinarily available, but the judge must assign this one. Also the freedom of the detainee to choose their attorney is restricted.[91]

Under this form of detention the detainee may be deprived temporarily of the right to designate a lawyer of choice, to communicate to persons apart from the judge, prosecutor or forensic doctor, to have private conversations with his or her lawyer and

[83] Article 579bis.3 CC.
[84] Incommunicado detention refers to the practice of severely limiting or denying detainees' rights to communicate with the outside world while in detention. See art. 17.3 and 24.2 Constitution.
[85] See also A. MacKinnon, Counterterrorism and checks and balances : The Spanish and American examples, *NYU Law Review*, 18 April 2007, vol 82.602, 617-619.
[86] See f.e. Art. 2 of the Ley de Medidas Especiales en Relaci ´on con los Delitos de Terrorismo Cometidos por Grupos Armados (B.O.E. 1978, 293) (allowing maximum of ten days of preventive detention of terrorism suspects, provided that government requested prolongation of detention during first 72 hours and received judicial approval of request within 24 hours).
[87] Article 509 LEC.
[88] STC, Dec. 16, 1987 (R.T.C., No. 199, p. 518, at 555). The decision also invalidated another aspect of the prevailing practice that effectively allowed the government to detain a suspected terrorist preventively for 24 hours beyond the 72-hour constitutional maximum before obtaining authorization from the relevant judicial authority.
[89] Ley Org ´anica de Reforma de la Ley de Enjuiciamiento Criminal (B.O.E. 1988, 126) (codified at L.E. CRIM. art. 520 bis(1) (2004)). The police must request judicial approval for prolonged preventive detention during the first 48 hours of detention, and the judicial authority must rule on that request within 24 hours.
[90] Article 17.2 Constitution.
[91] Ley Org ´anica por la que se Desarolla el Art´ıculo 17.3 de la Constituci ´on en Materia de Asistencia Letrada al Detenido y al Preso y Modificaci ´on de los Art´ıculos 520 y 527 de la Ley de Enjuiciamiento Criminal (B.O.E. 1983, 310).

to access his or her lawyer apart from when that is necessary to challenge the lawfulness of the detention. [92]

Special Counter-terrorism Tribunal

The National Court in Madrid (*Audiencia Nacional*) has exclusive jurisdiction in terrorism related cases. Nevertheless, the Spanish Constitution foresees a right for defendants to be tried before an ordinary judge who is predetermined by law.[93]

b. Implementation of the Directive 2017/541

(See table of comparison in Annex I)

Spain is one of the member states of the EU that has a particularly intense experience with counter-terrorism policies dating from before the 9/11 attacks in the United States. Therefore, it had already a long practice and certain expertise on terrorism related legislation and case law, since the 1970s and 80s.

The Spanish Criminal Code has been regularly changed since that period, with the main changes on counter-terrorism provisions in 2003 and 2015. Because the Spanish Constitution is allowing the Parliament to vote organic laws that may change certain criminal investigative procedures, there have been frequent changes f.e. in regards of the preventive and incommunicado detention regime and the rights of detainees to speak with their lawyers.

In general, the Directive 2017/541 is fully implemented in the Spanish Criminal Code which even goes further than the Directive requires:

- Definition of terrorist offence: Seriously disturbing public peace and installing fear among citizens are included in the list of terrorist purposes/aims.
- Definition of terrorist group: There is a distinction between a terrorist group and organisation, in that for a group there is no requirement of duration or stability of the group.
- Self-training or education: Training yourself to be able to commit terrorist offences is criminalised and this offence includes two presumptions of culpability: regularly visiting certain websites and possessing documents that might encourage terrorist activities. There is an intention required for this offence, but it is not clarified in the text what the scope of this intent is.
- Financing of terrorism: Providing means for a concrete terrorist offence will be classified as co-authorship of that offence and providing means to a concrete author of a terrorist offence will be punished with the highest range of penalties of that provision.
- Collaboration with activities or purposes of terrorist organisations: The Directive goes quite far already in stretching the link between the conduct and the actual commission of terrorist offences in e.g. article 4, 10 and 13 of the Directive. Article 577 CC seems to stretch it even further by penalising any act of collaboration with activities or purposes of a terrorist organisation or group. This provision lists some examples of such acts, such as the possibility of broad interpretation of this provision. In addition to that, §2 states that in case of

[92] Article 527.1 LEC.
[93] Article 24.2 Constitution.

damage to humans or properties, the collaborating persons will be punished on the basis of co-authorship or conspiracy to these offenses. Finally, §3 even penalises gross negligence in failing? to act against any form of collaboration.

- Glorification of terrorism: Spain not only explicitly penalises the glorification and justification (indirect incitement) of terrorism, but also the act of discrediting, despising or humiliating victims of terrorism or their family members. Judges and prosecutors have interpreted this provision in a very broad and problematic way, seriously impeaching the freedom of expression.
- Travelling for terrorist purpose: The Spanish provision is narrower than the Directive as it only targets the movement to or residing in a foreign territory that is controlled by terrorist organisations/groups. In this sense, the scope is narrower than the Directive, but at the same time also problematic because of the unclear qualification of "controlled by a terrorist organisation". Also the intentional element of this offence is not specified as in the Directive.

II. The most pertinent challenges / issues faced by the judges / experts in applying counterterrorism measures in line with human rights

a. The main gaps identified

Spain has rather longstanding legal and judicial experiences with counter-terrorism measures. However there is also considerable criticism of Spanish counter-terrorism law, and of the counter-terrorism policy of the Spanish government, including in relation to its impact on human rights. [94]

The lack of legal certainty is an issue that was raised by the interviewees because the definitions in the Spanish law are very vague and very broadly interpreted by judges. Judges are independent, but they experience a considerable pressure from the political system and from the public opinion through the media. Police statements and information collected by the secret services are often quasi-conclusive evidence and this was identified by interviewees as undermining the right to fair trial and the presumption of innocence of the suspects.[95]

Another gap in the conformity of counter-terrorism legislation with human rights is the constitutional possibility to suspend certain rights of fair trial and protection against arbitrary detention in case of terrorism-related offences and not only in case of a state of emergency (art. 55.2 Constitution). The *incommunicado* detention has been criticised a lot in the ETA era and has been subjected to many legislative changes over the years, and it remains a concern. [96]

b. Possible problems with legal certainty

The interviewees do recognise that the provisions in criminal law are generally always quite open and vague. It is perceived as a positive aspect that the judge has some margin

[94] Study for the LIBE Committee, EU and Member States' policies and laws on persons suspected of terrorism-related crimes, December 2017, http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596832/IPOL_STU(2017)596832_EN.pdf .
[95] Summary of interviews (English), see Annex II.
[96] Summary of interviews (English), see Annex II.

of appreciation in applying the law on counter-terrorism. The interviewees also noted the vagueness of the EU Directive itself.[97]

The reform of 2015 did address certain problematic practices, but interviewees indicate that there is still a serious concern about the lack of legal certainty, especially regarding ancillary terrorist offences, where there is a serious risk of over-extended interpretation and thus over-criminalisation of conduct. For example, there used to be an unclear differentiation between supporting and being a member of a terrorist organisation/group, there are broad applications of the provisions on glorification of terrorism and humiliating victims of terrorism and there is uncertainty on the definition of a terrorist organisation/group. In the ETA period, many organisations "*el entorno de ETA*" (around ETA) were included in the qualification of a terrorist organisation/group,[98] but there is no recent jurisprudence on this issue related to terrorism offences inspired by international terrorism. Since the conflict with ETA is over, most of the provisions remained in place in the criminal law. There are not many cases in recent years, but the majority of them are about the offence of glorification of terrorism, applied to persons who criticised law enforcement officers.[99] In these cases the lack of legal certainty shows that there is a concern on the broad and almost banal definition of "terrorism".

c. Particular problems related to prosecution of children

The *incommunicado* detention regime is not applied to minors younger than 16 years old. The age of criminal responsibility is 14 years old, but minors of 14-18 years fall within the juvenile justice system. The interviewees did not raise any problematic practices in this area.[100]

d. Discriminatory way of implementing the CT provisions

Recently, the interviewees did not observe many discriminatory practices in the application of counter-terrorism provisions of the Criminal Code. In the past, there were Basque parties who suffered discrimination.[101]

Nevertheless, there is a potential risk of discriminatory impact embedded in the "*Stop Radicalismo*" anti-radicalisation plan of the Government. In this plan the Government encourages people to report and denounce radical persons or radical behaviour.[102] This could lead to discrimination, xenophobia and islamophobia among the population.

e. The role of gender

There were no particular issues raised regarding gender equality.

[97] Summary of interviews (English), see Annex II.
[98] The impact on the whole Basque region was very serious as many organisations who pleaded for independence and did not publicly defy the use of violence, f.e. by ETA, were qualified as terrorist organisations.
[99] See *infro.*
[100] Summary of interviews (English), see Annex II.
[101] Summary of interviews (English), see Annex II.
[102] Summary of interviews (English), see Annex II.

III. Specific challenges in national law and practice

a. Definitions

The elements to define a terrorist group or a terrorist offence are mainly the same as in the Directive. There are two particularities however. First, there is a reference to the existing provisions of a criminal organisation and a criminal group. This results in a differentiation between terrorist groups and terrorist organisations. Secondly, there are two extra terrorist aims specified in article 573 CC regarding the terrorist offences. "Seriously disrupting public peace" and "provoking a state of terror in the population" are very vague descriptions of what can be interpreted as a terrorist aim.[103] It is also broader than the Directive as it includes, for example, falsification of documents.[104]

b. Freedom of expression

There have been many criticisms on the Spanish counter-terrorism legislation related to the respect (or lack thereof) for the freedom of speech.

In a joint opinion of UN experts on the freedom of expression, published in 2015, it was highlighted that *"criminal responsibility for expression relating to terrorism should be limited to those who incite others to terrorism; vague concepts such as 'glorifying', 'justifying' or 'encouraging' terrorism should not be used."*[105] Also NGOs have advocated to change articles 578 and 579 CC. Especially in 2016, many people were convicted on the basis of "glorification of terrorism" and often artists or musicians were targeted by the rule.[106] This broad interpretation in the case law might have the objective of sending a strong message to the population in order to create a climate of self-censorship, rather than prosecuting individuals to counter terrorism.[107]

Interviewees recognised that glorification, "*apologia*" and humiliation of victims are very problematic offences in the criminal law. Interviewees considered that while they should be interpreted restrictively and with respect for the right to freedom of expression, there is a tendency of regression in Spain with convictions of people sharing comments on social media, musicians writing songs and puppeteers performing in cases that are of dubious relevance to countering terrorism.[108]

---

[103] See also *supra* Section I.
[104] Summary of interviews (English), see Annex II.
[105] Joint Declaration on Freedom of Expression and responses to conflict situations, see https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15921&LangID=E .
[106] « Artists and satirists form one of the watchdog communities necessary in every democracy. They criticize injustice, question the status quo, offer new forms of thought, and collectively speak to all citizens regardless of age or social class. Spain should not try to silence either its rappers or the other artists who have faced charges in recent years, including puppeteers and photographers. Instead, it should safeguard their basic right to freedom of expression, restricting speech only when it is absolutely necessary to protect the legitimate rights and safety of others. » See https://freedomhouse.org/blog/terrorism-laws-are-threatening-freedom-expression-spain. For example: Case of two detained puppeteers Raul Garcia Perez and Alfonso Lazaro de la Fuente; Case of photographer Santiago Sierra; Case of 21 years old student on Twitter.
[107] See f.e. Report of Amnesty International on counter_terrorism laws restricting the freedom of expression in Spain :
https://www.amnesty.org/download/Documents/EUR4179242018ENGLISH.PDF.
[108] Summary of interviews (English), see Annex II.

In 2016, out of 25 prosecuted persons, 22 were found guilty by the *Audiencia Nacional* for glorification of terrorism, with most of the cases including the use of internet (social media) as aggravating circumstances.[109] The Supreme Court, which rules in appeal, seems to apply a more strict interpretation however. Interviewees noted that this is positive in respect of the freedom of expression, but is not improving the consistency of jurisprudence or the legal certainty. Interviewees did state that it appears that prosecutions on the basis of glorification of terrorism have decreased and are interpreted in a more narrow scope than in the past.[110]

Another interviewee stressed that the interpretation of the provisions varies strongly depending on the ideology of the judge.[111] It is also observed that the judges in the *Audiencia Nacional* tend to be more likely to be politically biased because of their centralised position in Madrid.[112] They are also criticised for not being receptive to international human rights law as arguments and even perceiving these instruments as an obstacle rather than rules to comply with.[113]

c. Specific terrorist offences

(see comments in section II.)

1. Glorification

(See *supra[114])*

2. Indoctrination

This new provision in Article 575 CC establishes that the access to communication services with terrorist content is now regarded as a terrorist offence. The provision applies to those preparing to commit a terrorism-related crime by habitually accessing or acquiring content online for the purpose of, or suitable for, the promotion of membership in a terrorist group, or for cooperation with any such group or their goals. Regarding this provision, the Supreme Court in Spain ruled that it is difficult to punish the activity of purely ideological content, because the sole reception of beliefs or ideologies is protected under the rights of freedom of speech, freedom of religion and freedom of thoughts. The limit to those rights is the active indoctrination or incitement to hatred, discrimination and terrorism.[115]

3. Financing terrorism

---

[109] Study for the LIBE Committee, EU and Member States' policies and laws on persons suspected of terrorism-related crimes, December 2017, p132, http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596832/IPOL_STU(2017)596832_EN.pdf .
[110] Summary of interviews (English), see Annex II.
[111] Summary of interviews (English), see Annex II.
[112] Summary of interviews (English), see Annex II.
[113] Summary of interviews (English), see Annex II.
[114] Also see A. Petzsche, The Penalization of Public Provocation to Commit a Terrorist Offence, *European Criminal Law Review*, 2017, vol. 7.
[115] Tribunal Supremo (sala de Io Civil), 2 June 2017, Roj: STS 2251/2017 - ECLI: ES:TS:2017:2251, http://www.poderjudicial.es/search/documento/TS/8059156/Proteccion%20del%20inversor/20170616; Also see https://verfassungsblog.de/passive-indoctrination-as-a-terrorist-offense-in-spain-a-regression-from-constitutional-rights/.

The Spanish law is very specific and comprehensive on the financing of terrorism, including as an offence the falsification of documents and even the negligence of authorities to track and prevent financing of terrorism.

d. Special procedures

(see comments in section I)

Centralised court

(see *supra*)

Incommunicado detention

Persons suspected of terrorist offences may be subject to *incommunicado* detention and restricted access to the prosecution file (*secreto de sumario*) during the investigations.[116] This regime has been criticised and the UN Human Rights Committee insisted on its abolishment in 2013.[117] In the 2015 reform, the system was not abolished but amended.[118] As the Special Rapporteur on Torture already pointed out, this system creates the "opportunity for torture or ill-treatment".[119] In a few cases, mostly related to ETA terrorism in the past, claims of torture and ill-treatment were not adequately investigated by the Spanish authorities. However, in 2017 the Supreme Court decided to overturn the 15-year prison sentence of ETA member Iñigo Zapirain Romano because the *Audiencia Nacional* refused the investigation into his torture allegations.[120] On a positive note, this might indicate that at least there is an effective remedy available for victims.

It is still uncertain how frequently incommunicado detention may be used in the future, especially in the cases of returning foreign terrorist fighters.[121]

Informal information sharing

Many formalised structures are in place to share information with other countries, for example, the Global Counterterrorism Forum, INTERPOL, Europol, Eurojust etc.[122] There is no legislation in Spain on the international exchange of information between judicial bodies in relation to terrorist offences and therefore, there is a lack of safeguards for data protection of sensitive information of the suspect.[123] In addition to that, other

[116] Summary of interviews (English), see Annex II.
[117] United Nations Human Rights Committee, María Cruz Achabal Puertas v. Spain, Communication No. 1945/2010, U.N. Doc. CCPR/ C/107/D/1945/2010, 2013.
[118] *Supra.*
[119] United Nations Report of the Special Rapporteur on the question of torture: Visit to Spain. 6 February 2004, E/CN.4/2004/56/Add.2.
[120] Study for the LIBE Committee, EU and Member States' policies and laws on persons suspected of terrorism-related crimes, December 2017, p132, http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596832/IPOL_STU(2017)596832_EN.pdf.
[121] Study for the LIBE Committee, EU and Member States' policies and laws on persons suspected of terrorism-related crimes, December 2017, p132, http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596832/IPOL_STU(2017)596832_EN.pdf.
[122] Spanish Ministry of Foreign Affairs and Cooperation, http://www.exteriores.gob.es/Portal/en/PoliticaExteriorCooperacion/Paginas/inicio.aspx .
[123] Study for the LIBE Committee, EU and Member States' policies and laws on persons suspected of terrorism-related crimes, December 2017, p130,

human rights issues arise, such as the exchange of information that was obtained through torture, especially when this exchange is with a country outside the EU.

Secret service info

In practice, the statements by police and/or secret services are often treated as *de facto* judicial truth or quasi-conclusive evidence.[124] Challenging those statements is already hard when the suspect is in *incommunicado* detention and building a defence on this is hard. This results in a *de facto* reversed burden of proof and infringes the principle of criminal law that one is innocent until proven differently.

e. Sanctions

There is a possibility to rely on mitigating circumstances in sentencing but judges are pressured to take a strong stand on sanctioning terrorism. For authors who change their mind and voluntary withdraw from actions for example, the judge can take this into account as mitigating circumstances, but the sanctions cannot be annulled. In practice, even mitigating circumstances are not often taken into account.[125]

There seems to be too little efforts to focus on prevention through administrative measures to counter terrorism and too much focus on criminalising and punishing conducts that are indirectly related to terrorism. There is a deterrence factor of criminal law, but this is not the main purpose of criminal law.

IV. Conclusions: the most important challenges

As a Member State with a long experience in the field of countering terrorism, accompanied by long-standing criticism of the compliance of its counter-terrorism measures with international human rights law obligations, Spain has had several legislative reforms over the past decades. Nevertheless, problems with offences and legal definitions that are too vague and judicial interpretations that are too broad remain persistent. Especially the right to freedom of expression, the right to fair trial, the protection against torture and the rights of persons in incommunicado detention are significantly affected by Spanish law and its implementation by the courts.

Application of the law by the *Audiencia Nacional* seems to be particularly problematic in regard to compliance with human rights law and standards. The Supreme Court and Constitutional Court have intervened on several occasions already.[126] The lack of legal certainty is a serious issue in Spain because of the many legal reforms.

http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596832/IPOL_STU(2017)596832_EN.pdf.

[124] Summary of interviews (English), see Annex II.

[125] Summary of interviews (English), see Annex II.

[126] The Supreme Court reversed some decisions in appeal and the Constitutional Court has declared some practices to be unconstitutional.

ANNEX: Table of comparison

EU Directive 2017/541	**Spanish law:**
Definition of a Terrorist Group (Article 2) The Directive defines a '*terrorist group*' as '*a structured group of more than two persons, established for a period of time and acting in concert to commit terrorist offences*.' A '*structured group*' means '*a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure*.'	Article 571 CC: Definition of terrorist organisation or group. The provision is referring to the two previous provision defining a criminal organisation (570bis CC) and a criminal group (570ter CC). A terrorist organisation resp. group fullfills the requirements of that provision but distinguishes itself because of the aim to commit a criminal offence of terrorism (see Chapter VII Subchapter 2 CC).
Definition of a Terrorist Offence (Article 3) The Directive requires states to criminalize certain intentional acts as well as threats to commit those acts when committed with the aim of one or more of the following aims: *(a) seriously intimidating a population; (b) unduly compelling a government or international organisation to perform or abstain from performing any act; and (c) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation*.	Article 573 CC: Any criminal offence against life, physical integrity, moral and sexual integrity, freedom, etc. when commited for one of the following purposes: a) Subverting the constitutional order OR seriously suppress or destabilise the functioning of political institutions or of social or economic structures of the State OR force public powers to realise an act or abstain from an act, b) seriously disrupting public peace, c) seriously destabilising the functioning of an international organisation, d) provoke a state of terror in the population or in part of the population.
Offences Relating to a Terrorist Group (Article 4) The Directive requires states to criminalize *a) directing a terrorist group* and *b) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group*.	Article 570bis CC: Promoting, constituting, organising or directing a criminal organisation or active participation to its activities, membership or cooperation by providing financial means will be punished in general, but the punishements are higher if the objective of such organisation is to commit serious crimes. It is not specified whether there has to be an intention to contribute or knowledge of the fact that it will contribute to the criminal activities.
Public Provocation to Commit a Terrorism Offence (Article 5) The Directive requires states to criminalise "*the distribution, or otherwise making available by any means, whether on or offline, of a message to the public, with the intent to incite the commission of one of the offences listed in Article 3(1)(a) to (i), where such conduct, directly or indirectly, such as by the glorification of terrorist acts, advocates the commission of terrorist offences, thereby causing a danger that*	Article 18 CC: Provocation to commit a criminal offence is punished if the criminal law foresees it and is defined as direct incitement, through the printing press, broadcasting or any other means of publicity with similar effect, to commit a crime. This article also defines apology as a form of provocation, which exposes or disseminates ideas or doctrines that glorifies crimes or praises the author of a crime.

one or more such offences may be committed." It requires such acts are punishable when committed intentionally. A very low threshold is set by considering an act punishable when it causes danger that an offence may be committed and criminalizes conduct directly or indirectly advocating terrorist offences.	Article 578 CC: This provision is specifically penalising the glorification and public justification of certain terrorist offenses or the authors thereof or acts of discredit/humiliation of the victims. Using the internet is an aggravating circumstance, as well as the circumstances of the facts if they could seriously disrupt public peace or create a serious feeling of insecurity or fear in society. Spain has been widely criticised on this provision, mainly because there is not even an intention required and because it is very broadly applied in case law. Article 579 CC: This provision penalises incitement to commit terrorist offences (public dissemination with the purpose to incite or by their content are suitable to incite) and any act of provocation, conspiracy or proposal to commit terrorist offences.
Recruitment for terrorism (Article 6) The Directive requires States to criminalise "soliciting another person to commit or contribute in the commission of" offences listed as a terrorist offence or offences relating to a terrorist group. The Directive explicitly states that recruitment is punishable only when committed intentionally.	There is no specific provision on recruiting persons for a terrorist organisation, but article 570bis CC could cover this as promoting a criminial organisation (higher punishment if it is a terrorist organisation).
Providing Training for Terrorism (Article 7)	Also not penalised specifically, but there is a specific provision that penalises training yourself (article 575 §1-2 CC). This is particular and uncommon, as the provision even installs a presumption if the person is intentionally and regularly accessing certain public communication services or content on the internet or any other electronic communication service, if such content is directed or suitable to encourage membership of or cooperation with terrorist organisation or group. Another presumption is installed when someone acquires or possesses documents that have the purpose or, by their content, are able to encourage joining such organisation or group.
Receiving Training for Terrorism (Article 8) The newly introduced Article 8 requires states to criminalize the receipt of instruction, from another person, "*in the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or in other specific methods or techniques*", for the purpose of committing a terrorist offence (excluding the	Article 575 §1-2 CC: Receiving training to be able to carry out a terrorist offence is penalised, as well as receiving indoctrination, military training or weapon development techniques.

threat to commit a terrorist offence). The training must be undertaken intentionally.	
Travelling Abroad for the Purpose of Terrorism (Article 9) Article 9 of the Directive introduces another new offence which requires States to criminalize "*travelling to a country other than that Member State for the purpose of the commission or contribution to a terrorist offence referred to in Article 3, for the purpose of the participation in the activities of a terrorist group with knowledge of the fact that such participation will contribute to the criminal activities of such a group as referred to in Article 4, or for the purpose of the providing or receiving training for terrorism referred to in Articles 7 and 8*". Subparagraph (a) of paragraph 2 requires states to criminalize travelling to their territories for the above purposes. Subparagraph (b) punishes "*preparatory acts undertaken by a person entering that Member State with the intention to commit or contribute to a terrorist offence, as referred to in Article 3*". For all these acts to be punished, they must be committed intentionally.	Article 575 §3 CC: Travelling to a foreign territory that is controlled by a terrorist group or organisation to collaborate with them or to commit terrorist offences, if there is the intention to follow this purpose. Instead of "travelling to" the provision uses the wording "transferring or establishing yourself" (se traslade o establewca).
Organising or otherwise facilitating travelling for the purpose of terrorism (Article 10)	Not specifically implemented, but covered by the broad article 577 CC which penalises any act of collaboration or facilitating the activities of a terrorist organisation/group or commission of terrorist offences.
Financing of terrorism (Article 11) In a newly introduced provision, the Directive requires States to criminalize '*providing and collecting funds, by any means, directly or indirectly, with the intention that they be used, or in the knowledge that they are to be used, in full or in part, to commit or to contribute to any of the offences referred to in Articles 3 to 10*.' There is no requirement that the funds in fact be used, in full or in part, to commit or to contribute to a terrorist offence, nor that the offender knows for which specific offence(s) the funds are to be used.	Article 576 CC: Directly or indirectly financing terrorist activities if there is the intent to contribute to these activities OR if there is knowledge that this will contribute to such activities. The provision specifies that if you give concrete financial or material means to the author of a terrorist offence, the maximum penalty applies. If those means are used for the execution of a concrete terrorist offence, the provider will be punished as a co-author of this offence.
Relationship to Terrorist Offences (Article 13) In a newly introduced provision, the Directive states that preparatory / non-principle offences (membership of a terrorist group, travelling, financing, provocation, facilitating travel) it is not necessary that a principle offence be actually committed.	There is no specific provision implemented in the criminal law. Again it could be argued that this is covered by the very broad article 577 CC that penalises "carrying out, procuring or facilitating any act of collaboration with the activities or purposes of a terrorist organistation, group or element", without defining what the last "elemento terrorista"

	means.
Support to Victims (Title V Articles 25-26) The Directive includes a whole section on the rights of victims of terrorism and the support services that should be available. This builds on the Victims Directive 2012/29/EU which details the provision of victim support services. Member states had until 2015 to implement the Victims Directive but as many states had limited services in place, it is likely that effective implementation will take some time.	Chapter V of the CC establishes an Information and Assistance Office for Victims of Terrorism, where victims could get easy access to servicesm individualised assistance etc.

PART III. GERMANY

I. Applicable legal framework

a. National legal framework of counterterrorism laws

Counterterrorism legislation in Germany is concentrated in the Federal Criminal Code (*Strafgesetzbuch- StGB*) in Art 80a-131. This latter includes different layers of offenses, both old and recent ones, which cover terrorist activities: High Treason (Art. 81 etc.), Organizational Crimes: forbidden association (Art. 85, 86), endangering of the Democratic State (Art. 84 etc.), criminal association (Art. 129, 129a, 129b), Preparation for and Financing of Terrorist Action (Art. 89a-c).[127]

In the German Criminal Code, individual terrorist offences fall within the general scope of the criminal offences like homicide, bodily harm, criminal offences against public order and criminal offences dangerous to the public (e.g. arson, creating explosion and poisoning).[128]

In 2009, three new sections were added to the StGB by the Act on the Prosecution of the Preparation of Serious Violent Offences Endangering the State (*Gezetz zur Verfolgung der Vorbereitung von schweren staatsgefärenden Gewalttaten - GVVG*):

- Section 89a StGB "*preparation of a serious violent offence endangering the state",*
- Section 89b StGB "*establishing contacts for the purpose of committing a serious violent offence endangering the state*"
- Section 91 StGB "*encouraging the commission of a serious violent offence endangering the state".*

In 2015, this Act was amended again, to include provisions on travelling abroad with terrorist intent (section 89a and b (3) StGB) and financing of terrorism (section 89c StGB).[129]

Section 89a StGB criminalises the preparation of serious violent acts with the aim of endangering the state, with sanctions of imprisonment from six months to ten years.[130] The action must be "intended to impair and capable of impairing the existence or security of a state or of an international organization, or to abolish, rob of legal effect or undermine constitutional principles of the Federal Republic of Germany". The broad concept of the preparation of serious violent acts is narrowed down by providing a restrictive list of punishable preparatory acts, including instructing or receiving

[127]The wording of sections 129a-b and 89 a-b StGB are more precise and since section 89c StGB was inserted later, the provision has not yet been translated into English.
Section 129a : Forming terrorist organisations
Section 129b : Criminal and terrorist organisations abroad ; extended confiscation and deprivation
Section 89a : Preparation of a serious violent offence endangering the state
Section 89b : Establishing contacts for the purpose of committing a serious violent offence endangering the state
Section 89c : Terrorismusfinanzierung.
For English text : https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p0908
For German text:https://www.gesetze-im-internet.de/stgb/__89c.html .
[128]CODEXTER, Profiles on Counter-Terrorist Capacity. Germany, September 2016.
[129]CODEXTER, Profiles on Counter-Terrorist Capacity. Germany, September 2016.
[130]Imprisonment of 3 months up to 5 years in less serious cases, mitigated in the case of voluntarily end the preparation and commission of the serious violent acts or prevent others from completing these acts. (Section 89a (5) and (7) StGB).

instructions in the production or use of different kind of arms, producing or storing such arms, producing or storing substances to produce such arms and collecting, accepting or providing assets for this purpose (s. 89 a (2)). The restrictive list is a positive attempt to clarify the broad scope of preparatory acts, but it is still worrying that the restrictive categories enlisted are again defined in very broad terms. Subsection 89a (2) §1 StGB criminalises not only the instruction on producing arms but also any "other skills that can be of use for the commission of an offence (…)" that endangers the state. Furthermore, the same preparatory acts can be punished under German law when they are entirely committed abroad.[131]

Section 89b StGB criminalises establishing or maintaining contacts with a terrorist organisation (as defined in section 129a StGB), which can be punished with a fine or imprisonment of maximum 3 years. The contacts must be established or maintained "with the intention of receiving instruction for the purpose of the commission of a serious violent offence endangering the state".

Section 89c StGB was introduced in 2015 to punish individuals who collect, accept or make available any assets for the commission of an offence listed in the section. The offender needs to know or have the intention that with these assets, another person will commit such offences. In many ways, the offense has similar criteria and conditions as the preparatory offenses of section 89a StGB.

Section 91 StGB criminalises the encouragement to committing a serious violent offence endangering the state. It is now a criminal offense to display, supply or obtain written materials "which by its content is capable of serving as an instruction to the commission of a serious violent offence endangering the state if the circumstances of its dissemination are conducive to triggering or encouraging the preparedness of others to commit such an offence". The degree of guilt required is not minor however and there are exceptions for acts that serve the purpose of citizenship education, defence against anti-constitutional movements, arts, sciences, research, teaching, reporting etc.

The only explicit mention of "terrorism" in the language of the Criminal Code is in **sections 129a and b StGB**. These provisions contain the criminal offences of creating and being part of a terrorist organisation. Hence, this offence distinguishes two variations of a terrorist organisation. If the organization's objectives or activities are directed towards the commission of murder, manslaughter, hostage-taking or other serious criminal offences, then the member or creator will be punished with a sentence of imprisonment of one to ten years.[132] If the objectives or activities are directed towards the inflicting of serious physical or psychological injury on other persons or towards the commission of computer sabotage, arson, some serious environmental crimes or crimes involving firearms etc., another criterion has to be proven in order to be criminalised. This criterion is that the purpose of the criminal offences (those enlisted in section 129a (2) StGB) has to be:

- To seriously intimidate the population, OR
- To force an authority or an international organization to act under duress by use of violence or the threat of violence, OR
- To eliminate the basic political, constitutional, economic or social structures of a state or an international organization or considerably interfere with them in

[131]Section 89a (3) StGB.
[132]For the leaders of such an organisation three years of imprisonment is the minimum sentence.

such a way that the effects of this interference may cause considerable damage to the state or the international organization.

Founders, leaders, members, participants, recruiters and supporters of an organisation that is ruled to be a terrorist organisation according to the criteria in section 129a and b StGB, are all committing an individual criminal offence.

b. Which of these provisions implement the Directive 2017/541

(See table in Annex)

Germany has no separate law related to the fight against terrorism.[133] The "classical" tools that are available in the criminal law and other measures to avert dangers will suffice to counter the terrorism offenses.[134] Nevertheless, the classical criminal offenses are sometimes complemented with extra provisions specifically for terrorism related offences, for example in section 89a, b, c and section 129a StGB.

Terrorist group (art. 2 CT Dir): The StGB does not have a singular definition of terrorist organisations like the Directive, but adds a provision (section 129a StGB) after the already existing provision on criminal organisations (section 129 StGB), which include very similar wordings for the terrorist intention that characterises a terrorist organisation according to the list in art. 3 §2 of the Directive. The offence of taking part in a terrorist organisation requires the lowest form of intent, as the offender merely needs to knowingly accept the terrorist aim of the organisation.

Terrorist offence (art. 3 CT Dir): StGB does not use this term, but the subjective element of the provision on participation to activities of a terrorist group in section 129a (2) StGB covers the content of the definition in article 3 of the Directive. However, section 129a (2) StGB requires a higher level of intent to also seriously damage the state or international organization, given the nature or consequences of the offences.

Offences relating to a terrorist group (art. 4 CT Dir): *idem:* The German law only requires the lowest form of intent as for the qualification for a terrorist group, but additional intent is required as for the terrorist offence (see below).

Public Provocation to commit terrorist offence (art. 5 CT Dir): The Directive does not have strict criteria and therefore does not impose a high threshold for the qualification of this offence. In the StGB, three provisions are relevant in the case of public provocation to commit terrorist offences: Section 26 (general provision on abetting, with double element of intent), section 111 (general offence of public incitement to crimes) and section 129a (5) (specific offence of direct incitement concerning terrorist related offences).

Recruitment for terrorism (art. 6 CT Dir): The general provision on conspiracy (section 30 (1) StGB: inducing another to commit a felony) is complemented by the

[133] There actually was a "Counter Terrorism Act" (Anti-Terrorismusgezetz) voted in 1976, on procedural rules in terrorism cases. Context: several extreme-left terrorist attacks by Red Army Fraction in the seventies. Now, they are applicable in the fight against crime in general.
CODEXTER, Profiles on Counter-Terrorist Capacity. Germany, September 2016, https://rm.coe.int/1680641010.

[134] CODEXTER, Profiles on Counter-Terrorist Capacity. Germany, September 2016, https://rm.coe.int/1680641010.

special provision on the recruitment of members and supporters of terrorist groups (section 129a (5) StGB).

Providing and receiving training for terrorism (art. 7-8 CT Dir): There is only the general provision of preparation of serious violent offence endangering the state of section 89a StGB with a high threshold of intent to impair/be capable of impairing the existence or security of a state or international organization or to undermine constitutional principles of Germany. The Directive requires only the intent to commit a terrorist offence.

Travelling for the purpose of terrorism (art. 9 CT Dir): The Directive requires States to criminalise travelling abroad whenever there is an intent to participate in activities of a terrorist group (on the condition that the offender has knowledge of his contribution to the criminal offences relating to such group) or receive/provide training for terrorism. The StGB is stricter, since it criminalises preparation of offences when outside of the German territory, with the intent to commit individual serious violent offences endangering the state. There is no explicit criminalisation of the travelling for the purpose of participating in a terrorist organisation for example (section 89a (3) StGB).

Organising or otherwise facilitating travelling for the purpose of terrorism (art. 10 CT Dir): The StGB does not have any specific provisions for this offence.

Financing terrorism (art. 11 CT Dir.): A new section 89c was introduced in the StGB to criminalise acts of terrorism financing (collect, accept or make available any assets for the commission of a terrorist offence as set out in Section 89c (1)), which is very similar to art. 11 of the Directive. "The new provision does not contain a materiality threshold ("substantial assets") anymore. In addition, it applies to all kinds of terrorism financing, not only financing for the purpose of preparing a serious violent offense endangering the state."[135]

Support to victims (art. 25-26 CT Dir): The government foresees financial means to compensate victims of terrorist attacks with an overall effort to expand the category of individuals who are eligible to file a claim for such compensation.[136]

II. The most pertinent challenges/issues faced by the judges/experts in applying counterterrorism measures in line with human rights law

(*This and next section mainly reflect information gained through the interviews.*)

a. The main issues identified

1. Principle of legality in criminal law

[135] J. Gesley, "Germany: New Anti-Terrorism Legislation Entered into Force", *The Law Library of Congress*, 10 July 2015, http://www.loc.gov/law/foreign-news/article/germany-new-anti-terrorism-legislation-entered-into-force/.
[136] CODEXTER, Profiles on Counter-Terrorist Capacity. Germany, September 2016, 5-6, https://rm.coe.int/1680641010.

Definition of terrorism

There are no definitions of terrorism in German law. Nonetheless, some new elements were included in the German criminal law to implement the European Directive.

Specifically, interviewees mentioned:

- **Definition of a terrorist group**: The case law developed on the qualification of a terrorist group is quite strict. Although the EU Framework Decision and Directive both introduce a rather broad definition, Germany decided not to include it in such a broad sense. The recent provision 129(2) and 129a referring to groups of organized crime specifies that there should be a terrorist aim, but it is a bit narrower than the one in the CT Dir.

- **Dissemination of terrorist content**: German law does not specifically require such content to be made public. However here the EU framework helps to interpret German law more narrowly. The Framework decision requires that this content is made public. Based on EU law it is now also the interpretation in Germany (see for instance "terrorist cookbooks").

- **Recruitment for terrorism:** There is no such specific offence in German law as soliciting another person. It would fall under "*Anstiftung*" Section 26 (Abetting - pushing someone to commit an offence), but in this case the person must have in the end committed the offence. This is a general provision in German criminal code. There might be not so many problems with the German law in this area as the threshold is quite high. Section 111 on public incitement to crime is not specific for terrorism.

- **Providing and receiving training for terrorism:** Two sections of the law are relevant: Section 89a and a specific example of providing training: 91.1.1 StGB.

  Section 89a StGB ("preparation of a serious offence endangering the state") is a very problematic provision. It is very broadly worded as preparatory acts cover:

  - *"instructing another person or receiving instruction in the production or the use of firearms, explosives, explosive or incendiary devices, nuclear fission material or other radioactive substances, substances that contain or can generate poison, other substances detrimental to health, special facilities necessary for the commission of the offence or other skills that can be of use for the commission of an offence under subsection (1) above,*
  - *producing, obtaining for himself or another, storing or supplying to another weapons, substances or devices and facilities mentioned under No. 1 above,*
  - *obtaining or storing objects or substances essential for the production of weapons, substances or devices and facilities mentioned under No. (1) above, or*
  - *collecting, accepting or providing not unsubstantial assets for the purpose of its commission."*

  This means that acquiring any other skills could be enough to be punished, if there is a criminal intent. The question is how is the law applied in specific cases. For instance, someone could be arrested if a certain chemical component is found in his or her household (might be used for cleaning or to compose an explosive). Even if the intent cannot be proven in such cases, this could be sufficient for an initial arrest, merely because of the objective element. However,

a specific case regarding a person suspected of bombing a bike race in Frankfurt calls for a more restrictive application of section 89(a). In this case, a Kalashnikov and some materials that could be used for explosives were found in the basement of the person. In the end the court didn't convict the person, as it could not prove that the person was firmly determined to commit a terrorist offence. Based on this judgment of the Federal court, one has to interpret the subjective element in this way. However, the judge remains free to decide how to determine if the person was firmly determined. There is a risk that the judge says yes, he or she is obviously, firmly determined, but we still don't know if he wants to do anything next week or never. In this case the person was only convicted for breaching the weapons regulation.

- **Travelling for the purpose of terrorism:** The German criminal code has not been brought in line with the Directive. This conduct could however be penalized under section 89a (2) StGB as a preparatory act. Because the physical behaviour is merely leaving Germany, the proof is completely relying on the subjective element. Therefore, it must be interpreted narrowly.

  Article 9 CT Dir is now also penalising individuals entering the country with the purpose of committing a terrorist offence. This is not explicitly mentioned in the German law either, but could again be seen as a preparatory act. A judge interviewed, who in the last 8 years has been part of about 25 criminal cases, informed us that so far almost none of those people leaving the country were sanctioned.[137]

Legal certainty

Although the German legislator has made a great effort to narrow the broad definitions of the CT Directive, it is still problematic for the legal certainty that preparatory acts are defined in a very broad way and conduct is penalised on the basis of the subjective element.

Criminalization of socially neutral behaviour

In German law, there is a prohibition on punishing socially neutral behaviour only because of a set of mind. This principle has been embedded in the German Criminal law since the 16th century. The concerns related to counter-terrorism laws arise when it comes to "preparation of terrorist actions" by for example reading neutral books, for instance about architecture or chemistry (See Art. 89a CC/Art. 7 CTDir). The same concerns arise when it comes to travelling or helping someone to travel (Art. 9-10 CTDir).

Expert A, interviewed on this matter,[138] finds that since the EU Framework decision, the scope of German criminal law has broadened in a rather problematic way. For instance in section 89a StGB, the legislator wanted to criminalise "other skills that can be used for the terrorist offence". This was written in the preparation of the law without any further clarification. The current text tried to be clearer by using the wording: "other skills that can be of use for the commission of an offence under subsection (1)", referring to a limited list of offenses and enlisting certain preparatory actions. In the opinion of Expert A this needs to be interpreted in a very strict way to comply with the principle of legal

[137]Interview with JudgeA (anonymous), conducted on 19 December 2018.
[138]Interview with Expert A (anonymous), conducted on 29 November 2018.

certainty. As a result of the broad categories of section 89a StGB, there are still a number of mere neutral acts that can be penalised, such as flight training or buying a cell phone.

The Federal Criminal Court in 3 StR 326/16, on 6 April 2017, also assessed whether this provision could be problematic. It concluded that it is not problematic having such a provision in the law, explicitly:

> *"It is fundamentally not objectionable, if a statutory provision provides that objective - in some circumstances taken neutral in itself - actions only in connection with the subjective context, the plans and intentions of the offender, punishable punishable wrong (BGH ibid., P. 232 mwN). The consideration of a damage intent does not mean a criminal offense; On the contrary,* ***in the case of a criminal offense shifted far into the run-up to the actual violation of the rights of the offense,*** *with a small, objective base of injustice, the demands made on the subjective element of injustice are regularly increased (Sieber / Vogel, p. 143).* ***The limit to the law of criminal intent or mental criminal law, which is incompatible with the principles of criminal law, would at best be exceeded if the perpetrator's intention of manifesting an offense did not manifest itself in an external act*** *(see Sieber / Vogel, pp. 140 f mwN). However, this cannot be the case here; rather, the realization of § 89a para. 2a of the Criminal Code must at least express an attempt to leave because the perpetrator's intention to commit serious acts of violence or commits preparatory acts in to set up a country in which training camps are located, wants to implement; In this respect too, it is not the thought of an act that is punished, but rather its activity which endangers the law."*

Nevertheless, the experts interviewed do see this provision rather problematic with a possibility to be misused in some ways. However, one judge that was interviewed and who prefers to remain anonymous, expressed his confidence in the clarity of the text and the jurisprudence of the Higher Regional Courts on these provisions. He believes in the ability of judges to interpret these provisions in a manner that is in compliance with fundamental rights.[139]

Intent – proving the subjective element

According to Expert A, there are now a lot of "neutral" acts in the German legislation, that can be penalized – such as flight training, or buying a cell phone, etc. In German criminal law, a subjective element has always to be proven (*dolus evenutalis*).[140] *Dolus eventualis* is not a very high threshold and in most terrorist offences this is enough. However the highest court decided that for instance the training in terrorist camps with lower degree of intention would be unconstitutional. The court stated that the perpetrator has to be highly decided to commit a crime.

[139] Interview with Judge A (anonymous), conducted on 19 December 2018.

[140] In German law, criminal law recognizes 3 degrees of intent: (1) First degree: the purpose (absicht dolus directus), knowing, (2) Second degree: Certain knowledge – the offender is certain that the crime will be fulfilled, (3) Third degree: Dolus eventualis – the offender realizes that he could cause an offence – (not a very high threshold).
See inter alia:
https://epdf.tips/homicide-law-in-comparative-perspective-criminal-law-library.html
https://www.state.gov/documents/organization/272488.pdf
https://static1.squarespace.com/static/56330ad3e4b0733dcc0c8495/t/56b923771bbee0772f2dc750/1454973816503/GLJ_Vol_05_No_05_Zoeller.pdf
http://www.germanlawjournal.com/volume-05-no-05/.

It is very difficult to actually prove the intent. For example, is there enough evidence if the intent has to be shown by indirect proofs such as a post on Facebook or a chat with someone?[141]

Because of the broad EU definition of terrorist groups, it is difficult to prove such terrorist aim or intent while both respecting EU law and German law. The Federal Court found that the "union-friendly" application of section 129 a) and b) StGB would be against the fundamental principles of German Law.[142]

Expert B also points out the problem of the low threshold of the "terrorist aim" of article 3 §2 c CT Dir ("unduly compelling a government to perform or abstain from performing any act") is that a country like Germany has a long legal history of organizing strikes and pressuring the government to act in a certain way.[143] The Federal Criminal Court has established what *unduly* means:

> "*If the government of a state is forced by acts of violence against third parties or objects to fulfill certain political demands, then these riots are only violence against a constitutional body within the meaning of the [criminal law], if the pressure emanating from them* ***reaches such a degree that a responsible government may be compelled to surrender to the claim of violent criminals forced to avert serious damage to the commonwealth or individual citizen.***"[144]

The core of German law since the 12th century has been based on the fact that there needs to always be a separate proof of intent or negligence – these cannot be fictional but must be based on objective elements.[145] It is prohibited to punish someone without proving his guilt, but the issue with the terrorist offences is that the terrorist intent should be proven separately. This intent or negligence is only a *dolus eventualis*, which is a very low threshold.[146]

Political authorization to prosecute foreign acts

Section 89a (4) and 129b StGB give the authorization to the Federal Ministry of Justice to decide on whether to prosecute an individual if the preparation of the offense occurs outside the territory of the member states of the European Union or if the offence relates to an organisation outside the member states of the European Union. Courts seem to have little control on the arbitrariness of such decisions.

Caution is required since the principle of non-interference applies in international law, including in the case of dictatorships. Therefore, the authorisation is necessary, but still this provision could be overstretched or delimited with substantive requirements if it would be extensively applied in cases of preparatory offences (section 89a (4) StGB).

---

[141] Interview with Expert A (anonymous), conducted on 29 November 2018.
[142] See BGH 3 StR 277/09 on 3 December 2009. This was a case of the previous Framework Decision of 2002, but its observations are still relevant for the new CT Directive.
[143] Presentation by Expert B (anonymous) on Counterterrorism Measures and the Implementation of the Directive, Issues and Challenges in Germany, 9 October 2018, Brussels.
[144] See BGH 3 StR 256/83 on 23 November 1983.
[145] On the German Criminal Procedures: first terrorism case in 2004sets out the guidelines for the weighting of evidence in terro cases.
https://static1.squarespace.com/static/56330ad3e4b0733dcc0c8495/t/56b923f1ab48def04c000c4c/1454973937973/GLJ_Vol_05_No_05_Safferling.pdf
[146] Presentation by Expert B on Counterterrorism Measures and the Implementation of the Directive, Issues and Challenges in Germany, 9 October 2018, Brussels.

Also, any organisation trying to overthrow a political order in a foreign state could fall under the provision, even if that state is committing grave violations of human rights.[147]

A judge who is dealing with many terrorism related criminal cases admits that *"there are difficulties with the international application according to sections 89a (5) and 129 (1) StGB, id est for purely foreign acts."* He states: "*Here we must trust courts (so far) that the Federal Ministry of Justice only gives the authorisation to prosecute for purely foreign acts, if appropriate. At present, I do not see a solution for differentiate "freedom struggle" and "terrorism" (beyond the uninvolved victims), but so far this has not been a problem in my work."*[148]

Further, the authorisation is needed for the offences committed abroad, but not for travelling to another country with the purpose of committing terrorist offences. The authorisation clause is also not applicable for terrorist groups within the territory.[149] This leaves space for arbitrary decisions.

Proportionality

What CT laws target are mainly preparatory conduct, very far away from a violent act of terrorism actually happening, and the penalties are set very high.

Judges are put in an extremely difficult position, as they have to apply laws that have a too broad wording and are unclear. It is difficult to take a decision based on indications, rather than proofs. Judges are under a tremendous pressure in such cases and do often have to guess whether the person is guilty or not.[150]

2. Principle of Non-Discrimination

Gender

There is in general lack of reflection on gender in German courts. For Expert A, women are generally less likely to offend and to commit worse crimes, so a bias is understandable, especially in terrorism cases.[151]

On the other hand, the interviewed judge firmly claimed that there is absolutely no difference in the treatment of male and female suspects or offenders. The provisions and procedures are exactly the same for any gender.[152]

Minors

Germany has a specific law on juvenile offenders below the age 21 (for persons aged 18-21 the judge can decide whether to put them in front of an adult court or the juvenile system). This law models the criminal process in a different way, with specific safeguards for children. The goal of the law is the education of the juvenile offenders.

The interviewed experts were not aware of cases of children to be prosecuted under CT laws in Germany, but think that there would not be any problems with prosecuting

[147]Presentation by Expert B (anonymous) on Counterterrorism Measures and the Implementation of the Directive, Issues and Challenges in Germany, 9 October 2018, Brussels.
[148]Interview with Judge A (anonymous), conducted on 19 December 2018.
[149]Presentation by Expert B (anonymous) on Counterterrorism Measures and the Implementation of the Directive, Issues and Challenges in Germany, 9 October 2018, Brussels.
[150]Interview with Expert A (anonymous) conducted on 29 November 2018.
[151]Interview with Expert A (anonymous), conducted on 29 November 2018.
[152]Interview with Judge A (anonymous), conducted on 19 December 2018.

children thanks to this law. The interviewed judge also stated that in some cases it is appropriate to imprison adolescents (18-21 years), because they can only get a maximum penalty of 10 years and they can receive training in prison. He mentioned a case of a convicted who was 26 years old by the time of his release. This man claimed that the trainings he received in prison helped him to "deradicalise" and to appreciate the value of living in a pluralistic democracy.[153]

Ethnic or religious groups

There is a risk of racial discrimination and bias, as most cases currently in Germany are cases of Islamic terrorism. Room for such discrimination is left by the broad scope of CT laws (Expert A), as the judge has to basically assess the guilt based on considering the suspects personality, religion will thus play a major role.

There are strong indications for such discrimination as in the case of the right wing (NFU) terrorism, where the police and the investigators were biased. They did not believe that Germans would do something like that, and blamed the Turkish victims instead, expecting them to be involved in drugs or other crime (Expert A). Other experts claim that there was a real lack of identifying right wing terrorism as terrorism according to section 129a-b StGB. This contributed to the growing movement of right wing violent extremist groups. But it could also show that there is a significant difference in reaching the threshold of intent or "terrorist aim", when the offenders of extreme violence endangering the state or the terrorist group are not Muslim for example.[154]

During the interview, the judge seemed to acknowledge that there is a stronger focus on Muslim citizens in the fight against terrorism. Hence, he clarified that this does not automatically mean it is discriminatory towards a religious or ethnic group.[155]

3. Freedom of expression

The German approach is quite parsimonious. There is no broad offence, such as glorification, but speech can only be criminalized in specific circumstances. Instead of creating a new broad offence on incitement of terrorism, the German approach is to have several relevant provisions that will try to find a balance between punishing the conduct of terrorism propaganda and incitement, while respecting the freedom of speech.[156]

The relevant international documents are the UN Security Council Resolution 1624 (2005), the Council of Europe Convention on the Prevention of Terrorism 2005 and the EU Counter Terrorism Directive 2017/541. According to a non-binding definition of the Secretary-General, the UN seems to only urge the State Parties to penalize direct

[153]Interview with Judge A (anonymous), conducted on 19 December 2018.
[154]D. Koehler, Recent Trends in German Right-Wing Violence and Terrorism : What are the Contextual Factors behind 'Hive Terrorism', Perspectives on Terrorism, December 2018, vol. 12, no. 6, 72-88. https://www.universiteitleiden.nl/binaries/content/assets/customsites/perspectives-on-terrorism/2018/issue-6/a5-koehler.pdf.
[155]Interview with Judge A (anonymous), conducted on 19 December 2018.
[156]A. Petzsche, The Penalization of Public Provocation to Commit a Terrorist Offence, *European Criminal Law Review*, 2017, vol 7., 248.

incitement and not the mere glorification or "apology" of terrorist acts.[157] The Council of Europe and the European Union nevertheless, do require the penalization of direct and indirect incitement, such as the glorification of terrorist acts.[158]

In Germany the criminal law has many different provisions to penalize different forms of incitement to terrorist acts:

- **Section 26 StGB: Abetting:** Intentionally inducing another to intentionally commit an unlawful act. The difficulty is that the unlawful act (*in concreto* a terrorist offence) should have taken place or at least being attempted. It will also be hard to prove that the incitement was intended to the commission of a specific terrorist act.
- **Section 30 StGB: Conspiracy:** Attempting to induce or abet another to commit a serious offence, as far as that other person declares his willingness at least to commit or abet the commission of such serious offence. Here, a certain degree of (detailed, specific) planning should be proven, regardless of the actual attempt or commission of such an offence.
- **Section 91 StGB: Encouraging:** Dissemination of written materials to awaken or encourage the preparedness of others to commit a serious violent offence endangering the state. To reduce the risk of infringing the right to freedom of expression of individuals, there is an exemption in the text of this offence.
- **Section 111 StGB: Public incitement to crime**: Publicly inciting (written or oral) the commission of unlawful acts, regardless of the actual commission of the offence. It is generally formulated and has no specific criteria for terrorist offences, but it definitely includes direct and indirect incitement.
- **Section 129a (5) StGB: Support of a terrorist group and recruitment**: Promoting, enhancing or securing the specific potential threat of a terrorist organisation so it benefits from it. Case law clarified that mere lobbying for sympathy or approval as well as glorifying acts or aims of a terrorist organisation are not falling under this provision.[159]

---

[157]Report of the Secretary General, The protection of human rights and fundamental freedoms while countering terrorism, UN Doc A/63/337, margin no. 61 : « incitement is a direct call to engage in terrorism, with the intention that this will proéote terrorism, and in a context in which the call is directly causally responsible for increasing the actual likelihood of a terrorist act ocurring. »

[158]*Article 5* of Directive 2017/541 (EU): "Member States shall take the necessary measures to ensure that the distribution, or otherwise making available by any means, whether online or offline, of a message to the public, with the intent to incite the commission of one of the offences listed in points (a) to (i) of Article 3(1), where such conduct, directly or indirectly, such as by the glorification of terrorist acts, advocates the commission of terrorist offences, thereby causing a danger that one or more such offences may be committed, is punishable as a criminal offence when committed intentionally." and article 5 of the Convention on the Prevention of Terrorism (CoE): "For the purposes of this Convention, "public provocation to commit a terrorist offence" means the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed. Each Party shall adopt such measures as may be necessary to establish public provocation to commit a terrorist offence, as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law."

[159] The Federal Criminal Court (BGH 3 StR 314/12) found that posting a link to a propaganda video of al-Qaida and providing it with subtitles on internet platforms « did not provide a tangible benefit for the terrorist organisation » and therefore that, « the act was limited to a mere endorsement of the organisation, the justification of its aims and glorification of criminal acts which did not fulfil the requirements of the offence. », see A. Petzsche, The Penalization of Public Provocation to Commit a Terrorist Offence, *European Criminal Law Review*, 2017, vol 7., 252.

- **Section 130a StGB: Attempting to cause the commission of offences by means of publication:** Disseminating materials that can serve as an instruction for committing certain offences. However, it must be proven again that the instructions are for a specific unlawful act.
- **Section 131 StGB: Dissemination of depictions of violence**: The depiction of inhumane acts of violence must be "in a manner expressing glorification" covers certain indirect forms of incitement of terrorism.
- **Section 140 StGB: Rewarding and approving of offences:** Publicly approving (written or oral) of certain listed offences is punishable, if it is done in a manner that is capable of disturbing the public peace. It is only in this specific case that glorification of terrorism is criminalised.

Penalising direct or indirect incitement poses an inherent threat to the right to freedom of expression. Because of the broad concepts and definitions of "terrorism" or "terrorist organisation" or "public incitement", there is a risk of violating freedom of expression. A. Petzsche concludes that the German pragmatic approach of having multiple general and very specific provisions on different forms of incitement is better than a more symbolic approach to have a provision that specifically penalizes incitement to terrorism. The German law is thus narrower than the European Directive, but is more protected against the risk of a chilling effect and self-censorship.[160]

Since January 2018, the Network Enforcement Act (NEA) came into effect.[161] Social network providers with more than 2 million registered users in Germany should respond to any complaint within 7 days and should remove content within 24 hours if this content is "manifestly unlawful". Journalistic or editorial content on platforms is explicitly excluded in this law. The main criticism of the new law was that it should remain the government's task (and not of private companies) to determine the legality of online public content.[162] The UN Special Rapporteur also raised his concerns on the strict timing that is stipulated in the law.[163]

On the implementation of the NEA, there was a concern of social media platforms being too cautious and thus censoring the free speech in Germany. Comprehensive reports of YouTube, Twitter and Facebook were published.[164]

---

[160]A. Petzsche, The Penalization of Public Provocation to Commit a Terrorist Offence, *European Criminal Law Review*, 2017, vol 7., 256-257.
[161]Act to Improve Enforcement of the Lwa in Social Networks (Network Enforcement Act or *Netzdurchführungsgesetz*) of 12 July 2017.
[162]See Declaration on Freedom of Expression, in response to the adoption of the Network Enforcement Law by the Federal Cabinet on 5 April 2017,
[163] D. Kaye, Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression in a briefing to the Office of the High Commissioner for Human Rights on 1 June 2017.
[164] "In January 2018, just days after the NEA came into effect, Facebook and Twitter blocked prominent posts and accounts—mostly from the far right, but also satirical comments from journalists. The deleted tweets all concerned refugees in Germany. What follows is a more detailed description of some of the deleted content." and "Since enforcement of the NEA began, the courts have had to decide about the legality of deleting legal content. Individuals who believe that their content has been inappropriately deleted can, under Section 1004 I 2 of the German Civil Law Code, submit a claim against the SNP to omit the removal of their content. The increased number of civil law cases corresponding with enforcement of the NEA might also show that companies are preferring to delete content in case of doubt."
https://www.lawfareblog.com/social-media-content-moderation-german-regulation-debate
Other interesting numbers and graphs:
https://blogs.lse.ac.uk/mediapolicyproject/2018/08/16/removals-of-online-hate-speech-in-numbers/

b. Special procedures

There are new procedures put in place to implement the CT Directive. The procedures in the court are not specially different from other criminal trial. "*In every "Land", a higher regional court is assigned the processing of terrorist offences (§120 GVG). There is a senate of five judges at each court dealing with these issues, as well as a "collegiate senate" for cases to be dealt with for a second time, when referred back by the Federal Supreme Court (BGH) because of legal errors. Other senates can be set up for special needs or assigned terrorism issues.*"[165]

The only special treatment terrorist offenders get is a different treatment in prison, since they are kept in another section of the building, specialised for detainees convicted for offences related to terrorism.

c. Sanctions

According to Expert A, it could help making the sentences a little bit more moderate. There is also a large range of possible sanctions, so the judge has a lot of discretion in deciding on the penalty.

III. Conclusions: the most important challenges

The German legislator has tried to implement the Directive by interpreting as much as possible the existing criminal law in line with the Directive and only creating new provisions where it was strictly necessary. The definitions also try to be more precise and detailed. A good example of this is the penalization of public incitement to commit terrorist offences. Despite these positive aspects, the intent required for some offences remains too low and the consequent criminalisation of social neutral behaviour is alarming. The definitions are (although narrower than the Directive) still too broad and focusing too much on the intentional element. In addition, there are serious concerns regarding the political aspect embedded in the law on whether or not to prosecute foreign acts.

In some points German law might not be perfectly well implementing the EU Directive, for the better from the human rights point of view. For instance the definition of a terrorist group is stricter under German case law than in the EU Directive, for the sake of clarity, legal certainty and proportionality. The entire criminal code has no explicit reference to "terrorist offences", but rather defined criteria to qualify as a participator or member to a "terrorist group" and added a provision on the "preparation of serious violent offence endangering the state". The German legislator decided that many provisions of the Directive were already implemented in the general criminal provisions and only added specific provisions related to the financing of terrorism, public incitement to terrorism and preparation of terrorist offences (including recruitment, training and travelling).

- **Legal certainty** is an issue due to the wide formulation of CT offences. CT provisions to be interpreted strictly in order to comply with the principle of legal certainty

[165]Interview with Judge A (anonymous), conducted on 19 December 2018.

- The way **subjective element** in counter-terrorism offences is proven needs to be addressed, to ensure that it is applied strictly.

- **The application of the proportionality principle** by judges is important. It requires them, amongst other things, to narrowly interpret the very broad CT provisions to ensure that they intrude on human rights to the minimum degree possible.

- Some guidelines to **differentiate** terrorism form other forms of freedom fighters would be useful to have more legal certainty and more **judicial control** on the Ministry of Justice to **avoid arbitrariness**.

ANNEX: Table of comparison

EU Directive	German Criminal Code (StGB)
Definition of a Terrorist Group (Article 2) The Directive defines a '*terrorist group*' as '*a structured group of more than two persons, established for a period of time and acting in concert to commit terrorist offences*.' A '*structured group*' means '*a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure*.'	**Germany**: The German Criminal Code (StGB)does not contain a singular definition of a terrorist organisation. However, subsection (1), (2) and (3) of section 129a StGB describe the basis on which an organisation would be considered as a "terrorist organisation" in conjunction with section 129 (2) StGB. Section 129 (2) StGB clarifies that an organisation is a structured group of more than two persons, established for a period of time that does not need to have formally defined roles for its members, continuity of its membership or a developed structure but whose members pursue a common overarching goal. The length of time or degree of organisation required are not specified. In order for an organisation to become a terrorist one it needs to fulfill the additional requirements of section § 129a (1), (2) or (3) StGB. Matthias: Gang v criminal/terrorist organization ?
Definition of a Terrorist Offence (Article 3) The Directive requires states to criminalize certain intentional acts as well as threats to commit those actswhen committed with the aim of one or more of the following aims: *(a) seriously intimidating a population;* *(b) unduly compelling a government or international organisation to perform or abstain from performing any act;* *and****(c) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.***	Section 129a (1) on 'forming terrorist organisations' punishes anyone who forms organisations whose aims or activities are directed at the commission of certain serious crimes such as genocide, war crimes and crimes against humanity. The subjective element requires the lowest form of intent (*dolus eventualis*). The offender needs to know that the aim of the organisation is directed at the commission of the aforementioned crimes and has to knowingly accept this. The article also criminalises in subsection 2 the forming of an organisation whose aims or activities are directed at one of the crimes listed in article 3 of the Directive. There is also an additional and stronger intent necessary - the offender needs to intend to seriously intimidate a population or to unduly compel a government or international organisation to perform or abstain from performing any act or to seriously destabilise or destroy the fundamental political, constitutional, economic or social structures of a country or an international organisation. Section 129a (3) StGB criminalises the threat to commit a criminal offence as mentioned in section 129a (1) or (2). The term 'terrorist offence' is not explicitly mentioned but the offences described would be classified as such within the scope of the EU Directive.
Offences Relating to a Terrorist Group (Article 4) The Directive requires states to criminalize *a) directing a terrorist group* and *b) participating in the activities of a terrorist group, including by supplying information or material resources, or by*	The German Criminal Code criminalises participation in and founding/directing a terrorist organization. Section 129a Subsection 1 states that if the aim of the organisation is directed at committing certain severe crimes such as murder, murder under certain aggravating circumstances, genocide, crimes against humanity, war crimes or crimes against personal

funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group.	liberty, the participation or founding of such an organisation is a criminal offence. The subjective element requires the lowest form of intent (*dolus eventualis*). In Section 129a Subsection 2 the participation in and founding/directing of a terrorist organisation is also criminalised. But there are higher requirements for the subjective and intent elements. As mentioned above there must be intent for the particular aim of the crime.
Public Provocation to Commit a Terrorism Offence (Article 5) The Directive requires states to criminalise "*the distribution, or otherwise making available by any means, whether on or offline, of a message to the public, with the intent to incite the commission of one of the offences listed in Article 3(1)(a) to (i), where such conduct, directly or indirectly, such as by the glorification of terrorist acts, advocates the commission of terrorist offences, thereby causing a danger that one or more such offences may be committed.*" It requires such acts are punishable when committed intentionally. A very low threshold is set by considering an act punishable when it causes danger that an offence may be committed and criminalizes conduct directly or indirectly advocating terrorist offences.	The German Criminal Code criminalises incitement in two ways. First, there is the general part of the Criminal code, which contains general rules regarding incitement. These provisions can be applied to every criminal offence. Section 26 (abetting) StGB is especially important. The subjective element of abetting requires two elements of intent or knowledge (In German Criminal Law this is called *doppelter Anstiftervorsatz*).The abetting person needs to have known and accepted the actual crime itself and recognised and accepted the consequences of his actions. In order for section 26 to be applicable, the offence abetted, must be attempted at least. If the incitement was unsuccessful there is still section 30 StGB which creates liability for attempted incitement. The second criminalisation of incitement can be found in the specific criminal offences created by the German Criminal Code. Section 129a (5) StGB encompasses some forms of direct incitement concerning terrorist related offences (*Petzsche*, EuCLR 2017, 241 (251)).Intent is required for recruitment in section 129a (5) S. 1 whereas for the support of a terrorist organisation in section 129a (5) S. 2 StGB it is sufficient that you should have known. Also mentioned should be section 111 StGB (https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1144 (accesed on 12 December 2017))which prohibits the public incitement to crime (For further information regarding the public provocation to a terrorist offence see *Petzsche*, EuCLR 2017, 241).
Recruitment for terrorism (Article 6) The Directive requires States to criminalise "soliciting another person to commit or contribute in the commission of" offences listed as a terrorist offence or offences relating to a terrorist group. The Directive explicitly states that recruitment is punishable only when committed intentionally.	The German criminal code prohibits the recruitment of members and supporters of terrorist groups (Article 129a subsections (5) S.2). Intent is required as part of the offence (MüKo-StGB/*Schäfer* §§ 80-185j, 3rd edition 2017, § 129a Rn. 60; § 129 Rn. 24.).[37] Recruitment is further covered by the general provision on conspiracy (Article 30(1)) which stipulates that a "person who attempts to induce another to commit a felony or to abet another to commit a felony shall be liable."
Providing Training for Terrorism (Article 7)	
Receiving Training for Terrorism	The German provision on receiving training

(Article 8) The newly introduced Article 8 requires states to criminalize the receipt of instruction, from another person, "*in the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or in other specific methods or techniques*", for the purpose of committing a terrorist offence (excluding the threat to commit a terrorist offence). The training must be undertaken intentionally.	("instruction" in the English translation of the original word "*unterweisen*") differs from the Directive in relation to the list of principle offences primarily those related to the preparation of a serious violent offence endangering the state. These include offences against life under section 211 or 212 or offences against personal freedom, which under the circumstances are intended to impair and capable of impairing the existence or security of a state or of an international organisation, or to abolish, rob of legal effect or undermine constitutional principles of the Federal Republic of German.The subjective element requires a *mens rea* element for which *dolus eventualis* is, in principle, sufficient. Regarding the serious violent offence endangering a State the offender has to be firmly determined ("*fest entschlossen*") to commit such an act.[166] The list of skills (methods and techniques) to be obtained is more specific than the Directive.[167]
Travelling Abroad for the Purpose of Terrorism (Article 9) Article 9 of the Directive introduces another new offence which requires States to criminalize "*travelling to a country other than that Member State for the purpose of the commission or contribution to a terrorist offence referred to in Article 3, for the purpose of the participation in the activities of a terrorist group with knowledge of the fact that such participation will contribute to the criminal activities of such a group as referred to in Article 4, or for the purpose of the providing or receiving training for terrorism referred to in Articles 7 and 8*". Subparagraph (a) of paragraph 2 requires states to criminalize travelling to their territories for the above purposes. Subparagraph (b) punishes "*preparatory acts undertaken by a person entering that Member State with the intention to commit or contribute to a terrorist offence, as referred to in Article 3*". For all these acts to be punished, they must be committed intentionally.	The German Criminal Code criminalizes travel but focuses on individual terrorist acts and does not directly criminalize traveling for the purpose of being a leader or participating in a terrorist organisation per se.[168]The German Criminal Code requires that the offender has intent (*Absicht*) regarding the purpose of the travelling.[169]

[166]BGH-NStZ 2014, 703; MüKo-StGB/Schäfer, §§ 80-185j, 3rd edition 2017, § 89a Rn. 58.

[167]Article 89a (2) 1st subparagraph: "...production or the use of firearms, explosives, explosive or incendiary devices, nuclear fission material or other radioactive substances, substances that contain or can generate poison, other substances detrimental to health, special facilities necessary for the commission of the offence or other skills that can be of use for the commission of an offence under subsection (1) above,"

[168]Section 89a: http://www.gesetze-im-internet.de/stgb/__89a.html (German, accessed on 23 July 2016).

[169]The purpose of the travelling must be to commit a violent dangerous offence endangering the state or to participate in a terrorist training. MüKo-StGB/*Schäfer*, §§ 80-185j, 3rd edition 2017, § 89a Rn. 59.

Organising or otherwise facilitating travelling for the purpose of terrorism (Article 10) Article 10 introduces another new provision and requires States to criminalize "*any act of organisation or facilitation that assists any person in travelling for the purpose of terrorism*" knowing that the assistance thus rendered is for that purpose. This offence is punishable only when committed intentionally.	There are no explicit provisions penalizing facilitating travel for the purpose of terrorism in Germany.
Financing of terrorism (Article 11) In a newly introduced provision, the Directive requires States to criminalize '*providing and collecting funds, by any means, directly or indirectly, with the intention that they be used, or in the knowledge that they are to be used, in full or in part, to commit or to contribute to any of the offences referred to in Articles 3 to 10*.'There is no requirement that the funds in fact be used, in full or in part, to commit or to contribute to a terrorist offence, nor that the offender knows for which specific offence(s) the funds are to be used.	The German Criminal Code criminalises the collection of, and transfer of funds with the knowledge or the intent, that they be used, by another person, for the commission of a terrorist offence. (Section 89c: http://www.gesetze-im-internet.de/stgb/__89c.html (German, accessed on 23 July 2016). This is similar to the Directive.
Relationship to Terrorist Offences (Article 13) In a newly introduced provision, the Directive states that preparatory / non-principle offences (membership of a terrorist group, travelling, financing, provocation, facilitating travel) it is not necessary that a principle offence be actually committed.	
Support to Victims (Title V Articles 25-26) The Directive includes a whole section on the rights of victims of terrorism and the support services that should be available. This builds on the Victims Directive 2012/29/EU which details the provision of victim support services. Member states had until 2015 to implement the Victims Directive but as many states had limited services in place, it is likely that effective implementation will take some time.	The national parliament provides financial means to compensate victims of terrorist attacks. This voluntary payment, to which there is no legal entitlement, is to be understood as an act of solidarity of the state and its citizens with the victims of such attacks. However, there is a draft to a new law ("*Gesetz zur Einführung eines Anspruchs auf Hinterbliebenengeld*") which shall provide legal claims to surviving dependents of killed victims.[76] Additionally, there exists a general law for all crime victims which has some specific legal requirements.[77]

PART IV. THE NETHERLANDS

I. Applicable legal framework

a. National legal framework of counterterrorism laws

The approach of terrorism in the Netherlands is originally from a criminal law nature. It was decided not to include the legislation regarding terrorism in separate legal anti-terrorism legislation. Instead, it is systematically brought into the Code of Criminal Procedure (*Wetboek van Strafvordering (Sv)*) and the Criminal Code (*Wetboek van Strafrecht (Sr)*). However, administrative laws have been considerably expanded. There is now a special "Temporary Administrative Powers Counter Terrorism Act" (Temporary Powers Act). [170]

This Temporary Powers Act targets persons who the government claims "can be associated with terrorist activities or the support thereof". The Act envisages far reaching administrative control orders on such individuals that would restrict a person's access to certain places and areas; contact with specific people; ability to travel outside the Schengen area; and/or would impose a duty to report regularly to the police.[171]

The Act also provides for the use of ankle tags to ensure compliance. Local administrative authorities would also be empowered to reject or revoke subsidies, permits and exemptions to such individuals when there is an alleged serious risk that these would be used to commit or support terrorism related activities.[172]

On August 10, 2004, the Terroristic Crimes Act (*Wet terroristische misdrijven (Wtm)*) came into effect.[173] This law is the result of the implementation of EU's counterterrorism legislation.[174] With this law conspiracy to commit terrorist offenses and to recruit persons for armed combat (recruitment for jihad) is punishable.

Previously, the European arrest warrant was implemented in the Dutch "*Overleveringswet*" (Law of Surrender) and the legislation for approval and implementation of UN conventions regarding combating the financing of terrorism and suppression of terrorist bombings.

---

[170] Tijdelijke wet bestuurlijke maatregelen terrorismebestrijding (Memorie van toelichting, kamerstuk 34 359, nr.3).
[171] Temporary Rules on the imposition of restraints on persons constituting a threat to national security or intending to join terrorist groups to fight and on the refusal and withdrawal of decisions [on applications for a granting a license, etc.] at serious risk of being used for terrorist activities (Temporary Administrative Powers Counter Terrorism Act), Parliamentary Papers I 2015 - 2016, 34359, A, 17 May 2016. It passed the House of Representatives (the parliament) on 17 May 2016.
[172] Subsidies for local youth associations, for example, can be temporarily withheld and stopped all together if there is a suspicion that the association's directors can be linked to specified groups and if subsequently there is a risk that the association might use government subsidies to organize or support terrorism-related activities. Also, government subsidies for education or research can be withheld from groups and organizations for the same reason.
[173] Besluit van 21 juli 2004 tot vaststelling van het tijdstip van inwerkingtreding van de Wet terroristische misdrijven, Stb. 2004,373.
[174] Kaderbesluit van de Raad van 13 juni 2002 inzake terrorismebestrijding, PbEG L 164.

Between 2004 and 2009 legislative proposals were adopted that made preparatory acts of terrorism punishable and the hearing of protected witnesses possible. Also the involvement and participation in terrorist training was being criminalized and the opportunities for investigation and prosecution of terrorist offenses was broadened.
In 2010, the legislation - under the influence of the Council of Europe Convention on the Prevention of Terrorism – was extended by the Act Training for Terrorism, which introduced article 134a Sr and article 83b Sr.

In 2013 the amendment to the Criminal Code was adopted in connection with the offense of financing terrorism.[175]

Existing and new counterterrorism measures were brought together in 2014 in the Integrated Approach to Jihadism (*Actieprogramma Integrale Aanpak Jihadisme*).[176]

The National Counterterrorism Strategy 2016-2020 connects all government partners in the joint approach to extremism and terrorism in the Netherlands. It provides the framework for the necessary interventions. [177] The EU-directive 2017/540 is implemented in this strategy.

In summary, the following laws are of interest:

- preparation of general offenses such as murder, manslaughter and arson (art. 46 jo. 289/288/257 Sr);
- a specific preparatory offense (art. 96 lid 2 Sr);
- conspiracy of murder/homicide with terroristic intent (art. 96 lid 1 Sr jo. 289a/288a Sr);
- training for terrorism (art. 134a Sr);
- recruiting for armed combat (art. 205 Sr);
- participation in a terrorist and/or criminal organization (art. 140a/140 Sr);
- agitation (art. 131/132 Sr);
- general offenses with 'terroristic intent' (art. 83a Sr): this allows certain general offenses (such as murder) to be labeled as terroristic crimes, while the maximum penalty is increased for a number of crimes with terrorist intent;
- criminalizing terrorist financing (art. 421 Sr; since 2013);
- The Act Explosives Precursors came into effect on June 1, 2016. This law regulates the sale of certain chemicals and obliges sellers to report suspicious transactions, thefts and missing items via a specially set up hotline.

New legislation

- Termination of (unemployment) benefits, study financing, scholarships, etc. in case of participation in a terrorist organization.
- The Minister may impose, without intervention of a judge, a restraining order to prevent departure to Syria.
- Exclusion from the electoral rights of people convicted for terrorist offenses.
- Obligatory reporting of terrorist offenses and preparation facts *(Aangifteplicht*).
- Extending existing powers in the 'Act on Dutch citizenship' and withdrawal of Dutch citizenship.[178]

[175] Kamerstukken II 2012/13, 33478, 292.
[176] Kamerstuk 29 754, nr. 432.
[177] Kamerstuk 29 754, nr. 391.
[178] Ms. E. Tendayi Achiume, Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance of UNHR expressed on October 2018 her concerns in a letter to The

- With a terrorism suspect in pre-trial detention, DNA can be taken sooner. The criteria that a strong suspicion ('serious objections') must exist is canceled.
- The threshold to keep these individuals in detention is lowered. The consequence of this will be that someone who is suspected of a terroristic offense (based on some suspicion) can be retained longer than is currently allowed by law.[179]

1. Pre-trial detention

This applies to all suspicions of criminal facts and not specifically for terrorist related facts.

The first stage of pre-trial detention is called *bewaring* (custody) and can last for a maximum of fourteen days (before the *bewaring* a suspect can be held by police for up to three days and fifteen hours). The *bewaring* can be ordered by an investigative judge upon a motion by the public prosecutor (Article 63 Sv). The hearing in which the decision is made about the *bewaring* must take place within three days and fifteen hours after the arrest. At this hearing the investigative judge also checks the legality of the arrest (Article 59a Sv). Before this hearing the defence is presented with the motion from the prosecutor containing the request for pre-trial detention and its reasons. The defence also receives the available evidence in the case file at that time.

The second stage of pre-trial detention is the gevangenhouding (imprisonment) and has to be ordered by a panel of three judges (Article 65 Sv), again upon a motion by the public prosecutor. The first hearing in this stage of the pre-trial detention takes place within fourteen days after the initial pre-trial detention order was granted by the investigative judge (unless the initial order was for a shorter period).

In terrorism-related cases, the indictment can be postponed - and the pre-trial detention extended - up to a maximum of two years in addition to the first 104 days of pre-trial detention.[180]

At any time during the pre-trial detention a request can be made to suspend the pre-trial detention. In case of refusal of a request for suspension appeal is possible. An appeal can be lodged only once. The public prosecutor can also appeal.

2. Terrorist Wing

Dutch Immigration and Naturalisation Service. The Netherlands citizenship revocation policies rely on a mono-/dual-nationality distinction. Recent jurisprudence within the UN human rights system strongly suggests that such a distinction directly discriminates on the basis of "national or social origin" and is per se incompatible with the Netherlands' international human rights law obligations. These policies are also discriminatory because they effectively establish classes of citizenship, with Dutch mono nationals holding full citizenship and Dutch dual nationals holding a less secure, contingent form of citizenship. This tiered citizenship is incompatible with the Netherlands' human rights law obligations to realize equal protection of the law and equality before the law. This tiered citizenship is further impermissible because it discriminates on the basis of ethnicity, national origin and descent. Because Dutch dual nationality is typically held by specific national origin or ethnic origin groups, the Netherlands' citizenship revocation policies and their resulting classes of citizenship establish a regime of differential treatment on the basis of descent, or national or ethnic origin. This discriminatory result violates the Netherlands' human rights law obligations to ensure racial equality and prevent all forms of indirect racial discrimination,
https://www.ohchr.org/Documents/Issues/Racism/SR/Amicus/DutchImmigration.pdf.

[179] Stb 2018, 338.

[180] Stb. 2018, 338.

Persons suspected and convicted of terrorist offences are placed in a special, highly monitored "terrorist wing" (TW). These "suspects" include individuals who have not yet been indicted, as well as those who are indicted for terrorism offences. As a result, authorities automatically assigned persons suspected or convicted of a terrorist offence to the TW without ever assessing if individuals actually posed this or any other threat or if the TW's security measures were necessary or proportionate in each case.

The original purpose of the Netherlands' specialized detention "terrorist wing" was to separate people suspected and convicted of terrorist offences, as defined under Dutch law, from ordinary detainees and prisoners and to place them in a special, highly monitored "terrorist wing". The government did this with the aim of preventing those suspected of or convicted for terrorist offences from recruiting and "radicalizing" people detained in regular prison wings. A second stated goal was to monitor the TW population to gain knowledge and develop expertise in dealing with people suspected and/or convicted of terrorist offences.

3. Punishment

In general, the maximum prison sentences for crimes such as homicide, heavy assault, hijacking or kidnapping are increased if they are committed with terrorist intent. Most cases results in an increase of the sentence by 50 percent. However, in case of a felony punishable by a sentence of fifteen years of imprisonment, the penalty can be increased to life imprisonment or thirty years (art. 114a Sr).

Participation in a terrorist organization could be punishable with a prison sentence of eight years. Its leaders could face imprisonment of fifteen years.

Some crimes are also linked to a planned terrorist crime (artt. 311, 312 and 134a Sr) for which the sentence can be increased by one third; for example, forgery (art. 225 Sr). If forgery of documents is committed with the objective of preparing a terrorist act the sentence can be increased by one third.

b. Implementation of EU Directive 2017/540

Cfr. Section I(a) – National Legal Framework and the Annex – table of comparison.

II. The most pertinent challenges / issues faced by the judges/experts in applying counterterrorism measures in line with human-rights law

a. Administrative measures

According to an interviewed anonymous judge the definitions are workable:
"There is no difference with regular legislation. It is broad and through jurisprudence it has to crystallize further. However, when it comes to administrative law, it becomes very difficult to defend against it".[181] For terrorism-related facts broader definitions are required, because of the safety.

[181] Questionnaire former Judge A (anonymous), 22 November 2018.

On the one hand, it does stretch the determination, but it covers the cargo. It can be contrary to human rights, but this would also be the case if you let an alleged terrorist go ahead. So far in the experience of the anonymous Judge, the prosecutors are not prosecuting persons for nothing, he believes in the integrity of the public prosecution service.[182] However, concerning the application of administrative law, he believes it is good that there are alternatives. By means of administrative law you can make it for persons more difficult to actually commit a terrorist fact. Administrative measures are less far-reaching than criminal measures. If a person comes into contact with criminal law that individual will go immediately to the terrorist wing in prison. This is not the case with an administrative law measure. It is good to consider human rights and that is also necessary, but also the safety of a country and its inhabitants should be kept in mind. This balance between subsidiarity and proportionality must be checked constantly according to him.[183]

On the other hand administrative law only verifies whether the government has been able to come to a reasonable decision. Criminal law checks whether it is actually a criminal offense. Guarantees in the criminal law can thus be circumvented.[184] The statements regarding the controversial Imam Fawaz Jneid confirms this.[185]

Defence against administrative measures is very difficult. For example, publishing the Terrorism list where you can see whose bank accounts are frozen because they are suspected of a terrorist act. It is unclear what the criteria are for getting on such list and what you can do to be taken off of it. [186] [187]

Especially the "Temporary Powers Act" threatens, in theory, to violate a range of human rights, including freedom of movement and association; the right to leave one's country and return to it; the right to privacy and family life.

The Temporary Powers Act does not define or list which actions might bring a person under suspicion and thus vulnerable to the application of a control measure.

An administrative order banning travel outside the Schengen Area is a key feature of the Temporary Powers Act. If the government has "well-founded suspicion" that a person plans to leave the Schengen area with the purpose of joining a group deemed to be engaged in acts threatening national security, a travel ban would be imposed. This would automatically lead to the confiscation and revocation of a person's passport.

The bill contains no requirement for judicial authorization prior to the application of the administrative control measure, consolidating power to issue and apply an order solely by the executive authorities.

An affected person would be able to appeal the ministerial order directly to an administrative court and an administrative judge would be able to consider any facts and circumstances that would have become relevant after the date of the order.

[182] Questionnaire Anonymous Judge, 20 December 2018.
[183] Questionnaire Anonymous Judge, 20 December 2018.
[184] Questionnaire former Judge A (anonymous), 22 November 2018.
[185] ECLI:NL:RVS:2018:1763.
[186] Questionnaire former Judge A (anonymous), 22 November 2018.
[187] Released jihadists end up in a person-oriented approach of the government. A chain in which the goal is to let ex-jihadists return to society. However, these people are on the national terrorism list. They can not open a bank account and can not receive any finance/salary.

However, this judicial review is only available on procedural grounds and not on substance, and only after the control order has been imposed.

This procedure is in clear violation of the European Convention on Human Rights. In *Klass and others v Germany*, the European Court of Human Rights (ECtHR) observed that *"an interference by the executive authorities with an individual's rights should be subject to an effective control which should normally be assured by judiciary, at least in the last resort, judicial control offering the best guarantees of independence, impartiality and proper procedure".*[188]

There are also a wide range of fair trial guarantees (i.e. the presumption of innocence, principle of legal certainty and right to appeal), the prohibition of discrimination and the right to an effective remedy which are in danger.

This bill does not require that an individual in question be charged with any crime or even reasonably suspected of involvement in a specific criminal offence. The authorities are not required to seek prior judicial authorization for the application of the restrictive measures that both bills envisage, nor do they provide for ongoing judicial or other independent supervision of the measures.

According to the anonymous Judge, these kind of bills threatens to fuel stereotypes that certain individuals – Muslims, foreigners, dual nationals – are more inclined to be associated with terrorism - related acts than others. Such associations contribute to discrimination and hostility toward such groups.[189]

Within the Dutch Nationality Act a person can appeal a stripping order, but the bill fails to expressly provide for suspensive effect of the order while an appeal is pending. If the person has been effectively notified - which could be extremely difficult given the fact that he or she would be abroad and/or would be in a conflict zone and has managed to lodge an appeal - he or she would be able to appoint a lawyer and a person of choice (e.g. a family member) to represent this person in the appeals process. If the affected person does not personally lodge an appeal within the required timeframe, an automatic appeal at the District Court of The Hague would commence, with legal counsel appointed by the court to represent the affected person. An appeal of the District Court ruling could then be lodged at the Council of State (Administrative Jurisdiction Division, which is the highest general administrative court). Administrative courts typically review only on procedural grounds, not on substance. It is important to note that ministerial decisions to strip a person of Dutch nationality are often based on secret information from the intelligence and security services, which is generally not accessible to the affected person or its representative, raising concerns about "equality of arms" in the course of the appeal. An affected person should have access to enough information to effectively challenge the stripping of his or her Dutch Nationality.

Moreover, in general nationality-stripping measures in the context of counter-terrorism initiatives can be divisive, and buy into and promote false and xenophobic narratives about "true" citizens whose sole nationality is Dutch and those Dutch citizens of a second tier, possibly perceived to have divided loyalties due to their dual nationality. Nationality stripping can have a detrimental impact on the environment in which Dutch nationals of foreign origin/descent or certain racial/ethnic/religious groups are able to

[188] Klass and others v Germany, (5029/71), European Court of Human Rights, 6 September 1978.
[189] Questionnaire former Judge A (anonymous), 22 November 2018.

enjoy their human rights on the basis of equality. The ultimate risk is that in fuelling stereotypes of who is a "terrorist" the stripping measure helps to create a climate in which certain groups of immigrants and others of certain national origins may find themselves victims of discrimination.[190]

b. Special investigative powers

In the title VB of the Code of Criminal Procedure (Sv) we find the regime that applies to the possible use of special investigative powers within the framework of an investigation concerning possible terrorist offenses. This can be used when "indications of a terrorist crime" exist. Practice and Parliamentary documents show that those indications are only based on a limited number of data sources. The most important sources are: anonymous information from the General Intelligence and Security Service (AIVD) or Team Criminal Intelligence (TCI, formerly the Criminal Intelligence Unit (CIE), or information coming from the hotline Report Crime Anonymously (*Meld Misdaad Anoniem*).

According to a judge who wants to remain anonymous the assessment of the obtained evidence is difficult. This is especially the case with women who have been travelling to IS areas (ISIS controlled territories?). Women pose less often with weapons in photographs for example, and participate less often in armed combat. It is difficult to test evidence that women have supported terrorists. One depends on stories on social media, stories from the press or information from the services. Those stories are difficult to check. It is problematic that the ministerial decision to issue a control order could be based on secret information from the Dutch intelligence and security services, which would not be subject to disclosure to the person affected by the order or that person's lawyer. An individual must be able to access sufficient information to effectively challenge the application of a control measure. [191]

Judges are aware of the lack of control on information gathered by the Dutch intelligence and security services. But on the other hand they must be able to assume that the information is reliable, otherwise they cannot do their work properly. They do not have indications that this power is being abused.[192]

A Dutch terrorism lawyer who wants to stay anonymous denounces the low burden of proof in terrorism cases and the "bullying behavior" of the security services with suspects of terrorism. They constantly monitor the suspects and their environment. These persons' privacy is violated. Because of the low burden of proof, enough evidence can be found soon to start prosecution. Lawyers cannot conduct confidential conversations with clients because they are monitored by the security services and against all human rights rules this is subsequently put in the file. The lawyer explained that *"according to Dutch law intelligence agencies can listen in on conversations that defence lawyers have with their clients. Since May this year the regional court in The Hague has to give permission. The exact criteria for that permission aren't clear. There is no lawyer there when the court in The Hague makes that decision. In the American FISA*

[190] In January 2019 15 persons were stripped of their nationality or were on the list to be stripped,*Niet meer als terrorist gezien, wel je Nederlanderschap kwijt*, NRC Handelsblad 7 January 2019.
[191] Questionnaire Anonymous Judge, 20 December 2018.
[192] Questionnaire former Judge A (anonymous), 22 November 2018 and Anonymous Judge, 20 December 2018.

courts, there are lawyers who argue the defendant's case. We don't have that in Holland. It has a chilling effect with my discussions with clients". [193]

c. Definition of terrorism

No definition of terrorism is present in Dutch criminal law, but a definition of the terrorism objective exists. It is sufficiently defined in criminal law. In administrative law, the formulations are too vague. The legal provisions still require extra jurisprudence to define them better (for example, article 96 Sr. about the terrorist objective). When is that the case? The difference lies in the motive, purpose and effect. It is about whether you want to disrupt the State. Only your origin/religion is not sufficient. For example Jason W. threw a hand grenade at the police in 2004, but he was not convicted of throwing with a terrorist intent.[194] Laura Hansen[195] has been convicted on articles 96 and 157 Sr.[196]

According to a judge, Article 134a Sr. has also been drawn up too broadly. It includes almost everything. The Netherlands go further than any other country especially in the preparation phase (see also art. 96 paragraph 2 Sr.). Compared to other criminal laws, it is not that different. However, we must be critical of it. [197]

Also, Prosecutor A is of the opinion that article 134a Sr. is drawn up too broadly. He explains that "*if you look at that text, you are going to fall off your chair. We hardly use it*". [198]

In April 2017, the Supreme Court showed the limits. [199]

The guidelines are broadly formulated, but it is manageable through jurisprudence and good consultation. In addition, the Dutch legal system has a good self-cleaning ability. There is specialized legal practice, a lot of consultation with the police takes place and a constructive relationship with each other exists. This is absolutely needed for these difficult topics.[200]

d. The Dutch Nationality Act

This amendment would only affect persons already outside the Netherlands and provides for the revocation *in absentia* of a dual national's Dutch nationality.

An affected person can be deemed a threat to national security on the basis of government's claims that they left the country to voluntarily "join" a foreign state's military service or a "terrorist organization". It remains unclear what precise actions would constitute "joining" such a group (e.g. marrying a member). The Cabinet maintains a list of such organizations. Dutch nationality can then be stripped without

[193] Questionnaire anonymous lawyer, 19 December 2018.
[194] ECLI:NL:GHSGR:2008:BC2576.
[195] Laura Hansen is a Dutch woman who was convicted of terrorism for joining IS. She received 2-year prison sentence for traveling to Syria to join a terror group with her partner and children. The court considered it proven that she planned to prepare and promote terrorist activities.
[196] ECLI:NL:RBROT:2017:8858.
[197] Questionnaire former Judge A (anonymous), 22 November 2018.
[198] Questionnaire Prosecutor A (anonymous), public prosecutor at the court of appeal, 27 December 2018.
[199] ECLI:NL:HR:2017:416.
[200] Questionnaire Prosecutor A (anonymous) public prosecutor at the court of appeal, 27 December 2018.

prior criminal conviction when Dutch nationals voluntarily enlist in the armed forces of a terrorist militia. Persons subject to this deprivation of nationality can include minors (persons 16 years and older) and will not need to have been charged or previously convicted of terrorism-related crimes. No prior judicial authorization will be required. Upon the stripping of nationality, the affected individual will automatically be declared an "unwanted alien" and will be prohibited from re-entering the country, voting, or reuniting with family members.

According to former judge A, it's discriminatory that the Dutch nationality of citizens with two nationalities is revoked, while they are born and raised in the Netherlands. He stated that when they participate in the Dutch national soccer team, they are considered Dutchmen (they belong to us), but if they do something wrong, they are deprived of the Dutch nationality.[201]

e. Freedom of speech

Article 131 of the Dutch criminal code already criminalizes public incitement verbally or through writing or images – to violence against public authorities.[202] The maximum punishment is five years in prison. However, when the incitement is to commit acts related to terrorism, or in preparation for, or furtherance of a terrorism-related offence, the maximum punishment is increased by a third. Article 132 makes it an offence to disseminate any material that would incite others to commit crimes. The maximum punishment is three years, increased by a third when the incitement is to commit a terrorism-related offence.[203] [204]

According to Prosecutor A, the freedom of speech is still well guaranteed. As he states, looking at social media incitement is not so much of an attention, because most of the incitements are not serious. and many react like possessed on social media.[205]

f. Financing terrorism

When looking at financing of terrorism, conditional intent (*voorwaardelijk opzet*) is already sufficient to prosecute. As a result, a person could be accused of financing terrorism, while that individual only wants to send a family member money for medication. It would probably be better if the criminal code would include the purpose of a terrorist crime (*oogmerk*) instead of conditional intent.

On the other hand, the penalties for a conviction regarding financing terrorism are not the most severe penalties, usually it is a conditional punishment. [206]

---

[201] Questionnaire former Judge A (anonymous), 22 November 2018.
[202] Criminal Code (2012), http://www.legislationline.org/documents/section/criminal-codes/country/12. To fall within this provision, a direct connection must exist between the incitement and the crime incited, but the incitement itself can be direct or indirect. Moreover, the act of incitement is complete once it is communicated - whether the incited act is actually committed is irrelevant. Incitement must also be done publicly.
[203] On 10 December 2015, the District Court of The Hague convicted eight men and one woman for a range of terrorism-related offenses in a trial known as the "Context" case. Nine individuals were found guilty of various terrorism offences, including for online incitement to terrorism (Art. 131) and the dissemination of terrorism-related inciting content (Art. 132). See ECLI:RBDHA:2015:16102.
[204] Questionnaire former Judge A (anonymous), 22 November 2018.
[205] Questionnaire Prosecutor A (anonymous) public prosecutor at the court of appeal, 27 December 2018.

The lawyer explains as example:
"I have clients who have been prosecuted for sending money to a client who is detained in the TW. The charge was financing terrorism. Clients who don't have links with Jihadi groups. Dutch Antilleans that sold ammunition to terrorists. They also have been placed on the TW. It's very easy to be named terrorist. It's so broad".[207]

g. Pre-trial detention

The Dutch policy towards the use of pre-trial detention is being criticized. According to European law the judge must demonstrate that he reviewed the requirements for the continuation of the pre-trial detention. The judge has to motivate why he rejects the request of suspension.[208] It can be stated that in Dutch practice this is not the case. Standard forms are available, but the question is whether these forms meet the European requirements.

Prosecutor A, Dutch prosecutor at the court of appeal, never used the possibility of keeping someone who is charged for a terrorist act longer in pre-trial detention than suspects of regular crimes. He considers that *"the fact that the law allows it does not mean that we have to apply it."* His experience is that they deal with it in a magistrate way.[209] In practice, terrorist offenses are not prosecuted in any other way than regular criminal offenses. When there is a suspicion of a terrorist crime, consultations are first held with partners, such as the local police officer. They know the persons from the neighborhood and observe changes. Together with the information gathered by for example the intelligence services, they will decide whether an individual will be arrested.[210]

h. Terrorist Wing

International human rights standards permit states to subject detainees to restrictive security measures in exceptional circumstances only [211] and exclusively in a necessary and proportionate manner based on an individual risk assessment of each detainee.

The anonymous lawyer says that the establishment of this separate unit is an unnecessary, unsubstantiated and possibly even a counterproductive approach to prevent recruitment in prison. Only the persons suspected or convicted of terrorist offences should be placed in the TW based on individual risk assessments rather than automatically assigned to the TW. [212]

---

[206] Questionnaire Anonymous Judge, 20 December 2018.
[207] Questionnaire anonymous lawyer, 19 December 2018.
[208] ECHR 26 June 1991, Appl Nr. 12369/86 (Letellier vs. France) and ECHR, 24 july 2003, Appl. Nr. 46133/99 and 48184/99 (Smirnova vs. Russia).
[209] Questionnaire Prosecutor A (anonymous), public prosecutor at the court of appeal, 27 December 2018.
[210] Questionnaire Prosecutor A (anonymous), public prosecutor at the court of appeal, 27 December 2018.
[211] Rule 53 of Recommendation Rec(2006)2 of the Committee of Ministers of the Council of Europe to Member States on the European Prison Rules (adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies) (hereinafter European Prison Rules).
[212] Questionnaire anonymous lawyer, 19 December 2018.

The European Court of Human Rights has also held that such an assessment must take into account each detainee's actual behaviour.[213] Contrary to its obligations under international law, Dutch authorities are failing to conduct such individual assessments to ensure that a person's placement in the TW under a restrictive regime of high-security measures is necessary and proportionate.

International human rights law and standards require authorities to manage all places of detention with the aim of facilitating the reintegration of detainees into society.[214] The European Prison Rules stress that authorities must ensure that prison conditions *"offer meaningful occupational activities and treatment programmes to inmates, thus preparing them for their re-integration into society."*[215]

i. Minors

The Commentary to the rules explains that detainees should be given every opportunity to develop their skills and personal relationships in ways that will make it less likely that they will re-offend after they are released.[216] The Council of Europe's Guidelines for Prison and Probation Services regarding Radicalization and Violent Extremism also emphasize the importance of reintegration and instruct states to evaluate the negative impact that security measures can have on reintegration.[217] The Special Rapporteur on torture has noted that the practice of solitary confinement in particular is contrary to the penitentiary system's essential aim of rehabilitation and reintegration.[218] The TW's requirement of confinement to an individual cell and routine restrictions on family contact also hampers reintegration. As described above, these general restrictions are unjustified because they are not based on individualized risk assessments.

The failure to provide these services is also deeply misguided because it threatens to further isolate already stigmatized detainees, and reinforces the misconception that persons suspected of and convicted of terrorist offences cannot proceed to play productive roles in Dutch society.[219]

Two judges testify on children prosecuted for terrorism-related offences:

> *"One of the suspects in the Context-case just turned eighteen. He was seventeen when he committed most criminal offenses he was charged off. We did not experience that as a special problem. We could apply the adult criminal law. We have taken into account his age in the grounds for sentencing".*[220]
>
> *"As far as I know, children in the Netherlands have never been convicted of a terrorist offense. Some minors just under eighteen were convicted when they committed the act. In*

[213] Horych v. Poland (13621/08), European Court of Human Rights (2012), para. 93.
[214] Article 10(3) of the ICCPR: "The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation…." Rule 6 of the European Prison Rules: "All detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty." See also Principle 8 of the Basic Principles for the Treatment of Prisoners, and Rules 107 and 108 of the Mandela Rules.
[215] European Prison Rules, p. 5 of the Commentary.
[216] European Prison Rules, p. 113 of the Commentary.
[217] Guidelines 10 and 22 of the Prison Guidelines on Radicalization and Violent Extremism
[218] Interim Report to the General Assembly, Special R on torture and other cruel, inhuman or degrading treatment or punishment, UN Doc. A/66/268, para. 79.
[219] Questionnaire former Judge A (anonymous), 22 November 2018.
[220] Questionnaire former Judge A (anonymous), 22 November 2018.

this case it will be examined on a case-by-case basis whether it can be dealt with through juvenile or adult criminal law. This is not different from regular criminal law in the Netherlands".[221]

There were minors convicted who were just under eighteen when they committed the offense.[222] Also Prosecutor A, mentions that it will be examined on a case-by-case basis whether it can be dealt with through juvenile or adult criminal law.[223]

j. Women

Women are treated exactly the same as men. Also when they are convicted. In contrast with the regular criminal law (where women will go to a separate women's department) women who are convicted for a terrorist offense are also placed on the TW (in between men, but the TW has an individual regime).[224]

There is no difference in approach when you look into the persecution. You do see that the women fulfil different roles than men. In general, women support the men and they make preparations.[225]

III. Recommendations

- Define the notion of 'preparatory acts'.
- Ensure the respect for human rights at all stage of procedure.
- Provide the relevant actors with specific trainings on terrorism related matters.
- Increase the sharing of expertise by including more experts on the EU list, organizing events to exchange good practices and experiences.
- Ensure that counter-terrorism legislation, policies and prosecutions do not only target islamist extremism but also political extremism.
- Increase the cooperation among the different actors involved in terrorism-related cases.
- Ensure that human rights of every individual are respect after the detention and prevent the abuse of special measures.

<u>Former Judge A</u>
My starting point is: we have the international obligation to combat terrorism. Criminal law is an important instrument for this because of the safeguards it contains.
A good topic for a seminar could be: what is covered by preparatory acts and how can we guarantee human rights.

<u>Anonymous Judge</u>
It is wise to have specialized judges, prosecutors and lawyers for terrorism cases. It is more than just the explanation of the law. Cultural background also plays a big part in understanding certain explanations and it helps with getting more insight.
What is missed is specialization among psychiatrists and psychologists. It happens that vulnerable people are recruited. Practice shows that psychiatrists/psychologists often

[221] Questionnaire Anonymous Judge, 20 December 2018.
[222] For example the Hague jihad preacher Oussama Chanou in the Context-case, ECLI:NL:RBDHA:2015:14365.
[223] Questionnaire Prosecutor A (anonymous), public prosecutor at the court of appeal, 27 December 2018.
[224] Questionnaire former Judge A (anonymous), 22 November 2018.
[225] Questionnaire Prosecutor A (anonymous), public prosecutor at the court of appeal, 27 December 2018.

shed the behaviour under the expression of religion, while there are rather vulnerable people who use religion to conceal their vulnerability.

Prosecutor A
My biggest concern is that we look too much at terrorism linked to the jihad. While we also need to be focused at the rise of extreme right and left.[226] In view of the reports from the intelligence services and the developments abroad, we should also focus on this.[227] A group of people exist now which abuses our democratic system.[228] They use the same techniques as jihadists. We must not lose sight of the other groups of terrorists. We now work with specialized people and we need to continue that. The experience of these specialists can also be used for the non-jihad terrorism cases. Another problem is the necessity for investment is dwindling when no attacks occur. Under a reduced threat, investments appear to stop. That is a worrying development, especially in view of the rise of other terrorist groups that are seeking to undermine the democracy.

Within the EU policy more persons have to listen to experts from the field. That is hardly done now. Invite them and ask for their findings and experiences.

Good practice is that we often get more insight through case consultation and consultation with community agents. That is very valuable. With this information it can be established whether a person is really radicalized, maybe it's just someone with psychological problems or possibly both.

Very good cooperation takes place with the specialized team of the Probation Service. Radicalized persons on which special conditions such as a location ban or specialist care are imposed, are supervised by the specialized team Terrorism, Extremism and Radicalization (TER) of the Dutch Probation Service. Team TER focuses on identifying, managing and removing risks. Together with its chain partners, it also looks for opportunities to detach someone from their extremist network and to reintegrate them into society.[229]

The Netherlands exchange much experience with other countries, in particular with Belgium, England and Germany.

---

[226] Dreigingsbeeld Terrorisme Nederland 48, September 2018, Nationaal Coördinator Terrorisme bestrijding en Veiligheid, , p. 9-10.
[227] Jaarverslag 2017, Algemene Inlichtingen- en Veiligheidsdienst, p. 15-18.
[228] ECLI:NL:RBGEL:2018:5215.
[229] The nationally operating Team TER (Terrorists, Extremists and Radicals) helps the Dutch Probation Service prevent (further) radicalization by Dutch probationers. It aims chiefly to disengage radicalised Muslims (mainly home-grown jihadi) from radical movements using a tailor-made probation approach, and to influence their behaviour. Push and pull factors are used to promote behavioural change and stimulate the process of reintegration into society. The main tasks are risk management and supervision, carried out in close cooperation with partners (judicial, prison, police and municipal authorities). The team is also supported by psychological and theological experts.
The Dutch Probation Service engages with persons suspected or convicted of terrorism-related offenses such as rioting, recruiting and financing. Individuals suspected or convicted of offences like attempting to travel to or return from conflict areas or preparing an attack are referred to Team TER. In addition, Team TER engages with individuals who are suspected or convicted of other offences but are known to be involved in radicalization- or terrorist-related risks.
The team comprises 20 (internationally) trained probation officers specialised in relevant fields. They use regular probation methods of working in a judicial framework with mandated clients and make cognitive behavioural interventions.

Good topics for a seminar could be:

- In which way can be co-operated effectively with other parties in the field to prevent the undermining of democracy by terrorism?
- Is the isolation of suspects and convicts of a terrorist offense in detention effective?
- How can we prevent further radicalization without restricting human rights?

Anonymous lawyer

Good topics for a seminar could be:

- What to do with people who served their detention? Now, in The Netherlands years of supervision after detention is being done (electronic supervision, talking to an Imam). A client that got convicted for sending EUR 1000,- to a good friend in Syria. He got sentenced to 3 years of electronic supervision. Add to that the year he had the electronic supervision before he was sentenced. In total he has 4 years of electronic supervision for a relatively minor offense. Judges are looking for ways to exercise control over suspects/convicted individuals. There are far-reaching infringements of third parties' rights: contacts with parents, girlfriend and/or employer of the suspect/convicted individual.

ANNEX : table of comparison (directive 2017/541 v. Dutch legislation)

https://maxius.nl/wetboek-van-strafrecht/boek2

EU Directive	Dutch law
Definition of a Terrorist Group (Article 2) The Directive defines a '*terrorist group*' as '*a structured group of more than two persons, established for a period of time and acting in concert to commit terrorist offences*.' A '*structured group*' means '*a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure*.'	The Dutch Criminal Code does not give a definition of a terrorist group or organisation. However, in the same title as participation to a terrorist organisation, the CC states when committed by an association of two or more people, some of these offenses should be punished more severely.
Definition of a Terrorist Offence (Article 3) The Directive requires states to criminalize certain intentional acts as well as threats to commit those acts when committed with the aim of one or more of the following aims: *(a) seriously intimidating a population; (b) unduly compelling a government or international organisation to perform or abstain from performing any act; and (c) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation*.	Article 83 (a) of the Dutch Criminal Code. It strictly follows the definition provided by the directive. "Terrorist intent means the intent to terrify the population or part of the population of a country, or to illegally force a government or international organization to do something, not to do or tolerate it, or the fundamental political seriously disrupt or destroy constitutional, economic or social structures of a country or an international organization."
Offences Relating to a Terrorist Group (Article 4) The Directive requires states to criminalize *a) directing a terrorist group* and *b) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group*.	Participation to a terrorist group is defined by articles 140 and 140(a) of the Dutch criminal code. It criminalizes founders, leaders and directors. Participation includes any financial or material support .
Public Provocation to Commit a Terrorism Offence (Article 5) The Directive requires states to criminalise "*the distribution, or otherwise making available by any means, whether on or offline, of a message to the public, with the intent to incite the commission of one of the offences listed in Article 3(1)(a) to (i), where such conduct, directly or indirectly, such as by the glorification of terrorist acts, advocates the commission of terrorist offences, thereby causing a danger that one or more such offences may be committed*." It requires such acts are punishable when	The Dutch criminal code (art. 132) generally prohibits the distribution, public exhibition and storage of any document or image encouraging a criminal offence or violent action against public authority. However, the criminal code adds a requirement. The person must know or should have known that this content could provoke such reactions. A specific paragraph mentions that when this offense is used to encourage or commit terrorist offenses the punishment increases by a third.

committed intentionally. A very low threshold is set by considering an act punishable when it causes danger that an offence may be committed and criminalizes conduct directly or indirectly advocating terrorist offences.	
Recruitment for terrorism (Article 6) The Directive requires States to criminalise "soliciting another person to commit or contribute in the commission of" offences listed as a terrorist offence or offences relating to a terrorist group. The Directive explicitly states that recruitment is punishable only when committed intentionally.	
Providing Training for Terrorism (Article 7)	Article 134a Sr. prohibits providing anyone with the opportunity, means or attempt to commit a terrorist offense. It includes teaching someone else.
Receiving Training for Terrorism (Article 8) The newly introduced Article 8 requires states to criminalize the receipt of instruction, from another person, "*in the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or in other specific methods or techniques*", for the purpose of committing a terrorist offence (excluding the threat to commit a terrorist offence). The training must be undertaken intentionally.	Article 134a Sr. prohibits acquiring knowledge to commit a terrorist offence.
Travelling Abroad for the Purpose of Terrorism (Article 9) Article 9 of the Directive introduces another new offence which requires States to criminalize "*travelling to a country other than that Member State for the purpose of the commission or contribution to a terrorist offence referred to in Article 3, for the purpose of the participation in the activities of a terrorist group with knowledge of the fact that such participation will contribute to the criminal activities of such a group as referred to in Article 4, or for the purpose of the providing or receiving training for terrorism referred to in Articles 7 and 8*". Subparagraph (a) of paragraph 2 requires states to criminalize travelling to their territories for the above purposes. Subparagraph (b) punishes "*preparatory acts undertaken by a person entering that Member State with the intention to commit or contribute to a terrorist offence, as referred to in Article 3*". For all these acts to be punished, they must be committed intentionally.	

Organising or otherwise facilitating travelling for the purpose of terrorism (Article 10)	
Financing of terrorism (Article 11) In a newly introduced provision, the Directive requires States to criminalize '*providing and collecting funds, by any means, directly or indirectly, with the intention that they be used, or in the knowledge that they are to be used, in full or in part, to commit or to contribute to any of the offences referred to in Articles 3 to 10*.' There is no requirement that the funds in fact be used, in full or in part, to commit or to contribute to a terrorist offence, nor that the offender knows for which specific offence(s) the funds are to be used.	Article 421 Sr. punishes financing of terrorism. It prohibits supporting wholly or partially, immediately or indirectly the committing of a terrorist offense or the preparation and facilitation of such a crime.
Relationship to Terrorist Offences (Article 13) In a newly introduced provision, the Directive states that preparatory / non-principle offences (membership of a terrorist group, travelling, financing, provocation, facilitating travel) it is not necessary that a principle offence be actually committed.	Article 134a Sr. punishes the preparation or facilitation of a terrorist crime and does not require an independent offence to be committed.
Support to Victims (Title V Articles 25-26) The Directive includes a whole section on the rights of victims of terrorism and the support services that should be available. This builds on the Victims Directive 2012/29/EU which details the provision of victim support services. Member states had until 2015 to implement the Victims Directive but as many states had limited services in place, it is likely that effective implementation will take some time.	The Dutch Code of Criminal Procedure does not specifically address victim of terrorism but the right of victims in general (Title IIIA Sv).

PART V. ITALY

I. Applicable legal framework

a. National legal framework of counterterrorism laws

The main component of Italian counterterrorism law is criminal law. Most of the terrorist-related offences have been included into the Criminal Code of 1931 (*Codice penale*), which has been amended on many occasions. However, administrative law is no less important in providing tools for regulating counterterrorism activities (e.g. with regard to the confiscation and freezing of assets).

Many of the relevant criminal law provisions and tools date back to the 1970s, when the Italian state had to face the terrorist threat coming from far-left and far-rights groups. More recently, the need to contribute to the fight against international terrorism in the aftermath of the 9/11 attacks – not to mention the challenges posed more recently by ISIS – has paved the way for successive updates and adaptations in the field of antiterrorism law. Antiterrorism legislation has also been massively influenced by some of the special procedural tools, which have been put in place for prosecuting mafia-like organized crime. The more recent phase in the history of Italian counterterrorism law has been deeply shaped by the influence of international and European law.

More in detail, decree-law no. 59/1979 – enacted in the wake of the kidnapping of former Prime Minister Aldo Moro – first introduced the "purpose of terrorism" into the Italian legal order. The "purpose of terrorism" makes it possible to identify a number of autonomous offences, e.g. kidnapping (Article 605 Criminal Code) and kidnapping "for the purpose of terrorism or subversion" (Article 289 *bis* Criminal Code). However, as it happens in the United Kingdom and France, the "purpose of terrorism" is mostly ancillary, i.e. it does not create an autonomous offence.
Still, the "purpose of terrorism" was long characterised by a relevant degree of indeterminacy. What is meant by terrorist conduct has been clarified by Article 270 *sexies* Criminal Code (introduced by decree-law no. 144/2005): the definition includes:

(i) causing serious dame to a state or an international organization,
(ii) intimidating population,
(iii) compelling state government or an international organization to perform or abstain from performing any act, and
(iv) destabilising or destroying the fundamental political, constitutional, economic and social structures of a country or an international organization.

As can be seen, this definition largely builds on the requirements of Article 1 of the Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA) (see below at III.a).

In the last few years there has been a trend towards anticipating the moment in which a conduct becomes criminally relevant (see above all decree-law no. 7/2015). This can be explained in light of the concerns related to ISIS and the radicalisation – and subsequent mobilisation as foreign fighters – of "lonely wolves" who wish to join ISIS in theatres of war. Consequently, the ultimate goal of the most recent strand of

legislation is to neutralize the political project of the self-styled "Caliphate" to the greatest possible extent. In this vein, those who are recruited for the purpose of domestic or international terrorism are now punishable (Article 270 *quater* (2) Criminal Code). Previously, only the conduct of recruiting was criminally relevant (Article 270 *quater* Criminal Code). Similarly, organizing, financing or advertising travel for the purpose of terrorism has become an autonomous offence under Article 270 *quater* 1 Criminal Code. Another offence with a strong preventive **aspect** that has been introduced into the legal system is terrorist self-training (Article 270 *quinquies* Criminal Code).[230]
The current scenario largely corresponds to Directive 2017/541, the main difference being the lack of a specific provision concerning travelling for the purpose of terrorism.[231]

b. Which of these provisions implement the Directive 2017/541?

According to Article 28 of Directive 2017/541, Member States have to modify and adapts their own laws and regulations by 8 September 2018 at the latest. Article 1 of law no. 163/2017 has delegated the Government to adopt legislative decrees (*decreti legislativi*) for the transposition of the Directive. As of 16 February 2019, those decrees have not been enacted yet.

Still, one provision of the Directive has already been transposed into the domestic legal order in a different way. Article 24 of law no. 167/2017 has implemented Article 20 of the Directive: according to this provision, records of telephone and online traffic, as well as data related to unanswered calls, have to be stored for 72 months. This provision derogates from the general framework of Article 132 of the Code on Data Protection (legislative decree no. 196/2003), under which data related to telephone and online traffic and unanswered calls can be retained, respectively, up to 24, 12 and one month.

On a different note, Italian legislation largely anticipated some contents of Directive 2017/541. Indeed, both Italian and EU law provisions trace their origins to Resolution no. 2178 (2014) of the UN Security Council on threats to international peace and security caused by terrorist acts. Ahead of the adoption of the Directive, decree-law no. 7/2015 introduced tools whose goal is to combat foreign fighters. Law no. 153/2016 modified the Criminal Code so as to ensure compliance with Resolution no. 2178: more in detail, it modified Articles 270 *quinquies* 1, 270 *quinquies* 2 and 270 *septies* of the Italian Criminal Code.

II. The most relevant challenges and issues faced by judges and experts in applying counterterrorism measures in line with human rights law

a. The main gaps identified

[230] See G. De Minico, *Costituzione. Emergenza e terrorismo* (Napoli, Jovene, 2016) at 186-91.
[231] This is an important difference with France (see Article 421-2-6 *Code pénal*).

The opinions of our interviewees differ on the topic. Whereas an anonymous prosecutor believes that the current system can be improved but does work, an expert highlights practical issues relative to the vagueness of legislation.

"*There is an inherent tension between the criminalization of preparatory activities, on the one hand, and freedom of association and freedom of speech, on the other hand. Indeed, the relevant provisions in the Criminal Code are quite far reaching and penalise not only direct participation but also indirect involvement in terrorist groups, irrespective of the actual commission of violent acts.*
Another significant problem is what is meant by conspiracy for the purpose of domestic or international terrorism under Article 270 bis Criminal Code. Investigators tend to bring individuals to trial not so much by proving what they have done as by providing evidence of their connections with a terrorist group. In sum, there is a tension between individual responsibility and an elusive notion of conspiracy". (Expert A)

"*The current system can be improved but it does work. It is composed of efficient tools, also thanks to the historic link between fight against organised crime and counterterrorism, which was strengthened over the years. Great attention is devoted to the observance of rules. This has led to prosecuting CIA officials (e.g. in the Abu Omar case) and to proving the defendant's innocence".* (Prosecutor A)

b. Possible problems with legal certainty

Scholars are generally highly critical of the very structure of terrorism-related offences, in that they focus on the preparatory phases of terrorist activities. Many of the offences in the Criminal Code are victimless crimes (*reati di pericolo*). Indeed, they may raise concern from the viewpoint of Article 15 ECHR.

As highlighted by the interviewees, the definition of terrorism and terrorism related offences is vague and leaves room for interpretation.

Expert A states that the explanation should be traced back to the legacy of Italian terrorism in the Seventies (the so-called Years of Lead). In addition, if you also take into account the role of inchoate offences, the borders of criminal liability may become porous

Prosecutor A explains that these offences are then modeled after offences which are already well-rooted in the Italian legal system and gives as example the classic model of conspiracy (associazione a delinquere)

"More in detail, it is useful to clarify the concept of participation in ISIS activities (to date, judgments on Milanese cases have become final, think e.g. of Fathima and other cases). Norms are modeled after the empirical characteristics of terrorism and its territorial embedding at an early stage. UN Resolution 2178/2170 is based on this background: in fact, the first phase in the vicissitudes of the Caliphate was marked by a call to arms and by holy war in specific parts of the world. In general terms, the Italian system holds out much more firmly than in other states."

c. Particular problems related to prosecution of children

According to Prosecutor A, there have been few relevant episodes and they were tackled by the Juvenile Prosecutor's Office (*Procura per i minorenni*). In one of the most important cases, an Italian juvenile declared that he had built a drone in order to

hit a sensitive target. In Venice, a minor Kosovar was involved in a terrorist conspiracy that was found guilty of organizing terrorist attacks in Venice. On the whole, a stronger link between the two categories of Prosecutor's Offices in needed. Furthermore, a number of problems are related to the mobility of children, an issue which many countries have experienced.

d. Discriminatory way of implementing the counterterrorism provisions

In some respects, the link between international terrorism and Islamist radicalism can lead to a discriminatory implementation of the existing regulations. This is all the more true as counterterrorism policies are elaborated against the background of increasingly multicultural European societies.
A critical issue is citizenship stripping, as debates in a number of European countries in the last few years have shown. In Italy, the so-called "Security Decree" has introduced a case of citizenship stripping which is directly related to terrorism (Article 14 of decree- law no. 113/2018): those who are found guilty of a number of terrorism- related offences are stripped of their Italian citizenship if they have acquired it by birth and residence in Italy or by naturalization. Scholars have criticized this provision because it makes the adoption of the measure of citizenship stripping dependent on a quite wide range of terrorism-related offences. More importantly, this provision creates a distinction among Italian citizens based on how they acquired their citizenship: apparently, there is no compelling ground justifying this decision.[232]

Expert A highlights that a recurring risk is that law enforcement authorities resort to racial profiling and end up targeting minorities, above all in places like airports. Furthermore, administrative measures like deportation and citizenship stripping are only admissible for third country nationals (TCNs).

e. The role of gender

At least for the time being, the gender dimension of counterterrorism criminal law is limited. As of today, most cases have concerned young men.[233]

However, women play a significant role, as they are involved in organizing travel for themselves or with their partners, and they may organize the travel of their minor children. In other moments, they provide assistance to support terrorist activities properly understood. This kind of participation should be indictable even in the absence of a direct link with terrorist attacks. In the *Fathima* case (GUP Milano no. 598/2016), a woman organizing her own travel to Syria was involved.[234] The ordinary court in Milan found her guilty of organizing travel for the purpose of terrorism. However, this choice lends itself to criticism.[235]

III. Specific challenges in national law and practice

[232] See C. Sbailò, "Immigrazione: il fallimentare approccio europeo e i limiti della risposta neo-sovranista", *federalismi.it*, no. 3/2019, www.federalismi.it; C. Bertolino, "Paradossi della cittadinanza nella legge di conversione del decreto legge c.d. 'Sicurezza'", *federalismi.it*, no. 3/2019, www.federalismi.it.
[233] Interview with Expert A
[234] Interview with Prosecutor A.
[235] See R. Bertolesi, "Il 'caso Fathima' e le condotte di supporto ad un'organizzazione terroristica", *Diritto penale contemporaneo*, 5 July 2016, www.penalecontemporaneo.it.

a. Definition of terrorism, terrorist offence, terrorist group and participation in a terrorist group[236]

The Italian legislative framework has evolved, with crucial steps in 2000, 2001, 2009, and 2015. As mentioned previously (section I.a), a definition of terrorism has been introduced into the domestic legal order only in 2005.

Article 270 *sexies* Criminal Code was introduced in 2005 in order to clarify the meaning of Article 270 *bis* (association for terrorist purposes). Prior to this, the interpretation of the concept of terrorism gave rise to a controversial body of case law and to heated academic debate. Although mentions of terrorism had first appeared in Italian criminal law since the late 1970s, the concept itself had remained undefined. Nor was a definition provided when, under law no. 438/2001, the notion of international terrorism was introduced in the wording of Article 270 *bis* Criminal Code.

Prosecutors and judges were left to decide on a case-by-case basis whether an act fell within the offence of "association for terrorist purposes", only relying on principles of national and international law to define the notions of terrorist offence and terrorist act. A lengthy discussion, which is not exclusively Italian, has concerned the legal standing of individuals claiming to be "freedom fighters". A good example of this dispute is the contrasting interpretation at different stages of the *Ansar Al Islam* case. A judge in Milan held that violent or guerrilla actions carried out during wartime did not fall within the notion of international terrorism, except when they are intended to terrorize civilians. A similar line had already been taken by the Court of Cassation (*Maamri Rachid* case). In a subsequent case, a judge in Brescia ruled that acts committed in pursuance of a program of violence must be considered as offences under Article 270 *bis* Criminal Code and not as legitimate and proper guerrilla actions. In a subsequent ruling (2008), the Court of Cassation held that kamikaze attacks in crowded places that affect civilians, although directed against military targets in wartime, may be charged under Article 270 *bis*, as the distinction between guerrilla and terrorism is not to be considered relevant.

According to Prosecutor A, Art. 270 *bis* Criminal Code [criminalizing conspiracies for the purpose of international or domestic terrorism] is typical. It is still a key norm, also because we can use it with regard to conspiracies. Italian courts have adapted conspiracy offences to the structures of Al Qaeda and ISIS In this respect, the differences between Al Qaeda and ISIS should be considered. We used to confront ISIS cells which were part of a territorial network. On the other hand, Al Qaeda cells pose more complex challenges. After 2001, a discussion concerned terrorist activities in war settings (*Buiaia* case). A Milanese judge, Clementina Forleo, rendered an acquittal decision and held that the case had not to do with terrorism. The second-tier *Corte di assise di appello* recognised that war crime was the prevailing relevant offence. After two acquittal decisions, the Court of Cassation vindicated the Public Prosecutor's Office. We stressed the relevance for terrorism of the military and civilian targets, which make it possible to treat this as terrorism.

Having in mind this background, Article 270 *sexies* contains a general definition (see above at I.a) and a blanket provision. The blanket provision brings within the general

[236] This section takes as basis the interview conducted with Expert A.

definition any action deemed terrorist under international law or under conventions binding on Italy. This cross-reference is open and imprecise, and does not specify which international instruments should be considered. The scope and impact of this blanket provision are a matter of controversy. If the general definition is broad enough, the cross-reference is redundant. According to another interpretation, the blanket clause merely rubber-stamps a long-established judicial practice. However, critics argue that the vagueness of the definition leaves judges with too much discretion.

Article 270 *bis* Criminal Code was first introduced by law no. 15/1980 and criminalizes involvement in a terrorist group. It was amended in 2001 in order to cover terrorism directed against foreign states and international organizations. Furthermore, terrorism financing is punished with the same sentence as promoting, constituting, organizing or directing an association for terrorist purposes. A specific offence, also introduced in 2001, punishes those who assist members of a terrorist association (Article 270 *ter* Criminal Code). "Assistance" has to be distinguished from involvement in a terrorist group: it may consist in providing terrorists with a safe haven or food, hospitality, means of transportation or communication. In such cases, the offender's participation in the crime has not yet risen to the level of conspiracy. For the latter offence, it is sufficient that assistance is provided to a single member of the association and does not directly contribute to the perpetration of a specific offence or to the existence of the association.

b. Freedom of expression[237]

The Italian Criminal Code does not define "apologia of terrorism" and/or "incitement to terrorism" as a specific criminal offence. Two such provisions (Articles 302 and 303 Criminal Code) were enacted during the 1920s and were used in Fascist times to punish all forms of dissent, and then used again, less oppressively, during the 1960s and 1970s. Following the enactment of the Republican Constitution in 1948, the Constitutional Court (*Corte costituzionale*) found these articles incompatible with Article 21 of the Constitution – protecting freedom of expression – in certain cases. The Constitutional Court has, however, repeatedly underlined that freedom of expression does not represent a defence when the expression threatens protected goods or rights.

Article 303 Criminal Code (repealed by law no. 205/1999 as it was considered a feature of a police state) formerly punished public incitement and apology of the offences against the state, with a term of imprisonment from three to twelve years. This offence was drafted in a very broad way as someone could be prosecuted for the sole fact of having incited. Following the repeal of this provision, indirect incitement addressed to unspecified persons or a public "*apologie du terrorisme*" is no longer punishable as such. However, Article 302 Criminal Code establishes a general offence of direct incitement to commit intentional offences against the state, punishable with a term of imprisonment up to eight years. The offences falling within the scope of this provision are: association for terrorist purposes and assistance to those taking part in the association (Articles 270 *bis* and 270 *ter* Criminal Code); attacks with a view to terrorism (Article 280 Criminal Code); and kidnapping with a view to terrorism (Article 289 *bis* Criminal Code). Article 15(1) *bis* of law no. 155/2005 introduced a new aggravating circumstance to the offence of public incitement (Article 414 Criminal

[237] This section takes as basis the interview conducted with Expert A.

Code). Judges have to take it into account for sentencing purposes:

"if the aforementioned incitement or glorification concerns terrorism offences or crimes against humanity the sentence will be increased by half."

In this context, for example, the judge might have to ascertain on a case by case basis whether certain acts of proselytism within Mosques can lead to acts of violence and thus represent a terrorism offence as defined by Article 270 *bis* in combination with Article 270 *sexies* Criminal Code

According to practitioners, Article 302 is never used in relation to glorification of terrorism offences and the aggravated circumstance under Article 414 is preferred for the purpose of prosecution. Most cases involve charges against unknown individuals. As internet servers are often abroad, identifying a suspect is extremely difficult.

Prosecutor A explains that, Art. 414 Criminal Code – with multiple aggravating circumstances – has become an important tool against apologetic or instigating speech that is given in the absence of participation in terrorist activities. A significant achievement is rigorous interpretation of the provision, with due regard for the *nullum crimen sine actione* principle. On some occasions, Art. 414 Criminal Code turns into Art. 270 *bis* Criminal Code. Defendants are often charged with both offences jointly. A possible example: press agencies linked to ISIS used to publish online press releases, declarations and videos celebrating holy war. How should they be defined in terms of criminal law? Problems arise from the minimal requirements for participation: the Court of Cassation generally says that for ISIS individual reactions to a generalised invitation are not sufficient. The requirements for participation are not met if there is no link with the mother cell.

Finally, it should be noted that there is no clear/*expressis verbis* incrimination of "indirect apology" as there is in UK for example (see the case of the sermon/lecture in the mosques).

c. Definition of offences in national laws (Articles 6-11 CT Dir) – are these sufficiently clearly defined? What is the burden of proof for these offences?

Recruitment and training[238]

In Italy, law no. 155/2005 introduced two new offences into the Criminal Code, namely recruiting (Article 270 *quater*) and training individuals to carry out activities for terrorism purposes (Art. 270 *quinquies*). The background was that a growing number of cases of enrolment of Islamic fighters could not be prosecuted under the existing provisions because there was insufficient evidence to charge suspects with preparatory acts under Article 270 *bis*. In addition, individuals acting on their own cannot be charged under an offence of conspiracy, requiring at least three people acting together. Before 2015, the mere fact of being recruited was not punishable under Art. 270 *quater* (see above at I.a). Like Article 270 *bis* (see above at III.a), these provisions also encompass international terrorism.

[238] This section takes as basis the interview conducted with Expert A.

A prosecution for the offences of recruitment and training does not require proof of a specific association agreement. It is sufficient that the activities suggest the existence of a terrorist organization. Recruiting must aim to pursue violent of sabotage with a terrorist purpose. The judge has to determine whether the organization concerned has a terrorist purpose under Article 270 *sexies*.

With regard to the scope of Article 270 *quinquies* (training for terrorist purposes), in July 2011 a ruling of the Court of Cassation made it clear that training is not limited to providing and receiving information. The offence requires a continuous and systematic programme of education, including an assessment of the results by the trainer. However, the education programme needs only be "appropriate" to carrying out terrorist activities, and the causal link with the main terrorist offence remains weak.

Travelling[239]

Italy has a complete legislative framework. The only point on which relevant interpretive doubt remains is related to travelling. The organization of one's trip is not explicitly seen as a criminal offence. There is an endless debate about whether or not it is enough to arrange trips for other people. In this respect, it is possible to rely on a different provision of the Criminal Code, i.e. organizing travelling for the purpose of exploiting child prostitution. By now, this is less important because there are no important destinations for terrorist fighters any longer. Other problems have to do with the transposition of Articles 9 and 10 of the Directive. The Working Group on the implementation of Directive no. 541 discussed the proposal to include the organization of one's trip into the distinct offence of recruitment for terrorism. However, this attempt was ultimately unsuccessful. Alternatively, criminal law could regulate this conduct by means of interpretation, without adding an ad hoc provision. However, this would be difficult to reconcile with the fundamental principles *nullum crimen sine culpa* and *nullum crimen sine actione*. The *Fathima* case provides an example of this (Art. 270 *quater* 1 – organising travel for the purpose of terrorism), as there was a link between organising travel and persuading other people. In the opinion of Prosecutor A, due to the gradual de-territorialisation of ISIS, this is one of the most important and interesting topics also for further research.

As regards the burden of proof, general rules have not changed. Rather, tools have been changed or have been adapted. In general terms, the Italian system is adversarial but the peculiar context of criminal proceedings should also be taken into account.

d. Special procedures[240]

A distinctive trait of the Italian legal order is that, special procedures which were put in place in order to prosecute mafia-like organized crime, have served as a model for terrorism legislation. Interestingly, in 2015, the Italian legislature modified the mission of the National Antimafia Directorate (DNA), changed its name into National Antimafia and Counterterrorism Directorate (*Direzione nazionale antimafia e antiterrorismo*) and entrusted it, among other things, with fighting terrorism.

Other critical issues are related to the relationship between intelligence activities and

[239] This section takes as basis the interview conducted with Prosecutor A.
[240] This section takes as basis the interview conducted with Expert A

criminal proceedings and, more generally, to the "place" of criminal proceedings within the wider system of counterterrorism activities. These are independent from one another, although some kind of coordination and "exchange of information" has been admitted by the Italian legislature under international and European pressure. On a different note, the respect of fundamental rights and safeguards may not be taken for granted when it comes to information collected by the intelligence services. This is why criminal proceedings are somehow impervious to supporting evidence coming from the intelligence services (Article 226(5) of the Implementing Provisions of the CPP).[241] Similarly, confiscation measures can also be adopted independently from the findings of criminal proceedings (legislative decree no. 109/2007, implementing Directive 2005/60/EC).

Interception of communications

Exceptional provisions for the interception of communication under less stringent requirements were first enacted by Article 13 of law no. 203/1991 for the investigation of organized crime offences. In terrorism cases, the legal regime for judicial interceptions has been amended by Article 3 of law no. 438/2001. This article extends to terrorism investigations the special provisions on intercept evidence which were first introduced in relation to organized crime cases.

Three main derogations are thus introduced to the ordinary regime. Firstly, an interception can be authorized where there are sufficient (as against 'serious') grounds (*sufficienti indizi*) for believing that a crime has been committed. Secondly, interceptions need only to be necessary (rather than indispensable) for investigative purposes. Thirdly, the interception may aim at developing new investigative paths (rather than being merely employed in the course of an already established investigation).

Interceptions in terrorist cases can last for up to forty days (rather than fifteen) and are renewable for successive periods of twenty days (rather than fifteen) when the reasons grounding the initial decision still subsist. No limits exist to the number of renewals available. In case of emergency, the renewal can be authorized by the public prosecutor and then validated by the judge, who has to verify the existence of urgent matters.

Judicial interceptions under this special regime are available for the investigation of terrorist offences punishable with a term of imprisonment between five and ten years (Article 407(2)(a)(4) Criminal Procedure Code – *CPP*). The legislator has also explicitly included in the scope of the provision the offence of "assistance to a terrorist group" (Article 270 *ter CPP*) punishable with a maximum term of four years of imprisonment.
The 2001 provisions have been subject to major criticism not merely in relation to the ECHR but also for standing out against domestic constitutional principles such as the right to freedom and secrecy of personal correspondence and the right to privacy (Articles 15 and 14 of the Constitution). Among the possible criticisms, the list of offences for the application of this special regime has become too long. For instance, the use of interceptions in cases of assistance to a terrorist group (Article 270 *ter CP*) could be disproportionate. Moreover, the vaguely defined concepts of "organized crime" and "terrorism" may entail a further extension by case law of the scope of the current derogations. In any case, such an intrusive method is now available even when it does not represent the ultimate resort as it need only be somehow necessary for the

[241] See D. Curtotti, "Procedimento penale e *intelligence* in Italia: un'osmosi inevitabile, ancora orfana di regole", *Processo penale e giustizia*, no. 3/2018, www.processopenaleegiustizia.it.

purpose of an investigation.

Preventive interceptions are currently regulated under Article 226 of the implementing provisions (*disp. att.*) *CPP*, identifying the authorities entitled to apply for and issue interception warrants, the purpose of such application, and its specific content. This provision was at first not clearly drafted, and in consequence was completely rearranged by Article 5 of law no. 438/2001. This type of interception is permitted when necessary for the prevention of organized crime and terrorism offences. Unlike judicial interceptions, they need not follow the commission of a criminal offence.

Article 5 of law no. 438/2001 differentiates the authorities legitimated to apply for an interception warrant in relation to the two categories of offences. The Ministry of Interior has general competence to apply for an interception of communications for both organized crime and terrorism offences. Here, the warrant is issued by the local public prosecutor of the district in which the person to be put under surveillance is resident, or where investigative needs have emerged and the operations have to be executed.

Other provisions have further amended the regime of preventive interceptions.
Law no. 155/2005 established a wider range of circumstances enabling the relevant authority to implement preventive interceptions. In order to foster investigative and intelligence activities, Article 4 gave the head of security and intelligence services (*SISMI* and *SISDE*) – acting on the instructions of the Prime Minister – the right to apply to the public prosecutor for an interception warrant under Article 226 *disp. att. CPP*, whenever deemed to be necessary to prevent terrorist activities or subversion of the constitutional order. The legislator has thus attributed to the executive an important role in the political coordination of intelligence activities (on the model of Law 801/1977 on security services), unfortunately at the expense of judicial scrutiny, but has also placed a controversial and powerful new instrument in the hands of the security services.

Preventive interceptions need only be "necessary for the prevention of terrorist and subversive activities." The absence of any requirement specifying the seriousness of the offence seems to imply that, in referring to terrorist activities, the legal provision includes any offence (or preparatory act) relating to terrorism or the subversion of the democratic structure of the state. Case law will hopefully restrain the applicability of this provision to better balance individual rights and prevention needs.

Stop and search of individuals and vehicles

The Italian police have wide powers of stop, search and arrest (particularly for identification purposes) even in ordinary cases, although these powers are applicable only under specific circumstances of necessity and urgency. Any person arrested or stopped by the police must be brought before a judge within 48 hours (Article 13 of the Constitution and Articles 380-391 *CPP*). Anti-terrorism law has further broadened the scope of these powers.

Arresto and *fermo*

For suspects caught *in flagrante delicto* (as defined in Article 382 *CPP*) the police have either a duty to arrest or a discretionary power to do so.

Among other things, under Article 380 *CPP* the police have a duty to arrest a person *in flagrante delicto* for those offences (either attempted or committed), other than an offence of negligence, which are punishable with a minimum of five and a maximum of twenty years of imprisonment. They also have a duty to arrest a person if suspected of committing any offence from a list which includes crimes against the state, terrorist offences and subversion, promoting, organizing and directing an organized crime association. In these cases, they are punishable with a minimum of five and a maximum of ten years of imprisonment.

Article 384 *CPP* provides an additional measure affecting individual liberty called *fermo*, another form of arrest that does not require the suspect to be caught *in flagrante delicto*. In principle, this power belongs to the public prosecutor. But the police may arrest a suspect who is likely to abscond without a warrant when it is impossible to wait for the usual prior authorization, given with a specific warrant by the public prosecutor. Against a general background of concern about terrorism, art. 13 of law no. 155/2005 has greatly enhanced police powers of arrest, stop and search. These measures have been repeatedly criticized as they curtail the constitutional principle of the inviolability of personal freedom until final conviction.

The minimum statutory penalty required for the police to make an arrest has been lowered from five to four years of imprisonment. Although when it was first introduced in relation to terrorism offences in 1979 many feared an abuse of this power, the threshold for the applicability of this power remains fairly high.

The applicability of the discretionary power of arrest (under Article 381 *CPP*) has been extended to the new offence of fabrication and possession of false identity documents (Article 497 *bis* Criminal Code). This amendment is particularly significant as its impact goes beyond the measures adopted within the counterterroism field. To be liable to arrest under this provision, the person concerned need not have been involved in terrorism or indeed in any kind of subversive activity. Yet it looks as if, when framing these provisions, the legislator equated the possession of false documents with involvement in terrorism-related activities. Article 13 of law no. 155/2005 has also added offences committed with a terrorist purpose to the list included in Article 384 *CPP*, which authorizes the use of a *fermo*.

These choices represent a radical change from previous legislative trends which had attempted to limit both the application of a *fermo* and the cases where the police could act without a prior authorization of the public prosecutor.

Arrest for identification purposes (*fermo identificativo*)

In addition, for identification purposes, the police are empowered to hold an individual under investigation, or any person able to provide useful information to the investigative authorities, for up to twelve hours when their identity cannot be established or can be established only with difficulty (either because they refuse to be identified or give false personal particulars or false identity documents) (Art. 349 *CPP*). If such identification appears particularly complex or requires the assistance of a consular authority or an interpreter, the custody may now last up to twenty-four hours. Fingerprints and non-intimate samples may be taken for identification purposes (Article 349 *bis* (2) *CPP*).

During this process, the suspect has no access to a lawyer and the police are not required to notify him of the formal right to inform a relative, as ordinarily required by Articles 386 and 387 *CPP*. In addition, the police need not to obtain judicial approval (*convalida*), whether beforehand or afterwards. The legislation simply provides for the prosecutor to be promptly informed (even orally) of the arrest so that he can order the immediate release of the detained person if he ascertains that the statutory requirements are not fulfilled. In terrorism cases, there are no requirements as to the minimum statutory penalty allowing the use of this type of arrest.

This provision significantly enhances the investigative measures that the police can use *motu proprio*. There is an obvious risk that the police could abuse this measure and interview the person in custody in order to bypass the limitations legally imposed on interviews in ordinary cases.

Stop and search powers of armed forces

In addition, Article 18 *bis* of law no. 155/2005 also conferred on the armed forces law enforcement powers which were traditionally entrusted to the police. Law no. 128/2001 had already allowed members of the armed forces to stop individuals and vehicles for identification purposes in order to prevent dangerous behaviour. The amendment entitled members of the armed forces to search individuals and their vehicles, in exceptional circumstances, though solely in order to ascertain whether they are carrying weapons or explosives. A written report of the operations must be submitted to the public prosecutor within forty-eight hours.

Once again the law refers to the vague requirements of "necessity and urgency" and is based upon the existence of suspicion.

Powers of entry and search of houses and other premises

In Italy, house searches are authorized in ordinary cases by the public prosecutor where there are reasons to believe that evidence concerning the offence under investigation or the absconding individual (suspect or defendant) is to be found. A prior judicial warrant is not required for searches in urgent circumstances when delay might lead to the disappearance of significant evidence. An autonomous police operation of this sort must be communicated to the public prosecutor for validation within forty-eight hours (Article 352 *CPP*).

In this connection, a special regime for organized crime cases was created in 1992 (Article 25 *bis* of law no. 356/1992). Article 3 of law no. 438/2001 then extended its applicability to terrorist offences. As a result, police authorities can search entire buildings or parts of them when they have a reasonable ground to believe that weapons, ammunition or explosives are in the premises, or that an individual is hiding there. In case of emergency this provision can be executed without any prior judicial authorization. The results of the operations are then communicated (within twelve hours) and validated (within forty-eight hours) by the local public prosecutor.

Gathering and retention of fingerprints and other non-intimate samples

Provisions relating to terrorism, as well as more broadly to organized crime, have introduced new powers (or expanded the existing powers) for the gathering and storage of DNA samples and fingerprints in the context of criminal investigations and

prosecutions. In this connection, the issue of consent and the retention of the information gathered are the most important sources of concern.

In Italy, Article 224(2) *CPP* allows the judge to order any measure necessary to enable an expert to carry out an examination. In 1996 the *Corte costituzionale* ruled that this provision is unconstitutional insofar as it permits the taking of body samples of a suspect, a defendant or any other individual. The provision does not require the individual's consent nor does it specify the measures that can be adopted, nor the cases and manner in which it may be used (as required by Article 13(2) of the Constitution).

In 2005 the legislator partially filled the resulting gaps in the law. Article 10(1) of law no. 155/2005 allowed the police to take fingerprints and non-intimate samples of a suspect or anybody able to provide useful information to the investigating authorities (Article 349(2) *bis CPP*).

Article 10(2) also amended art. 11 of law no. 191/1978, allowing the police to take samples from any person who refuses to be identified or gives false personal details or false identity documents. A judicial warrant is required where the individual does not consent to the operation. The samples so obtained can be used for identification purposes only and cannot be checked against other biological traces found on the crime scene. The provision does not mention whether the samples can be further used as evidence in the proceedings.

The compatibility of the new provision with the Constitution is questionable. It is not limited to terrorist cases or to a list of serious offences but is potentially applicable to all offences. Article 10 regrettably does not specify the cases (the article reads "when necessary") or the manners in which a sample may be taken. Paradoxically, the police can use this measure whereas a judge cannot order it within criminal proceedings even when ordering the recourse to expert evidence.

Powers of detention for evidence gathering with a view to prosecution

The Italian police have been given enhanced powers of arrest without warrant for "dangerous individuals", a category that includes terrorist suspects. However, these extra powers of arrest are not matched with extraordinary powers of detention for questioning. In this respect, terrorist suspects, like any other suspect, may only be held in police detention for a maximum of four days.

The police must take the suspect under arrest to a police station as soon as possible and must inform the public prosecutor, as well the family of the suspect, without delay. Within 24 hours the suspect must be put at the disposal of the public prosecutor. The public prosecutor can then question the detainee and he must inform the suspect of the reason and grounds of the prosecution as well as the criminal allegations he faces. Provided that this does not prejudice the investigation, the suspect is also told the sources of the public authority's information. The defence lawyer is immediately informed of the questioning in order to give him/her the chance to attend. Within 48 hours of the time of the arrest, the public prosecutor should either release the suspect or ask the judge for the preliminary investigations (GIP) to validate the arrest. Within 48 hours, the arrest is validated in the hearing in front of the judge for the preliminary investigations, the suspect formally knows the charges against him and the decision is formally made to prosecute the suspect. Most notably, if the deadlines mentioned in

this paragraph are not complied with, the measure will be without effect and the detainee must be freed.

Pre-trial detention provisions

The Italian Criminal Procedure Code (CPP) allows for very long periods of pre-trial detention. Such long periods may be adopted only if there is serious evidence of guilt and solely in order to prevent the person under investigation from interfering with the evidence and the investigation or from absconding or to prevent him from committing an offence (Article 274 *CPP*). The purpose of the detention is to allow the prosecuting authority to gather sufficient evidence during the preliminary investigation phase, which can last for a maximum of two years.

Following the hearing to validate the arrest, the judge for preliminary investigations (*GIP*) may order coercive measures, such as pre- trial detention in prison. This measure may be adopted only in relation to offences (attempted or committed) for which a sentence of four years or more can be imposed (Article 280 *CPP*).

The limit of pre-trial detention currently varies greatly in relation to the different stages of the proceedings and the maximum penalty available for the offence (Article 303 *CPP*). Here, the judge has the power to extend, with a reasoned warrant, the pre-trial detention limits if so requested by the public prosecutor under certain circumstances, when serious precautionary needs subsist. Only two extensions are available and the different limits provided by art. 303 cannot be surmounted by more than half the time (Article 305 *CPP*). The maximum duration of pre-trial detention is, altogether, two years for a crime with a maximum penalty of six years in prison, four years for a crime with a maximum penalty of twenty years and six years for a crime with a maximum penalty of more than twenty years (Article 308 *CPP*).

The Italian judicial process is known for being long and tortuous, 42% of the prison population is made up of detainees on remand (the average in Europe being 20-25%). Defendants often have to be released before the trial and the subsequent appeal stages have been completed because they have already spent the maximum time in custody on remand. Italy has been repeatedly condemned by the Strasbourg Court for failures to respect the pre-trial detention limits.

According to Prosecutor A, each country should adopt proper tools in order to react promptly. Typically, this happens thanks to the procedural double track. This is a result of the UN Convention against Transnational Organized Crime. Many countries were not prepared and have taken action too late. The Italian regulatory system is particularly efficient. We have the proper tools and we are used to resort to them. In this respect, at the international level we can propose tools, which are worth exporting to other legal systems.

e. Sanctions

A critical point in the Italian regime is that balancing of mitigating and aggravating circumstances is excluded from the outset, with judicial appreciation reduced correspondingly (Article 270 *bis* 1 Criminal Code).

On the whole, Prosecutor A considers the penalties imposed for crimes of terrorism can be defined as adequate, except for some crimes of directing a terrorist group. On a

different note, if a comparison is made with other substantive and procedural provisions, we can state that:

i) the penalties for offences under Art. 270 *bis* Criminal Code are possibly less severe than Directive no. 541 would require if summary judgment is granted, and

ii) when it comes to drugs, a number of terrorist-related offences are subject to less severe penalties. The same is true of the aggravating circumstances under Art. 270 *bis* 1 Criminal Code.

IV. Conclusions: the most important challenges

The Italian system shows distinctive features. On the one hand, unlike countries like France or the UK, it has not been marked by the impact of international terrorism. On the other hand, the need to combat domestic terrorism and organized crime made it possible to develop a relevant expertise in this area. Therefore, Italy can play an important role in the development of a good legal framework, in which effectiveness and respect of fundamental rights are satisfactorily ensured.

The two interviews show that, in Italy, knowledge about European and international human rights law on counterterrorism has been developing slowly. This is true both of lawyers and judges. For all the specialisation of Public Prosecutor's Offices, only few judges have relevant expertise in this field. Similarly, only in some areas of the country, mainly in Northern Italy, a group of lawyers with an adequate level of expertise has been emerging.

Due to the peculiar traits of the Italian case, greater knowledge of the phenomenon of radicalisation of second-generation immigrants should be developed. In general, as remarked by Expert A, Italy lacks a strategy to face violent extremism. The main experiments in deradicalisation have taken place at the local level.

ANNEX: Table of comparison (Directive vs. Italian legislation)

EU Directive	Italian Criminal Code
Definition of a Terrorist Group (Article 2) The Directive defines a '*terrorist group*' as '*a structured group of more than two persons, established for a period of time and acting in concert to commit terrorist offences*.' A '*structured group*' means '*a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure*.'	**Art. 270-bis.** **Associations for terrorist purposes, including international terrorism or subversion of the democratic order.** Anyone who promotes, establishes, organizes, directs or finances associations that propose the carrying out of acts of violence for the purpose of terrorism or subversion of the democratic order is punished with imprisonment for seven to fifteen years. Anyone who participates in such associations is punished with imprisonment for five to ten years. For the purposes of criminal law, the purpose of terrorism also occurs when the acts of violence are directed against a foreign state, an institution or an international body. Confiscation of the things that served or were destined to commit the crime and the things that are its price, the product, the profit or that constitute its use is always mandatory with regard to the sentenced person.
Definition of a Terrorist Offence (Article 3) The Directive requires states to criminalize certain intentional acts as well as threats to commit those acts when committed with the aim of one or more of the following aims: *(a) seriously intimidating a population; (b) unduly compelling a government or international organisation to perform or abstain from performing any act; and (c) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation*.	**Article 270 *sexies* Criminal Code** (introduced by decree-law no. 144/2005): the definition includes: (i) Causing serious dame to a state or an international organization, (ii) Intimidating population, (iii) Compelling state government or an international organization to perform or abstain from performing any act, and (iv) Destabilizing or destroying the fundamental political, constitutional, economic and social structures of a country or an international organization
Offences Relating to a Terrorist Group (Article 4) The Directive requires states to criminalize *a) directing a terrorist group* and *b) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group*.	ADD HERE ALSO ART.270 BIS C.P. IT IS THE CRIME CORRESPONDING TO ART.4 OF THE DIRECTIVE **Article 270-*ter*.- Assistance to associates.** Anyone, except in cases of concurrence in the offense or aiding and abetting, gives refuge or provides food, hospitality, means of transport, communication tools to any of the people who participate in the associations indicated in articles 270 and 270-bis is punished with imprisonment until at four years old. The penalty is increased if assistance is

	provided continuously. Those who commit the fact in favor of a close relative cannot be punished.
Public Provocation to Commit a Terrorism Offence (Article 5) The Directive requires states to criminalise "*the distribution, or otherwise making available by any means, whether on or offline, of a message to the public, with the intent to incite the commission of one of the offences listed in Article 3(1)(a) to (i), where such conduct, directly or indirectly, such as by the glorification of terrorist acts, advocates the commission of terrorist offences, thereby causing a danger that one or more such offences may be committed*." It requires such acts are punishable when committed intentionally. A very low threshold is set by considering an act punishable when it causes danger that an offence may be committed and criminalizes conduct directly or indirectly advocating terrorist offences.	The Italian Criminal Code does not define "apologia of terrorism" and/or "incitement to terrorism" as a specific criminal offence.
Recruitment for terrorism (Article 6) The Directive requires States to criminalise "soliciting another person to commit or contribute in the commission of" offences listed as a terrorist offence or offences relating to a terrorist group. The Directive explicitly states that recruitment is punishable only when committed intentionally.	**Article 270 *quater* Criminal Code - Enlistment for terrorist purposes, including international ones.** Outside of the cases referred to in article 270-bis, anyone enrols one or more people for the performance of acts of violence or sabotage of essential public services, with a view to terrorism, even if they are directed against a foreign state, an institution or international body, is punished with imprisonment for seven to fifteen years. Except for the cases referred to in article 270-bis, and except in the case of training, the enlisted person is punished with a prison sentence of five to eight years.
Providing Training for Terrorism (Article 7) **Receiving Training for Terrorism (Article 8)** The newly introduced Article 8 requires states to criminalize the receipt of instruction, from another person, "*in the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or in other specific methods or techniques*", for the purpose of committing a terrorist offence (excluding the threat to commit a terrorist offence). The training must be undertaken intentionally.	**Article 270 *quinquies,* Training in activities for terrorist purposes, including international ones.** Outside of the cases referred to in Article 270-bis, anyone trains or otherwise provides instructions on the preparation or use of explosive materials, firearms or other weapons, harmful or dangerous chemical or bacteriological substances, as well as any other technique or method for carrying out acts of violence or sabotage of essential public services, with the aim of terrorism, even if directed against a foreign State, an institution or an international body, is punished with imprisonment from five to ten years. The same penalty applies to the trained person, as well as to the person who having acquired, even

	autonomously, the instructions for carrying out the acts referred to in the first period, engages in unambiguous behavior aimed at the commission of the conduct referred to in the article 270-sexies. The penalties provided for in this article are increased if the fact of the person who trains or instructs is committed through IT or telematic tools.
Travelling Abroad for the Purpose of Terrorism (Article 9) Article 9 of the Directive introduces another new offence which requires States to criminalize "*travelling to a country other than that Member State for the purpose of the commission or contribution to a terrorist offence referred to in Article 3, for the purpose of the participation in the activities of a terrorist group with knowledge of the fact that such participation will contribute to the criminal activities of such a group as referred to in Article 4, or for the purpose of the providing or receiving training for terrorism referred to in Articles 7 and 8*". Subparagraph (a) of paragraph 2 requires states to criminalize travelling to their territories for the above purposes. Subparagraph (b) punishes "*preparatory acts undertaken by a person entering that Member State with the intention to commit or contribute to a terrorist offence, as referred to in Article 3*". For all these acts to be punished, they must be committed intentionally.	Lack of a specific provision concerning travelling for the purpose of terrorism If relevant add the following note: ITALIAN CASE LAW IS ORIENTED TO APPLY ART. 270 QUARTER.1 ALSO IN CASE OF ORGANISATION OF HIS/HER OWN TRAVEL IF THE ACTIVITIES ARE NOT CONSIDERED AS PARTICIPATION TO A TERRORIST GROUP UNDER ART.27 BIS C.P.
Organising or otherwise facilitating travelling for the purpose of terrorism (Article 10)	**270 *quater* 1 - Organization of transfers for terrorist purposes** Except for the cases referred to in articles 270-bis and 270-quater, anyone who organizes, finances or propagates trips to foreign territory aimed at carrying out the conduct for terrorism purposes referred to in article 270-sexies, is punished with the imprisonment by five at eight years old.
Financing of terrorism (Article 11) In a newly introduced provision, the Directive requires States to criminalize '*providing and collecting funds, by any means, directly or indirectly, with the intention that they be used, or in the knowledge that they are to be used, in full or in part, to commit or to contribute to any of the offences referred to in Articles 3 to 10*.' There is no requirement that the funds in fact be used, in full or in part, to commit or to contribute to a terrorist offence, nor that the	**Art. 270-*quinquies*. 1. Financing of terrorist conduct** Apart from the cases referred to in articles 270-bis and 270-quater.1, anyone who collects, dispenses or makes available goods or money, in any way made, intended to be used in whole or in part for the fulfillment of the conducted with the purpose of terrorism referred to in article 270-sexies is punished with imprisonment for seven to fifteen years, regardless of the actual use of funds for the

offender knows for which specific offence(s) the funds are to be used.	commission of the aforementioned conducts. Anyone who deposits or keeps the goods or money indicated in the first paragraph is punished with imprisonment for five to ten years.
Relationship to Terrorist Offences (Article 13) In a newly introduced provision, the Directive states that preparatory / non-principle offences (membership of a terrorist group, travelling, financing, provocation, facilitating travel) it is not necessary that a principle offence be actually committed.	
Support to Victims (Title V Articles 25-26) The Directive includes a whole section on the rights of victims of terrorism and the support services that should be available. This builds on the Victims Directive 2012/29/EU which details the provision of victim support services. Member states had until 2015 to implement the Victims Directive but as many states had limited services in place, it is likely that effective implementation will take some time.	Italy has adopted a legislative framework regarding compensation of victims of terrorism L. 03.08.2004 n.206 provides for compensations of victims of terrorism. L. 56 of 04.05.2007, L. 20 of 24.02.2012 and L.96 of 21.06.2017 modified several provisions of the Italian legislative framework to include specific rights for victims of terrorism and criminal organizations.