ASSOCIATION INTERNATIONALE DE DROIT PÉNAL – INTERNATIONAL ASSOCIATION OF PENAL LAW – ASOCIACIÓN INTERNACIONAL DE DERECHO PENAL

XVIIIth International Congress of AIDP
(Istanbul, September 2009)

Section I General criminal law
The expanding forms of preparation and participation
Place: A Coruña, Spain
Date : 5 – 8 September 2007
General Reporter: Prof. Lorenzo Picotti (Italy)
Young Penalists' Reporter: Dr. Ahmed Khalifa (Egypt)

The Netherlands National Report, compiled by dr. M.M. Dolman*

A. General questions
1. Individuation of the manifestations of the phenomenon of globalization at an internal penal level

In this section, a brief overview will be given of the ways in which Dutch criminal law has responded to developments which may be seen as aspects of 'globalisation'. 'Globalisation' is not a legal term; in fact, it may be used to denote several distinct, but sometimes interrelated phenomena. As these phenomena may call for legal – as opposed to political or military – responses, they will be the focus of these introductory remarks.

'Globalisation' may be loosely defined as the world's getting smaller. Ultimately, this process may be explained from developments in human communication. As information travels around the world more freely, people become more readily – and acutely – aware of events taking place on the other side of the world. Traditional means of communication like print, radio and television are fast becoming superseded by decentralised means of communication made possible by the internet and wireless telephone networks. In addition, people are finding it ever more easy to act on their newly acquired knowledge, by travelling to places they only heard about in the past. As a consequence, global migration has taken on proportions hitherto inconceivable.

As criminal justice traditionally has been organised along the lines of nation states, these developments may call for specific legal responses. On the one hand, so-called organized crime may use the opportunities provided by increased mobility of persons, goods and capital by increasing the scale of its operations, notably where states have failed to take account of the international aspects of crimes taking place on their territory. Economies of scale also apply to criminal activity. In addition, globalisation may offer new opportunities to criminals willing to exploit the fact that globalisation has made existing economic inequalities all the more visible.

On the other hand, developments in communication have profoundly altered the nature of political debate, which is ever more often conducted on a global plane. The threat of terrorism makes it painfully clear that disaffected groups may take their grievances anywhere they want to, striking at the heart of their perceived enemies and gaining maximum exposure in doing so. Terrorism has taken on global dimensions not only because of the motives behind it, but also because terrorist groups often find ready support outside their countries of origin, in that they are able to draw on the disaffectation of minorities elsewhere.

As neither organised crime nor terrorism ordinarily falls within the scope of international crimes as these have been defined in the Statute of the International Criminal Court, they must ultimately be addressed at the national level. The legal responses to these phenomena must, however, take account of their global nature. In part this may be achieved through international judicial cooperation, although this is largely geared towards enabling states to enforce their domestic laws. In addition, harmonisation of substantive criminal law may be called for, which would create uniform conditions for the repression of crimes irrespective of the locale of their commission.

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2. General outlining of the general juridical system of preparatory acts and of participation in your system
2.1. Preparatory acts
2.1.1. Limits with reference to attempt

Attempt: general provisions

Title IV (Articles 45-46b Sr) of the Dutch Penal Code concerns attempt and preparation. Its provisions read (my translation)[1]:

> (Art. 45)[2] 1. An attempt to commit a crime is punishable where the perpetrator manifests his intention by initiating the crime.
> 2. In case of attempt, the maximum penalty prescribed for the crime is reduced by one third.
> 3. In case of a crime carrying a sentence of life imprisonment, a term of imprisonment of not more than twenty years shall be imposed.
> 4. The additional penalties for the attempt are as for the completed crime.
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> (Art. 46)[3] 1. Preparation to commit a crime which, by statutory definition, carries a term of imprisonment of not less than eight years, is punishable, where the perpetrator intentionally obtains, manufactures, imports, transits, exports or has at his disposal, objects, substances, information carriers, spaces or means of transport intended for the commission of the crime.
> 2. In case of preparation, the maximum principal penalty prescribed for the crime is reduced by one half.
> 3. In case of crimes carrying a sentence of life imprisonment, a term of imprisonment of not more than fifteen years shall be imposed.
> 4. The additional penalties for preparation are as for the completed crime.
> 5. Objects are understood to comprise all tangible objects and all property rights.
>
> (Art. 46a)[4] An attempt to induce another to commit a crime by employing one of the means listed in Article 47, paragraph 1(2), is punishable, provided that the sentence imposed shall not be more severe than that which may be imposed for an attempt to commit the crime, or, where such attempt is not punishable, for committing the offence.
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> (Art. 46b)[5] Neither preparation nor an attempt to commit a crime obtains where the crime has not been completed by reason only of circumstances dependent on the perpetrator's will.

In Dutch law, an attempt exists if two requirements are satisfied: intent and initiation. An attempt only amounts to a punishable offence if the perpetrator acted intentionally: his acts must prove his intention to commit a crime. Intent consists of an cognitive and a volitive element: a person is said to have acted with intent if he acted knowingly and willingly. In this respect, two remarks have to be made. Firstly, several grades of intent are distinguished, the highest grade being premeditation and the lowest *dolus eventualis*. For the purposes of Article 45 this means that in principle – unless the appro-

[1] In 1997 an integral translation of the Dutch Penal Code was published in the American series of foreign penal codes: Louise Rayar & Stafford Wadsworth, *The Dutch penal code*, Littleton, CO: Rothman 1997. I have used this translation, although I have not followed it strictly. Firstly, a revision of the translation was made necessary by subsequent revisions of the Penal Code. Secondly, I take issue with the translation on some terminological matters. Needless to say, I am fully responsible for any defects in the translations included in the text.
[2] Original Dutch: (Art. 45) 1. Poging tot misdrijf is strafbaar, wanneer het voornemen van de dader zich door een begin van uitvoering heeft geopenbaard. 2. Het maximum van de hoofdstraffen op het misdrijf gesteld wordt bij poging met een derde verminderd. 3. Geldt het een misdrijf waarop levenslange gevangenisstraf is gesteld, dan wordt gevangenisstraf opgelegd van ten hoogste twintig jaren. 4. De bijkomende straffen zijn voor poging dezelfde als voor het voltooide misdrijf.
[3] Original Dutch: (Art. 46) 1. Voorbereiding van een misdrijf waarop naar de wettelijke omschrijving een gevangenisstraf van acht jaren of meer is gesteld is strafbaar, wanneer de dader opzettelijk voorwerpen, stoffen, informatiedragers, ruimten of vervoermiddelen bestemd tot het begaan van dat misdrijf verwerft, vervaardigt, invoert, doorvoert, uitvoert of voorhanden heeft. 2. Het maximum van de hoofdstraffen op het misdrijf gesteld wordt bij voorbereiding met de helft verminderd. 3. Geldt het een misdrijf waarop levenslange gevangenisstraf is gesteld, dan wordt gevangenisstraf opgelegd van ten hoogste vijftien jaren. 4. De bijkomende straffen zijn voor voorbereiding dezelfde als voor het voltooide misdrijf. 5. Onder voorwerpen worden verstaan alle zaken en alle vermogensrechten.
[4] Original Dutch: (Art. 46a) Poging om een ander door een der in artikel 47, eerste lid onder 2*e*, vermelde middelen te bewegen om een misdrijf te begaan, is strafbaar, met dien verstande dat geen zwaardere straf wordt uitgesproken dan ter zake van poging tot het misdrijf of, indien zodanige poging niet strafbaar is, terzake van het misdrijf zelf kan worden opgelegd.
[5] Original Dutch: (Art. 46b) Voorbereiding noch poging bestaat indien het misdrijf niet is voltooid tengevolge van omstandigheden van de wil van de dader afhankelijk.

priate statutory definition requires a specific form of intent – the perpetrator at least must have accepted the considerable risk of committing an offence.[6] Secondly, intent may be inferred from a person's acts: if an act can only be committed intentionally, a person is said to have acted with intent.[7]

A crime is initiated if the perpetrator's acts, viewed by their outward appearance, are geared towards completion of the crime.[8] The question whether the perpetrator's acts were in fact geared towards completion of the crime he intended must be answered with regard to the statutory definition of the crime: are the perpetrator's acts characteristic for the completed crime?[9] In this respect, a distinction must be made between formal and material definitions. Materially defined crimes – causing an occurrence in any which way – are initiated if and when that occurrence would have taken place without further steps on the part of the perpetrator. Manslaughter for instance is attempted if and when as a consequence of the perpetrator's actions the victim's death would ordinarily ensue; it is immaterial by which means the perpetrator has sought to bring about the intended victim's death.[10] Formally defined crimes – mere acts, irrespective of their consequences – on the other hand are initiated once the perpetrator commences the act. Theft for example is defined as unlawfully taking another person's goods without his consent, so the crime of theft is attempted once the perpetrator has commenced to take possession of another person's goods. It follows that where the appropriate statutory definition doesn't require additional circumstances there is little or no room for attempt[11], as the crime is completed by the mere act[12]. Where, on the other hand, additional circumstances are required, such circumstances may constitute initiation notwithstanding that the perpetrator hasn't yet commenced the central act.[13]

In judging the perpetrator's acts, one must assume the viewpoint of an objective bystander, albeit one who is in possession of all relevant facts, not only those which are visible from the outside.[14] As a consequence of this approach, the distinction between the requirements of intent and initiation becomes blurred: acts which are ostensibly geared towards the completion of a crime carry the implication that the perpetrator intended to commit it.[15]

As the focus on outward appearances in modern doctrine derives from the fact that an attempt carries the risk of the intended crime being completed, the reason why it wasn't completed is of special relevance. An attempt might fail because of the inadequacy of the means the perpetrator used or because of its object, but such inadequacies do not necessarily imply that no risk existed of the intended crime being completed. In this respect, a distinction is made between relative and absolute inadequacy[16]: attempt is punishable only where the means used ordinarily are suited for their pur-

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[6] HR 17 December 1996, *NJ* 1997, 245.

[7] HR 6 February 1951, *NJ* 1952, 474; HR 21 November 2000, *NJ* 2001, 160. Recent case law, however, seems to show greater reluctance in this respect: HR 10 October 2000, *NJ* 2001, 4; HR 25 March 2003, *NJ* 2003, 552; HR 24 June 2003, *NJ* 2003, 555; HR 18 January 2005, *NJ* 2005, 154; HR 6 September 2005, *NJ* 2006, 50.

[8] HR 24 October 1978, *NJ* 1979, 52; HR 8 September 1987, *NJ* 1988, 612.

[9] HR 24 March 1992, *NJ* 1992, 815; HR 14 December 1993, *NJ* 1994, 293.

[10] HR 1 July 1996, *NJ* 1997, 427.

[11] As is demonstrated by case law on theft, which is completed by taking goods from the victim's dominion. Consequently, the thief need not be in full possession; if he is apprehended whilst leaving the scene of the crime, he is guilty of theft, not merely attempted theft. See for example HR 11 January 2000, *NJ* 2000, 588.

[12] That is, unless the wording of the statutory definition may be stretched to encompass acts which take place over a longer period of time. Such interpretation is especially prevalent as regards contraventions of the Opium act; the act of exporting drugs isn't limited to taking them across the border, but encompasses the whole smuggling operation, starting when the smuggler takes care of the drugs and ending when he delivers them. See for example 13 December 1994, *NJ* 1995, 252.

[13] Whereas simple theft is only attempted if and when the perpetrator makes to take away something, burglary is attempted once the perpetrator tries to gain access to the goods he intends to steal; see HR 20 June 1920, *NJ* 1920 , p. 807; HR 22 June 1999, *NJ* 1999, 636.

[14] HR 20 June 1989, *NJ* 1990, 33; HR 2 December 1992, *NJ* 1993, 321.

[15] See HR 2 November 2004, *NJ* 2005, 275.

[16] H.J. Smidt, *Geschiedenis van het Wetboek van Strafrecht: volledige verzameling van regeeringsontwerpen, gewisselde stukken, gevoerde beraadslagingen, enz.* (bew. J.W. Smidt & E.A. Smidt), Zwolle: H.D. Tjeenk Willink 1891-1901, I, p. 426,429.

pose[17], and the crime may in fact be committed with respect to its intended object[18]. If either the means[19] or the object[20] is wholly unsuited, an attempt isn't punishable.

As the criminality of attempt and preparation derives from the risk of the intended crime being completed, Article 46b Sr provides that neither preparation nor an attempt to commit a crime obtains where the crime has not been completed by reason only of circumstances dependent on the perpetrator's will. In that event no punishable offence has been committed, either by the person who prepared it or attempted to commit it or by persons who participated in its commission.[21]

Involuntary non-completion is not an element of punishable attempt or preparation, but an exception to the perpetrator's liability. Consequently, the prosecution need not prove that the defendant ceased execution of his criminal plans involuntarily; it is up to the defendant to adduce evidence which makes his defence of voluntary non-completion credible.

It follows from the nature of the exception that the perpetrator's decision not to follow through is relevant only where the crime has not yet been completed. Whether this is in fact the case depends on the statutory definition of the crime; a person who induced another to commit an crime has to convince that person not to attempt it. Non-completion however presupposes attempt or preparation: the exception only applies to cases in which the perpetrator ceases execution of his criminal plans. Consequently, the perpetrator is liable if he has followed through, but the intended crime isn't completed because of circumstances over which he had no control.[22]

Attempt: special provisions

Article 79 Sr provides that an attempt as specified in Articles 92-94 (attempt against state security), 108 (attempt on the life or liberty of the King, the King's consort, the heir apparent or the spouse of the latter), 115 (attempt on the life or liberty of the head of a friendly nation) and 117 Sr (attempt on the life or liberty of an internationally protected person) occurs where the perpetrator manifests his intention to commit an offence by initiating it within the meaning of Article 45 Sr.[23] Because such attempts are defined as crimes *per se* the provisions of Articles 45(2, 3) and 46b Sr do not apply: as the crime is completed once is has been initiated, the cause of its non-completion is irrelevant.

2.1.2. Punishable preparatory acts (and/or conspiracy)

Preparation: general provisions

Preparation may be loosely defined as the run-up to initiation of the intended crime; it ends where the intended crime is attempted. Preparation of serious crimes was criminalised in 1994, specifically in order to combat organised crime.[24] As preparatory acts which didn't amount to punishable attempt as a rule were not punishable at all, the police was forced to wait until the intended crime had been initiated in the sense of Article 45. And although the completion of a crime may still be some way off once it is initiated, in practice waiting for initiation often posed an unacceptable risk.[25] In such cases, the

[17] See for examples HR 29 March 1949, *NJ* 1949, 422 (administering an insufficient dose of arsenic); HR 8 December 1993, *NJ* 1993, 321 (intended victim of deception was not in fact deceived); HR 7 October 2003, *JOL* 2003, 503 (use of an incorrect PIN in bank fraud).

[18] See for examples HR 20 December 1870, *W*. 3281 (theft from an empty poor box); HR 31 August 1931, *NJ* 1932, p. 1255 (theft from an empty cash register).

[19] See for example HR 7 May 1906, *W*. 8372: administration of a foul but innocuous concoction does not amount to attempted murder.

[20] See for example HR 17 March 1987, *NJ* 1988, 166: the intended murder victim dying from causes unrelated to the perpetrator's actions does not make him an unsuitable object; it does, however, prevent the intended murder from being completed.

[21] *Kamerstukken II* 1990/91, 22 268, nr. 3, p. 4, 20, with reference to Article 50 Sr: non-completion of the offence is not a personal circumstance excluding criminal liability.

[22] HR 7 May 1946, *NJ* 1946, 587; HR 24 June 1969, *NJ* 1970, 28; HR 4 April 1978, *NJ* 1979, 24; HR 19 April 1983, *NJ* 1983, 573.

[23] In English, the Dutch terms 'poging' (Article 45 Sr) and 'aanslag' (Article 79) are both translated as: attempt.

[24] Act of 27 January 1994, *Stb*. 1994, 60, which entered into force on 1 April 1994.

[25] HR 8 September 1987, *NJ* 1988, 612, being a case in point. In this case, two persons – both wearing wigs and two sets of clothes – were sitting in a stolen car with false licence plates, opposite a bank, with the engine running. In addition, they were in possession of fire arms and materials which might be used to shackle someone. According to the Supreme Court, the Court

police let public safety prevail, by disturbing the criminals' plans prematurely, i.e. before the intended crime had been initiated.[26] Because in that event the criminal got off scot-free, preparation of the most serious crimes was criminalised.

Because preparation precedes attempt – i.e. an act which by its outward appearance is geared towards completion of the intended crime – the criminal character of preparatory acts isn't necessarily evident. In order to maintain a semblance of legality, several restrictions applied which precluded innocent everyday activities from being criminalised. According to its statutory definition, the prepared crime had to carry a term of imprisonment of at least eight years, the perpetrator had to act intentionally and his acts had to be obviously intended for the joint commission of that crime. Furthermore, preparatory acts were defined as obtaining, importing, transiting, exporting or having at one's disposal objects, substances, information carriers, spaces or means of transport.

The requirement that a crime must carry a minimum prison term of eight years in order for its preparation to be punishable limits the application of the general provision of Article 46 to the most serious crimes. In general, preparation would only be punishable in respect of crimes against state security[27], crimes against royal dignity[28], crimes against heads of friendly states and other internationally protected persons[29], crimes concerning the exercise of civic rights and obligations[30], crimes against public order[31], crimes endangering the general safety of persons or property[32], crimes against public authority[33], perjury[34], counterfeiting[35], forgery[36], crimes against public morals[37], abandonment[38], crimes against personal liberty[39], capital crimes[40], abortion[41], causing bodily harm[42], theft[43], extortion[44], official misconduct[45] and crimes against the safety of shipping and aviation[46].

The requirement of intent governs all elements of the statutory definition of preparation to which it applies grammatically. Consequently, preparation is only conceivable with respect to crimes whose statutory definitions contain that subjective element. Ordinarily, *dolus eventualis* would suf-

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of Appeal had rightly judged that no robbery had been attempted, as the defendants hadn't left the car. In view of the fact that they had undertaken what looked like a dress rehearsal before, there was no way of telling what they would have done in the present instance.

[26] *Kamerstukken II* 1990/91, 22 268, nr. 3, p. 7, 10.

[27] Articles 92-95a, 97(1), 98, 98a(1, 2), 99, 100, 101, 102, 103 and 105 Sr. It should, however, be noted that Articles 96(2) and 97(2) Sr contain specific provisions in respect of preparation of crimes against state security, whereas Articles 97a, 97b and 98a(3) Sr define preparatory acts as crimes *per se*.

[28] Articles 108, 114a and 114b(1) Sr. It should, however, be noted that according to Article 114b(2), Article 96(2) Sr also applies to the crime defined in Article 114b(1).

[29] Articles 115, 117, 117b, 120a and 120b(1) Sr. It should, however, be noted that according to Article 120b(2), Article 96(2) Sr also applies to the crime defined in Article 120b(1).

[30] Articles 121, 121a, 122b(1), 123 and 124 Sr. It should, however, be noted that according to Article 122b(2), Article 96(2) Sr also applies to Article 122b(1).

[31] Articles 140(3) and 140a Sr.

[32] Articles 157, 161(2°, 3°), 161*bis*(3°, 4°), 161*quater*, 161*sexies*(3°, 4°), 162, 162a, 164, 166, 168, 170, 172(1), 173a, 174 and 176b(1) Sr. It should, however, be noted that according to Article 176b(2), Article 92(2) Sr also applies to conspiracy with terrorist intent to the crimes defined in Articles 157, 161, 161*bis*, 161quater, 161sexies, 162, 164, 166, 168, 170, 172, 173a and 174. See Article 83a Sr for the definition of terrorist intent.

[33] Articles 178(2), 181(3°), 182(2[2°, 3°]) and 197a(4, 5, 6) Sr.

[34] Articles 207(2), 207a and 207b Sr.

[35] Articles 208 and 209 Sr.

[36] Article 225(3) Sr.

[37] Articles 242, 243, 244, 245, 246, 248 and 252(3) Sr.

[38] Articles 257(2) and 258 Sr.

[39] Articles 273a(3, 4, 5, 6), 274, 275, 276, 277, 278, 281(2 [2°]), 282, 282a, 282b and 282c(1) Sr. It should, however be noted that according to Article 282c(2), Article 96(2) also applies conspiracy to the taking of hostages with terrorist intent.

[40] Articles 287, 288, 288a, 289, 289a(1), 291 and 293 Sr. It should, however, be noted that according to Article 289(2), Article 96(2) Sr also applies to conspiracy to murder with terrorist intent.

[41] Article 296(3, 4) Sr.

[42] Articles 301(3), 302, 303, 304a and 304b(1) Sr. It should, however, be noted that according to Article 304b(2), Article 96(2) Sr also applies to conspiracy to cause bodily harm with terrorist intent.

[43] Articles 311(2) and 312 Sr.

[44] Article 316 Sr.

[45] Article 358(2), 364 and 384a(3) Sr.

[46] Articles 381, 382, 383, 384, 385, 485a, 385b, 385d, 395(2[3°]), 396(2[2°, 3°]), 415a and 415b(1) Sr. It should be noted, however, that according to Article 415b(2), Article 96(2) Sr also applies conspiracy to the crimes defined in Articles 385a, 385b and 385d with terrorist intent.

fice[47], but as the perpetrator's plans still have to come to fruition, 'purpose' would be a more appropriate term.

The definition of preparatory acts isn't really restrictive, as just about any act which is instrumental to the commission of a crime is covered by it. In practice, only the term 'objects' appeared to be too narrow, as it is commonly understood to refer to tangible objects only.[48] Because of the definition of 'funds' in the Convention for the Suppression of the Financing of Terrorism[49] – which extends to property rights – section (5) was included in 2002, making the term 'monies or other means of payment' in section (1) superfluous[50]. The term 'having at one's disposal' gave rise to the question whether actual, physical possession is required. Although this has been argued by some commentators, the question is answered in the negative in the parliamentary histories of the 1994 and 2002 acts.[51]

In order not to criminalise innocent everyday activities, preparatory acts were required to be obviously intended for the joint commission of a crime. Whether such obvious intent was present had to be judged objectively; the average observer would have to come to the conclusion that a criminal enterprise was being embarked upon.[52] This approach – which was in keeping with the doctrine on attempt – was confirmed by the case law, which required concrete evidence of a crime being intended.[53] Consequently, mere intent was insufficient; the intent to commit a crime could only be said to be present where the perpetrator's actions carried the real risk of the intended crime being committed.

In a recent terrorism case, the Court of Appeal was not satisfied that the perpetrator's actions did carry the real risk of the intended crime being committed. In the Court's opinion, the perpetrator's intent has to be judged in conjunction with the nature of the means he has at his disposal. Therefore, the fact that they might in abstract be of use in the commission of a crime isn't decisive; what is paramount is their actual importance in the perpetrator's plans and – consequently – whether they represent a real risk. For that reason the Court – although it had no doubts as to the defendant's terrorist intentions – came to the conclusion that no crime had been prepared: the defendant's plans hadn't moved beyond the embryonic stage and his preparations were so primitive and clumsy that they posed no real risk for the foreseeable future.[54]

Because the perpetrator's intent had to be judged in conjunction with the means he had at his disposal, it needed to be established that he intended to use them according to their obvious purpose. Actual intent was required, not just the possibility that a crime was being prepared. Even where the perpetrator had means at his disposal of which no lawful use may be made, it needed to be proven that he intended to use those means in the execution of his criminal plans.[55] But as that might still be some way off, no certainty was required in this regard.[56]

As preparation – like attempt – was criminalised because of the risk it carries of the intended crime being committed, similar considerations apply in respect of the adequacy of means and object. Consequently, preparation is only punishable where the means the perpetrator had at his disposal

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[47] *Kamerstukken II* 1990/01, 22 268, nr. 3, p. 15-16.

[48] See Article 3:2 BW. Because of this private law definition, the Penal Code contains a number of provisions which extend the definition of the term 'object' in order to cover intangible rights; see for example Article 33a(4) Sr.

[49] New York, 9 December 1999, *Trb*. 2000, 12. In Article 1(1) of the Convention, the term 'funds' is defined as: assets of any kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit.

[50] Act of 20 December 2001, *Stb*. 2001, 675, which entered into force on 1 January 2002; see *Kamerstukken II* 2001/02, 28 031, nr. 5, p. 4.

[51] *Kamerstukken II* 1990/91, 22 268, nr. 3, p. 18; *Kamerstukken II* 2001/02, 28 031, nr. 5, p. 9. The latter document seems to imply that a person who donates a sum of money to a charity serving as a front for a terrorist organisation has that money at his disposal.

[52] *Kamerstukken II* 1990/91, 22 268, nr. 3, p. 18. The Explanatory Memorandum was not entirely consistent in this respect, as it was also suggested that a van which still has to be adapted in order to ram a shop front is obviously intended for robbery; *Kamerstukken II* 1990/91, 22 268, nr. 3, p. 18. On the whole, however, an objective line was taken.

[53] See for example HR 18 November 2003, *JOL* 2003, 605.

[54] Hof Den Haag 18 November 2005, *LJN* AU6181.

[55] HR 17 February 2004, *NJ* 2004, 400: in view of the fact that the defendant had apparently discarded a letter containing information on the robbery of armoured trucks, there was insufficient evidence of his intent to commit such robberies.

[56] HR 18 November 2003, *JOL* 2003, 605. The perpetrator's intent to use the means he has at his disposal to prepare a crime might, however, be inferred from the use he made of them; HR 17 September 2002, *NJ* 2002, 626.

might in fact have been used to commit the intended crime[57] and that crime might in fact have been committed in respect of its intended object.

In 2007, the requirement that preparatory acts are obviously intended for the commission of a crime was scrapped.[58] The relevant amendment formed part of a bill to amend the Penal Code, the Code of Criminal Procedure and other acts in order to extend the possibilities for investigation and prosecution of terrorist offences. The Explanatory Memorandum[59] doesn't make a great deal out of the proposed amendment, arguing it was in keeping with current practice. In view of the differences of opinion in legal doctrine regarding the requirement of obvious intent – some stressing the perpetrator's intent, others the nature of the means he has it his disposal – and considering that case law applies it none too strictly[60], the requirements could be dispensed with. In addition, Article 46 will be more in keeping with the special provision of Article 96(2 [3°] Sr.

As a consequence of this amendment, the perpetrator's intent – i.e. the use he intends to make of the means at his disposal – has become decisive in determining whether a crime was being prepared. In this respect, explicit reference is made to the financing of terrorist attacks: the criminal purpose of holding or providing funds in order to finance terrorism isn't evidenced by their very nature. It remains to be seen, however, whether this amendment will actually result in extending the punishability of preparation, as Article 46 Sr still requires that a crime was in fact being prepared. In this respect much depends of the facts of the case; if the means the perpetrator has at his disposal may be put to lawful use, preparation of a crime cannot be proven.[61]

At the time preparation was criminalised, the most important requirement for its punishability was that a crime which would be jointly committed was being prepared. In the Explanatory Memorandum to the Bill which introduced Art. 46 to the Dutch Penal Code, this requirement was motivated by referring to the greater likelihood of joint plans being completed.[62] It meant that acts of preparation by a single person could be punishable, provided that they were intended for the joint commission of a crime. Because that intention was paramount, it was irrelevant whether the intended crime was in fact committed jointly. Preparatory acts intended for the commission of a crime by a sole perpetrator were, however, not punishable, even if committed jointly.

In 2002, the requirement that the prepared crime would be jointly committed was scrapped. The principle motive behind this amendment lay in the fact this requirement is absent from the Convention for the Suppression of the Financing of Terrorism.[63] In the wake of the 9/11 bombings it was felt that it placed undue restrictions on what had been dubbed the 'war on terror', as preparation of actions by lone terrorists did not amount to a criminal offence. In addition, it was argued that the gravity of preparation of a crime which is to be committed by a lone perpetrator isn't such that it warrants its being treated differently from preparation of a crime which is to be committed jointly.[64] This argument of course is fallacious, as the restriction to crimes to be committed jointly didn't derive from their supposedly greater gravity, but from the fact that such crimes are more likely to be completed.

Preparation: special provisions

Article 96(2) Sr provides that a person who, with the intent to prepare or promote the commission of a crime defined in Articles 92-95a Sr: (1) tries to induce another person to commit that crime, to commit it through a third person or to commit it jointly, to aid and abet the commission of that crime or to provide opportunity, means or information for its commission; (2) tries to acquire opportunity, means or information for the commission of that crime for himself or others; (3) has means at his disposal he

[57] Hof Den Haag 18 November 2005, *LJN* AU6181.
[58] Act of 20 November 2006, *Stb.* 2006, 580, entry into force on 1 February 2007.
[59] *Kamerstukken II* 2004/05, 30 164, nr. 3, p. 49.
[60] Reference is made to HR 17 September 2002, *NJ* 2002, 626.
[61] Although it concerns a question of evidence, the author of the present report is under no great illusions as to the proof of the intent to prepare a crime. The fact that the defendant had means at his disposal which might have been used to prepare a crime may acquire greater weight in view of his refusal to explain their presence, a practice which has been sanctioned by the ECHR in the Murray case: ECHR 8 February 1996, *Reports* 1996-I. Furthermore, people who are charged with terrorist crimes may for good reasons disbelieve the truism that the innocent have nothing to fear.
[62] *Kamerstukken II* 1990/91, 22 268, nr. 3, p. 17.
[63] New York, 9 December 1999, *Trb*. 2000, 12.
[64] *Kamerstukken II* 2001/02, 28 031, nr. 5, p. 4

knows are intended for the commission of that crime; (4) prepares or possesses plans for the commission of that crime which are intended to be divulged to others; or (5) tries to prevent, hamper or frustrate any official measure to prevent or suppress the commission of that crime, is liable to a prison term not exceeding ten years and/or a fine of the fifth category (€ 67.000).

The preparatory actions defined in Article 96(2) Sr must because of their definition be committed intentionally, although *dolus eventualis* suffices. This doesn't hold, however, for the perpetrator's intent to prepare or promote the crimes defined in Articles 92-95a Sr: preparing of promoting those crimes must have been his primary motive. The preparatory acts are characterised by the fact that they amount to a criminal offence, regardless of their consequences; whether the crime the perpetrator sought to prepare or promote is in fact prepared, attempted or committed is irrelevant.[65]

Article 97(1) Sr provides that a person who establishes contact with a foreign power with the intent to induce it to commit hostilities or wage war against the state, to strengthen its resolve in that respect, to promise it assistance or to assist it in its preparations is liable to life imprisonment or a prison term not exceeding thirty years and/or a fine of the fifth category (€ 67.000). According to section (2), acts committed in preparation of the crime defined in section (1) are punishable by a prison term not exceeding ten years and/or a fine of the fifth category (€ 67.000).

Article 98a(1) Sr provides that a person by whom any information, object or data specified in Article 98 – i.e. information etc. classified in the interest of the state or its allies and information etc. emanating from a prohibited place and relevant to the security of the state or its allies – is intentionally disclosed, or by whom, without authority, said information, object or data is intentionally provided or made available to a foreign power, a person or body established in a foreign country, or to a person or body of such nature that there is a risk of the information or data becoming known to a foreign power or to a body or person established in a foreign country, where he knows or y should reasonably suspect the information or data to be of such nature, is liable to a term of imprisonment not exceeding fifteen years or a fine of the fifth category (€ 67.000). In addition, section (2) provides that where the offender has acted in wartime, or in the employment of or on assignment for a foreign power or a person or body established in a foreign country, life imprisonment or a term of imprisonment not exceeding thirty years or a fine of the fifth category (€ 67.000) may be imposed upon him. According to section (3), acts committed in preparation of the crimes defined in sections (1) and (2) are punishable by a term of imprisonment not exceeding six years and/or a fine of the fifth category (€ 67.000).

Article 121 Sr provides that a person who by an act of violence or by threat of violence disperses a meeting of one or both chambers of parliament, compels it or them to take or to refrain from taking any decision, removes a member or a minister from that meeting or intentionally prevents a member or a minister from attending such meeting or from discharging his duties therein without let or hindrance, is liable to life imprisonment or a term of imprisonment not exceeding thirty years and/or a fine of the fifth category (€ 67.000). According to Article 122(1) Sr, conspiracy to the crime defined in Article 121 is punishable by a prison term not exceeding ten years and/or a fine of the fifth category (€ 67.000). This provision is complemented by section (2), which provides that in respect of preparation Article 96(2) Sr applies. Accordingly, acts committed in preparation of the crime defined in Article 121 Sr are punishable by the same penalties as conspiracy to that crime.

Conspiracy

Conspiracy to commit a crime does not generally amount to a criminal offence; the Dutch Penal Code does not contain a provision to that effect. There are, however, a number of provisions according to which conspiracy to commit specific crimes does amount to a criminal offence. Foremost among these is Article 96(1) Sr, providing that conspiracy to commit one of the crimes defined in Articles 92-95a Sr (crimes against state security) is punishable by a prison term not exceeding ten years and/or a fine of the fifth category (€ 67.000). In addition, conspiracy has been criminalised in respect of the crimes defined in:

[65] See for an example Rb. Rotterdam 14 February 2006, *LJN* AV1652.

– Article 102 (aiding and abetting the enemy in time of war)[66];
– Article 108 (attempt on the life or liberty of the King, the heir apparent or the spouse of the latter with terrorist intent)[67];
– Articles 115 and 117 (attempt on the life or liberty of the head of a friendly nation with terrorist intent)[68];
– Article 121 (violence against parliament)[69];
– Articles 157, 161(2, 3), 161*bis*(3,4), 161*quater*, 161*sexies*(3,4), 162, 164, 166, 168, 170, 172, 173a and 174 (endangering and causing damage to public works with terrorist intent)[70];
– Article 282a (deprivation of liberty with terrorist intent)[71];
– Article 289 (murder with terrorist intent)[72];
– Article 303 (grievous bodily harm with terrorist intent)[73], and
– Article 385a-385d (crimes against the safety of shipping and aviation with terrorist intent)[74].
Conspiracy to these crimes is punishable a prison term not exceeding ten years and/or a fine of the fifth category (€ 67.000).

The rationale of criminalisation of conspiracy lies in the vital interests which are at stake, considering that once two or more persons have agreed to commit a crime the chances of their following through with their plans – thus endangering the protected interests – increase. According to Article 80 Sr, a conspiracy exists once two or more persons agree to commit a crime; such an agreement must be seriously intended and specific but no overt acts need to take place. Consequently, although one might well imagine persons attempting to conspire – meeting or even agreeing to meet in order to conspire would qualify as an attempt – there is little need or use for such reasoning in order to establish criminal liability.

2.1.3. Field of applicability (general/specific for certain offences)

Attempt: general provisions

According to Article 91 Sr, the general provisions in the preceding articles in principle apply to the offences defined in the Dutch Penal Code as well as to offences defined in other acts or regulations. As regards the applicability of the general provisions on attempt, there are, however, two kinds of restriction. Firstly, there are limitations of a general nature, deriving from either the definition of attempt or the statutory definition of the pertinent offence. The obvious examples of this category are misdemeanours and offences whose mental element consists of negligence; attempt is only punishable where the intent to commit a crime has been initiated.[75] Secondly, it may be explicitly provided that the attempt to commit a specific offence isn't punishable. At this time, the only such provision still on the statute books relates to simple assault.[76]

Furthermore, although the application of Article 45 to the crimes defined in Articles 92-94, 108, 115 and 117 Sr – which define some attempts as crimes *per* se – as such isn't inconceivable, it would in effect amount to criminalisation of preparatory acts. Consequently, it would strain the arrangement in Articles 45 and 46 Sr, which provides that preparatory acts are only punishable under the

[66] Article 103 Sr.
[67] Article 114b Sr.
[68] Article 120b Sr.
[69] Article 122 Sr.
[70] Article 176b Sr.
[71] Article 282c Sr.
[72] Article 289a Sr.
[73] Article 304b Sr.
[74] Article 415b Sr.
[75] H.J. Smidt, *Geschiedenis van het Wetboek van Strafrecht: volledige verzameling van regeeringsontwerpen, gewisselde stukken, gevoerde beraadslagingen, enz.* (bew. J.W. Smidt & E.A. Smidt), Zwolle: H.D. Tjeenk Willink 1891-1901, I, p. 420. As regards offences whose mental element consists of negligence, an apparent exception must, however, be made concerning negligently receiving goods of criminal provenance (Article 417*bis* Sr). Because goods are necessarily received intentionally, attempting to receive them is quite conceivable; this isn't altered by that fact that in respect of the goods' criminal provenance suffices. See HR 6 February 1990, *NJ* 1990, 417.
[76] Article 300(5) Sr. The provision's rationale is obvious: without it, a futile gesture would amount to a criminal offence. Oddly enough, attempted ill-treatment of an animal has been punishable since a similar provision was scrapped in 1961.

conditions set out in the latter article. There is no practical need for the application of Article 45 Sr either, as preparatory acts have been defined as crimes *per se* with respect to most attempts referred to.

Attempt: special provisions

Article 79 Sr – which provides that an attempt defined in Articles 92-94, 108, 115 and 117 Sr as a crime *per* se occurs where the perpetrator manifests his intention to commit an offence by initiating it within the meaning of Article 45 Sr – only applies to those crimes.

Preparation: general provisions

As regards the applicability of the general provisions on preparation, three restrictions derive from its statutory definition: a crime punishable by a term of imprisonment of not less than eight years must have been intentionally prepared. Consequently, preparation does not amount to a criminal offence in respect of misdemeanours and less serious crimes and in inconceivable in respect of crimes whose mental element consists of negligence.

Furthermore, it may be argued that the general provisions on preparation do not apply to conspiracy. Conspiracy exists once two or more persons agree to commit a crime, whereas it was the legislator's stated intent to criminalise preparation only in cases where the conspirators have followed through with their plan. In addition, Article 96(2) Sr – which complements the provision of section (1) on conspiracy – contains special provisions on preparation. It should be noted, however, that in the course of the parliamentary debate on the Terrorist Crimes Bill, an amendment to the effect that Article 46 does not apply to conspiracy was rejected.[77]

Preparation: special provisions

Article 96(2) Sr complements section (1) of that article in that they apply to the same crimes: where conspiracy to commit a crime is punishable, so is preparation within the terms of article 96(2). The preparation of terrorist crimes – i.e. crimes committed with terrorist intent – is criminalised in a similar fashion, as the statutory provisions which criminalise conspiracy to terrorist crimes are always complemented by a provision on the perpetration of such crimes.[78]

Article 97(2) Sr only applies to the crime defined in section (1).

Article 98a(2) Sr only applies to the crimes defined in sections (1) and (2).

Article 122(2) Sr only applies to the crime defined in Article 121 Sr.

Conspiracy

The provisions criminalising conspiracy only apply to the crimes they explicitly refer to, i.e. the crimes defined in Articles 102; 108; 115 and 117; 121; 157, 161(2, 3), 161*bis*(3,4), 161*quater*, 161*sexies*(3,4), 162, 164, 166, 168, 170, 172, 173a and 174; 282a; 289; 303; and 385a-385d.[79]

2.1.4. Applicable punishments: a comparison with the punishments applicable to the offences committed

Attempt: general provisions

According to Article 45(2) Sr, the maximum penalty prescribed for the pertinent crime is reduced by one third in the case of attempt, which reduction may be explained from the fact that the danger posed

[77] *Kamerstukken II* 2003/04, 28 463, nr. 24.
[78] See Articles 114b, 120b, 176b, 282c, 289a, 304b, 415b Sr.
[79] See Articles 103, 114b, 120b, 122, 176b, 282c, 289a, 304b, 415b Sr respectively.

to the protected interest ultimately wasn't realised. If the pertinent crime is punishable by life imprisonment, a prison term of twenty years may be imposed (Article 45[2] Sr).[80] The imposition of additional penalties[81] and non-punitive sanctions[82] is not similarly affected; they may be imposed regardless of the crime being completed (Article 45[4] Sr).

Attempt: special provisions

An attempt as defined in Articles 92-94 Sr (attempt against state security) is punishable by life imprisonment or a prison term not exceeding thirty years and/or a fine of the fifth category (€ 67.000); an attempt as defined in Article 108 Sr (attempt on the life or liberty of the King, the King's consort, the heir apparent or the spouse of the latter) is punishable by a prison term not exceeding fifteen years and/or a fine of the fifth category (€ 67.000) or – if the victim's death ensues or the attempt was premeditated – by life imprisonment or a prison term not exceeding thirty years and/or a fine of the fifth category (€ 67.000); an attempt as defined in Article 115 Sr (attempt on the life or liberty of the head of a friendly nation) is punishable by a prison term not exceeding fifteen years and/or a fine of the fifth category (€ 67.000) or – if the victim's death ensues or the attempt was premeditated – by life imprisonment or a prison term not exceeding thirty years and/or a fine of the fifth category (€ 67.000); and an attempt as defined in Article 117 Sr (attempt on the life or liberty of an internationally protected person) is punishable by a prison term not exceeding fifteen years and/or a fine of the fifth category (€ 67.000) or – if the victim's death ensues or the attempt was premeditated – by life imprisonment or a prison term not exceeding thirty years and/or a fine of the fifth category (€ 67.000).

Preparation: general provisions

According to Article 46(2) Sr, the maximum penalty prescribed for the pertinent crime is reduced by one half in the case of preparation. If the pertinent crime is punishable by life imprisonment, a prison term of fifteen years may be imposed. As is the case with attempt, the imposition of additional penalties and non-punitive sanctions is not similarly affected.

Preparation: special provisions

Preparation within the terms of Article 96(2) Sr is punishable by a prison term not exceeding ten years and/or a fine of the fifth category (€ 67.000).[83] In addition, forfeiture and disqualification from the exercise of certain rights may be ordered.[84]

Preparation within the terms of Article 97(2) Sr is punishable by a prison term not exceeding ten years and/or a fine of the fifth category (€ 67.000).[85] In addition, forfeiture and disqualification from the exercise of certain rights may be ordered.[86]

Preparation within the terms of Article 98a(3) Sr is punishable by a prison term not exceeding six years and/or a fine of the fifth category (€ 67.000).[87] In addition, forfeiture and disqualification from the exercise of certain rights may be ordered.[88]

[80] Although in Dutch law, life imprisonment means exactly that (see Article 10[1] Sr), crimes punishable by life imprisonment may alternatively by punished by a fixed prison term of thirty years; hence the provision that a prison term of twenty years may be imposed in the case of attempt.
[81] Disqualification from the exercise of certain rights (Article 28 Sr) , forfeiture (Articles 33-34 Sr) and publication of the judgment (Article 36 Sr).
[82] Removal from circulation (Articles 36b-36d Sr), seizure of illegal gains (Article 36e Sr), compensation (Article 36f Sr), committal to a psychiatric hospital (Article 37 Sr), committal to an institution for the criminally insane (Articles 37a-38k Sr) and committal to an institution for habitual offenders (Articles 38m-38u Sr).
[83] It should be noted, however, that a maximum fine of € 67.000 may only be imposed in respect of crimes committed after 1 February 2006, when the Recalibration of penalties act (Wet herijking strafmaxima: *Stb*. 2006, 11) entered into force. As regards crimes committed before that date a maximum fine of € 45.000 may be imposed.
[84] See Articles 33-34 and 106 Sr respectively.
[85] A maximum fine of € 67.000 may only be imposed in respect of crimes committed after 1 February 2006.
[86] See Articles 33-34 and 106 Sr respectively.
[87] A maximum fine of € 67.000 may only be imposed in respect of crimes committed after 1 February 2006.

Preparation within the terms of Article 122(2) Sr is punishable by a prison term not exceeding ten years and/or a fine of the fifth category (€ 67.000).[89] In addition, forfeiture and disqualification from the exercise of certain rights may be ordered.[90]

Conspiracy

Articles 96(1), 103, 114b, 120b, 122, 176b, 282c, 289a, 304b, 415b Sr all provide that conspiracy to the crimes referred to in those articles is punishable by a prison term not exceeding ten years and/or a fine of the fifth category (€ 67.000).[91] In addition, forfeiture and disqualification from the exercise of certain rights may be ordered.[92]

[88] See Articles 33-34 and 106 Sr respectively.
[89] A maximum fine of € 67.000 may only be imposed in respect of crimes committed after 1 February 2006.
[90] See Articles 33-34 and 130 Sr respectively.
[91] A maximum fine of € 67.000 may only be imposed in respect of crimes committed after 1 February 2006.
[92] See Articles 33-34 and 106 Sr respectively.

2.2. Participation

2.2.1. Treatment of the acting in concert of individuals in the commission of the offence (categories of the criminal, instigation, cooperation, complicity)

Principals: preliminary remarks

Title V of Book I of the Dutch Penal Code (Articles 47-54 Sr) concerns participation in criminal offences. Article 47 Sr reads (my translation)[93]**:**

> (Art. 47) 1. The following persons are liable as principals:
> (1) those who commit a criminal offence, either personally or jointly with another or others, or who causes an innocent person to commit a criminal offence;
> (2) those who, through gifts, promises, abuse of authority, use of violence, threats or deception or providing the opportunity, means or information, intentionally solicit the commission of an offence.
> 2. With regard to the last category, only those actions intentionally solicited by them and the consequences of such actions are to be taken into consideration.

With respect to participation four preliminary remarks have to be made. Firstly, under Dutch case law, a person may be held liable for an offence he did not physically commit, if he can be said to have acted through another person, irrespective of whether that other person is also by himself criminally responsible for that offence. An offence is considered as having been functionally committed if three requirements are satisfied: (i) the statutory definition of the offence allows for its functional commission[94] (ii) the defendant violated a norm which was addressed to him[95], and (iii) the physical acts of another person can be imputed to the defendant[96]. A person is held liable as the functional perpetrator of an offence because of his facilitating another person's acts: if he had control over those acts and accepted them or tended to accept them.

Secondly, legal doctrine also recognizes compound participation, i.e. participating in acts of participation.[97] In principle, any form of compound participation is punishable, provided that the acts in which a person participates are themselves punishable. The only limit to ever increasing circles of liability is set by the requirement of intent: a person has to intend the participation of others. This requirement, however, is applied rather loosely by the Supreme Court. According to the Court, it does not extend to the exact form of participation.[98]

Thirdly, participants have in common that they contribute to the commission of an offence, either previously or simultaneously: complicity after the fact generally is not a punishable offence.[99] As a consequence, participation is subject to what may best be called the dependency principle: participation only amounts to a punishable offence if at least a punishable attempt has been made.[100] A notable exception to this principle is provided in Article 46a Sr, which criminalises unsuccessfully soliciting or causing an innocent person to commit a crime. In that case, a person is liable for attempting to participate in a crime which doesn't actually ensue. The dependency principle doesn't imply that the person who committed the offence has to be prosecuted, much less that he must be found

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[93] Original Dutch: (Art. 47) 1. Als daders van een strafbaar feit worden gestraft: 1° zij die het feit plegen, doen plegen of medeplegen; 2° zij die door giften, beloften, misbruik van gezag, geweld, bedreiging of misleiding of door het verschaffen van gelegenheid, middelen of inlichtingen het feit opzettelijk uitlokken. 2. Ten aanzien van de laatsten komen alleen die handelingen in aanmerking die zij opzettelijk hebben uitgelokt, benevens hun gevolgen.

[94] This requirement only excludes offences with a dominant physical component, like violent offences and offences against public morals. Murder may, however, be committed functionally: HR 29 May 1990, *NJ* 1991, 217.

[95] This is evident where the statutory definition of the offence requires it to have been committed in a certain capacity; see HR 31 August 2004, *NJ* 2004, 591.

[96] HR 23 February 1954, *NJ* 1954, 278.

[97] HR 24 January 1950, *NJ* 1950, 287: solicitation of complicity to attempted deception.

[98] To give an example: if a person has planned a murder, it's irrelevant for his criminal liability for murder whether the person he employs for the execution of his plans commits the murder by himself or jointly with others, or solicits a third person; see HR 31 March 1987, *NJ* 1988, 633.

[99] Certain types of cooperation after the fact – typically involving the handling of goods of illegal provenance – have been penalized in Title XXX, Book II of the Dutch Penal Code (Articles 416-420).

[100] See for example HR 18 September 1995, *NJ* 1996, 40: liability for unsuccessful solicitation may not be founded in Article 47 Sr (although it may be founded in Article 46a Sr).

guilty; as regards the liability of participants, it's sufficient that a criminal offence is proven to have been committed.

Finally, although Article 91 Sr provides that the general provisions in the preceding articles apply to all offences defined in the Dutch Penal Code as well as to offences defined in other acts or regulations, this principle is subject to two qualifications: acts of parliament may contain explicit provisions to the contrary and it may be sidestepped it by defining acts of participation as offences *per se*.[101]

Joint commission

An offence is said to have been committed jointly where two or more persons consciously collaborate and jointly execute an offence. Conscious collaboration means that the perpetrators must knowingly and willingly – i.e. intentionally – collaborate with a view to the commission of an offence. Consequently, their intent must apply to the collaboration between them and to the commission of a criminal act; whether it extends to other circumstances depends on the relevant statutory definition.[102] No explicit agreements need to have been made; tacit collaboration suffices. A person may even be deemed to have intended the joint commission of an offence where he was present at its commission and didn't distance himself from it.[103] Such reasoning is prevalent in respect of violent crime, notably manslaughter and murder.[104] It does, however, rest on the presumption that it was in fact possible to distance oneself[105]; in the absence of that opportunity, a person who was present at the commission of the offence cannot be said to have jointly committed it[106].

The requirement of joint execution doesn't imply that the perpetrators must all be personally involved with the commission of the offence. Provided that their collaboration is intimate and complete, giving support may amount to joint commission.[107] In a way, the requirements of conscious collaboration and joint execution are communicating vessels: as the perpetrators collaborate more intimately, joint execution is less important. In the event of one person planning an offence which is subsequently committed by another, they may be said to have committed it jointly.[108]

Commission through another person

Someone is said to have committed an offence through another person where he caused the commission of an offence for which the perpetrator may not be held liable. Consequently, in order to hold someone liable for having committed an offence through another person two requirements must be satisfied. Firstly, the intellectual actor must have intended to cause a criminal act. In this respect, it should be noted that the requirement of intent on the part of the intellectual actor only applies to the material actor's actions; whether it extends to the elements of the relevant offence depends on its statutory definition.

Secondly, the material actor must not be liable himself. His liability may be excluded on the grounds that he lacks the mental element or capacity required by the appropriate statutory definition or his actions are excused.[109] Offences whose statutory definition requires a certain capacity – an official capacity, for example – may therefore be said to have been committed through another person where either the intellectual actor or the material actor[110] possesses the necessary capacity. Where only the intellectual actor possesses the necessary capacity, this is self-evident, as the material actor cannot

[101] See for examples Articles 131, 133 and 140 Sr, which are commented on under 2.2.2. Article 46a Sr isn't wholly comparable to such provisions, as it concerns the unsuccessful solicitation of a specific offence, whereas according to the statutory definitions of participatory acts as offences *per se* the offence in which the perpetrator intended to participate is irrelevant.
[102] HR 2 February 1999, *NJ* 1999, 554; HR 6 December 2005, *LJN* AU2246.
[103] HR 11 January 2000, *NJ* 2000, 228; HR 8 May 2001, *NJ* 2001, 480.
[104] See for examples HR 8 May 2001, *NJ* 2001, 480; HR 28 May 2002, *NJ* 2003, 142; HR 14 October 2003, *NJ* 2005, 183.
[105] HR 12 April 2005, *NJ* 2005, 577.
[106] HR 2 October 2004, *NJ* 2004, 682.
[107] HR 29 October 1934, *NJ* 1934, p. 1673.
[108] HR 17 November 1981, *NJ* 1983, 84/197; HR 15 April 1986, *NJ* 1986, 740; HR 14 April 1987, *NJ* 1988, 515; HR 24 January 1995, *NJ* 1995, 352.
[109] HR 26 June 1898, *W*. 7146.
[110] See, for example, HR 21 April 1913, *NJ* 1913, p. 961.

commit the offence; where the material actor does possess that capacity, his liability must be excluded because he lacks the necessary mental element or his actions are excused.[111]

Solicitation

Someone is said to have solicited the commission of an offence where he incited another person to commit an offence for which that person may himself be held liable; generally, a person who solicits the commission of an offence does not participate in it. In order to hold someone liable for solicitation, four requirements must be satisfied: (i) intent on the part of the intellectual actor, (ii) incitement, (iii) use of certain means and (iv) liability of the material actor.

As Article 47(1[2]) Sr specifically provides that the commission of an offence must be solicited intentionally, the intellectual actor's intent must apply to his inciting another person to commit an offence, as well as to all elements of that offence. Intent on the material actor's actions only does not suffice; in fact, the intellectual actor's intent doesn't have to extend to the way in which the material actor subsequently goes about committing the offence.[112] The requirement of incitement means that the intellectual actor must have caused the material actor's decision to commit the offence. Consequently, an offence isn't solicited where the perpetrator had already decided to commit it.[113]

In order to solicit another person to commit an offence, the intellectual actor must use one of the means listed in Article 47(1[2]) Sr: gifts, promises, abuse of authority, violence, threats, deception or providing opportunity, means or information. Abuse of authority doesn't require a formal relationship as exists between parents and children or employers and employees; it may derive from circumstances which oblige a person to do what another person tells him.[114] Violence, threats and deception have the same effect, although it mustn't be so strong as to exclude the material actor's culpability. In that case, an innocent person was caused to commit an offence. Information must be relevant in the context of the intended offence, in that it is suited to bring about its commission.[115]

Article 47(2) Sr provides that as regards the intellectual actor only the actions he intentionally solicited and the consequences of such actions – i.e. consequences in respect of which no intent is required[116] – are to be taken into consideration. This provision applies to the legal qualification of the intellectual actor's involvement with the offence as well as to the penalties which may be imposed. Where, for example, the intellectual actor only intended to solicit simple theft, he isn't held liable for the material actor's subsequent use of force, nor is he punished for it.

Accessories

Articles 48 and 49 Sr deal with accessories, i.e. persons assisting in the commission of a crime by another person.[117] Its provisions read (my translation)[118]:

> (Art. 48) The following persons are liable as accessories to a crime:
> (1) those who intentionally assist during the commission of the crime;
> (2) those who intentionally provide the opportunity, means or information necessary to commit the crime.

[111] This peculiarity distinguishes causing an innocent person to commit an offence from solicitation: in respect of solicitation, it is always the material actor who must possess the necessary capacity.
[112] Solicitation of theft, for example, may imply the intellectual actor's accepting the risk of the wrong object being stolen; HR 29 April 1997, *NJ* 1997, 654.
[113] HR 8 March 1920, *NJ* 1920, p. 458; HR 25 January 1944, *NJ* 1944, 362. The fact that the material actor has in the past committed similar offences does not, however, preclude solicitation, provided that in the present instance his decision to commit an offence was prompted by the intellectual actor; see for examples HR 3 January 1934, *NJ* 1934, p. 549; HR 28 June 1937, *NJ* 1938, p. 173; Hof 's-Hertogenbosch 19 October 1999, *NJB* 1999, nr. 154.
[114] HR 1 June 1976, *NJ* 1977, 42; HR 14 May 1991, *NJ* 1991, 769.
[115] HR 27 February 2001, *NJ* 2001, 308.
[116] Such consequences – for example: the fact that a victim of assault subsequently dies (Article 300[3] Sr) – generally serve as aggravating circumstances. There are, however, also offences whose statutory definition explicitly exempts circumstances which constitute liability from the requirement of intent, notably offences against the general safety of persons and property (articles 157-176b Sr); see HR 29 March 1966, *NJ* 1966, 395.
[117] Art. 52 Sr expressly states that complicity to a misdemeanour is not punishable.
[118] Original Dutch: (Art. 48) Als medeplichtigen van een strafbaar feit worden gestraft: 1° zij die opzettelijk behulpzaam zijn bij het plegen van het misdrijf; 2° zij die opzettelijk middelen, gelegenheid of inlichtingen verschaffen tot het plegen van het misdrijf.

> (Art. 49) 1. The maximum principal penalties prescribed for the crime are reduced by one third in respect of accessories.
> 2. In respect of crimes for which a life sentence has been prescribed, a prison term not exceeding twenty years shall be imposed.
> 3. The additional penalties are the same as may be imposed for the crime itself.
> 4. In determining the sentence, regard may only be had for the acts the accessory intentionally made possible or promoted, as well as their consequences.

Complicity[119] consists of assisting another person in the commission of a crime, either previously or simultaneously. Because misdemeanours and complicity are considered less grave, complicity only amounts to a criminal offence in respect of crimes; Article 52 Sr explicitly says so. In order for an accessory to be criminally liable, three requirements have to be satisfied: the accessory must intend to assist in the commission of a crime, he must have given actual assistance and the crime must have ensued. The accessory's intent must extend to his own contribution as well as to (the elements of) the crime towards whose commission it is made. In both respects, *dolus eventualis* suffices: it is sufficient for an accessory to have consciously accepted the considerable risk of contributing to another person's crime.[120]

The question arises, however, whether the accessory is also liable where his intent as to the crime he intended to assist in does not concur with the intent of its perpetrator. As regards this question, three situations must be distinguished: the perpetrator may commit an entirely different crime, a similar but less grave crime or a similar but more grave crime. In the first situation, it is obvious that the accessory cannot be held liable, as he did not in fact assist in the commission of a crime. In the second situation, the accessory's liability is limited to the crime the perpetrator has committed. Where, for example, the accessory intended to assist in the commission of burglary, he is only liable for simple theft if the door wasn't locked. The third situation is provided for in Article 49(4) Sr: although the accessory is liable for having contributed to the offence committed by the principal – indeed, the legal qualification of his contribution conforms to the qualification of the offence committed by the principal – only those actions which were intentionally facilitated or promoted by the accessory and the consequences of such actions – i.e. consequences in respect of which no intent is required[121] – are to be taken into consideration in the sentence. Where, for example, the accessory intends to assist in the commission of assault but the principal intends to murder the victim, the accessory is liable as an accessory to murder but may only be punished for having assisted in the commission of assault.

Article 48 Sr distinguishes between two types of complicity: anterior complicity – which precedes the offence – and simultaneous complicity – which concurs with the offence. The relevance of this distinction lies in the fact that – because it is further removed from the completed crime – anterior complicity must consist of providing opportunity, means or information necessary to commit the crime.[122] Consequently, in the case of anterior complicity an active contribution is required, whereas simultaneous complicity may be wholly passive, provided the accessory was under a legal obligation to act.[123] Such an obligation exists where under the circumstances – specifically in view of his previ-

[119] Although the different nature of liability founded in Article 48 Sr is best expressed by the term 'accessory', I use the term 'complicity' to denote the liability of accessories, for simple reason that no comparable noun deriving from the word 'accessory' exists.
[120] HR 8 May 1979, *NJ* 1979, 481; HR 26 February 1985, *NJ* 1985, 651; HR 13 November 2001, *NJ* 2002, 245.
[121] Such consequences – for example: the fact that a victim of assault subsequently dies (Article 300[3] Sr) – generally serve as aggravating circumstances. There are, however, also offences whose statutory definition explicitly exempts circumstances which constitute liability from the requirement of intent, notably offences against the general safety of persons and property (articles 157-176b Sr); see HR 29 March 1966, *NJ* 1966, 395.
[122] The careful reader will observe that providing opportunity, means or information may also amount to solicitation. The cardinal difference between solicitation and complicity – which explains why complicity may be punished less severely – is that in the case of solicitation, the participant puts the idea of committing an offence in someone else's head, whereas in the case of complicity that idea has already taken hold; HR 13 June 1898, *W*. 7145; HR 22 October 1928, *NJ* 1929, p. 189; HR 6 March 1939, *NJ* 1939, 897; H.J. Smidt, *Geschiedenis van het Wetboek van Strafrecht: volledige verzameling van regeeringsontwerpen, gewisselde stukken, gevoerde beraadslagingen, enz.* (bew. J.W. Smidt & E.A. Smidt), Zwolle: H.D. Tjeenk Willink 1891-1901, I, p. 413..
[123] HR 12 December 2000, *NJ* 2002, 516; Hof Den Haag 9 August 1988, *NJ* 1988, 979.

ous conduct – a person is in a position to prevent the crime from being completed; mere knowledge of the principal's criminal intentions is insufficient.[124]

The assistance provided by an accessory does not have to be indispensable[125], although he must in fact have supported the principal; no liability exists where the accomplice was in no way helpful in the commission of an offence[126]. Assistance after the fact generally does not amount to a criminal offence, although it may be relevant in connection with previous conduct.[127]

Criminal liability of legal entities

Originally, the Dutch Penal Code only provided for criminal liability of natural persons: only they could be principals of or accessories to criminal offences. In 1976, however, a general provision was introduced to the effect that criminal offences may also be committed by legal persons.[128] Strictly speaking, this provision doesn't increase the number of acts for which persons may be held criminally liable – wherein lies the primary importance of the provisions on the liability of principals and accessories – but the number of persons liable for those acts.

The criminal liability of legal persons is provided for in Article 51 Sr, which reads (my translation)[129]:

> (Art. 51) 1. Criminal offences may be committed by natural persons and legal persons.
> 2. Where a criminal offence is committed by a legal person, criminal proceedings may be instituted and such penalties and measures as are prescribed by law, where applicable, may be imposed:
> (1) against the legal person, or
> (2) against those who have ordered the commission of the criminal offence and against those who directed such unlawful behaviour, or
> (3) against the persons mentioned under (1) and (2) jointly.
> 3. In the application of the preceding sections, the following are deemed to be equivalent to legal persons: unincorporated companies, partnerships, shipping companies and special funds.

Whether a legal person exists must be judged primarily according to the criteria set out in book II of the Dutch Civil Code. It should, however, be borne in mind that for the purpose of establishing criminal liability private law criteria cannot be decisive. Consequently, defects in the establishment or structure of a legal person don't preclude criminal liability. Moreover, Article 51(3) broadens the definition of legal persons in order to accommodate manifestations which are not legal persons *stricto sensu*. In sum, it may be argued that for the purpose of establishing criminal liability any manifestation which has an existence independent of the natural persons involved may be dubbed a legal person.[130]

The criminal liability of legal persons closely resembles the liability of functional perpetrators, as legal persons necessarily act though natural persons. Consequently, similar requirements apply.

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[124] HR 27 November 2001, *NJ* 2002, 517.
[125] HR 7 January 1918, *W*. 10225.
[126] This does not mean, however, that the principal must have been aware of being assisted; unlike joint commission, complicity doesn't require conscious collaboration; HR 6 October 1998, *NJ* 1999, 90. A person may, for example, be liable as an accessory to burglary although the burglar wasn't aware of the door having been deliberately left open.
[127] That is, under Article 48 Sr. Special provisions may penalize assistance after the fact: see HR 8 January 1985, *NJ* 1988, 6; HR 15 December 1987, *NJ* 1988, 835.
[128] Act of 23 June 1976, *Stb*. 1976, 377. It should, however, be observed that the criminal liability of legal persons wasn't entirely novel, as specific provisions to that effect has been enacted in respect of economic and fiscal offences.
[129] Original Dutch: (Art. 51) 1. Strafbare feiten kunnen worden begaan door natuurlijke personen en rechtspersonen.
2. Indien een strafbaar feit wordt begaan door een rechtspersoon, kan de strafvervolging worden ingesteld en kunnen de in de wet voorziene straffen en maatregelen, indien zij daarvoor in aanmerking komen, worden uitgesproken:
1°. tegen die rechtspersoon, dan wel
2°. tegen hen die tot het feit opdracht hebben gegeven, alsmede tegen hen die feitelijke leiding hebben gegeven aan de verboden gedraging, dan wel
3°. tegen de onder 1° en 2° genoemden te zamen.
3. Voor de toepassing van de vorige leden wordt met de rechtspersoon gelijkgesteld: de vennootschap zonder rechtspersoonlijkheid, de maatschap, de rederij en het doelvermogen.
[130] Case law even provides an example of Article 51 Sr being applied to a British limited company; HR 13 November 2001, *NJ* 2002, 219.

Firstly, it must be said that the legal person contravened a norm addressed to it.[131] If not, the relevant offence may not be committed by a legal person.[132] Secondly, the actions of a natural person must be imputed to the legal person. Whether this is possible depends on the facts of the case, notably the character of the act in question and its context: was the act committed by someone in service to the legal person, did it fit normal practice and did the legal person benefit from it?[133] In addition the criteria developed in respect of functional perpetration may be applied: a legal person may be judged to have committed a criminal offence where it had control of the relevant acts and accepted or tended to accept them.[134] Thirdly, the legal person must have possessed the mental element required by the relevant statutory definition, if any. Ordinarily, in the absence of a formal decision to commit criminal offences, the intent or carelessness of a natural person must be imputed to the legal person; whose intent or carelessness may be imputed depends on the structure of the legal person and the various responsibilities of natural persons working within it. In this respect, much depends on the way in which the legal person goes about its business: the natural person whose intent or carelessness is imputed to the legal person need not have acted in any formal capacity.

Liability of directors

Alongside the criminal liability of legal persons a provision was introduced to the effect that natural persons may be held liable on account of their involvement with a criminal offence committed by a legal person. As this type of liability does increase the number of acts for which a person may be held liable, it resembles participation. It is, however, of an essentially different nature, because it isn't founded in a person's participation in actual offences, but rather in his not preventing the commission of a criminal offence by persons in the service of the legal person.[135]

Where a legal person has committed a criminal offence, the natural persons who ordered or directed it may be punished accordingly. In the absence of an explicit order a natural person may be held liable for having directed the commission of the offence if he (i) consciously refrained from taking preventive measures, although he was competent to take such measures and should have done so under the circumstances and (ii) as a consequence accepts the considerable risk of the relevant act's occurrence, thereby intentionally promoting it.[136] Article 51(2) applies to all persons who were in fact involved in the commission of a criminal offence by the legal person, regardless of their formal positions; they needn't have acted in a specific capacity. It may even be that the commission of an offence by a legal person is directed by a person who – on paper, at least – has nothing whatsoever to do with it.[137]

2.2.2. Regulation and sanction of the acts of participation

Specific provisions on participation

In respect of some offences, the fact that they were committed jointly serves as an aggravating circumstance.[138] Because two or more persons committing the offence jointly poses a greater danger to the protected interest, it may be punished more severely than would be possible under Article 47(1) Sr.

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[131] This is evident where the statutory definition of the offence requires it to have been committed in a certain capacity; see HR 22 June 2004, *NJ* 2004, 441.

[132] This requirement only excludes offences with a dominant physical component, like violent offences and offences against public morals.

[133] HR 21 October 2003, *NJ* 2006, 328; HR 29 March 2005, *LJN* AR7619.

[134] HR 1 July 1981, *NJ* 1982, 80; HR 14 January 1992, *NJ* 1992, 413.

[135] Of course this implies that the court needs to establish that a criminal offence was committed by the legal person; this implication echoes the dependency principle which governs participation.

[136] HR 16 December 1986, *NJ* 1987, 321/322; HR 21 January 1992, *NJ* 1992, 414. Consequently, at least *dolus eventualis* is required; mere carelessness on the part of an official who should have prevented the offence from being committed is insufficient; HR 19 November 1985, *NJ* 1986, 125/126.

[137] HR 16 June 1981, *NJ* 1981, 586.

[138] See for examples Articles 138 (unlawful entry), 139 (breach of the peace), 182 (coercing or resting an official), 311 (theft) and 312 (theft with violence or menaces) Sr.

Although such provisions prevail over Article 47(1) Sr, they do not detract from the general requirements for the liability of participants, which must be judged according to the same criteria.[139]

Participation as an offence per se

In addition to the general provisions concerning inchoate offences there are several provisions which deal with certain specific types of conduct. Title V of Book II of the Dutch Penal Code, which deals with offences against public order, contains a number of provisions which penalize acts which foster, encourage or advance the criminal intentions of others.

Articles 131 and 132 Sr penalize incitement and dissemination of seditious materials. Article 131 provides that a person who publicly, either orally or in writing or by image, incites another or others to commit any criminal offence or act of violence against the public authorities is liable to a term of imprisonment not exceeding five years and/or a fine of the fourth category (€ 16.750). Article 132(1) provides that a person who disseminates, publicly displays or posts written matter or an image containing incitement to commit any criminal offence or act of violence against the authorities, or who has such in stock to be disseminated, publicly displayed or posted, is liable to a term of imprisonment not exceeding three years and/or a fine of the fourth category (€ 16.750), where he knows or has serious reason to suspect the written matter or the image to contain such incitement; according to section (2) the same penalties apply to a person who, with like knowledge or like reason to suspect, publicly utters the contents of such matter.

Incitement is punishable as such: whether its intended effect ensues is irrelevant. Where the intended offences ensue, incitement may – provided the means listed in Article 47(1[2]) Sr were employed – be qualified as solicitation. Consequently, attempted incitement is hardly conceivable: either a person incites others to commit offences or he does not. The fact that Article 46a Sr contains a specific provision regarding attempted solicitation may be explained from the different contexts in which solicitation on the one hand and incitement on the other hand take place: in the case of solicitation, the perpetrator tries to induce a specific person to commit a specific crime, whereas in the case in the case of incitement the perpetrator addresses the general public in general terms. Because of the greater risk solicitation carries of actually bringing about the commission of an offence, an allowance was made for the eventuality of its intended perpetrator not following through: otherwise, attempted solicitation wouldn't have been punishable.[140]

Although incitement must be committed intentionally and publicly, neither requirement is very strict. The requirement of intent does not imply intent on the criminal character of those offences: intent on the underlying acts suffices.[141] Nor does the requirement that incitement must be public mean that it must have taken place publicly. What is essential is that the utterances are made under such circumstances that the public may take notice of them. For instance, a speaker at a private meeting may be liable for incitement if journalists are present and his speech is subsequently reported in the press.[142]

Articles 133 and 134 Sr penalize offering assistance to commit a criminal offence and possession or dissemination of materials containing such offers. Article 133 provides that a person who publicly, either orally or in writing or by image, offers to provide the information, opportunity or means to commit a criminal offence is liable to a term of imprisonment not exceeding six months and/or a fine of the third category (€ 6.700). Article 134(1) provides that a person who disseminates, publicly displays or posts written material or an image, in which the provision of information, opportunity or means to commit any criminal offence is offered, or has such in stock to be disseminated, publicly displayed or posted, is liable to a term of imprisonment not exceeding three months and/or a fine of the second category (€ 3.350), where he knows or has serious reason to suspect the written material or

[139] HR 17 November 1981, *NJ* 1983, 84/197.
[140] The fact that the intended perpetrator doesn't actually do anything criminal is, however, taken into account in the provision that attempted solicitation is only punishable in respect of crimes.
[141] This is a consequence of a peculiarity of Dutch substantive criminal law. Generally, intent on the illegality of an act is not required. This is only the case where the statutory definition of an offence expressly requires intent on the unlawfulness of the act; see HR 5 February 1934, *NJ* 1934, p. 620.
[142] HR 22 May 1939, *NJ* 1939, 861.

the image to contain such offer; according to section (2), the same penalties apply to a person who, with such knowledge or suspicion, publicly utters the contents of such writing.

Article 133 Sr penalizes public offers of assistance to the commission of a crime. As with incitement, it's irrelevant whether the intended effect is achieved. Furthermore, the offer can be of a general nature. This offence differs from solicitation in that intent to induce a specific person to commit an offence is not required. Article 134 is its corollary: it penalizes dissemination of materials offering assistance for the commission of a crime.

Articles 135 and 136 Sr criminalise failure to warn the authorities of the intention of others to commit specific crimes. Article 135 Sr provides that a person who has knowledge of a criminal conspiracy and who, at a time when the commission of the crime conspired to can still be prevented, intentionally omits to give timely and proper notification thereof, either to judicial officers or police officers or to the person threatened by the crime is liable, where the offence ensues, to a term of imprisonment not exceeding one year and/or a fine of the fourth category (€ 16.750).

Article 136(1) provides that a person who has knowledge of an intention to commit one of the crimes defined in Articles 92-110 (crimes against state security and crimes against royal dignity) or to commit desertion in wartime, treason while a member of the armed forces, murder, abduction, rape, a crime endangering the general safety of persons or property or a terrorist crime, where this causes danger to life, and who, at a time when the commission of these crimes could still be prevented, intentionally omits to give timely and proper notification thereof, either to judicial officers or police officers, or to the person threatened by the crime is liable, where the crime ensues, to a term of imprisonment not exceeding one year months and/or a fine of the fourth category (€ 16.750); according to section (2), the same penalties apply to a person who has knowledge of the commission of any of the offences listed in paragraph 1 resulting in danger to life, and who, at a time when the consequences could still be averted, intentionally omits to communicate such in like manner.

Article 140(1) Sr provides that participation in an organisation that has as its object the commission of crimes is punishable by a term of imprisonment not exceeding six years or a fine of the fifth category (€ 67.000); according to section (3) the term of imprisonment may be increased by one third in respect of the founders, leaders or directors.

An organisation within the terms of Article 140 Sr requires structured, continuous collaboration. The participants must strive to achieve their purpose by adhering to and enforcing common rules.[143] But although spontaneous collaboration does not amount to an organisation, its membership may vary. Furthermore, the organisation must have the commission of a multiplicity of offences as its object, that is: as a feasible means to achieve its – possibly quite legitimate[144] – purposes; no actual crimes have to be committed[145]. If, however, the organisation's object is limited to the commission of a single crime, Article 140 does not apply.

According to the case law, participation in an organisation does not necessarily imply formal membership, nor participation in the offences which are its object. Participation does not imply formal membership of the organization, nor involvement in the offences the commission of which are its object. The question is whether a person did in fact participate in the organization's activities.[146] Participation not only implies belonging to the organization, but also requires taking part in or supporting acts which aim at or are directly connected with the realization of the organization's objectives.[147] Article 140(4) specifically provides that participation in a criminal organisation comprises providing financial or material assistance to and raising funds or recruiting persons in aid of it. Consequently, participation in a criminal organisation implies intent on its criminal character. But as there will generally be some division of labour within an organisation, no knowledge of specific offences is required.

Article 140(2) Sr provides that participation in the continued activity of a legal person banned by final judgement or legally forbidden or in respect of which an irrevocable declaration as referred to

[143] HR 16 October 1990, *NJ* 1991, 442.
[144] HR 26 June 1984, *NJ* 1985, 92; HR 26 February 1991, *NJ* 1991, 499.
[145] HR 14 February 1995, *NJ* 1995, 426: collection of debts by use of force.
[146] HR 16 October 1990, *NJ* 1991, 442
[147] HR 18 November 1997, *NJ* 1998, 225.

in Article 5a(1) Conflict of laws in respect of corporations has been made is punishable by a prison term not exceeding one year and/or a fine of the third category (€ 6.700).

In addition to the aforementioned provisions, there are a number of provisions which define certain types of complicity as separate offences.[148] The rationale for these provisions may be that a reduction of the maximum penalties by one third provided for in Article 49(1) Sr was found to be unduly lenient or that in the absence of a specific provision complicity would not amount to a criminal offence. Military offences are an example of the latter category, as the military quality of the perpetrator often is an element of the offence. Consequently, civilians – who lack the required quality – would not commit a criminal offence by participating in it.

[148] See for examples Articles 198 (removing or hiding sequestered goods), 199 (braking official seals), 203 (solicitation of desertion in peacetime), 204 (solicitation of mutiny in peacetime), 359 (hiding of money by an official), 361 (losing official documents) and 375 (complicity in violation of private communications) Sr and Article 10a(1[2]) Opium act.

3. Preparation and participation in relation to terrorism and other very serious forms of crime:
3.1. Does it exist, in your juridical regulations, explicit prescriptive definitions of 'terrorism' and of other very serious crimes? Are they complying or harmonized with the internationally established definitions (for example, with the Framework Decision of the European Union of 2002 against terrorism or with the UNO Convention of 2000 against multinational organized crime)?

Terrorist crimes have been defined in Article 83 Sr, which reads (my translation)[149]:

> Terrorist crimes are considered to be:
> 1° each of the crimes defined in Articles 92 through 96, 108(2), 115(2), 117(2), 121, 122, 157(3), 161*quater*(2), 164(2), 166(3), 168(2), 170(3), 174(2), and 289, as well as in Article 80(2) Nuclear energy act, where it has been committed with terrorist intent;
> 2° each of the offences punishable by imprisonment under Articles 114a, 114b, 120a, 120b, 130a, 176a, 282c, 289a, 304a, 304b, 415a en 415b, as well as Article 80(3) Nuclear energy act;
> 3° each of the crimes defined in Articles 140a, 282b, 285, derde lid, en 288a, as well as in Article 55(5) Arms and munitions act, Article 6(4) Economic offences act, Article 33b Civil use of explosives act and Article 79 Nuclear energy act.

The terrorist attacks of 11 September 2001 prompted international organisations as well as states to investigate whether criminal law was sufficiently geared towards the repression of terrorism. In 2002 the Council of the European Union adopted a framework decision[150], which the Netherlands implemented through the Terrorist crimes act of 2004[151]. Although the framework decision does not contain an explicit definition of terrorist crimes, it may be surmised from Article 1 that a terrorist crime must be regarded as such in domestic law and be committed with terrorist intent. The latter term is defined in Article 83a; see the answer to question 3.2 as to what constitutes 'terrorist intent'.

Article 83 Sr provides which crimes are regarded as terrorist crimes in Dutch criminal law, by enumerating all crimes which may qualify as such: section (1) refers to crimes which – if completed – are punishable by life imprisonment or a term of imprisonment not exceeding thirty years, section (2) refers to provisions according to which terrorist intent serves as an aggravating circumstance in respect of specific crimes, and section (3) refers to specific terrorist offences.

In a recent case, the Rotterdam District Court ruled that a terrorist organisation within the terms of Article 140a (see part B, question 3) must have terrorist crimes as defined in Article 83 Sr as its object; it's insufficient for it to have terrorist intent as defined in Article 83a Sr.[152] Consequently, an organisation only qualifies as a terrorist organisation to the degree that its object is the commission of terrorist crimes; the fact that its terrorist intentions extend to the commission of other, non-terrorist crimes is immaterial in this respect. It is therefore of paramount importance that the definition of terrorist crimes in Article 83 Sr adequately reflects the ways in which terrorists operate. In the opinion of the Court, however, this conclusion does not detract from the fact that a non-terrorist crime like incitement may be committed with a view to the commission of terrorist crimes. As a matter of fact, this would be highly relevant in establishing whether an organisation has the commission of terrorist crimes as its object.

In Dutch substantive criminal law, there currently exists no definition of other types of serious crime.

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[149] Original Dutch: (Art. 83) Onder terroristisch misdrijf wordt verstaan: 1° elk van de misdrijven omschreven in de artikelen 92 tot en met 96, 108, tweede lid, 115, tweede lid, 117, tweede lid, 121, 122, 157, onderdeel 3°, 161*quater*, onderdeel 2°, 164, tweede lid, 166, onderdeel 3°, 168, onderdeel 2°, 170, onderdeel 3°, 174, tweede lid, en 289, alsmede in artikel 80, tweede lid, Kernenergiewet, indien het misdrijf is begaan met een terroristisch oogmerk; 2° elk van de misdrijven waarop ingevolge de artikelen 114a, 114b, 120a, 120b, 130a, 176a, 282c, 289a, 304a, 304b, 415a en 415b, alsmede artikel 80, derde lid, van de Kernenergiewet gevangenisstraf is gesteld; 3° elk van de misdrijven omschreven in de artikelen 140a, 282b, 285, derde lid, en 288a, alsmede in artikel 55, vijfde lid, van de Wet wapens en munitie, artikel 6, vierde lid, van de Wet op de economische delicten, artikel 33b van de Wet explosieven voor civiel gebruik en artikel 79 van de Kernenergiewet.
[150] Framework decision of 13 June 2002, L 164/3 (22 June 2002).
[151] Act of 24 June 2004, *Stb*. 2004, 290, which entered into force on 10 August 2004.
[152] Rb. Rotterdam 10 March 2006, *LJN* AV5108. The organisation in question allegedly had the commission of incitement (Article 131 Sr), possession of seditious materials (Article 132 Sr), inciting hatred (Article 137d Sr) and threatening of serious crimes (Article 285 Sr) as its object, but only the latter crime qualifies as a terrorist crime under Article 83 Sr.

3.2. What are the constitutive (or differential) elements of these specific offences with regard to common offences? The objective element (actus reus)? The subjective element (mens rea)?

From the definition of terrorist crimes in Article 83 Sr it follows that the difference between terrorist and common crimes lies in the requirement that terrorist crimes be committed with terrorist intent. This applies equally to all three categories of terrorist crimes: in respect of the first category, Article 83 Sr explicitly says so, whereas in respect of the latter two categories terrorist intent is required by the appropriate statutory definitions. Terrorist intent is defined in Article 83a Sr, which reads (my translation[153]:

> Terrorist intent is considered to be the intent to seriously frighten the population or part of the population of a country, to unlawfully compel a government or international organisation to do, refrain from doing or suffer any act, or to seriously disrupt or destroy the fundamental political, constitutional, economic or social structures of a country or international organisation.

The first part of this definition ("Terrorist intent [...] any act") was inspired by Article 2(1[b]) of the International Convention for the Suppression of the Financing of Terrorism.[154] It is, however, not a literal translation; some changes were made in order to accommodate the concept of an all-encompassing United Nations treaty on terrorism. The term "seriously frighten" ("ernstige vrees aan te jagen") was preferred over "intimidate" ("intimideren') because it makes clear that the frightening of a population isn't required to have resulted in its being intimidated. Furthermore, intimidation is associated with direct confrontation, whereas frightening by indirect means is no less important. The phrase "to unlawfully compel a government or international organisation to do, refrain from doing or suffer any act" ("een overheid of internationale organisatie wederrechtelijk te dwingen iets te doen, niet te doen of te dulden") was preferred over "to compel a government or an international organization to do or to abstain from doing any act" because it is broader and in keeping with Article 284 Sr, which defines the crime of coercion. The second part of this definition ("or to seriously [...] organisation") was inspired by the concept referred to above.

3.3. In particular, does the incriminating or aggravating rule explicitly state that the perpetrator be acting in the pursuit of a specific intent (having a terrorist or subversive character, or concerning the aims of the criminal organization)?

As regards terrorist crimes, this question has been answered under 3.2; as regards the intent of participants in a criminal organisation, I refer to 2.2.2: participation as an offence *per se*.

[153] Original Dutch: (Art. 83a) Onder terroristisch oogmerk wordt verstaan het oogmerk om de bevolking of een deel der bevolking van een land ernstige vrees aan te jagen, dan wel een overheid of internationale organisatie wederrechtelijk te dwingen iets te doen, niet te doen of te dulden, dan wel de fundamentele politieke, constitutionele, economische of sociale structuren van een land of een internationale organisatie ernstig te ontwrichten of te vernietigen.

[154] International Convention for the Suppression of the Financing of Terrorism, New York 9 December 1999, *Trb*. 2000, 12; a Dutch translation was published in *Trb*. 2001, 62.

B. Characteristics of the expansion of the forms of preparation and participation
1. Has there been an expansion of the forms of preparation and participation (for example, concerning offences in the matter of terrorism and other forms of very serious crime)?

As regards preparation, I refer to A.2.1.2: general provisions; as regards participation, I refer to A.2.1.2: conspiracy. In that respect, it's important to note that with the exception of Articles 103 and 122 Sr, all provisions in the Penal Code which criminalise conspiracy were either introduced or substantially amended by the Terrorist crimes act of 2004.

1.1. Are the mere preparatory acts, such as the agreement or incitement not followed by the commission of the crime, punished as separate offences or as conspiracy?

Under A.2.1.2: conspiracy I have remarked that the mere agreement to commit a criminal offence as a rule isn't punishable; conspiracy – which is only punishable where this has been explicitly provided – is the only exception. In this respect it is important to note that where conspiracy is punishable, preparation generally is too; see under A.2.1.3: preparation: special provisions. In addition, there are a number of provisions which define acts of participation as offences *per se*: see under A.2.2.2: participation as an offence *per se*.

1.2. More particularly, are there specific indictments (and, if so, when have they been introduced) punishing separately such specific activities (as the recruitment, the training, the making or possession of falsified documents, the making, possession or purchasing of explosive substances or of weapons etc.), that take place prior to the actual carrying out of the acts of terrorism or of the criminal plan?

Recruitment

Article 205 Sr provides that recruiting another person for foreign military service or armed struggle without official permission is punishable by a prison term not exceeding four years and/or a fine of the fifth category (€ 67.000).[155] Originally this provision only criminalised recruitment for foreign military service, as this may easily jeopardise foreign relations. Recruitment for armed struggle was added by the Terrorist crimes act, which took away any doubt as might have existed regarding the object of recruitment. Whereas previously it could be argued that only recruitment for service with a foreign country's armed forces – i.e. its regular troops – was punishable, the current provision explicitly extends to recruitment for armed struggle in any way, shape or form, including service with irregular troops.

It is important to note that currently recruitment for armed struggle does not qualify as a terrorist offence, as Article 83 Sr doesn't mention Article 205 Sr. An amendment to include Article 205 Sr was defeated in parliament.[156]

Forgery

The common offence of forgery has been defined in Article 225 Sr. Section (1) provides that forging a document intended to prove any fact with the intent that it be used as genuine and true is punishable by a prison term not exceeding six years and/or a fine of the fifth category (€ 67.000); section (2) provides that the intentional use, delivery or possession of a forged document is punishable by the same penalties where the perpetrator knows or has reason to suspect its intended use. In addition, section (3) – which was added by the Terrorist crimes act – provides that the maximum penalties under sections (1) and (2) may be increased by one third where the offences defined in those sections are committed with the intent to prepare or facilitate a terrorist crime.

[155] Article 205 Sr literally requires that no permission from the King was obtained, which may be explained from the fact that the Dutch constitution previously required the King to consent to his subjects going into military service of a foreign power.
[156] *Kamerstukken II* 2005/06, 30 164, nr. 15.

Weapons and explosives

Contraventions of the rules governing the use of weapons and explosives are criminalised in the Arms and munitions act[157] and the Civil use of explosives act[158] respectively. Where such contraventions are committed with terrorist intent, they may qualify as terrorist crimes; see Article 83 Sr, which mentions both Article 55(5) Arms and munitions act and Article 33b Civil use of explosives act.

Drugs offences

As regards drug offences, special mention must be made of Article 10a of the Opium act, which paved the way for criminalisation of preparation in general.[159] Article 10a Opium act criminalises the preparation of intentionally importing or exporting (Article 10[5] j° 2[A] Opium act), growing, preparing, processing, selling, delivering, dispensing or transporting (Article 10[4] j° 2[B] Opium act) and producing (Article 10[5] j° 2[D] Opium act) of substances listed in Annex I to the Opium act, i.e. 'hard drugs'. It criminalises the attempt to induce another person to commit such offences, either as a principal or an accessory, the attempt to obtain opportunity, means or information to commit such offences and possessing objects, means of transport, substances or means of payment he knows or has reason to suspect are intended for the commission of such offences. These preparatory acts are punishable by a prison term not exceeding six years and/or a fine of the fifth category (€ 67.000).

1.3. Do more preparatory and/or accessory offences, in respect of the commission of these offences, exist?

Several types of conduct which encourage, foster or advance the criminal intentions of other have been defined as offences *per se*. The application of the relevant provisions – whose inclusion in the Penal Code derives from the dependency principle which governs participation – is not limited to certain crimes or types of crime; they are discussed in greater detail under A.2.2.2: participation as an offence *per se*.

*1.4. Are there cases where the same individual can be indicted and punished for the commission of one of these preparatory acts (for example, 'recruitment') and also for the commission of one of the offences representing the 'final aim' (for example 'commission of an act of terrorism')? and, possibly, also for the offence of association or participation in a terrorist or criminal group pursuing the same aim (*infra*, B.3)?*

In the answer to this question a distinction must be made between preparatory acts which have been defined as offences *per se* and preparatory acts which are only punishable under the general provision of Article 46 Sr. As regards the latter, the same individual may only be punished for the completed offences, as the preparation of the offence is consumed by its completion; as regards the former, the same individual may indeed be punished for preparing as well as for committing an offence, because these are considered distinct offences. Likewise, the same individual may be punished for participation in a criminal or terrorist organisation as well as for his participation in specific crimes the organisation had as its object.

1.5. Are there regulations or special conditions for the penal relevance of the attempt in these fields of crime? Which substantive or differentiating elements (concerning the objective or subjective element of the offence) do they possibly present if compared to the ones of the attempt for corresponding common offences?

[157] Act of 5 July 1997, *Stb*. 1997, 292, most recently amended by Act of 7 April 2006, *Stb*. 2006, 236.
[158] Act of 7 July 1994, *Stb*. 1994, 552, most recently amended by Act of 20 November 2006, *Stb*. 2006, 593.
[159] Article 10a Opium act was introduced by Act of 4 September 1985, *Stb*. 1985, 495, preceding the introduction of Article 46 Sr by a full nine years.

Article 79 Sr does indeed contain a special provision regarding the attempt against state security, the attempt on the life or liberty of the King, the King's consort, the heir apparent or the spouse of the latter, the attempt on the life or liberty of the head of a friendly nation and the attempt on the life or liberty of an internationally protected person; see under A.2.1.1: attempt: special provisions. Where these crimes where committed with terrorist intent, they qualify as terrorist crimes; see under A.3.2.

2. Are there special regulations or conditions for the penal relevance of the participation in the offence or for the punishment of complicity in these fields of crime?
2.1. What are their constituent or differential elements in respect of those concerning the objective and subjective element of the complicity provided in common or corresponding offences?

In addition to offences in respect of which joint commission serves as an aggravating circumstances there are a number of provisions which define acts of participation as offences *per se*: see under A.2.2.2: participation as an offence *per se*.

2.2. Are mere agreement or mere incitation (conspiracy) not followed by the commission of the offence in anyway punishable as separate offences or, possibly, as conspiracy? Or are they punishable only in the case of terrorist offences and other very serious crimes?

Under A.2.1.2: conspiracy I have remarked that the mere agreement to commit a criminal offence as a rule isn't punishable; conspiracy – which is only punishable where this has been explicitly provided – is the only exception. In addition, there are a number of provisions which define acts of participation as offences *per se*: see under A.2.2.2: participation as an offence *per se*. Of these, only Articles 135 and 136 Sr – which criminalise the failure to warn the authorities of another person's intention to commit an offence – relate to specific offences; under the other provisions the nature of the offence the perpetrator intends to foster, encourage or advance is immaterial.

2.3. Does there exist at a procedural level (or through the indictment itself) a form of presumption or of simplification of the evidence of participation?

There are no explicit provisions – either of a procedural or a substantive nature – regarding proof of participation in terrorism or other serious crime, so the general provisions on participation apply. The burden of proof resting on the public prosecutor may, however, be alleviated considerably by provisions which criminalises participation as an offence *per se*, as these do away with the constrictions deriving from the dependency principle.

2.4. Is there an explicit punishment for preparatory or collateral conduct, such as support, assistance, 'external' help (on the part of non-associated individuals or through adequate social contributions, for example, on the part of a lawyer, a doctor etc.) to the activities and associations constituting very serious crime, or to individual associated?

See under A.2.2.2: participation as an offence *per se*, where fostering, encouraging and advancing the commission of criminal offences by individuals as well as organisations are discussed; participation in terrorist organisations is discussed under 3.

3. Is there a separate offence for 'terrorist' association or organization or group, or for an organization addicted to very serious crime, with respect to the conspiracy or mere complicity in such crimes? Or are common offences (if the case, aggravated) for criminal association applied?

The common criminal organisation is discussed under A.2.2.2: participation as an offence *per se*; the terrorist organisation is discussed below. In respect of the latter, it is important to note that an organisation only qualifies as a terrorist organisation where it has the commission of terrorist crimes as its object. Consequently, it needs to be established that the organisation's objective was the commission of such crimes as are listed in Article 83 Sr which are considered terrorist crimes where they are committed with terrorist intent in the sense of Article 83a Sr; see under A.3.1-3.2.

3.1. If specific offences exist, how are these criminal associations identified? Does this identification depend upon the status of the individuals involved, by his/her/their inclusion in lists drawn up by the government authorities, or in similar lists, or by (material and/or moral) elements described in abstract terms by the law?

Criminal organisations are identified by their object, i.e. the commission of (terrorist) crimes; see Articles 140 and 140a Sr respectively. Where an organisation hasn't made its criminal objectives publicly known – which is hardly likely in respect of a common criminal organisation, but certainly possible in respect of a terrorist organisation – its object must be determined in reference to the intentions of its participants: they must strive to bring about its criminal objectives.

3.2. What are the requirements constituting and/or characterizing a terrorist or criminal association or group (a certain number of participants, organizing requirements, distribution of roles, stability or terms of the organization or of the group, nature of the criminal plan, specific purposes pursued etc.)?

The characteristics of common criminal organisations are discussed under A.2.2.2: participation as an offence *per se*; terrorist organisations are discussed above.

3.3. Is there a difference in sentencing between the mere participation and other more aggravating conduct (such as the constitution, the organization, the direction etc.)? Are there specific rules or conditions concerning the responsibility of members or leaders of the association for the commission of offences representing the purpose of the criminal association if they did not take an active part in the commission of the offence?

Under Article 140(3) Sr the maximum term of imprisonment for participation in a criminal organisation may be increased by a third in respect of its founders, leaders or directors; consequently, a prison term not exceeding eight years may be imposed. Although according to this provision being a founder, leader or director in itself does not amount to a criminal offence but serves as an aggravating factor in respect of participation, it would be difficult to conceive of an example of a founder, leader or director not participating. The terms 'leader' and 'director' seem to exclude the eventuality of leaders and directors not participating, as they would by definition lead or direct an organisation whose criminal intentions have become manifest. As regards founders the theoretical possibility exists of them founding an organisation which subsequently develops criminal intentions, but where they do not participate in the organisation's criminal activities they are unlikely to be prosecuted.

Under Article 140a(1) participation in a terrorist organisation may be punished by a prison term not exceeding fifteen years and/or a fine of € 67.000; Article 140a(2) Sr provides that founders, leaders or directors of a terrorist organisation may by punished by life imprisonment or a prison term not exceeding thirty years. Although the latter provision doesn't say in so many words that merely founding, leading or directing a terrorist organisation does not amount to a criminal offence, in view of the affinity between Articles 140 and 140a Sr it must nonetheless be assumed that it only serves as an aggravating factor.

As participation in a criminal or terrorist organisation has been defined as an offence *per se*, it's irrelevant whether the organisation's criminal intentions have materialised; see under A.2.2.2: participation as an offence *per se.* Consequently, there are no special rules for participants who were

not involved in the commission of specific crimes. If they were, they may be charged cumulatively, for their participation in the organisation as well as for their actual involvement in the crimes it had as its object; see also under 4.

4. Are the provisions and sanctions concerning the (penal or non-penal) liability of entities (legal persons), if they are in general provided in your national law, also applicable to the commission of acts of terrorism or other very serious crimes? What is the relationship between such regulations and the criminal indictment of a terrorist or criminal association or group (subsidiary, alternative, cumulative etc.)?

According to Article 91 Sr, Article 51 Sr – which provides for the criminal liability of legal persons and their directors – applies to all criminal offences; see A.2.1.1: criminal liability of legal persons, liability of directors. Consequently, a legal person and/or its directors may be held liable for participating in a criminal or terrorist organisation.

5. Do there exist specific indictments for conduct consisting of the expression and/or dissemination of thought or opinions linked to terrorism, distinguishable from the possible penal relevance of the instigation to commit acts of terrorism or by other forms of moral participation or by assisting another to commit such acts?
5.1. In particular, are glorification, ideological proselytism, the publication and circulation of papers and other matters, also audiovisual and on the internet, propaganda etc. linked to terrorism, separately punished?

The expression or dissemination of opinions likely to encourage, foster or advance the terrorist intentions of others has indeed been criminalised; see under A.2.2.2: participation as an offence *per se*. Glorification of terrorist crimes as such will not be criminalised. Although there appeared to be ample support in parliament to criminalise glorification of terrorist crimes[160], ultimately the government decided against introducing a bill to that effect, in view of strong criticism from the judiciary, the criminal bar and academics[161].

5.2. What are the objective and subjective elements required for the liability of each of such acts to be punished? When are they consummated?

See under A.2.2.2: participation as an offence *per se*. Because the expression or dissemination of incendiary opinions is completed once they have been made public, it's immaterial whether such opinions have the intended effect, i.e. encouraging, fostering or advancing the crimes of others.

5.3. What is their sentence, as compared with the one provided for other acts of terrorism and/or corresponding common offences?

See under A.2.2.2: participation as an offence *per se*. As regards this question, is should be noted that – as the appropriate provisions define crimes *per se* – the applicable penalties do not in any way depend on the penalties provided for the crimes the perpetrator seeks to encourage, foster or advance.

5.4. What are their relationships and which problems may arise with respect to freedom of thought, freedom of opinion and expression, protected by international Charters and by democratic Constitutions?

Although the offences discussed under A.2.2.2: participation as an offence *per se* may in theory conflict with treaty or constitutional provisions guaranteeing freedom of thought and freedom of expression, there is hardly any Dutch case law on their compatibility with such guarantees. The reason for this appears to be twofold: firstly, the enjoyment of the freedom of thought and the freedom of expression is always subject to limitations in order to prevent crime and secondly, the relevant statutory provisions only criminalise the expression and dissemination of opinions whose incendiary nature is evident.[162]

[160] Indeed, two motions urging the government to refrain from criminalising glorification of terrorist crimes failed to be adopted; the first motion to that effect was defeated (*Kamerstukken II* 2004/05, 29 754, nr. 9; *Handelingen II* 2004/05, 49, p. 3188-3189), the second motion was withdrawn by its proponents (*Kamerstukken II* 2005/06, 29 754, nr. 59; *Handelingen II* 2005/06, 21, p. 1331-1332).
[161] *Kamerstukken II* 2006/07, 29 754, nr. 94 (bijlage).
[162] The judgment of the Rotterdam District Court of 10 March 2006 discussed under A.3.1 provides a recent example.

6. Is there a difference in the sentencing of anticipated forms of preparation and participation? What is their nature and measure (from the point of view of the type and term of the applicable penalties, of possible supplementary penalties or measures, of the criteria to be applied, of possible specific regulations derogating common law)?

The applicable penalties in respect of preparation and anterior participation are discussed under A.2.1.4: preparation: general provisions; preparation: special provisions and A.2.2.1: principals: preliminary remarks; accessories, respectively.

6.1. Is the enforcement of the abovementioned penal indictments, what is the importance of the withdrawal from and/or a possible compensation, or of reconciliation with the victim/victims?

In the answer to this question, a distinction must be made between penalties on the one hand and measures on the other hand. Penalties are of an essentially punitive nature: as they intentionally inflict harm on the perpetrator of a criminal offence, they must be founded in his culpability; indeed, in the absence of culpability no penalty may be imposed. Article 9 Sr distinguishes between principal penalties: imprisonment (Article 10 Sr), detention (Article 18 Sr), community service (Article 22c Sr) and fine (Article 23 Sr) and additional penalties: deprivation of certain rights (Article 28 Sr), forfeiture (Articles 33-34 Sr) and publication of the judgment (Article 36 Sr). Measures serve to protect society from danger or – where such danger has manifested itself – to remedy the consequences of a criminal offence. They comprise removal from circulation (Articles 36b-36d Sr), seizure of illegal gains (Article 36e Sr), compensation (Article 36f Sr), committal to a psychiatric hospital (Article 37 Sr), committal to an institution for the criminally insane (Articles 37a-38k Sr) and committal to an institution for habitual offenders (Articles 38m-38u Sr).

The Dutch Penal Code does not provide for extraordinary sanctions in respect of victims of serious crime or terrorism, so common sanctions apply. Of these, only compensation is of practical relevance. Community service serves as an alternative for short custodial sanctions and in addition benefits the community as a whole, goods removed from circulation are destroyed because of the danger they pose to the public and illegal gains which are seized flow into the public coffers. Article 36f Sr provides that the court which convicts a person of a criminal offence may impose the obligation to pay the government a sum of money for the benefit of the victim, which the government upon receipt transfers to the victim forthwith. The most important requirement for obliging the perpetrator of a criminal offence to compensate the victim is that the perpetrator is liable for damages under private law. In essence, the measure of compensation serves to alleviate the victim's position, by sparing him the necessity to bring a civil case against the perpetrator; if the perpetrator is found to be liable for damages, the government acts as bailiff on his behalf.

6.2. Are there peculiarities concerning the actual enforcement of the penalty and of the sanctions or measures, particularly taking into account prison treatment and possible restrictions or conditions for the granting of prison benefits or other institutes in favour of prisoners?

The Dutch prison system does indeed have special facilities for those convicted of serious and/or terrorist crimes whose detention under normal conditions would pose unacceptable risks. Firstly, there is an Extra Security Unit, designed for detainees who pose an extreme risk of flight as well as an unacceptable risk of recommitting serious violent offences or whose escape poses a socially unacceptable risk which prevails over the risk of flight.[163] Secondly, there are two Terrorist Units, designed for detainees suspected or convicted of terrorist crimes who have engaged or are engaging in expressing or disseminating radicalist opinions.[164] In these facilities, detainees lack many of the liberties awarded to detainees under normal conditions. Their movements within the confines of the facility are severely

[163] Rules on selection, assignment en transfer of detainees, *Stcrt.* 2000, 176, most recent revision published in *Stcrt.* 2006, 181, Article 6.
[164] Rules on selection, assignment en transfer of detainees, Article 20a.

restricted, as are their contacts with the outside world. Although the regime in the Extra Security Unit has been severely criticised from its inception – even provoking a critical report from the European Committee for the Prevention of Torture[165] and giving rise to a condemnation by the European Court of Human Rights[166] – there are currently no plans to dispense with it; indeed, the regime in the Terrorist Units has been modelled on the regime in the Extra Security Unit. As regards the Terrorist Units, the question has recently been asked whether such restrictive measures might not prove counterproductive, in that they may strengthen the detainees in their radicalist beliefs. A critical television documentary[167] prompted two members of parliament to ask for the Justice Minister's view on the matter[168]. Although no answer has been received yet a radical change in policy seems unlikely; any changes in the foreseeable future will likely be of a gradual, not a fundamental nature.

[165] Report to the Netherlands Government on the visit to the Netherlands carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 17 to 27 November 1997, CPT/Inf (98) 15 [EN], 29 September 1998, http://www.cpt.coe.int/documents/nld/1998-15-inf-eng.htm#II.B.4. On a subsequent visit, conditions in the Extra Security Unit were found to have improved, although they were still far from perfect; see Report to the Authorities of the Kingdom of the Netherlands on the visits carried out to the Kingdom in Europe and to the Netherlands Antilles by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment in February 2002, CPT/Inf (2002) 30, 15 November 2002, http://www.cpt.coe.int/documents/nld/2002-30-inf-eng.pdf.
[166] ECHR 6 July 2006, application no. 8196/02 (Salah v. The Netherlands).
[167] KRO Reporter, 29 April 2007, 20.45 hrs, Nederland 3. The documentary was entitled 'Guantanamo Vught', referring to the location of the prison complex which also houses the Extra Security Unit; the other Terrorist Unit is located in Rotterdam.
[168] *Kamervragen II* 2006/07, nr. 2060714120

C. Other questions

1. Do there exist specific preventive measures or other instruments having a non-penal nature to combat terrorist and very serious criminal activities and associations? In particular, if non-nationals are involved?

As regards terrorism there are indeed several preventive measures in place or under consideration. Firstly, a bill has been introduced in parliament which provides for administrative measures in the interest of national security.[169] The rationale of this bill is that there may be real threats to national security which criminal justice cannot adequately deal with, for instance where there no suspicion of a criminal offence having been committed exists or where a suspect has been acquitted. The bill envisages two types of measures: restriction of a person's freedom of movement and restriction of public services. A person's freedom of movement may be restricted in the interest of national security if his conduct connects him to terrorist activity. He may be forbidden to dwell in certain localities or in the vicinity of certain persons or he may be required to report to the police at certain times. Restrictions of this type initially apply for a period of three months, which may be extended to a maximum of two years. Public services may be restricted by rejecting applications for subsidies, permits or exemptions or by withdrawing them if the person concerned may be connected to terrorist activity and a considerable risk exists that he will abuse the subsidy, permit or exemption to support it.

Secondly, there are a number of European instruments in place aimed at curtailing the financing of terrorism.[170] Each of these instruments has an appendix which lists persons, groups and other entities involved in terrorism, which is periodically revised. They are implemented through the Sanctions Act 1977, which provides for administrative as well as criminal enforcement of the European rules on freezing terrorist assets.[171] The Sanctions Act 1977, however, has a wider scope than the European instruments in that – firstly – it applies to a greater number of European persons and organisations[172] and – secondly – it may provide for freezing assets which are located in The Netherlands only, pending revision of the European lists[173]. Furthermore, the Sanctions Act 1977 provides for granting specific exemptions, for instance to allow a person access to sufficient means for sustenance.

2. What is the importance of the role of victims in the formulation and enforcement of the above-mentioned penal indictments?

Victims have no role in the application of the non-penal measures discussed under 1.

[169] *Kamerstukken II* 2006/06, 30 566, nrs. 1-2.

[170] Council Regulation (EC) No 2580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, L344, p. 70; Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism, L344 , p. 93; Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, L139 , p. 9.

[171] Act of 15 February 1980, *Stb*. 93, revised by acts of 12 March 1986, *Stb*. 99, 4 June 1992, *Stb*. 422, 16 December 1993, *Stb*. 650, 10 July 1995, *Stb*. 355, 6 November 1997, *Stb*. 510, 13 April 2000, *Stb*. 196, 23 November 2000, *Stb*. 496, 16 May 2002, *Stb*. 270, 23 April 2003, *Stb*. 214, 17 December 2003, *Stb*. 2004, 9, 20 November 2006, *Stb*. 605 and 7 December 2006, *Stb*. 706.

[172] Sanctieregeling terrorisme 2002 II, *Stcrt*. 2002, 138.

[173] See for the most recent example the Sanctieregeling terrorisme 2007, *Stcrt*. 2007, 39.

D. Reform proposals
1. Are there recent doctrinal or jurisprudential stances concerning the expansion of the forms of preparation and participation that might raise problems of compatibility with the fundamental rights acknowledged by international Charters and Conventions, as well as by the national Constitutions?
2. Are there requests as to the revision or modification of the provisions considered? What is their nature? Which basic needs are they taking into account?
3. Are there legislative reforms under discussion or in preparation?

Although legal doctrine has been largely critical of recent expansions of liability for preparation and participation, there has been ample support for them in parliament and indeed in society at large. This is made especially clear by the introduction of the bill on administrative measures in the interest of national security discussed under C.1, which demonstrates that recent expansions of criminal liability are still considered insufficient to adequately address the terrorist threat. In effect, the limits of criminal repression have been reached.

E. Final remarks

[p.m.]

Abbreviations

Art.	Artikel	Article
BW	Burgerlijk Wetboek	Civil Code
	Handelingen I/II	Parliamentary Minutes (of the First/Second Chamber of Parliament)
Hof	Gerechtshof	Court of Appeals
HR	Hoge Raad der Nederlanden	Supreme Court of the Netherlands
JOL	Jurisprudentie online	Online Case Law
	Kamerstukken I/II	Parliamentary Documents (of the First/Second Chamber of Parliament)
	Kamervragen I/II	Parliamentary Questions (of the First/Second Chamber)
LJN	Landelijk jurisprudentienummer	National Case Law Number
NJ	Nederlandse Jurisprudentie	Dutch Law Reports
Rb.	Rechtbank	District Court
Sr	Wetboek van Strafrecht	Penal Code
Stb.	Staatsblad	Bulletin of Acts, Orders and Decrees
Stcrt.	Staatscourant	Official Gazette
Trb.	Tractatenblad	Bulletin of Treaties
W.	Weekblad van het Recht	Law Weekly