

Preventing Terrorism in the Courtroom – The Criminalisation of Preparatory Acts of Terrorism in the Netherlands

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Abstract

The shift towards preventivism in security refers to the process in which national security becomes the focal point of policymaking. Within this preventative shift, more and more policy instruments, including criminal law, are being drawn into the realm of national security. The determining argument in this debate is the idea that we are faced with wicked problems, unknown threats and unpredictable risks that we must somehow control. Potentially catastrophic consequences demand exceptional measures here and now to control the risks and govern the future. In recent years, there has been a growing trend in Europe to criminalise preparatory acts related to terrorism. This article examines this trend in The Netherlands and analyses how it plays out in the courtroom and to what extent the preventative logic has permeated the legal sphere.

Keywords

radicalization – criminalization – legal framework – precaution – terrorism – foreign fighters

Introduction

The number of foreign (terrorist) fighters leaving their home countries to join the Islamic State (IS) in Syria and Iraq has been on the rise since 2011.¹ History shows us that most of these foreign fighters will eventually return to their home countries.² In the meantime, the legal net is being cast wider in many European Union member states to increase the chance of successfully prosecuting returnees, individuals who have attempted to travel to Syria, and a wider group of sympathizers who might pose a threat in their home countries. Most efforts to address this threat are characterised by the law-enforcement approach and have focused on quick fixes and repressive, punitive solutions. At the same time, a number of administrative measures have been implemented (such as passport confiscation and revocation of nationality) that cannot be qualified under the law-enforcement approach.

However, recent years have witnessed a shift in thinking that can be characterised as the “preventative turn”. In policy reports and political speeches, the axiom of *countering* violent extremism (CVE) has been subtly replaced with that of *preventing* violent extremism (PVE), thereby even more clearly emphasising the increasing attention being devoted to long-term preventative efforts. Within this preventative turn, the criminal-justice sector response—i.e., the process of investigating, arresting, detaining, prosecuting, sentencing and imprisoning—features as an increasingly important tool for dealing with those who plan to participate or have already participated in conflicts abroad.

This article focuses on the role of the criminal-justice sector in counterterrorism. It is believed that, with current challenges such as foreign fighters, courts increasingly become the arena in which the fight against terrorism is taking place.³ In The Netherlands, this is demonstrated by the demand of Dutch politicians for laws facilitating the detention and prosecution of returned foreign fighters on preventative grounds—

1 E. Schmitt and S. Sengupta, ‘Thousands Enter Syria to Join Isis Despite Global Efforts’, in *New York Times*, 26 September 2015. http://www.nytimes.com/2015/09/27/world/middleeast/thousands-enter-syria-to-join-isis-despite-global-efforts.html?smid=tw-share&_r=1.

2 D. Malet, ‘What Does the Evidence Tell Us about the Impact of Foreign Fighters on Home Grown Radicalization?’ *Radicalization Research*, 6 July 2015. <http://www.radicalizationresearch.org/debate/malet-foreign-fighters-home-grown-radicalization/>.

3 J. McCulloch and S. Pickering, ‘Pre-Crime and Counter-Terrorism: Imagining Future Crime in the ‘War on Terror’’, in *British Journal of Criminology*, no. 5, 2009, pp. 628–645. doi: 10.1093/bjc/azp023.

regardless of the evidenceregarding their potential offences while in Syria and/or Iraq.⁴

The criminalisation of preparatory acts of terrorism is a relatively recent trend, which has further accelerated with the development of the foreign-fighter phenomenon. Not just in The Netherlands, but also internationally, the legal net has been cast wider to facilitate the use of the criminal-justice sector in countering terrorism. Preparatory acts are acts performed in preparation for a terrorist offence. In the context of foreign fighters, individuals can, for example, be prosecuted not just for the actual commission of an attack, but also for preparing to leave for fighting abroad, for facilitating someone's travel to the conflict area or for recruiting others to do so. These types of cases focus on the concept of preparation and the future consequences preparatory actions can have even though no actual terrorist act has yet been committed; hence, the preparation becomes the criminal act.

According to some scholars, the criminalisation of preparatory acts signifies the precautionary principle in criminal law.⁵ In their opinion, this is a potentially problematic development for the rule of law, as the precautionary principle has the ability to undermine traditional legal principles such as legal certainty.⁶

The Present Study

This article analyses the extent to which the preventative logic plays a role in criminal-law measures to counter terrorism, especially in the context of The Netherlands. In order to analyse a pattern of post- or pre-crime thinking in the legal discourse, a framework is developed that outlines central notions of the pre-crime discourse such as risk management, precaution and the relationship between risk and law. In other words, the criminalisation of preparatory acts is seen as a way of controlling the risk of terrorism based on the precautionary principle.⁷ The link between risk and law can be a problematic one;⁸ therefore, it is important to analyse the attempt to govern risk through law. Understanding the criminalisation of preparatory acts, and crucially, how prosecutors, judges and defence lawyers make use of it, enables us to understand the underlying discourse and the potential legal shift it causes.

To this end, a discourse analysis is performed on four court cases in which these laws were used. Interviews were carried out with both the public prosecution and defence lawyers to see if and how the precautionary logic is adopted and how these offences are approached in practice. The following four court cases were analysed. (1) The case of Shukri F. (2014), who was prosecuted for recruiting people to join the armed conflict in Syria. Shukri F. was acquitted of all allegations; first, on the grounds that women do not participate in the

4 nrc, 2016.

5 M. de Goede and B. de Graaf. 'Sentencing Risk: Temporality and Precaution in Terrorism Trials,' in *International Political Sociology*, no. 7 (3), 2013, pp. 313–331. doi: 10.1111/ips.12025; R.V. Ericson. 'The State of Preemption: Managing Terrorism Risk through Counter-Law,' in L. Amoore and M. de Goede (eds.), *Risk and the War on Terror*, Oxon and New York: Routledge, 2008, pp. 87–125. doi: 10.4324/9780203927700.

6 R.V. Ericson, 'The State of Preemption: Managing Terrorism Risk through Counter-Law,' in L. Amoore and M. de Goede (eds.), *Risk and the War on Terror*, Oxon and New York: Routledge, 2008, pp. 87–125. doi: 10.4324/9780203927700; L. Amoore. 'Risk before Justice: When the Law Contests Its Own Suspension,' in *Leiden Journal of International Law*, no. 21(4), 2008, pp. 847–861. doi: 10.1017/S0922156508005414.

7 F. Ewald, 'The Return of Descartes's Malicious Demon: An Outline of a Philosophy of Precaution,' in T. Baker and J. Simon (eds.), *Embracing Risk: The Changing Culture of Insurance and Responsibility*, Chicago, IL: University of Chicago Press, 2002, pp. 273–302. doi: 10.7208/chicago/9780226035178.001.0001.

8 R.V. Ericson, 'The State of Preemption: Managing Terrorism Risk through Counter-Law,' in L. Amoore and M. de Goede (eds.), *Risk and the War on Terror*, Oxon and New York: Routledge, 2008, pp. 87–125. doi: 10.4324/9780203927700.

fighting in Syria/Iraq, and second, because there was not enough evidence.⁹ (2) The second case is the so-called Context Case (2015). Nine individuals were prosecuted and convicted of membership in a criminal organisation with terrorist intent. The Context Case also focused on other allegations, such as abetting, recruiting and facilitating for the armed conflict in Syria.¹⁰ (3) Adil C. (2016), the third court case, was prosecuted and sentenced to one-year imprisonment for terrorism financing. He sent one thousand euros to an individual who was fighting in Syria, and it was argued that this money facilitated terrorism.¹¹ (4) Finally, Salim S. (2016) was convicted for recruiting a minor.¹²

Governing the Future: Terrorism Risk and the Precautionary Logic

In order to understand the specifics of terrorism in the current risk society, it is important to focus on risk management. Risk management of terrorism is inherently different from other forms of risk management. As Ulrich Beck explains, the concept of risk is first and foremost related to control.¹³ Risk management is about making the ungovernable governable and the uncontrollable controllable: “As soon as we speak in terms of ‘risk’, we are talking about calculating the incalculable, colonizing the future”.¹⁴ Risk management thus relates to making uncertainties predictable and governable, as it assumes that adverse situations and their corresponding risks can to some extent be measured. Based on these measurements, preventative policies can then be developed that aim to control these risks.¹⁵ Terrorism is a high-impact phenomenon: although governments aim to make it governable, controllable and knowable, the unpredictable nature of terrorism changes the meaning of terrorism-risk management as it is simply very difficult, if not impossible, to manage that risk.¹⁶

This article follows the argumentation laid out by Louise Amoore and Marieke de Goede in their conception of the relation between risk and terrorism.¹⁷ The risk society described by Beck provides an important starting point for conceptualising terrorism risk. Amoore and de Goede adopt a more critical approach to risk as a social construct. Risk is not just, “a way in which we govern and are governed”; it is also performative—i.e., it creates

9 De Rechtspraak, Uitspraak 09/767193–13, The Hague, 1 December 2014. <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2014:14648>.

10 De Rechtspraak, Uitspraak 09/842489–14, 09/767038–14, 09/767313–14, 09/767174–13, 09/765004–15, 09/767146–14, 09/767256–14, 09/767238–14, 09/827053–15, 09/767237–14, 09/765002–15 and 09/767077–14, The Hague, 11 December 2015. <http://deeplink.recht-spraak.nl/uitspraak?id=ECLI:NL:RBDHA:2015:14365>.

11 De Rechtspraak, Uitspraak 10/960278–14, The Hague, 18 February 2016a. <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBROT:2016:1266>.

12 De Rechtspraak, Uitspraak 02/800190–15 and 02/665539–15, The Hague, 18 February 2016b. <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBZWB:2016:847>.

13 U. Beck, ‘The Terrorist Threat. World Risk Society Revisited,’ in *Theory, Culture & Society*, no. 19(4), 2002, pp. 39–55. doi: 10.1177/0263276402019004003.

14 Ibid.

15 M. de Goede, ‘The Politics of Preemption and the War on Terror in Europe,’ in *European Journal of International Relations*, no. 14(1), 2008, pp. 161–185. doi: 10.1177/1354066107087764.

16 L. Amoore, ‘Risk before Justice: When the Law Contests Its Own Suspension,’ in *Leiden Journal of International Law*, no. 21(4), 2008, pp. 847–861. doi: 10.1017/S0922156508005414; M. de Goede, ‘The Politics of Preemption and the War on Terror in Europe,’ in *European Journal of International Relations*, 2008, no. 14(1), pp. 161–185. doi: 10.1177/1354066107087764; M. Borgers and E. van Sliedregt, ‘The Meaning of the Precautionary Principle for the Assessment of Criminal Measures in the Fight against Terrorism,’ in *Erasmus Law Review*, no. 2(2), 2009, pp. 171–195. doi: 10.553/elr221026712009002002004.

17 L. Amoore and M. De Goede, ‘Introduction: Governing by Risk in the War on Terror,’ in L. Amoore and M. De Goede (eds.), *Risk and the War on Terror*, Oxon and New York: Routledge, 2008, pp. 1–25.

the consequences it names.¹⁸ Risks are not a given within social reality, but are constructed as risks. And after an issue is constructed as a risk, it demands action. This conception of risk leads to a focus on practices that are acted out, “*in the name of risk management and uncertainty*”.¹⁹

As Amoores and De Goede argue, “risk techniques” applied to terrorism provide a way of governing, and therefore of creating possibilities for intervention and management *despite* the uncertain and unknowable nature of terrorism.²⁰ This leads to precaution. According to François Ewald, precaution comes into the picture when an issue may have disastrous consequences and is (scientifically) hard to predict.²¹ Thus, instead of the complexities inherent in terrorism leading to inaction, it leads to action based on precaution. The perceived risks should be avoided at all costs, even though it is unknown what scenario will in reality unfold into an actual attack or other disastrous event.

Thus, precaution “demands that we act under scientific and causal uncertainty”.²² In the case of terrorism, where measuring the exact risk is not possible, policy decisions will be based on something else. According to Ewald, precautionary decisions are made by reflecting on all possible future scenarios, which are in turn based on suspicion, mistrust and fear.²³ As Jude McCulloch and Shanon Pickering argue,

Imagination animated through prejudice and stereotypes rather than objective fact or evidence that point to those facts form the basis of police and security intelligence action and even prosecution under counterterrorism pre-crime frameworks.²⁴

This imagination of disastrous consequences in the future leads to the need for action in the here and now: if nothing is done, those possible scenarios might become reality, even if their probability is low. Ewald goes on to argue that it is important for political institutions to detect risks as such: if this does not happen and an event occurs, the responsible institution will be seen as guilty.²⁵ This mechanism increases the incentive for political actors and institutions to act based on precaution. In practice, the precautionary logic implies that a lack of

18 L. Amoores and M. De Goede, ‘Introduction: Governing by Risk in the War on Terror,’ in L. Amoores and M. De Goede (eds.), *Risk and the War on Terror*, Oxon and New York: Routledge, 2008, pp. 1–25; C. Aradau and R. van Munster, ‘Governing Terrorism Through Risk: Taking Precautions, (un) Knowing the Future,’ in *European Journal of International Relations*, 2007, no.13(1), pp. 89–115. doi: 10.1177/1354066107074290.

19 L. Amoores and M. De Goede, ‘Introduction: Governing by Risk in the War on Terror,’ in L. Amoores and M. De Goede (eds.), *Risk and the War on Terror*, Oxon and New York: Routledge, 2008, pp. 1–25.

20 Ibid.

21 F. Ewald, ‘The Return of Descartes’s Malicious Demon: An Outline of a Philosophy of Precaution,’ in T. Baker and J. Simon (eds.), *Embracing Risk: The Changing Culture of Insurance and Responsibility*, Chicago, IL: University of Chicago Press, 2002, pp. 273–302. doi: 10.7208/chicago/9780226035178.001.0001.

22 C. Aradau and R. van Munster, ‘Taming the Future: The Dispositif of Risk in the War on Terror,’ in L. Amoores and M. de Goede (eds.), *Risk and the War on Terror*, Oxon and New York: Routledge, 2008, pp. 25–58.

23 F. Ewald, ‘The Return of Descartes’s Malicious Demon: An Outline of a Philosophy of Precaution,’ in T. Baker and J. Simon (eds.), *Embracing Risk: The Changing Culture of Insurance and Responsibility*, Chicago, IL: University of Chicago Press, 2002, pp. 273–302. doi: 10.7208/chicago/9780226035178.001.0001.

24 J. McCulloch and S. Pickering, ‘Pre-Crime and Counter-Terrorism: Imagining Future Crime in the ‘War on Terror’’, in *British Journal of Criminology*, no. 5, 2009, pp. 628–645. doi: 10.1093/bjc/azp023.

25 F. Ewald, ‘Two Infinities of Risk,’ in B. Massumi (ed.), *The Politics of Everyday Fear*, Minneapolis: University of Minnesota Press, 1994, pp. 221–8. Q5

conclusive evidence is not a sufficient reason not to take action in the form of preventative measures.²⁶

Oliver Kessler argues that, to understand the role of risk in legal reasoning, it is necessary to recognise the different temporalities that are at play in the legal environment.²⁷ Traditionally, criminal law focused on the present and the past; after all, prosecution focuses on offences committed. With the growing emphasis on risk, governments increasingly focus on prevention, as discussed above. This process shifts the temporal focus of law from the past to the future as a part of risk management. Kessler takes this one step further by arguing that it is precisely the concept of risk that relates the present to the future and facilitates the regulation of this relation.²⁸ According to him, the way in which the future and its unknowns and threats are *imagined* feeds into policies and decisions in the present.

Beck states that risk colonises the future, and that one of the ways through which this is done is through law.²⁹ Moreover, this future temporality changes the rules of the game when it comes to information gathering, evidence and argumentation. Following Kessler, the entrance of risk into the legal domain signifies a different rationality in the legal system, based on this future temporality.³⁰ Following a similar logic, Amoore explains that the norms in the legal sphere have changed due to the focus on risk management in the legal domain: traditionally, the norm is to arrive at a judgement on the basis of conclusive evidence, but Amoore argues that the norm is shifting towards suspicion as the basis of evidence on which to take action.³¹

Here, risk management, the precautionary principle, Kessler's temporal shift and law all come together: risk management and precaution lead to a future-oriented perspective, and hence a change in criminal law occurs where conclusive evidence and the past temporality are replaced by suspicion and precaution in order to prevent future events from occurring. This is different from the traditional criminal-law perspective with a focus on justice: once harm is done, action is undertaken to address this after the crime. To be suspected of causing harm in the future has become the norm in this world of risk management and precaution.³² The unpredictability of terrorism changes law in other ways as well; for instance, boundaries between war and peace become blurred. Moreover, terrorism also changes the rehabilitative orientation of law, as many terrorists have a desire to die for their ideology and the prospect of time in prison has no or much less influence on them

26 M. Borgers and E. van Sliedregt, 'The Meaning of the Precautionary Principle for the Assessment of Criminal Measures in the Fight against Terrorism,' in *Erasmus Law Review*, no. 2(2), 2009, pp. 171–195. doi: 10.553/elr221026712009002002004.

27 O. Kessler, 'Is Risk Changing the Politics of Legal Argumentation?' in *Leiden Journal of International Law*, no. 21(4), 2008, pp. 863–884. doi: 10.1017/S0922156508005426.

28 Ibid.

29 U. Beck, 'The Terrorist Threat: World Risk Society Revisited,' in *Theory, Culture & Society*, no. 19(4), 2002, pp. 39–55. doi: 10.1177/0263276402019004003.

30 O. Kessler, 'Is Risk Changing the Politics of Legal Argumentation?' in *Leiden Journal of International Law*, no. 21(4), 2008, pp. 863–884. doi: 10.1017/S0922156508005426.

31 O. Kessler, 'Is Risk Changing the Politics of Legal Argumentation?' in *Leiden Journal of International Law*, no. 21(4), 2008, pp. 863–884. doi: 10.1017/S0922156508005426; C. Aradau and R. van Munster, 'Taming the Future: The Dispositif of Risk in the War on Terror,' in L. Amoore and M. de Goede (eds.), *Risk and the War on Terror*, Oxon and New York: Routledge, 2008, pp. 25–58.

32 M. Borgers and E. van Sliedregt, 'The Meaning of the Precautionary Principle for the Assessment of Criminal Measures in the Fight against Terrorism,' in *Erasmus Law Review*, no. 2(2), 2009, pp. 171–195. doi: 10.553/elr221026712009002002004; R.V. Ericson, 'The State of Preemption: Managing Terrorism Risk through Counter-Law,' in L. Amoore and M. de Goede (eds.), *Risk and the War on Terror*, Oxon and New York: Routledge, 2008, pp. 87–125. doi: 10.4324/9780203927700.

and their decision to act violently.³³

Preparatory Acts within the Dutch Criminal Justice System

Preparatory acts of terrorism are acts that can lead to a terrorist offence. According to McCulloch and Pickering, preparatory acts of terrorism are mainly offences that, “do not require any specific, identified [concrete (eds.)] act to be [...] attempted”.³⁴—For instance, preparatory offences could be entail membership of a terrorist organisation or the association with these organisations or individuals. Preparatory acts are thus seen as acts that are criminalised based on the belief that they could lead to a terrorist attack. The criminalisation of preparatory acts is of course not new within criminal law. After all, one can also be convicted for other concrete plans to commit a crime. The difference is that this article focuses on the introduction of what under Dutch law is defined as “terrorist intent”.

Terrorist intent is a central notion in the legislation regarding terrorist activities: when it is proven that an offence has been committed *with* terrorist intent, the maximum sentence is greater than it is for the same act committed as a “regular” criminal activity. For example, Article 140 Sr describes membership in any criminal organisations, for which the maximum sentence is six years. Article 140a Sr describes the criminalisation of membership in a criminal organisation with terrorist intent, for which the maximum sentence is significantly higher: i.e., fifteen years. This *terrorist intent* is defined as follows:

The aim [intent³⁵] to instill terror in the population or part of the population of a country, or to illegitimately coerce a government or international organization to do, refrain from or suffer something, or to seriously disrupt or destroy the political, constitutional, economic or social structures of a country or international organization³⁶

Increased sentences can be relevant for offences such as manslaughter, aggravated assault, hijacking or kidnapping.³⁷ This development is not confined to the Dutch context, as many similar terrorism laws were passed worldwide following the 9/11 attacks.³⁸

According to H.G. van der Wilt, terrorist intent is formulated in such a way that it is too close to the definition of a motive, rather than intent.³⁹ *Intent*, according to Van der Wilt, refers to the direct goal for which an act is committed (for example, killing a person), whereas *motive* refers to the urge to satisfy a certain need that

33 R.V. Ericson, ‘The State of Preemption: Managing Terrorism Risk through Counter-Law,’ in L. Amoore and M. de Goede (eds.), *Risk and the War on Terror*, Oxon and New York: Routledge, 2008, pp. 87–125. doi: 10.4324/9780203927700.

34 J. McCulloch and S. Pickering, ‘Pre-Crime and Counter-Terrorism: Imagining Future Crime in the ‘War on Terror’’, in *British Journal of Criminology*, no. 5, 2009, pp. 628–645. doi: 10.1093/bjc/azp023.

35 Authors note: the legal article has been translated into English using the word ‘aim’ instead of ‘intent’ – however the authors believe the Dutch word ‘oogmerk’ is better translated as intent.

36 See 8.1: <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:16102>.

37 NCTV, *Wet en regelgeving, Wet Terroristische Misdrijven*, The Hague, 2016. Retrieved 9 June 2016, https://www.nctv.nl/onderwerpen_a_z/wet_regelgeving/index.aspx.

38 J. McCulloch and S. Pickering, ‘Pre-Crime and Counter-Terrorism: Imagining Future Crime in the ‘War on Terror’’, in *British Journal of Criminology*, no. 5, 2009, pp. 628–645. doi: 10.1093/bjc/azp023.

39 H.G. van der Wilt. ‘Het terroristische oogmerk,’ in Mr. M.M. Dolman (eds.), *Terrorisme, Europa en strafrecht*, Amsterdam: Amsterdam University Press, 2003, pp. 55–81. doi: 10.5117/9789056292935.

pushes an individual to act (for example, the wish to eliminate a competitor in a drug war).⁴⁰ By introducing terrorist intent into law, and by attempting to provide conclusive evidence proving someone committed an offence with this specific intent, it becomes even more difficult to distinguish between mere criminal or terrorist intent.⁴¹ Borgers and van Sliedregt refer to this as a “subjective criminalisation model”, as it criminalises the intent to which an offence has been committed rather than criminalising “acts of endangerment”.⁴² This is why, according to them, the introduction of terrorist intent into law is problematic, and inherently shows signs of what has been previously described as a norm shift towards suspicion.

There are a number of laws that discuss preparatory acts: the financing of terrorism (Article 42 Sr), the recruiting for terrorism (Article 134 Sr and Article 205 Sr) and the facilitating of terrorism (Article 83b Sr); membership in a terrorist organisation (Article 140a Sr); and participating or collaborating in training for terrorism activities (Article 134a Sr). Moreover, conspiracy to commit terrorist offences is criminalised (Article 421). *Conspiracy* is defined as, “two or more persons having agreed to commit a terrorist offence”. This agreement does not have to be acted upon for it to be illegal.⁴³ The Dutch Counter-Terrorism Coordinator specifies that recruitment does not have to be successful for it to be deemed an offence,⁴⁴ which is in line with the definition of preparatory acts by McCulloch and Pickering.⁴⁵

Methods

Since the precautionary principle and preventism within the conceptual framework of risk management are the primary foci here, it is important to use these elements in the analysis. This leads to the following framework for the discourse analysis:

- Mentions of risk and threats are elements that indicate the portrayal of an issue as a risk. Moreover, this means that proposals made to control, manage or address this risk are elements indicating *risk management*.
- Precaution will be operationalised by looking for mentions of the potentially disastrous consequences of terrorist acts and by the unknowable and uncertain nature of terrorism. If these arguments are used to justify action, it can be concluded that the *precautionary principle* plays a role.
- As mentioned above, the future plays a central role in the precautionary principle. But it should also be specifically operationalised in relation to law. Kessler’s⁴⁶ line of argumentation is followed: whenever mention is made of the criminalisation of preparatory acts, is the *temporal shift in criminal law* discussed explicitly or implicitly?

40 Ibid.

41 Ibid.

42 M. Borgers and E. van Sliedregt. ‘The Meaning of the Precautionary Principle for the Assessment of Criminal Measures in the Fight against Terrorism,’ in *Erasmus Law Review*, no. 2(2), 2009, pp. 171–195. doi: 10.553/elr221026712009002002004.

43 NCTV, Wet en regelgeving, Wet Terroristische Misdrijven, The Hague, 2016. Retrieved 9 June 2016, https://www.nctv.nl/onderwerpen_a_z/wet_regelgeving/index.aspx.

44 Ibid.

45 J. McCulloch and S. Pickering. ‘Pre-Crime and Counter-Terrorism: Imagining Future Crime in the ‘War on Terror’’, in *British Journal of Criminology*, 2009, no. 5, pp. 628–645. doi: 10.1093/bjc/azp023.

46 O. Kessler. ‘Is Risk Changing the Politics of Legal Argumentation?’ in *Leiden Journal of International Law*, 2008, no. 21(4), pp. 863–884. doi: 10.1017/S0922156508005426.

- On a more critical note, it is relevant to analyse whether the language is devoted to the potentially negative consequences of the role of the precautionary principle in criminal law. Elements that indicate this are—according to the literature—questions or statements relating to the consequences for the rule of law. Amoores argument on the norm shift from conclusive evidence to suspicion is also part of this: what is the justification for intervening and prosecuting?
- Another element is what Ericson⁴⁷ refers to as *laws against laws*: new laws that undermine or ‘counter’ existing law(s); which could lead to the possibility of acting on the basis of preventative logic?
- A final element in the operational framework is the role of *national security*. According to Ericson and McCulloch and Pickering,⁴⁸ when any criticism is addressed and/or countered by the actors involved, the argument will often be framed in light of guaranteeing national security.

A closer look at court cases offers a way of understanding how both the public prosecution and courts approach the criminalisation of preparatory acts in practice. The four cases focus on different aspects; however, they share a focus on preparatory offences with terrorist intent. First, the court cases will be introduced. Next, the findings will be presented by discussing different themes that manifested in these four trials.

The Cases

- (1) Shukri F. received her verdict on 1 December 2014 in the court of The Hague. She was prosecuted on allegations of recruiting multiple people to join the armed conflict in Syria and/or Iraq and for inciting terrorist offences.⁴⁹ Her husband, Maher H., was prosecuted on the grounds of joining the armed conflict in Syria and/or Iraq. Maher and Shukri were known to have gone to Syria together for a few months before returning to The Netherlands. Maher received a three-year sentence for joining the armed conflict, while Shukri was acquitted on the grounds that women traditionally do not join the actual fighting but have other responsibilities.⁵⁰ Overall, according to the judges, the evidence put forth by the prosecution to prove that Shukri recruited people to join the armed conflict was not conclusive or convincing. The verdict provided a setback for the public prosecution.⁵¹
- (2) The Context Case is a complicated one. First of all, it involves more than the nine individuals who were eventually sentenced in the verdict that is analysed here. Of the seventeen people who were part of the broader Context investigation, ten were believed to be members of a criminal organisation with terrorist intent. Initially, Maher H. and Shukri F. were also part of the Context research. The investigation of the Context Case started in April of 2013, after a number of people (mainly parents) turned to the police with stories about recruitment. In the city of The Hague, the number of foreign fighters was rapidly increasing, and this led the investigators to believe there was an organisation behind the recruitment and facilitation

47 R.V. Ericson, ‘The State of Preemption: Managing Terrorism Risk through Counter-Law,’ in L. Amoores and M. de Goede (eds.), *Risk and the War on Terror*, Oxon and New York: Routledge, 2008, pp. 87–125. doi: 10.4324/9780203927700.

48 McCulloch and S. Pickering, ‘Pre-Crime and Counter-Terrorism: Imagining Future Crime in the ‘War on Terror’’, in *British Journal of Criminology*, no. 5, 2009, pp. 628–645. doi:10.1093/bjc/azp023.

49 De Rechtspraak, Uitspraak 09/767193–13, The Hague, 1 December 2014. <http://deelink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2014:14648>.

50 Ibid.

51 Trouw, ‘Drie jaar en vrijspraak voor ‘jihadpaar’’. Trouw, 1 December, 2014. Retrieved 9 June, <http://www.trouw.nl/tr/nl/4492/Nederland/article/detail/3801744/2014/12/01/Drie-jaar-en-vrijspraak-voor-jihadpaar.dhtml>.

of individuals joining the armed conflict in Syria and/or Iraq.⁵² Neighbourhood police officers played an essential role in the investigation, as they were familiar with a number of the suspects. Additional information was provided through phone taps, observations and the Internet. The case file exceeds 17,000 pages.

Expert witness Martijn de Koning, a cultural anthropologist who studied the behaviour of some of the suspects, stated that Azzedine C., Oussama C. and Rudolph H. formed the heart of the organisation.⁵³ Hatim R., Anis Z. and Soufiane Z. did not attend the hearings, as they were believed to be in Syria (or passed away) at the time of the trial. The sentences ranged from seven days to six years. Azzedine C., as the leader of the organisation, received six years in prison, and Anis Z. and Hatim R. Oussama C. and Rudolph H. were sentenced to three years in prison (one year on probation). Jordi de J. was sentenced to 155 days (six months on probation). Moussa L. was sentenced to 30 months (ten months on probation). Hisham el O. was sentenced to five years. And finally, Imane B. was sentenced to seven days in prison. The final verdict was delivered on 10 December 2015.⁵⁴ Most of the suspects in the Context Case are currently appealing.

(3) Adil C. was prosecuted together with Sayed H. and Hardi N., three men from the city of Arnhem. Sayed and Hardi were prosecuted for planning to join the armed conflict in Syria. Here, only the verdict of Adil C. is taken into consideration due to the focus on the financing aspect. Sayed and Hardi were prosecuted on very different grounds, which fall beyond the scope of this article. They were arrested on their way to the battlefield. The verdict was delivered on 18 February 2016 in the court of Rotterdam. Adil C. was prosecuted for the financing of terrorism and received a sentence of one-year imprisonment and six months of probation. Adil transferred a sum of one thousand euros to a friend in Syria who was fighting there as part of a jihadist organisation. Although it cannot be proven that the money was used to facilitate or finance terrorist activities, both the public prosecution and the judge argued that the money made it possible for the recipient to achieve his goals and to sustain his livelihood; thus the money facilitated terrorist activities.⁵⁵

(4) Salim S. was prosecuted and convicted for recruiting for the armed conflict in Syria and/or Iraq, for money laundering and for social-benefit fraud. The last two allegations were not committed with terrorist intent and are therefore not of importance for this analysis. Salim, who received his verdict on 18 February 2016 in Breda, was proven guilty of recruiting a minor to join the armed conflict on the side of is. The minor was an asylum seeker from Syria, who came to The Netherlands to flee the violence in his home country. Salim was sentenced for his crimes to eighteen months in prison and six months of probation.⁵⁶

Intentions and Potentially Disastrous Consequences

The public prosecution in The Netherlands has a specialised team that consists of approximately ten prosecutors for jihadi/terrorism cases. This setup was chosen for a number of reasons. As one of the prosecutors

52 De Rechtspraak, Uitspraak 09/842489-14, 09/767038-14, 09/767313-14, 09/767174-13, 09/765004-15, 09/767146-14, 09/767256-14, 09/767238-14, 09/827053-15, 09/767237-14, 09/765002-15 and 09/767077-14, The Hague, 11 December 2015. <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2015:14365>.

53 Ibid.

54 Ibid.

55 De Rechtspraak, Uitspraak 10/960278-14, The Hague, 18 February 2016a. <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBROT:2016:1266>.

56 De Rechtspraak, Uitspraak 02/800190-15 and 02/665539-15, The Hague, 18 February 2016b. <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBZWB:2016:847>.

stated, terrorism just happens to be one of the specialisations in criminal law; other prosecutors specialise in financial criminal law or sexual offences. Terrorism cases require a deep understanding of the specific legal articles that focus on the phenomenon. Also, the political pressure is higher in the context of terrorism.⁵⁷

The objectives of the public prosecution for these four cases were discussed in various interviews with actors in the criminal-justice sector. Naturally, the task of the public prosecution is to follow the law; hence, it is part of their mandate to prosecute on the grounds of articles such as the Terrorism Act. One of the questions the prosecutors face relates to the timing of pressing charges and preparing a case. As one respondent explained, timing is not entirely up to the prosecutor, as prosecutors cannot wait to see if something will develop into a terrorist attack. It is the urgency of the matter that makes it necessary to intervene as soon as possible: “We cannot allow to let a terrorist attack happen or to let individuals join the conflict”.⁵⁸ The same applies when a prosecutor has clear indications that someone is planning to commit murder or roba bank.

One defence lawyer explained a development he labelled “increased security thinking” in the approach of the public prosecution: the prosecution used to intervene as a last resort, but this is no longer the case, as no risk can be taken when it comes to terrorism.⁵⁹ The lawyer stated that, even when there is very little evidence, as in the case with Adil C. and Salim S., the prosecution tries to push a verdict in order to prevent a terrorist act from materialising.⁶⁰ Another defence lawyer has argued that one of the main objectives of the public prosecution for these trials is, “to not wait until something happens, but to tackle the issue in the earliest possible phase”.⁶¹ This characterizes the approach of the prosecution towards these cases: inaction might lead to disastrous consequences that must be prevented. Thus, action—in the form of prosecution—is necessary, exemplifying a risk-management approach based on the precautionary principle. One defence lawyer puts it as follows:

Of course there is more to it. Of course it is about preventing foreign fighters, and preventing terrorism. (...) When you put the whole process in a broader perspective, then politics as a whole—within the public sphere combined with the sensitivity of the topic—continuously takes it to the next level, or actually continuously moves the cases up the timeline, to make sure they can always say: ‘At least we did something.’ As the legislator, you cannot sit still, and the public prosecution and the judges act on those grounds.⁶²

The final objective also underlies the foreign-fighter phenomenon. One defence lawyer has stated that returnees form a potential threat because they may have radicalised further or received training.⁶³ This poses a threat to both The Netherlands and the international community.

Preventing people from travelling to Syria/Iraq thus becomes an objective in itself. In the verdict of the

57 Interview public prosecutor, 19 May 2016.

58 Interview public prosecutor, 19 May 2016.

59 Interview defence lawyer, 16 May 2016.

60 Ibid.

61 Interview defence lawyer, 9 May 2016.

62 Ibid.

63 Interview defence lawyer, 9 May 2016.

Context Case,⁶⁴ the court argued that criminal law plays a role in the prevention of terrorism. The majority of the arguments refer to imagined future scenarios: it *could* happen that an individual is frustrated after being stopped from joining the armed conflict, and that *could* lead that person to want to commit an attack. This is an unknown and uncertain scenario, but the prosecutors act to make sure these possible future scenarios do not become reality. In the verdict, the court acknowledges that criminal law should indeed focus on the future temporality so as to prevent potential consequences. Hence, it becomes clear that both the prosecution and the court approach these cases following a precautionary logic: imagining scenarios that could become reality if they fail to act now.

Thus, the precautionary principle enters the legal sphere in general and the courtroom in particular. The following quote from Shukri F.'s verdict provides an example of how the precautionary principle underpins the courts' approach. The court referred to the Terrorism Act, which increases the sentence for recruitment for terrorism with a maximum of up to four years. In this respect, the court states that,

The increase of the maximum sentence is linked to the increased rejection of the punishable behaviour, combined with the intention to advance that the recruitment of people for jihad in the future can be adequately addressed on the grounds of article 205 Sr. This form of recruitment is, according to the legislator, a particularly harmful and threatening form of recruiting explicitly added to the scope of the penal provision: a form that, taking into account the potentially disastrous consequences of this recruitment for the subject and the possible victims, legitimises a maximum punishment of four years.⁶⁵

The court again stressed the potentially disastrous consequences of recruitment, emphasising the severity of the crime. This argument returned to both the Context Case and the case of Salim S., where recruitment was part of the allegations.⁶⁶ The court argued that this is the line of argumentation put forth by the legislator, and that the court should follow suit. Thus, the precautionary principle has found its way from the law-making process to the prosecution to the court.

In the case of Shukri F., the context played a less important role than it did in the other cases. According to the verdict, it could not be proven that women actually engage in fighting in the conflict in Syria. It stated that, "morally, ideologically or financially supporting the fight or fighters, marrying a fighter and/or caring for the possessions, the household and the children of a fighter" do not fall under the jurisdiction of the articles under which Shukri was prosecuted. In other words, the court argued that this type of facilitation cannot be interpreted as directly contributing to the armed conflict.⁶⁷ Hence, because it could not be proven that women

64 De Rechtspraak, Uitspraak 09/842489-14, 09/767038-14, 09/767313-14, 09/767174-13, 09/765004-15, 09/767146-14, 09/767256-14, 09/767238-14, 09/827053-15, 09/767237-14, 09/765002-15 and 09/767077-14, The Hague, 11 December 2015. <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2015:14365>.

65 De Rechtspraak, Uitspraak 09/767193-13, The Hague, 1 December 2014. <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2014:14648>.

66 De Rechtspraak, Uitspraak 09/842489-14, 09/767038-14, 09/767313-14, 09/767174-13, 09/765004-15, 09/767146-14, 09/767256-14, 09/767238-14, 09/827053-15, 09/767237-14, 09/765002-15 and 09/767077-14, The Hague, 11 December 2015. <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2015:14365>; De Rechtspraak, Uitspraak 02/800190-15 and 02/665539-15, The Hague, 18 February 2016b. <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBZWB:2016:847>.

67 De Rechtspraak, Uitspraak 09/767193-13, The Hague, 1 December 2014. <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2014:14648>.

actively contribute to the armed conflict, it could not be said that Shukri F. recruited the female suspects for the armed conflict.

In the case of Adil C. one-and-a-half years later, this argument was no longer valid. Adil was prosecuted under the Financing Article. However, as in the case of Shukri, it was not clear what happened with the means (the money) that Adil contributed to the conflict. In his case, the means were perceived as terrorism financing; hence, he was found guilty.⁶⁸ Both cases focussed on the consequences in the conflict area of actions that were taken outside of the conflict area. In the Shukri case, the line of argument was that, based on his statements, it could not be proven that women contribute to the fighting. In the Adil case, this argument is turned into its opposite: the money will, one way or another, support a fighter; hence, it supports terrorism. There was no conclusive evidence, but the court reduced the space for alternative explanations of specific—or even unknown—acts. What actually happened with the money is unknown, and this uncertainty led—in the case of Adil C.—to a sentence. The Adil C. case follows the precautionary logic and the arguments laid out about the norm shift to suspicion instead of conclusive evidence. This uncertainty, as Ewald argued, is part of precaution.⁶⁹ This is a clear example of how the precautionary principle has found its way into the legal sphere in both the approach of the prosecution (as was discussed above) and in the court.

According to the prosecution, there were so-called “plusses” that proved the terrorist intent of the case. For example, chat conversations between Adil C. and the recipient of the money imply terrorist intent or awareness of the terrorist intent of the recipient.⁷⁰ The court stated:

Through the financial support of jihadists, achieving an increase in the capacity of the jihadist, the reasonable chance is consciously accepted that the collected and donated money will be used for terrorist purposes.⁷¹

The court argued that Adil consciously accepted the chance that the money he wired would be used for terrorist purposes and thus that he committed an offence—although it cannot be proven. This line of reasoning is interesting, because it invokes the concept of “chance” here, establishing the uncertainty of the matter. The legal implications are discussed below.

Criminal Law as Optimum Remedium

One of the interviewees noted a shift from the use of criminal law as *ultimum remedium* to *optimum remedium*. Traditionally, criminal law is based on the idea of *ultimum remedium*, which means that criminal law should be used as a last resort. However, the prosecution noted that prosecutors are currently moving slowly towards approaching criminal law as an *optimum remedium* in the case of terrorism, which is criminal law as an instrument that can be deployed where it works best to achieve a certain goal.⁷² Criminal law is deployed

68 De Rechtspraak, Uitspraak 10/960278–14, The Hague, 18 February 2016a. <http://deelink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBROT:2016:1266>.

69 F. Ewald, ‘The Return of Descartes’s Malicious Demon: An Outline of a Philosophy of Precaution,’ in T. Baker and J. Simon (eds.), *Embracing Risk: The Changing Culture of Insurance and Responsibility*, Chicago, IL: University of Chicago Press, 2002, pp. 273–302. doi: 10.7208/chicago/9780226035178.001.0001.

70 Interview public prosecutor, 19 May 2016.

71 Ibid.

72 Ibid.

wherever it is believed to help best achieve the prevention of terrorism.⁷³

Respondents argued that criminal law alone cannot solve the issue, and other solutions and instruments should be deployed as well. The best and most effective approach is decided on a case-by-case basis.⁷⁴ These statements adhere to the following logic: criminal law can be deployed as one of the instruments to a certain goal: in this case, the goal of national security and terrorism prevention.⁷⁵ Deploying criminal law as the optimal instrument rather than an instrument of last resort is a form of risk management. Criminal law then becomes one of the tools through which the risk of terrorism is controlled and therefore is increasingly used as a policy instrument. Furthermore, criminal law as *optimum remedium* follows precautionary logic: it is uncertain what acts might develop into an attack, but based on the idea of zero tolerance, it is decided that intervention is needed to prevent terrorism. Within this scenario, criminal law is increasingly viewed as one of the best instruments to use rather than one of the last instruments available. This reasoning corresponds strongly with Ewald's conceptualisation of precaution.

Another important element mentioned by the respondents is the political pressure for public prosecutors involved in these cases. Although the political pressure is high, the public prosecution as an organisation does not see this emphasis on the criminal-justice approach as the most effective way to counter terrorism. One of the prosecutors stated that, "it indeed is the reality that we work in, but that does not mean we stop thinking critically".⁷⁶ The political pressure demands a repressive approach, but the prosecutors emphasize the importance of a preventative approach as well. In this sense, *prevention* refers to the use of other instruments to reach the objective of preventing terrorism. The prosecutor said that he is, "happy that our partners are creating these alternatives".⁷⁷ This is an interesting argument, as it shows that the prosecution truly sees criminal law as only one of the many ways in which the issue can be addressed. This is an important finding, as it shows that the precautionary principle has indeed entered the legal sphere, but not without self-criticism from the actors involved.

In the Context Case, the verdict started by asserting that the trial is not about religion or about prosecuting people for their beliefs or opinions. The freedoms that are part of a democratic society should be protected and are very important. At the same time, however, they are not without restrictions.⁷⁸ The court also paid attention to the instrumental use of criminal law with regard to counter-terrorism, as is illustrated in the following excerpts:

The court also wishes to make sure that there is no misunderstanding that criminal law, subject to the freedoms referred to above, plays a limited but important role in counter-terroring terrorism. From an international point of view, terrorism is one of the worst crimes and it is incumbent upon all states to combat it. Criminal law is instrumental in both

73 Ibid.

74 Interview public prosecutor, 19 May 2016.

75 Ibid.

76 Interview public prosecutor, 19 May 2016.

77 Ibid.

78 De Rechtspraak, Uitspraak 09/842489-14, 09/767038-14, 09/767313-14, 09/767174-13, 09/765004-15, 09/767146-14, 09/767256-14, 09/767238-14, 09/827053-15, 09/767237-14, 09/765002-15 and 09/767077-14, The Hague, 11 December 2015. <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2015:14365>.

preventing acts of terrorism as much as possible and in prosecuting and trying them.⁷⁹

In this way the legislator wished to give a clear field to combating terrorism. Undeniably, the penalization of acts in the pre-stage has given criminal law a more instrumental character. Obviously, courts have to be guided by the legislator's choice. Point of departure is still, however, that only acts are punishable.⁸⁰

These statements underline a number of important arguments that demonstrate how the precautionary principle—in the form of the instrumental use of criminal law—plays a role in the approach of the court. First, the court acknowledges the role of criminal law within countering terrorism by referring to its instrumental use. Being aware of the challenges, the court stresses that, of course, it should be wary of infringing upon freedom of opinion or any other human right. The shift within criminal law towards a future temporality is underlined by acknowledging the increased instrumental use of criminal law in the preliminary stage in the case of terrorism. Assigning the responsibility to prevent terrorism to criminal law means that future scenarios must be imagined, acknowledged and acted upon. Thus, it can be concluded that the court has not only justified but has also internalised the precautionary logic. Both the public prosecution and the court approach criminal law as an *optimum remedium*, and they argue and act based on the precautionary principle. Again, this shows how precaution has entered the legal sphere. Before we turn to the implications of this shift, it is important to discuss *how* criminal law is deployed as an instrument.

The Classic Security Versus Human Rights Debate

The approach of the public prosecution and the court is based on the precautionary principle. Furthermore, criminal law is increasingly used to counterterrorism. What are the consequences of these developments and to what extent are they visible in the analysed court cases?

Consequences for Civil Liberties

All respondents expressed criticism or concerns regarding these developments. The concerns—about the development of criminal law as an instrument in the counter-terrorism domain and about the consequences this development has for the rule of law—are related to what Ericson calls “laws against laws”.⁸¹ One of the defence lawyers was very critical of the developments within criminal law in terrorism trials. He argued that the European Convention on Human Rights (ECHR) states that everyone has the right to freedom of expression (ECHR, Article 10). One of his clients—who was, according to his lawyer, pushing the boundaries of the freedom of expression—received several years' imprisonment. According to the lawyer, it is rather extreme when crossing the boundary of freedom of expression by just one step results in such a high sentence.⁸² Here, the lawyer referred to the case of Jitse Akse,⁸³ a Dutch citizen and returnee who claims to have killed multiple fighters. The lawyer's client is frustrated as he received a high sentence for “expressing his opinion” and abetting people to join the armed conflict while Akse seems to be in less trouble despite committing murder. This can

79 1.8: <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:16102>.

80 1.10: <http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:16102>.

81 R.V. Ericson, ‘The State of Preemption: Managing Terrorism Risk through Counter-Law,’ in L. Amoore and M. de Goede (eds.), *Risk and the War on Terror*, Oxon and New York: Routledge, 2008, pp. 87 – 125. doi: 10.4324/9780203927700.

82 Interview defence lawyer, 16 May 2016.

83 Jitse Akse, a former Dutch soldier, claims he fought on the side of YPG and killed multiple ISIS militants. The Dutch public prosecution, on 21 June 2016, decided not to prosecute Mr. Akse, due to a lack of evidence (NOS, 2016b).

be explained by the fact that Akse and the lawyer's client supported opposing parties in the conflict: his client supports is, whereas Akse fought on the side of the Kurdish YPG.⁸⁴ Even though these cases are not similar when it comes to the level of evidence, they do pose questions regarding what Amoores calls differential norms in the legalsphere.⁸⁵

According to the defence lawyers, terrorism-related court cases increasingly infringe upon the freedom of speech where jurisprudence is built on these pieces of legislation.⁸⁶ In this light, the recent debate within Dutch parliament regarding the ban on Salafism was perceived as very worrisome.⁸⁷ At the same time, the respondents strongly disagree on the extent to which these trials cause concerns for the freedom of speech and religion.⁸⁸ The prosecution stresses that it is impossible in The Netherlands to be prosecuted just for sympathising with is; hence, freedom of speech is not infringed upon in the way the lawyers have argued.⁸⁹ Nonetheless, the knowledge that an individual sympathises with is contributes to what the prosecutor called the "colour" of his or her behaviour. Thus, if the prosecution knows that someone sympathises with is, and if that same person buys combat clothing and a one-way ticket to Turkey, then the sympathy for is becomes an indication (the so-called *colour*) of the intention.⁹⁰ So action can be undertaken only when an indication of intent can be combined with an act—not *just* on the grounds of sympathising. One of the prosecutors has emphasized the importance of awareness of detention and its consequences: all individuals sentenced (and those in pre-trial detention) for a terrorism-related offence are separated in the Dutch prison system from "regular" criminal offenders.⁹¹ Two prisons in The Netherlands—in Rotterdam and Vught—have such a terrorism wing. The respondents see this as problematic. The interviewees were concerned with the strict regime in place in these wings and with the fact that no differentiation takes place among the population.⁹² One of the lawyers expressed concerns about how the regime potentially infringes upon human rights for people sentenced for preparatory acts.⁹³ Due to the scope of this article, the role of the detention facilities will not be considered any further, but it is relevant to the extent that it reflects upon the consequences of the decisions made during the trials.

In the Context Case, the suspects were prosecuted on many different abetting statements. According to one respondent, the court followed the line of argument presented by the defence in many cases, leading to acquittals on these statements.⁹⁴ The suspects of the Context Case still received severe punishments for membership in a criminal organisation with terrorist intent.⁹⁵ One defence lawyer stated that, in this case, the

84 Interview defence lawyer, 16 May 2016.

85 L. Amoores, 'Risk before Justice: When the Law Contests Its Own Suspension,' in *Leiden Journal of International Law*, no. 21(4), 2008, pp. 847–861. doi: 10.1017/S0922156508005414.

86 Interview defence lawyer, 9 May 2016; Interview defence lawyer, 16 May 2016.

87 Interview defence lawyer, 16 May 2016.

88 Interview defence lawyer, 9 May 2016; Interview defence lawyer, 16 May 2016; Interview public prosecutor, 19 May 2016.

89 Interview prosecutor, 19 May 2016.

90 Interview public prosecutor, 19 May 2016.

91 T. Veldhuis, *Fear-based Prison Management*.

92 Interview defence lawyer, 9 May 2016; Interview defence lawyer, 16 May 2016; Interview public prosecutor, 19 May 2016.

93 Interview defence lawyer, 16 May 2016.

94 Interview defence lawyer, 9 May 2016.

95 *Ibid.*

context and climate in which the offences are committed play a significant role.⁹⁶

The terrorist attacks in Brussels in March of 2016, and those in Paris in January and November of 2015,⁹⁷ have had an impact on the judges, according to the lawyers. One lawyer said that his client's openness to the media influenced his sentence negatively, as the prosecution made an example of him to show its muscle.⁹⁸ Moreover, one of the defence lawyers expressed concerns regarding the overall direction of the legal developments related to terrorism: at this point, glorification of violence is not criminalised, but this could be the next step in the current climate. Right now, prosecuting and sentencing individuals for glorification of terrorism does occur through the use of the article on being a member of a criminal organisation with terrorist intent. However, to prosecute individuals that glorify violence, criminalisation of glorification would have to be established as an independent article.⁹⁹ These statements demonstrate the fear that, indeed, the process of criminalisation could further infringe on civil liberties.

Consequences for Legal Principles

The defence lawyers have additional concerns that relate to legal principles such as the *lex certa* principle: legal certainty. This is infringed upon when certain statements are subject to punishment not in and of themselves but because they have been expressed within a criminal organisation that is occupied with recruitment for jihad and thus with terrorist intent. The statements by themselves are not an offence, but the fact that they have been expressed within the context of an organisation with terrorist objectives means that members of the organisation are all held accountable for certain statements. According to the respondent, this creates a difficult situation for individuals who do not know what can and cannot be said and when one crosses the boundary of illegal statements.¹⁰⁰ This is connected to the claim laid out by both Amore¹⁰¹ and Ericson:¹⁰² legal certainty is a central legal principle within the rule of law, but a law against a law—as Ericson calls it—makes it difficult to know when exactly one is committing a criminal offence.

One of the defence lawyers stated that, despite being acquitted with respect to their own statements, clients were still found guilty of statements expressed by the criminal organisation with terrorist intent: “In that case, I do not understand what is left of the concrete accusation”.¹⁰³ According to him, the climate in which these individuals were operating played a big role in the motivation of the court to reach its verdict—a fact that seems to him to conflict with legal certainty.¹⁰⁴ A defence lawyer noted a development over time in the courts' decisions. Increasingly, the court followed the line of argument presented by the prosecution, thus leading to

96 Ibid.

97 In 7 January 2015, the offices of satire cartoon magazine Charlie Hebdo in Paris, France were attacked. On 13 November 2015, multiple bars, restaurants and a concert hall were attacked in Paris. On 22 March 2016, bombs exploded at the airport and a metro station in Brussels, Belgium.

98 Interview defence lawyer, 9 May 2016; Interview defence lawyer, 16 May 2016.

99 Interview defence lawyer, 9 May 2016.

100 Interview defence lawyer, 9 May 2016.

101 L. Amore, 'Risk before Justice: When the Law Contests Its Own Suspension,' in *Leiden Journal of International Law*, no. 21(4), 2008, pp. 847–861. doi: 10.1017/S0922156508005414.

102 R.V. Ericson, 'The State of Preemption: Managing Terrorism Risk through Counter-Law,' in L. Amore and M. de Goede (eds.), *Risk and the War on Terror*, Oxon and New York: Routledge, 2008, pp. 87–125. doi: 10.4324/9780203927700.

103 Interview defence lawyer, 9 May 2016.

104 Ibid.

more convictions:¹⁰⁵

They [the judges, jg] are only human, and see the excesses in Syria, in Brussels, in Paris. They think an example should be set. [...] They want to show that they do not find this acceptable and that you cross that boundary quite fast. That leads to strong sentencing and a low burden of proof.

These comments have to be analysed in light of the person who expressed them—in this case a lawyer defending his clients. But by taking into consideration the perspective of the prosecution, a more comprehensive analysis can be made. Prosecutors and lawyers note the same development within terrorism trials: judges also try to control external risks by approaching these preparatory acts from a precautionary perspective—a development that also shows in the analysis of the verdicts. As discussed above, institutions must act on risks. In this case, risks are clearly detected because of attacks in other countries, among other reasons.

In light of these comments on the importance of the context, some interesting findings stand out. For example, from a discourse-analysis perspective it is interesting to note that the table of contents of the Context verdict shows how much more extensive it is compared to the other verdicts analysed. It includes chapters entitled, “The investigation” and “The Developments in Syria”.¹⁰⁶ In the case of Shukri F., however, these features were discussed in a short paragraph. Even though the Context Case is more complex because it involves nine subjects, the amount of attention given to the context and developments in foreign affairs in the Context Case marks a clear difference from Shukri’s case. It shows the extent to which “climate” has played a role in this case.

Furthermore, one respondent noted another development he noticed in the Dutch criminal-justice system regarding terrorism trials: a reversal of the burden of proof.¹⁰⁷ For instance, the argument of the prosecution in the case of Adil C. was that the thousand euros sent by Adil enabled the recipient of the money to stay in Syria and should thus be viewed as terrorism financing. According to a lawyer, it cannot be proven that this money financed terrorism; but because it cannot be proven that it was not, Adil was convicted.¹⁰⁸ As was discussed earlier, the prosecution and the judge argued that there were “plusses” which proved that Adil was aware of the recipient’s terrorist intentions and that Adil consciously accepted the chance that the money would be used for terrorist purposes. Nonetheless, the case of Adil raises the question whether there is a shift towards reversing the burden of proof.

Finally, the level of evidence needed (the burden of proof) is decreased by arresting people on the basis of indication, thereby to prevent negative future scenarios.¹⁰⁹ According to the lawyer, fundamental constitutional guarantees—such as the freedom of speech and legal principles that uphold the rule of law—are at stake:

105 Interview defence lawyer, 16 May 2016.

106 De Rechtspraak, Uitspraak 09/842489–14, 09/767038–14, 09/767313–14, 09/767174–13, 09/765004–15, 09/767146–14, 09/767256–14, 09/767238–14, 09/827053–15, 09/767237–14, 09/765002–15 and 09/767077–14, The Hague, 11 December 2015.

107 Interview defence lawyer, 16 May 2016.

108 Ibid.

109 L. Amore, ‘Risk before Justice: When the Law Contests Its Own Suspension,’ in *Leiden Journal of International Law*, no. 21(4), 2008, pp. 847–861. doi: 10.1017/S0922156508005414.

At some point it will hit you. When your constitutional guarantees are taken away. That is what we should not do, even in these times. Those guarantees are in place for times like these as well, especially for times like these when we struggle with ourselves. As a society, we have to accept there is a certain risk. If not, it becomes a bit of a dictatorship.¹¹⁰

This is a bold statement. It expresses grave concerns about the consequences of current developments. But the prosecution is also aware of the precarious balance that is at stake in their work between certain legal principles on the one hand, and the criminal offences that someone is being prosecuted for on the other hand.¹¹¹ Here, the prosecution deals with encounters between criminal law and the precautionary principle.

The respondents see the potential problems in these developments, and they all discussed certain rights such as the freedom of speech and/or religion and the need to protect these rights. But, as is shown above, these developments come slowly. The analysis shows that the precautionary principle has entered the legal sphere and has changed certain aspects of criminal law. In the literature, concerns are expressed about developments in criminal law with special consideration for prevention and for the use of criminal law for risk management.¹¹² The analysis shows that, indeed, criminal law is used as a policy instrument for counter-terrorism, as interviewees have also pointed out. The prosecution is convinced that, by assessing the situation on a case-by-case basis, the most effective instrument can be deployed: i.e., criminal law or any other counter-terrorism instrument. The court, also aware of the potential pitfalls of these developments, has stressed that it will continuously protect the rule of law and human rights in light of these changes. Most of all, these developments are justified by continuously stressing, throughout all written documents, language and statements, the severe character of terrorism and its potential consequences.

Conclusion

When drawing conclusions based on the analysis, it is first and foremost of importance to recognize that respondents (both defence lawyers and public prosecution) do not present an unbiased view of their own roles. Especially from the perspective of the defence lawyers, it is important to realize the stake they have in defending their clients and thus their need to present a narrative that unveils potential negative developments on account of the prosecution. Nonetheless, when taking this into consideration, we can still deduct a number of interesting findings.

First, the findings show that the public prosecution and the court indeed have the objectives of controlling risk, preventing terrorism and stopping individuals from becoming foreign fighters. Furthermore, the prosecution acknowledges that there is a risk, and that waiting around and not acting is therefore not possible. According to the prosecution, a shift has taken place from criminal law as a last resort (*ultimum remedium*) to criminal law as one instrument among others (*optimum remedium*). Interestingly, the public prosecution also said that criminal law is not always the most effective way to address terrorism and that, therefore, other instruments should sometimes also be used. Despite these nuances, it can be concluded that the public prosecution approaches these cases on the basis of risk management and the precautionary principle. The

¹¹⁰ Interview defence lawyer, 16 May 2016.

¹¹¹ Interview public prosecutor, 19 May 2016.

¹¹² L. Amore, 'Risk before Justice: When the Law Contests Its Own Suspension,' in *Leiden Journal of International Law*, no. 21(4), 2008, pp. 847–861. doi: 10.1017/S0922156508005414; R.V. Ericson, 'The State of Preemption: Managing Terrorism Risk through Counter-Law,' in L. Amore and M. de Goede (eds.), *Risk and the War on Terror*, Oxon and New York: Routledge, 2008, pp. 87–125. doi: 10.4324/9780203927700; O. Kessler, 'Is Risk Changing the Politics of Legal Argumentation?' in *Leiden Journal of International Law*, no. 21(4), 2008, pp. 863–884. doi: 10.1017/S0922156508005426.

idea is that through early intervention, terrorism could be prevented and the risk controlled. Whether this is done through the use of criminal law or through social or psychological interventions is less important. With a holistic approach in which partners work together, the most effective instrument should be deployed to reach the collective aim of prevention. This is important, as it shows a departure from the literature. The findings show that the actors involved act on the basis of the precautionary principle—especially with the aim of prevention of terrorism—while looking for the most effective tool, which is not necessarily criminal law. So although increasing emphasis is placed on the use of criminal law, the actors involved are also careful about these developments and look for other possibilities.

Despite the less political role of the court, which holds a judicial position in contrast to the mix of executive and judicial power of the public prosecution in The Netherlands, the precautionary principle is also visible in how the court approaches these cases. The court also stressed the more instrumental use of criminal law with regard to terrorism. Additionally, references to the severity of jihad recruitment and to The Netherlands' obligation to prevent terrorism show that the court is driven by precautionary logic. Finally, the severity of the probation conditions—in one case going so far as to enforce discussing religious beliefs with an appointed expert—shows the extent to which the court also aims to contribute to the goal of controlling the risk.

Approaching criminal law as an instrument is based upon uncertainty and therefore relates to the precautionary principle as conceptualised in this article. The aim of preventing attacks and controlling the risk of terrorism leads to the imagining of future scenarios. In order to control these scenarios from unfolding, certain activities need to be disrupted, and, criminal law can then be used as an *optimum remedium*—i.e., as one of the ways in which this risk must be dealt with. Thus, the inherently unknown nature of future terrorist acts indeed plays a role in how these preparatory acts are approached in court by both the prosecution and the court. The prosecution touches upon this unknown nature by saying that we cannot wait around to see what develops into an attack and what does not.

The findings show that the public prosecution and the court approach terrorism trials as one of the ways in which the risk of terrorism can be managed. Therefore, this shift from *ultimum remedium* to *optimum remedium* causes criminal law to be used as a policy instrument. This leads to clashes between certain legal principles and this precautionary logic. For example, legal certainty is negatively affected when norms are differentiating such that it is difficult to know when one is committing an offence—as was seen in the analysis of the Context Case. Moreover, the increasing focus on future temporality—as both the prosecution and the court imagine future scenarios when discussing the severity of the offences—causes friction with the traditional focus of criminal law on the past and the present, just as Kessler argued.¹¹³ But it is not only with respect to these legal principles that the introduction of the precautionary principle causes challenging encounters. Although all actors express the importance of guaranteeing freedom of expression and religion, these freedoms clash with the precautionary principle. The precautionary principle, in its most extreme form, would lead to forms of control infringing upon these freedoms. In the Context Case, suspects were acquitted of certain statements. But such acquittals will stop being granted as the precautionary principle increasingly shapes the approach of the prosecution and the court. All of these encounters in which legal traditions and civil rights clash with the precautionary principle have to be dealt with by the actors involved, and it is important to consider the high political pressure these actors are under to act upon this issue. The analysis shows a mixed consideration in these encounters: although the precautionary principle increasingly influences the choices made, legal

113 O. Kessler, 'Is Risk Changing the Politics of Legal Argumentation?' in *Leiden Journal of International Law*, no. 21(4), 2008, pp. 863–884. doi: 10.1017/S0922156508005426.

principles and civil rights are still protected by the courts, and the aim of the prosecution is to balance the (alleged) offences with these principles and rights.

In many cases, a friction between the precautionary principle on the one hand, and legal principles and civil rights on the other hand plays a role in the legal sphere. When the legal approach is dominated by the precautionary logic, this is often justified by referring to the potentially disastrous consequences of terrorism—thus legitimising action. To some extent, this argument is justified by pointing out the need to guarantee national security in The Netherlands, although increasingly the emphasis is placed on the obligation The Netherlands has to counter terrorism. Furthermore, the findings show signs that institutions are influenced by the idea that failure to detect what is and is not a risk could harm the actors and the institutions. Because the pressure is high on this issue, institutions cannot make “mistakes” by failing to arrest, prosecute and sentence those who indeed pose risks. This influences the approach the public prosecution and the court take, and it underlines the precautionary principle. After all, it leads to a “zero tolerance” approach that focuses on controlling the risk of terrorism.

These encounters are where the consequences for the rule of law are decided. In the case of Adil C., it appears that a precautionary decision was made on the basis of uncertainty. But the acquittal of Shukri F. shows the importance of conclusive evidence. Although the importance of protecting the rule of law was stressed, the precautionary principle shows itself to be deeply ingrained in the approaches taken by the prosecution and court. The prosecution emphasises the need to use instruments other than criminal law to control terrorism, which could be a way to approach the terrorism risk through the precautionary principle without negatively affecting the rule of law.

What stands out from the findings is that, because of the consequences of a potential terrorist attack and the pressure of the political context, actors feel they have no option but to act. The pressure on the issue of counter-terrorism makes action important and inaction disastrous for institutions. Ewald touches upon this when he notes that it is important for institutions to detect the risks so that they will not be guilty when something happens.¹¹⁴ The analysis shows that the approach of all actors is strongly influenced by the precautionary principle: the prevention of uncertain and unknown disastrous consequences is the main objective in their approach. It also shows how a preventative role for criminal law has normalised since the adoption of the legislation that criminalises preparatory offenses.


Finally, the analysis shows that actors themselves are aware of the negative consequences of the precautionary principle for the rule of law and the legal sphere. Therefore, their aim is to use other instruments whenever possible to control the risk of terrorism. This is an important finding not only in relation to the literature (which shows a will to protect traditional principles while acting on the basis of precaution); the precautionary principle also deserves more attention from scholars.

The results show that the actors are situated within a larger playing field and that their different roles influence their standpoints. This means that political actors—such as ministers, policymakers and members of parliament and the senate—act under high political pressure: as terrorist attacks occur, it is increasingly necessary to show that action has been taken. Although the prosecution also operates under political

114 F. Ewald, 'The Return of Descartes's Malicious Demon: An Outline of a Philosophy of Precaution,' in T. Baker and J. Simon (eds.), *Embracing Risk: The Changing Culture of Insurance and Responsibility*, Chicago, IL: University of Chicago Press, 2002, pp. 273–302. doi: 10.7208/chicago/9780226035178.001.0001.

pressure, they have more space to work together with partners and to find alternative solutions—which is something they aim for. Although the prosecution works to prosecute individuals who commit offences—including those who commit preparatory offences—early intervention can in some cases be executed using instruments other than criminal law. This article shows that political pressure does influence the precautionary principle and how this principle subsequently enters the legal sphere. Moreover, this article shows how encounters between risk management and the precautionary principle, on the one hand, and law and legal principles, on the other hand, do not always end with a decision based on precaution. This shows that actors have their own discretionary space and power—even though it becomes increasingly difficult to resist the precautionary logic.

More work needs to be done to research the different roles and perspectives of institutions. First of all, this could be achieved by conducting research in countries other than The Netherlands to see if similar developments are taking place. One might ask to what extent the holistic approach adopted in The Netherlands is unique. What if other instruments do not exist? Is the development of criminal law from *ultimum remedium* to *optimum remedium* also occurring in other countries? Finally, how are encounters between risk and precaution approached in other countries? More research is relevant because of the consequences for the rule of law. If indeed other instruments than criminal law can be deployed, this could mean that the emphasis on criminal law can shift to other instruments to prevent terrorism, thereby preserving legal principles, and perhaps, preserving criminal law as the *ultimum remedium*. At the same time, due to the lack of evidence and to the difficulty of prosecuting in many of these terrorist or foreign-fighter cases, we have already witnessed a shift to the use of other instruments such as administrative measures. However, this does not necessarily preserve legal principles. On the contrary, legal principles might actually be circumvented due to lack of the judicial oversight needed for administrative measures.



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