# Domestic provisions and case law: the Belgian case [1]

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## 1. The context

Until recently, the terrorist threat facing Belgium was far more limited than the threat facing other Member States of the EU, such as Italy, Spain, France, Germany and the UK.

However, this does not mean that it was totally non-existent. As was the case for numerous other western European States, in first half of the 1980s Belgium had to face extreme left-wing domestic terrorism, especially the activities of the so-called cellules communistes combattantes (CCC) [Combatant communist cells]. Although this group carried out a number of terrorist attacks which resulted in the death of two firemen and three injured persons [2], they were not as serious as those carried out by the German Rote Armee Fraktion (RAF) or the Italian Brigate Rosse [3].

During the late 1980s and 1990s, no significant terrorist threat was recorded. But the situation changed about ten years ago. Although, as in other EU countries (see for instance the case of Italy), domestic terrorism does not seem to present the main danger any more, two recent cases show that such a threat has not completely disappeared: one concerns the left-wing extremist group parti communiste politico-

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[2] See especially the attack of 1st May 1985 in front of the head office of the Fédération des entreprises de Belgique (FEB).

[3] For more information about the CCC's activities and links with RAF and Action directe, see especially R. Haquin and P. Stéphany, *Les grands dossiers criminels en Belgique*, Bruxelles, Racine, 2005, p. 261 and f.

militaire (PCPM) [4] and the other concerns the right-wing extremist group Blood and Honour Vlaanderen [5].

However, according to intelligence and investigative authorities, the international terrorist threat and especially the threat related to Islamist terrorism has become of major concern. With some exceptions (see especially the *Nizar Trabelsi* case, also known as the case of the military barracks of Kleine Brogel [6]), criminal judicial procedures and/or judgments in Belgium do not concern the preparation or realisation of specific terrorist attacks on Belgian territory. Instead, they concern participation in terrorist groups. Belgium seems to serve as a logistics base for terrorist Jihadist groups, cells and networks. It also appears that recruitment and training for terrorism has been organised from Belgium (see especially the *Afghan kamikaze network* case, also called the *Malika El Aroud* case [7]). These latter cases also show that Belgium has not avoided the phenomena of homegrown terrorism and self-radicalisation.

Unlike Spain or France for instance, Belgium is not, as such, a target for separatist terrorist organisations. However, some members of organisations such as ETA or the PKK are present on Belgian territory and have been arrested [8].

By comparison with other EU Member States such as the UK, Belgium does not face a significant threat from animal rights groups or environmental eco-terrorist groups.

## 2. The legislation adopted to implement the 2002 and 2008 FDs

Before the transposition of the 2002 FD, Belgium was among the Member States of the EU that did not have terrorist offences as such in their criminal law. Belgian criminal law did not refer to terrorist offences as such because the terrorist threat was limited and because terrorist cases could be dealt with on the grounds of other incriminations and qualifications – as was especially shown by the convictions handed out in the *CCC group* case [9] and the *Nizar Trabelsi* case or case of the military barracks of Kleine Brogel [10].

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[4] Also called case of the *secours rouge international.* This case is still pending. In March 2012, the Chambre du Conseil of Brussels should pronounce itself on the transfer of the four individuals concerned to the tribunal correctionnel.

[5] This case is still pending. The decision of the Tribunal correctionnel de Dendermonde should be issued some time in March 2012.

[6] Among the facts forming the basis of the case was the attempted suicide attack against the military barracks of Kleine Brogel (see *infra*).

[7] See *infra*.

[8] In this regard, see for example the *TE-SAT 2011 report* (*EU Terrorism Situation and Trend Report*), p. 21 and 37.

[9] Four members of the Cellules communistes combattantes (CCC) [Communist combatant cells], including Pierre Carette and Bertrand Sassoye, were tried by the Cour d'assises de Bruxelles in September and October 1988. It resulted in their being sentenced to life imprisonment (*réclusion à perpétuité*).

[10] The individuals concerned, including Nizar Trabelsi, were sentenced in a decision in the first degree of 30 September 2003 by the tribunal correctionnel de Bruxelles, which was subsequently confirmed by a decision of the Cour d'appel de Bruxelles in June 2004 (see *infra*).

The implementation of the 2002 FD through the Belgian law of 19 December 2003 concerning terrorist offences [11] introduced significant legislative changes. It inserted terrorist offences and offences related to a terrorist group into Belgian law. The implementing law of 19 December 2003 introduced a new Title I*ter* in the second part of the Criminal Code [12], containing Articles 137 and following, which will be analysed afterwards.

Belgium has not implemented the 2008 FD yet. A draft bill has been prepared by the Ministry of Justice but has not even been officially submitted to the parliament because of the long-running Belgian political crisis and the successive resignations of governments. Following the establishment of a new government in December 2011, the implementation of the 2008 FD is one of the priority files of the new Minister of Justice, Annemie Turtelboom. It may well be that more than was the case with the transposition of the 2002 FD, the transposition of the 2008 FD could result in sensitive debates related to the vague and extensive definitions of the offences concerned, to the consequently large margin for manoeuvre left to the judges and to the respect of the legality principle. The potential conflict with freedom of speech and expression could of course also be raised. The need for transposition could be debated too. For recruitment and training for terrorism, some could argue on the basis of the existing case law (see *infra*) that the pre-existing terrorist offences and especially the offences related to a terrorist group are sufficient. However the question would then be whether the interpretation of the existing offences by case law only meets the European Court of Justice (ECJ) requirements in order to consider it a complete transposition, which gives sufficient guarantees in terms of legal security [13]. For "public provocation to commit a terrorist offence", it could be argued that it is already covered by an ancient

[11] *Moniteur Belge*, 29 December 2003. This law also implemented the UN Convention for the repression of terrorism financing of 9 Dec. 1999 (Article 141 CP).

[12] For more information about this law, see especially M.-A. Beernaert, "La loi du 19 décembre 2003 relative aux infractions terroristes : quand le droit pénal belge évolue sous la dictée de l'Union européenne", *J.T.*, 2004, p. 585 and f.; D. Flore, "La loi du 19 décembre 2003 relative aux infractions terroristes : genèse, principes et conséquences", in *Questions d'actualités de droit pénal et de procédure pénale*, Bruylant, Bruxelles, 2005, p. 209 and f.; V. Hameeuw, "Strafbaarstelling van terroristische misdrijven : van Europees kaderbesluit tot het Belgische Strafwetboek", *T. Strafr.*, 2005, p. 2 and f.

[13] Transposition into national law does not necessarily require that its provisions be incorporated formally and verbatim in express, specific legislation ; sometimes a general legal context may, depending on the content of the directive, be adequate. The Court nevertheless demands that the transposition is carried out in such a way as to guarantee the full application of the directive in a sufficiently clear and precise manner. The provisions of directives must be implemented with unquestionable binding force, and the specificity, precision and clarity necessary to satisfy the requirements of legal certainty. In this regard, the Court has ruled that, in order to achieve the clarity and precision needed to meet the requirement of legal certainty, it is not sufficient that the settled case-law of a Member State interprets the provisions of national law in a manner deemed to satisfy the requirements of a directive (ECJ, case C-144/99, *Commission v. Netherlands*, paras. 20 and 21) (see K. Lenaerts and P. Van Nuffel, *Constitutional Law of the EU*, London, Thomson, Sweet and Maxwell, 2nd ed., 2005, p. 766 and f.).

law dating back to 1891 [14], which incriminates incitement to commit criminal offences in general. However such law only covers *direct* incitement whereas the 2008 FD covers both *direct* and *indirect* incitement. That is why, according to the Belgian federal prosecutor, J. Delmulle, for example, it would not be sufficient to rely on the existing legislation [15].

## 3. The legislation in detail

### *A. Definition of offences and penalties*

The new Title I*ter* introduced by law of 19 December 2003 into the Belgian Criminal Code concerning terrorist offences includes Articles 137 to 141*ter* of the Criminal Code (hereafter CC).

With these new provisions, only two types of offences defined in the 2002 FD were explicitly implemented, namely terrorist offences (Articles 137 and 138 CC) on the one hand (1) and the offences relating to a terrorist group (Articles 139 and 140 CC) on the other hand (2). Concerning the third type of offences referred to in the FD, *i.e.* offences linked to terrorist activities, they were considered as being already covered by Belgian criminal law. The Belgian legislator also took the opportunity to put domestic law into line with the UN International Convention of 9 December 1999 on the Suppression of the Financing of Terrorism. Although the transposition of the 2002 FD covered most of the 1999 Convention requirements, the contribution to the commission of a terrorist offence committed independently of a terrorist group was added (3). The Belgian legislator also added some clarification regarding the scope of the provisions concerned (4).

#### *1. The terrorist offences (Articles 137 and 138 CC)*

Article 137 gives a definition of the terrorist offences which is quite faithful to the requirements of the 2002 EU FD. The three constituent elements are present, namely the material acts, the particular seriousness of the danger created and the moral element or terrorist intent.

Article 137, para. 2 and 3, list the material acts which can constitute a terrorist offence. They are either pre-existing criminal offences (para. 2) [16] or new offences which did not exist previously and which are only punishable as terrorist offences (para. 3) [17]. In line with the 2002 EU FD, the threat to realise one of the offences

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[14] See *Loi du 25 mars 1891 portant répression de la provocation à commettre des crimes ou des délits* [Law of 25 March 1891 on repressing provocation to commit crimes or offences].

[15] See the hearing of 3 February 2009 of J. Delmulle, Federal prosecutor concerning the evaluation of antiterrorist legislation on 3 February 2009, *Doc. parl.*, Chambre, S.O. 52, 2008-2009, 2128.

[16] They cover, for example, homicide, voluntary grievous bodily harm, hostage taking, abduction, massive destruction or damage of constructions (bridges, buildings, dikes, roads, etc), means of transportation (ships, cars, aircrafts, etc.), computer systems – insofar as this destruction or damage puts human lives in jeopardy or leads to significant economic losses –, etc.

[17] They cover, for example, the making and storage of nuclear and chemical weapons, use of such arms or biological arms, research and development of chemical arms, release of

identified is also provided for. According to the explanatory note, however, such a threat must be *serious* [18].

To be qualified as terrorist offences, these acts must result in a serious danger: they must be acts which, because of their nature or context, could seriously harm a country or an international organisation.

Terrorist offences imply a terrorist intent, which is defined in the same terms as in the FD: the offence must have been committed "with the aim of seriously intimidating a population, or unduly compelling a government or an international organisation to perform or abstain from performing any act, or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or of an international organization".

Article 138 provides for the penalties in full conformity with the EU FD. For the pre-existing offences listed in Article 137, para. 2, Article 138, para. 1, organises a system of aggravation of the penalties. The sanctions are those provided for for the pre-existing offences systematically aggravated. For example, the fine is replaced by a sentence of imprisonment of one year to three years, imprisonment of six months maximum is replaced by a prison sentence of three years maximum, etc. Regarding the new offences of Article 137, para. 3, the penalties are provided for by Article 138, para. 2. They are all of a criminal nature, except for the threat which is sanctioned with a prison sentence of three months to five years if it concerns an offence punishable with a correctional sentence ("*peine correctionnelle*") and by a prison sentence of five to ten years if it concerned an offence punishable with a criminal sentence ("*peine criminelle*").

*2. The offences relating to a terrorist group (Articles 139 and 140 CC)*

Before examining the act of participation in a terrorist group, the existence of a terrorist group must be scrutinised. That is the reason why Article 139, para. 1, first defines such a group. The definition is expressed identically as in the 2002 FD, namely "a structured association of more than two persons, established over a period of time and acting in concert to commit terrorist offences covered by Article 137". The notion of "structured association" is not defined as such. In this regard, reference is to be made to the definition of Article 2, para. 1, of the 2002 FD. The article nonetheless stipulates that an organisation whose real purpose is solely of 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.

Article 140 CC makes it a criminal offence to participate in the activity of a terrorist group. Such participation can take two forms: either the situation of anyone who participates in an activity of a terrorist group, including by providing information or material resources to that group or through any form of financing of a terrorist group's activity, in the knowledge that such participation aids the commission of

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dangerous substances which put human lives in jeopardy and the disruption of the supply of fundamental natural resources which put human lives in jeopardy.

[18] *Doc. parl.*, Chambre, S.O. 2003-2004, n° 51-258-1, p. 11.

a *crime* or *délit* of the terrorist group (para. 1) or the direction of a terrorist group (para. 2).

The requirement that the participant has the knowledge that such participation aids the commission of an offence is essential and must be demonstrated by the public prosecutor. Participation without such knowledge is not sanctioned by Article 140. The *travaux préparatoires* are very clear in this respect [19]. This element of knowledge is *a fortiori* required for acts of direction of a terrorist group [20].

The penalties for leading a terrorist group are more severe than those incurred for "mere" participation: whereas the participant will be sanctioned with a prison sentence of five to ten years and a fine from 550 to 27,500 euros, the leader will be sanctioned with a prison sentence from 15 to 20 years and a fine from 5,500 to 1,100,000 euros.

*3. Contribution to the commission of a terrorist offence committed independently of a terrorist group (Article 141 CC)*

Article 141 was added to put Belgian law in line with the UN International Convention of 9 December 1999 on the Suppression of the Financing of Terrorism. Although the transposition of the 2002 FD covered most of the 1999 Convention requirements, the contribution to the commission of a terrorist offence committed independently of a terrorist group was not as such covered. This was inserted by Article 141, which punishes each person who, outside the cases provided for in Article 140, furnishes the means, including a financial contribution, with a view to committing a terrorist offence of Article 137 by way of a prison sentence from five to ten years and a fine from 550 to 27,500 euros.

### *B. Two clauses framing/restricting the scope of application of the offences (Articles 141*bis *and 141*ter *CC)*

Articles 141*bis* and 141*ter* CC give some details about the scope of the legislation concerning terrorist offences.

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[19] *Doc. parl.*, Chambre, S.O., 2003-2004, n° 258/001, p. 13: "(…) the person *must know that his/her participation contributes to the perpetration of crimes and offences by a terrorist group*. An example of this might be people who financially support an organisation to allow it to buy weapons. The existence of the 'terrorist group' depends to a large extent on these anonymous people who finance it or give it a basis through material or intellectual services. It is desirable to incriminate such behavour in a person, who *knowingly* allows the perpetration of a crime or an offence. The form that these contributions take or their occasional or systematic nature is not taken into account".

From the so-called *travaux préparatoires* it also emerges that the *crimes* and *délits* to the commission of which the participation should contribute "are, in first place, terrorist offences but may include other offences. We know that terrorist groups are often guilty of other offences such as money laundering to collect the funds necessary for their activities" (*Doc. parl.*, Chambre, S.O., 2003-2004, n° 258/001, p. 13) (free translation).

[20] From the *travaux préparatoires*, it results that: "it will be more generally about people who take on the main responsibilities within the group. For this category of people, a heavier penalty is justified because of their central role in the 'terrorist group', they are more knowledgeable about the offences than anyone else and because they take the final decisions" (Doc. parl., Chambre, S.O., 2003-2004, n° 258/001, p. 14) (free translation).

Reflecting the eleventh para. of the preamble of the 2002 FD, Article 141*bis* excludes from the scope of Articles 137 to 140, on the one hand, actions by armed forces during periods of armed conflict, as defined and governed by international humanitarian law and, on the other hand, inasmuch as they are governed by other rules of international law, actions by the armed forces of a State in the exercise of their official duties.

Article 141*ter* contains a safeguard clause related to fundamental rights and freedoms, in particular freedom of assembly and association. This clause was very much criticised since it is of limited use in legal terms because it is obvious that Belgium is bound by the European Convention on Human Rights, including its Articles 8 to 11. It underlines the sensitivity of the new provisions related to terrorist offences.

### *C. Some specific procedural rules applicable to terrorist offences*

We will limit ourselves to mention three specific procedural rules applicable to terrorist offences.

First, some specific investigation methods (*méthodes particulières de recherche* or *MPR*) and other particular investigation techniques can be used where terrorist offences are concerned [21].

The Belgian law dated 19 December 2003 added the terrorist offences to the list of offences where telephone tapping was allowed, a list which is contained in Article 90*ter*, para. 2, of the Code of Criminal Procedure or *Code d'instruction criminelle* (hereafter *CCP*). The latter provides for a list of offences which, by reference, determine the scope of application of various other measures implying an interference in privacy and authorised by the Code, such as, for example, undercover operations, observation technology enabling law enforcement officers to look at what is happening in houses, hearing witnesses on the basis of anonymity, discreet visual controls or proactive investigations.

Second, the terrorist offences are submitted to specific rules concerning extraterritorial competences, which are inspired by Article 9, para. 1, of the EU 2002 FD. Belgian authorities have jurisdiction in respect of offences covered by the Title I*ter* of the Criminal Code perpetrated outside Belgium when:

- the offence was committed by a Belgian national or any person who has his/her main residence in Belgium (Article 6, 1°*ter* of the Preliminary Title of the CCP);
- the offence was committed against a Belgian national, a Belgian institution or an institution or a body of the European Union having its seat in Belgium (Article 10*ter* 4° of the Preliminary Title of the CCP);
- extraterritorial competence is imposed under a rule of international law binding on Belgium (Article 12*bis* of the Preliminary Title of the CCP).

[21] See M.L. Cesoni, "Terrorisme et involutions démocratiques", *Rev. dr. pén.*, 2002, p. 141 and f.

Third, the Office of the Federal Prosecutor (the so-called parquet fédéral) may exercise prosecution when a good justice administration requires it (Article 144*ter* of the *Code judiciaire*). In practice, such centralisation nearly always happens [22].

## 4. Brief assessment of the Belgian implementing law

Generally speaking, the Belgian law of 19 December 2003 is in line with the 2002 FD. As emerges from the previous brief description, the imprint of the 2002 FD is indeed very much present. The report from the Commission on the implementation of the FD pointed out a gap existing in the transposition law [23]. This lacuna concerns the incrimination of attempted minor terrorism offences (the so-called *tentatives de délit*). The draft bill implementing the EU 2008 FD should fill this gap.

The Belgian law of 19 December 2003 was severely criticised, especially by part of Belgian doctrine, by defence lawyers and by NGOs working in the field of human rights protection. One of the main criticisms it had to face concerned the vagueness of some constituent elements of the terrorist offences and the resulting breach of the legality principle. In spite of such criticisms, the proposal, which subsequently became the law of 19 December 2003, was adopted without too many difficulties. In its advice on the draft proposal [24], the Council of State (Law section) considered that, although checking the realisation of some of the constituent elements of the terrorist offences could create difficulties, the proposal met the requirements of the legality principle [25]. It concludes on this point by stating that "Whether regarding the appreciation of the intentional element or that of the materialness of the offence, it will be up to jurisdictions to interpret Article 136*bis* in a restrictive way by basing themselves on the objective elements that emerge from the file. For possible scenarios on the borderline, the benefit of the doubt will go to the accused" [26].

During the discussions in parliament, some members noticed the broad margin of manoeuvre left to the judicial authorities [27] and underlined the need to safeguard

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[22] See especially *circulaire commune de la ministre de la Justice et du Collège des procureurs généraux relative à l'approche judiciaire en matière de terrorisme* [joint circular of the Ministry of Justice and the College of general prosecutors relating to the judicial approach to terrorism] (COL 9/2005). Such circular was several times completed by addenda, as COL 18/2006 (concerning special investigation judges – *juges d'instruction*) and COL 2/2007 about the Organe de Coordination pour l'Analyse de la Menace (*OCAM*) [the Coordination Body for Threat Analysis]. On the advantages of such centralisation, see J. Delmulle, *Doc. parl.*, Chambre, S.O. 52, 2008-2009, 2128, p. 18 et s., p. 52.

[23] Report from the Commission based on Article 11 of the Council Framework Decision of 13 June 2002 on combatting terrorism (6 November 2007, COM (2007) 681 final), p. 8.

[24] For a critical approach of this advice, see. M.L. Cesoni, "Une évaluation des législations antiterroristes: les nouvelles incriminations", *op. cit*., p. 12.

[25] It considered that the draft proposal "is not drafted in such a way that the notions that it contains would deprive those subject to the rule of the requirement of precision, clarity and predictability (Conseil d'Etat, Opinion no. 34.362/4, § 8) (free translation).

[26] *Ibid.* (free translation).

[27] See for example M. Giet (*Doc. parl.*, Chambre, S.O. 2003-2004, n° 51-258-4).

human rights [28]. Their interventions only resulted in the maintenance or development of formal guarantees as the ones provided for in Article 141*ter* CC [29].

The proposal was first adopted within the Chambre des Représentants on 13 November 2003 by 131 votes to three with one abstention. It was then transmitted to the Senate where a few senators said that they were concerned about the broad definition of terrorist offences and/or referred to the concerns expressed by some NGOs [30]. These objections were, however, quickly set aside and the text was adopted by the Senate on 5 December 2003.

After the adoption of the law, three NGOs (Ligue des droits de l'homme, Liga voor Mensenrechten and the Syndicat des avocats pour la démocratie) introduced a request for annulment before the Belgian Constitutional Court. Through a decision dated 13 July 2005, the Court rejected the request [31]. It did not consider necessary to refer a preliminary ruling to the European Court of Justice as requested by the NGOs. On the basis of the case law of the European Convention on Human Rights, the Constitutional Court identified some possible difficulties of interpretation, particularly regarding the terrorist intent or *mens rea* of the terrorist offences. But it considered that the courts will have to strictly interpret the relevant penal provisions [32], to take into consideration the various formal safeguards contained in Title I*ter* CC (Articles 139, para. 2, and 141*ter* CC) [33]. And it concluded that even if it leaves a wide margin of appreciation to the judge, the law does not confer on him an autonomous power of incrimination, which would affect the competences of the legislator.

Despite this ruling, the risks for the legality principle continued to be stressed [34]. The extensive interpretation of the offences related to a terrorist group given by some

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[28] See for example Mr Giet, Muls, Mrs Claes and Taelman (*Ibid*.).

[29] "*En cette matière, il vaut mieux être inutilement explicite que dangereusement silencieux et ambigu*" ["In this area, it is better to be uselessly explicit than dangerously silent and ambiguous"], *Doc. parl.,* Chambre, S.O. 2003-2004, n° 51-258-4, p. 10-11.

[30] See Mr Vankrunkelsven and Mrs Nyssens, Sénat de Belgique, S.O. 2003-2004, 3-332/3, 3 December 2003.

[31] Ruling no. 125/2005 (available on the website http://www.arbitrage.be/): "The principle of criminal legality proceeds (...) from the idea that criminal law must be formulated in terms that allow everyone to know, at the moment when they adopt a particular behaviour, if it is punishable or not. It requires that the legislator indicates, in sufficiently precise, clear terms and offering legal certainty, what facts are punished so that on the one hand the person who adopts a particular behaviour can evaluate beforehand in a satisfactory way what the criminal consequence of this behaviour will be and, on the other hand, that too much power of appreciation is not left to the judge. However, the principle of legality in criminal law does not prevent the law attributing a power of appreciation to the judge. It is necessary to take account of the nature of generality of laws, the diversity and variability of situations as well as the subjects that they apply to and the evolution of behaviours that they punish" (free translation).

[32] See point B.7.2.

[33] See point B.7.3.

[34] See especially the concern expressed by Greenpeace and trade unions at their hearings of 9 June 2009 on their assessment of the legislation on terrorist offences, *Doc. parl.*, Chambre, S.O. 52, 2008-2009, 2128, p. 59 and f.) and the concern of NGOs active in the field of protection of human rights as the Ligue des droits de l'homme and the Comité de vigilance en matière

courts – and especially the ruling of the Court of Appeal of Ghent in the *DHKP-C* case [35] – as well as variations in the interpretations by case law – in this *DHKP-C* case – have partly fed such worries.

Another criticism addressed to Articles 137 and f. CC concerns the preventive nature of the incriminations provided. Such a criticism relates especially to the incrimination of the threat to realise a terrorist offence even if not followed by any effect (Article 137, para. 3, 6°) or to the incrimination of the contribution to an offence which has eventually neither been committed nor even attempted (Article 141) [36]. More generally speaking, a source of concern is the shift of the judicial intervention from a reactive and repressive nature (downstream of the criminal acts) towards a preventive nature (upstream of the criminal acts) [37] or the move or enlargement of criminal law towards prevention and its consequences.

It is a safe bet that the future amendments which should soon be brought to Title I*ter* CC in order to implement the EU 2008 FD will not hush up the aforementioned criticisms or put an end to the practical implementation/interpretation difficulties.

## 5. Terrorist offences in Belgian case law

Since 2003, more than 40 individuals have been tried before the Belgian courts under terrorism charges [38]. In 2010, 65 new files were opened (54 went through the '*information*' process and 11 through the '*instruction*' process).

To our knowledge, up until now, no prosecution has been launched and no case has been brought to the Belgian courts on the basis of the qualification of terrorist offences (Articles 137 and 138 of CC). But four main cases have given rise to prosecutions and judgments involving offences related to a terrorist group (Articles 139 and 140 CC). They all concern facts committed after the entry into force of the Belgian law dated 19 December 2003. These four cases are the following:

- The case of the *Moroccan Islamic Combattant Group* (GICM − *Groupe islamique combattant marocain*) (A)
- *The DHKP-C* case (Revolutionary People's Liberation Party–Front) (B)
- The case of the Iraki kamikaze network (*affaire dite de la "filière kamikaze irakienne"*) (C) and

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de lutte contre le terrorisme (Comité T) (see the annual reports of this Comité T available on the website : http://www.liguedh.be). See also M.L. Cesoni, "Une évaluation des législations antiterroristes: les nouvelles incriminations", avis pour la Commission de la Justice de la Chambre, octobre 2009 and M. Moucheron, "Chronique de criminologie. Le terme terrorisme et la construction européenne: une histoire obscure", *Rev. dr. pén.*, 2004, p. 889 and f.

[35] A. Weyembergh and V. Santamaria, "Lutte contre le terrorisme et droits fondamentaux dans le cadre du troisième pilier. La décision-cadre du 13 juin 2002 relative à la lutte contre le terrorisme et le principe de la légalité", *op. cit.*

[36] See M.L. Cesoni, "Une évaluation des législations antiterroristes : les nouvelles incriminations", *op. cit*., p. 4, 13, 14 and 17.

[37] See the hearing of D. Vandermeersch, Doc. parl., Chambre, S.O. 52, 2008-2009, 2128, p. 43.

[38] For numbers, see also those provided in the successive TE-SAT reports.

− The case of the Afghan kamikaze network (*affaire dite de la* "*filière kamikaze afghane*") (D).

### *A. The case of the* Moroccan Islamic Combattant Group *(GICM* − Groupe islamique combattant marocain*)*

Following the terrorist attacks in Madrid, waves of searches carried out in March and June 2004 in Brussels and in Maaseik led to the arrest and prosecution of 13 people for having created a support cell for the GICM in Belgium. In this context, they were suspected of having supported the transfer to Europe of members of the group, some of them having received military training in Afghan camps linked to Al Qaeda and others being Islamist extremists sought in Morocco. They were said to have provided false documents as well as logistics support (lodging, vehicles, GSM etc.). These people were, *inter alia*, prosecuted for taking part in the activities of a terrorist group or as a leader of such a group.

On 16 February 2006 [39], the Tribunal correctionnel of Brussels convicted most of the defendants under the abovementioned qualifications. On 15 September 2006, the Court of Appeal of Brussels toughened up the penalties of the four defendants by default. Three of them then opposed this decision, which resulted in a contradictory ruling on 19 January 2007 [40]. The court was seized of criminal procedure issues which will not be detailed here [41]. As to the qualifications linked to the terrorist group, some defendants contested that the GICM could be qualified as a terrorist group as defined by Article 139, para. 1, of the criminal code [42]. On this point, the court expressly rejected the argument put forward by the defence counsel according to which it would be up to the public prosecutor to prove the involvement of the group of defendants in terrorist attacks or to target preparatory acts showing that they would have contributed to the perpetration of *crimes* and *délits* by a terrorist group. The court declared on this point that "it is in no way required that the group structured with a view to committing terrorist offences has already committed them for its members to be punishable, nor even that it is preparing a specific one" [43].

The court also examined if each of the three defendants had taken part in a terrorist group activity in the knowledge that this involvement contributed to the committing of a *crime* or a *délit* by the group and in what capacity. The court noted that this was the case when the three defendants had taken part in an activity of the terrorist group GICM, in particular by being members of the Belgian cell of this group, this cell being an essential logistical support cell for the smooth organisation of the terrorist group.

Finally, the court convicted two defendants in their capacity as leaders of the terrorist group. Basing itself on the *travaux préparatoires*, the court underlined that it does not need to be the only leader, *i.e.* to be the only person at the top of the hierarchy

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[39] Corr. Bruxelles (54th Chamber *bis*), 16 February 2006.

[40] Bruxelles (12th Chamber), 19 January 2007.

[41] On its competence, on the specific investigation methods authorised by the examining magistrate, on the information provided by the Sûreté de l'Etat or the hearings carried out in Morocco and in France (p. 13 to 32).

[42] Judgement, p. 33 to 36.

[43] Judgement, p. 33 (free translation).

of a group but that the person must have a 'key role' by taking on responsibilities fundamental to the smooth running of the group and by taking decisions or initiatives needed to ensure the permanence of its structure [44]. They were sentenced respectively to seven and six years imprisonment.

As for the third defendant, convicted for taking part in activities of the terrorist group GICM, he was sentenced to five years imprisonment.

The three people convicted by the Court of Appeal then introduced a *pourvoi en cassation*, which the Court of Cassation rejected on 27 June 2007 [45]. As the domestic appeals' procedures had been exhausted, an appeal to the European Court of Human Rights was made at the end of 2007 [46].

The analysis of this decision shows very clearly that, in order to convict a person on the basis of offences related to a terrorist group (Article 139-140 CP), it is sufficient to establish the existence of a terrorist group and of an act of participation in one of this group's activities. There is no need to establish commission or a plan to commit a terrorist offence in Belgium or abroad (Article 137).

### *B. The* DHKP-C *case (Revolutionary People's Liberation Party–Front)*

Eleven defendants were taken to court, of which several had been arrested in Knokke in September 1999 in an appartment where weapons, munitions, false papers and documents relating to the armed struggle led by the DHKP-C in Turkey were found. Two defendants were accused of being leaders of a terrorist group, namely Bahar K. and Musa A.

This case resulted in a high number of judicial decisions, namely four decisions on the substance of the case and two rulings by the Cour de cassation.

On 28 February 2006 [47], the tribunal correctionnel of Bruges deemed that the DHKP-C corresponds to the definition of a terrorist group. Musa A. was sentenced to six years, in particular as a leader of a terrorist group and Bahar K. to four years as a '*mere*' participant in the activities of a terrorist group and not as a leader.

Via its ruling of 7 November 2006 [48], the Court of Appeal of Ghent confirmed DHKP-C as a terrorist group [49]. The sentences handed out were more severe for some defendants, including Musa A., who was sentenced to six years imprisonment

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[44] Judgement, p. 62.

[45] Cass. 27 June 2007, P.07.0333.F/1.

[46] In this regard *El Haski v. Belgium* still pending (see also decision by the Court of 29 June 2010, *Hakimi v. Belgium*).

[47] Corr. Bruges (14th Chamber), 28 February 2006.

[48] Ghent (6th Chamber), 7 December 2007.

[49] On this occasion, the Court of Appeal of Ghent expressly underlined that registering the DHKP-C on the European Union's terrorist organisations' list is not sufficient as proof and does not exempt the judge from assessing whether the organisation matches the criteria of terrorist group as defined in Article 139 of the criminal code (judgement, p. 125-126; along the same lines, see also Court of Appeal of Antwerp, 7 February 2008, p. 48). With regard to these lists, see, among others, S. Lavaux et P. Pieters, "Les listes nationales et internationales des organisations terroristes", *Rev. dr. pén.*, 2008, p. 715 and f.

and Bahar K., sentenced to five years imprisonment this time in his capacity as *leader* of a terrorist group.

On 19 April 2007 [50], this decision was quashed by the Court of Cassation, for procedural reasons that have nothing to do with what capacity the defendants were acting in [51].

The case was then referred to the Court of Appeal of Antwerp, which delivered a ruling on 7 February 2008 [52]. The court acquitted Musa A. and Bahar K. of the offence of taking part in the activities of a terrorist group, and by extension, of the offence consisting of leading such a group.

The Antwerp Court of Appeal's decision therefore offered a fundamentally different view of the facts that had been referred to it but also on the interpretation of the offences of taking part in the activities of a terrorist group. The reasoning for the decision is formulated, on this point, in the following terms:

> "It does not emerge from any element of the file that the defendants had formed a terrorist group during the period during which they were facing charges. No element emerges that they had for a single moment the intention to form an association in order to commit terrorist offences as set out in the law. It clearly emerges that they do not condemn this kind of offence and quite the reverse. It is not up to the court to judge the way that the defendants think".

In this respect, the court refers to Article 141*ter* of the criminal code:

> "No provision of this chapter can be interpreted as aiming to reduce or hinder rights or fundamental liberties such as the right to strike, freedom of meeting, of association or of expression, including the right to found trade unions with others and to consort for the defence of their interests and the related right to demonstrate and such as enshrined in particular by Articles 8 to 11 of the European convention for the protection of human rights and fundamental freedoms. No element emerges from the file that during the period covered by the charges, the defendants have gone beyond the exercise of the rights of which the law foresees that they cannot in any case be reduced or hindered" [53].

The ruling was quashed, rightly we think, by the Court of Cassation on appeal by the federal prosecutor. On 24 June 2008, the Court of Cassation in particular considered that taking part in the activities of a terrorist group does not require that the perpetrator has directly taken part in a terrorist offence in Belgium or abroad. The ruling of the court is formulated in the following terms:

> "12. The means, in this branch, invokes violation of Articles 139 and 140 of the criminal code: from the fact that the aforementioned defendants are not implicated in terrorist attacks committed abroad, it cannot be legally deduced that the criminal organisation does not exist.

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[50] Cass., 19 April 2007, P.06.1605.N/1.

[51] The ruling was based on the violation of Articles 6, para. 1 European Convention on Human Rights and 14 para. 1 of the International Covenant on Civil and Political Rights, which do not only require that the legal body is independent and impartial but also that there is no appearance of dependance or partiality.

[52] Antwerp (13th Chamber), 7 February 2008.

[53] Judgement, p. 159 (free translation).

> 13. Article 140, para. 1, of the criminal code punishes any leader of a terrorist group defined in Article 139 of the same code.
>
> Article 139, al. 1, of the criminal code, stipulates that by a terrorist group must be understood the structured association of more than two people, established in time, and which acts in a concerted way to commit terrorist offences covered in Article 137.
>
> 14. A leader of a terrorist group can be punished if it is established that it concerns a terrorist group and, subsequently, that the person concerned is the leader of this group. *Incrimination does not require that this person has him/herself had the intention of committing any terrorist offence in Belgium or elsewhere or that he/she was involved when the latter was committed.*
>
> By deciding otherwise, the appeal judges have not legally justified their decision" [54].

Following this second ruling of *cassation*, the case was referred to the Court of Appeal of Brussels, which delivered its decision on 23 December 2009 [55]. This ruling, clearer and, in law, more convincing than that of the Court of Appeal of Antwerp, acquits the defendants from the charges based on the offences linked to a terrorist group. The court of appeal gave as reasoning for its decision that no element emerged from the file that these two defendants would have played a leading role within a terrorist group or that they would have taken part in an activity of a terrorist group in the sense of Article 140 of the criminal code. According to the court, it is neither shown that the activities reproached of the two defendants during the period in question have contributed to the commission of a *crime* or of a *délit* by the terrorist group or that they knew of it. The court pointed out that, *inter alia*, the information disseminated in the DHKP-C information office and its interpretation by the defendants falls under the protection of the right to freedom of expression [56].

The epic legal journey of this case shows the difficulty for the judicial authorities to apply, in practice, the offences of leading a terrorist group or taking part in its activities. Whereas the two first appeal courts (of Bruges and Ghent) gave an extensive interpretation of the offence of participation in a terrorist group's activities and especially an extensive interpretation of the notion of direction of such a group, the last two ones (of Antwerp and Brussels) gave, on the contrary, a strict interpretation of these notions. Such variations fed the abovementioned criticisms and concerns relating to the vagueness of the definition of the terrorist offences.

### *C. The case of the Iraki kamikaze network (***affaire dite de la "filière kamikaze irakienne"***)*

This case followed the kamikaze attack by Muriel Degauque in Iraq in November 2005 and the death of her husband, killed by the Americans when he was preparing to commit a suicide attack. Six people faced charges for their involvement in a group transferring Jihad recruits to Iraq. One of them, namely Bilal S., was in particular charged for having taken part in the activities of a terrorist group as a leader. Four

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[54] Cass., 24 June 2008, P.08.0408.N (it is our underlining) (free translation).

[55] Brussels (13th chamber), 23 December 2009.

[56] Judgement, p. 30 to 32.

others were charged for having taken part in the activities of a terrorist group as members. That was the case for Youness L., who had basically gone to Iraq to fight the American 'invader' and had had a leg amputed there. Another defendant, Pascal C. converted to Islam and a friend of the husband of Murielle Degauque, had provided support during his departure and had then proceeded to convert his young companion, aged 19, in order to leave together for Iraq.

This case was the subject of a first decision by the Tribunal correctionnel of Brussels dated 10 January 2008 [57]. The court looked at the application of the aforementioned clause of Article 141*bis* of the criminal code [58]. It rejected the arguments made by the defence of some of the accused invoking this so-called 'exclusion clause' of Article 141*bis* CP. It considered that the behaviour of the defendants concerned came under the law on terrorism and not international humanitarian law [59]. The court convicted Bilal S., in particular as being a leader of a terrorist group [60] to ten years imprisonment, the reason for the severity of this sentence being because of its particularly dangerous nature. Youness L. and Pascal C. were, for their part, convicted *inter alia* as members of a terrorist group [61] to five years of prison but benefited from a suspension for the time exceeding the custodial detention that they had already undergone. Another defendant was sentenced to the same punishment but together with a partial suspended sentence. A fifth defendant was sentenced to a lighter punishment of 28 months.

Both the defence counsel and the public prosecutor launched an appeal of the judgement. Through a ruling of 26 June 2008 [62], the Court of Appeal of Brussels confirmed – via a reasoning different from that pursued by the Tribunal correctionnel of Brussels – the rejection of the application of the exclusion clause of Article 141*bis* but considerably reduced the sentences given against the defendants and acquitted Pascal C. The reasoning of the court with regard to the latter is interesting as regards the interpretation of the notion of participation in a terrorist group. The court established that Pascal C. had direct contacts and phone contacts with the other members of the group and particularly with the person who directs the group, that he shared their views, was arrested in their company, that he provided assistance to a potential kamikaze recruit. But the Court of Appeal considered that such assistance was not of the same nature as the assistance provided for by other members of the group. The acts of participation by Pascal C. could be justified by other motives than the will to take part in a terrorist group and more particularly by his friendship with the abovementioned kamikaze candidate. The court consequently concluded that Pascal C. did not commit an act of participation in a terrorist group's activities with the knowledge that these acts would allow the realisation of offences by the group.

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[57] Tribunal corr. Bruxelles (49th Chamber *bis*), 10 January 2008.

[58] See *infra*.

[59] On the difficulty for Belgian judges to qualify complex and distant situations on the basis of international humanitarian law, see O. Venet, "Infractions terroristes et droit humanitaire: l'article 141*bis* du code pénal", *JT*, 2010, p. 169 and f.

[60] See judgement, p. 128.

[61] Judgement, p. 137.

[62] Court of Appeal Bruxelles (12th Chamber), 26 June 2006.

### *D. The case of the Afghan kamikaze network (***affaire dite de la "filière kamikaze afghane"*)*

This case was about ten people facing charges of taking part in the activities of a terrorist group, of which three as leaders. Among the latter facing charges was Malika E.A., accused *inter alia* for her responsibility for the creation and management of a Jihadi website and for her role in recruiting and financing potential fighters wanting to go back to Waziristan to do some military training there and, if necessary, to fight alongside the Taliban on Afghan soil.

Through its ruling of 10 May 2010 [63], the Tribunal correctionnel of Brussels declared eight of the ten defendants guilty, of which Malika E.A., who was sentenced to eight years of imprisonment mainly for taking part as a leader of a terrorist group. This description and this sentence, as with that given against Muhammed E.A.B. for taking part in a terrorist group, have been confirmed by the Court of Appeal, which gave its decision on 1 December 2010 [64]. In general, these two decisions confirmed the principles previously highlighted for the interpretation of the applicable legal provisions, *inter alia* in the case of the Iraqi network. They have, *inter alia*, also ruled out the application of Article 141*bis* of the criminal code. And having concluded in the realisation of the legal conditions of the existence of a terrorist group, the Court of Appeal confirmed that Malika E.A. did take part in the activities of such a group by basing itself in particular on her intervention in the creation and management of a Jihadi propaganda site, on her active participation in the recruitment of Jihadi combatants, on her aid for the financing of potential combatants and on her aid for the translations of texts with a Jihadi connotation posted on the aforementioned website. The court also confirmed her function as a leader by basing itself on her coordinating activities, which shows the importance of her responsibilities and her key role within the terrorist group. As for the participation by Muhammed E.A.B. in the activities of this group, it was also confirmed on the basis of his role as an intermediary in bringing Jihadi recrutis to the area, advice provided to Malika E.A. and his collaboration in bringing necessary funds to the Jihadi group.

## 6. Perception of the instrument at the national level

The perception of the 2002 FD and of the national implementing provisions depends in particular on the professional profile or background of the persons. Schematically, two groups emerge, whose opinions are difficult to reconcile.

On the one side, defence lawyers [65] and NGOs working in the field of human rights protection and other NGOs are very critical: as seen previously, criticisms relate to the legality principle and to the preventive nature of some of the new incriminations [66].

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[63] Tribunal correctionnel, Bruxelles (49th Chamber), 10 May 2010.

[64] Court of Appeal Bruxelles (11th Chamber), 1 December 2010.

[65] In this regard see for instance the contribution of C. Marchand to this book.

[66] See the hearing of D. Vandermeersch, Doc. parl., Chambre, S.O. 52, 2008-2009, 2128, p. 43.

On the other side, prosecution authorities and others involved in the fight against terrorism are rather positive towards the new offences, especially underlining their necessity, the improvement of investigative techniques and cooperation in the field. This is not to say that they are considering the Belgian law of December 2003 as perfect. They also identify some problems, such as the difficulties raised by the exclusion clause of Article 141*bis*.

The doctrine is divided. Some authors are quite critical [67] whereas others are more positive towards the legislation [68].

## 7. Conclusion

As seen in the developments noted above, Belgian law was very much marked by the EU 2002 FD. Its imprint is very strong if we compare Article 137 and f. CC with the text of the framework decision. Consequently, it was subjected to similar criticisms. It remains to be seen how – and when – the 2008 EU FD will be implemented. It will surely result in criticisms and concerns. Those will probably be even stronger than in the case of the 2002 EU FD since the new offences added by the 2008 one go even further upstream from the commission of terrorist offences. The need for practitioners to interpret them narrowly will be all the more essential.

[67] See for example M.L. Cesoni.

[68] See for example D. Flore.