

## Preparations to commit a crime The Dutch approach to inchoate offences

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### 1. Introduction

Since in Western criminal justice systems emphasis has been placed on combating serious (organised) crime and terrorism, from way back reactive criminal law has been increasingly used for preventive aims. In combating these forms of crime, the emphasis is not placed on responding to committed offences, but on the thwarting thereof. For that reason, criminal law includes inchoate offences, which in essence are crimes of preparing or seeking to commit another crime. Inchoate offences permit law enforcement intervention before the intended substantive offence is completed.<sup>1</sup>

In the last few years, inchoate offences have been expanded in most countries, partly because of national developments, partly in order to comply with agreements made in the transnational context of the European Union or the United Nations. Most countries of the European Union have by now satisfactorily implemented the EU's Terrorism Framework Decision of 13 June 2002 and introduced offences of participating in a terrorist group, as well as linked offences and inciting, aiding and abetting and attempting terrorist offences.<sup>2</sup> New legislative modifications are foreseen, as the 1998 Joint Action on participation in a criminal organisation<sup>3</sup> will probably soon be replaced by a Council Framework Decision on the fight against organised crime, which has to be implemented within the substantive criminal law of the Member States, in order to approximate the definition of offences relating to participation in a criminal organisation.<sup>4</sup> On a global level, the United Nations Convention against Transnational Organized Crime, also known as the Palermo Convention, obliges Member States to adopt a series of crime-control measures, including the criminalisation of participation in an organised criminal group.<sup>5</sup>

In view of these developments, particular attention must be given to the national level, as each state has its own jurisdiction and criminal law system. The limits and fundamental issues

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1 D.A. Burgman, 'Unilateral conspiracy: three critical perspectives', 1979 *DePaul Law Review*, pp. 75-113, p. 84.

2 Report from the Commission based on Article 11 of the Council Framework Decision of 13 June 2002 on combating terrorism, COM(2007) 681 final.

3 Joint Action of 21 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union (98/733/JHA).

4 Council Framework Decision on the fight against organised crime, 12279/06 CRIMORG 132 OC 597.

5 The United Nations Convention against Transnational Organized Crime, adopted by General Assembly resolution 55/25 of 15 November 2000, entered into force on 29 September 2003.

of criminal liability vary from country to country. As regards the approach to inchoate offences, the divergence between civil law and common law traditions is a significant factor. Especially differences in conspiracy law have been reported in the literature.<sup>6</sup> Traditional civil law countries do not recognise conspiracy law in its broad application as historically developed in common law countries. Civil law countries have different legal weapons for combating serious (organised) crime. In the Council Framework Decision on the fight against organised crime, these differences are taken into account. Following the 1998 Joint Action and the Palermo Convention, Member States are allowed to choose either or both a civil law model offence and a common law model offence.<sup>7</sup> Even so, within the civil law context serious organised crime and terrorism are also perceived in various ways and combated through different instruments.<sup>8</sup> Militello distinguishes three different solutions used by the EU countries for their measures to counter organised crime on a national level.<sup>9</sup> A few countries deny the necessity of criminalising, in a separate way, collective structures in connection with criminal organisations.<sup>10</sup> In their approach, participation in a criminal organisation can be relevant at most as an aggravating circumstance to be taken into account during sentencing. Other countries have offences of participation in a criminal organisation<sup>11</sup> or, in the common law tradition, conspiracy. The third and most recent solution is to consider organised crime as a specific type of criminal enterprise.<sup>12</sup> The national reports for the XVIIIth Congress of the International Association of Penal Law give even a more differentiated view of approaches, as their starting point is expanding forms of preparatory acts and participation and, therefore, non-organisational inchoate offences are also discussed.<sup>13</sup>

The Netherlands has a tripartite approach to inchoate crime. The Dutch Criminal Code (in Dutch: *Wetboek van Strafrecht*) has an offence of participation in a criminal organisation, as well as an offence of illegal preparatory acts that penalises individual conduct. Of old, Dutch conspiracy law has been principally related to politically subversive crime, and therefore seldom used. A crime that is ‘so vague that it almost defies definition’ and ‘is always “predominantly mental in composition” because it consists primarily of a meeting of minds and an intent’,<sup>14</sup> does not fit well in our traditional approach to the principle of legality. Even so, conspiracy (in Dutch: *samenspanning*) has recently become a subject of interest in the Netherlands, too. After having been a regular topic of dispute during the twentieth century, the combating of terrorism eventually extended the Dutch concept of conspiracy beyond the field of political plots. In 2004, almost thirty offences involving conspiracy to commit terrorist crime were added to the Criminal Code, as well as the offence of participation in an organisation whose object is the commission of

6 See e.g. W.J. Wagner, ‘Conspiracy in civil law countries’, 1951 *The Journal of Criminal Law, Criminology, and Police Science*, pp. 171-183; R.J. Hoskins, ‘A comparative analysis of the crime of conspiracy in Germany, France, and the United States’, 1973 *New York University Journal of International Law and Politics*, pp. 245-270.

7 See for a critical analysis, F. Calderoni, ‘A definition that could not work: the EU Framework Decision on the fight against organised crime’, 2008 *European Journal of Crime, Criminal Law and Criminal Justice*, pp. 265-282.

8 L. Picotti, ‘L’élargissement des formes de préparation et de participation’, Colloque préparatoire de la Corogne (5-7 Septembre 2007), Section I – Droit pénal général, XVIIIth Congrès International AIDP.

9 V. Militello, ‘Participation in a criminal organisation as a model of European criminal offence’, in: V. Militello & B. Huber (eds.), *Towards a European Criminal Law Against Organised Crime*, 2001, pp. 20-23.

10 Denmark, Finland and Sweden.

11 France, Italy, Spain, Portugal, Belgium, Luxembourg, the Netherlands, Greece and Germany.

12 The Spanish Criminal Code, for example, has an offence of illicit association (‘*asociación ilícita*’; Articles 515 *et seq.* Código Penal). See J.-M. Silva Sánchez, ‘La riposte pénale contre les organisations criminelles en droit Espagnol’, in: S. Manacorda (ed.), *L’infraction d’organisation criminelle en Europe*, 2002, pp. 59-110.

13 Picotti, *supra* note 8.

14 *Krulwitch v. US*, 336 US 440, 69 S.Ct. 716, pp. 447-448 (Jackson, J. concurring).

terrorist crimes.<sup>15</sup> As far as is known, terrorist conspiracy offences have hardly been used up to now. In a lecture at a law students' conference, a public prosecutor, responsible for capital crime cases, explained that the task of proving a conspiracy agreement is very difficult, as the offence has strictly defined limits: the plan to commit a specific offence must be ready and must have been planned by at least two persons.<sup>16</sup> As was evidenced by his lecture, in the Netherlands conspiracy does not work as the 'darling of the modern prosecutor's nursery'.<sup>17</sup> Its rebuffal is presumably related to unfamiliarity with the offence, but is also a result of the fact that a conspiracy charge does not provide any advantage for prosecutors, since the Dutch criminal law system has no special procedural rules for conspiracy cases (and no jury system<sup>18</sup>). The defendants in the case that was discussed in his lecture had instead been charged with participation in a criminal or terrorist organisation.<sup>19</sup>

The aim of this article is to provide a clear picture of the Dutch approach to inchoate crime. The offences mentioned and the rationale that underlies them will be discussed. Special attention will be given to both recent national developments and legislative measures taken in order to approximate substantive criminal law on this issue. The article is divided into six sections. As a starting point, the oldest inchoate offence – attempt – is outlined in order to explain the traditional Dutch approach to inchoate crime (Section 2). The subsequent sections are devoted to preparatory law (Section 3), the offences of participation in a criminal or terrorist organisation (Section 4) and conspiracy law (Section 5). The article will conclude with some final remarks on inchoate crime in the Netherlands and the Dutch way of dealing with the current tendencies to approximate substantive criminal law (Section 6).

## 2. The law on 'Attempt'

To understand the Dutch approach to inchoate crime we should go back in time and start more than a century ago, as the current Dutch Criminal Code became effective in 1886.<sup>20</sup> The Criminal Code is heavily influenced by the social and political climate of that era.<sup>21</sup> Nineteenth century liberalism emphasised the solidarity of all Dutch citizens and the equality of everybody before the law.<sup>22</sup> Outside its natural field of activity (maintaining order, foreign politics, infrastructure) the Government was required to adopt a reserved attitude, so that citizens could develop with freedom.<sup>23</sup> Contemporary tolerance was also reflected in the criminal law. Criminal law was seen as a last resort, the ultimate remedy for the most serious norm violations that cannot adequately be suppressed by any other means.<sup>24</sup> A basic assumption of the traditional liberal school is that thoughts are free; the mere intention to commit a crime remains unpunished. Criminal responsi-

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15 Terrorist Offences Act (in Dutch: *Wet Terroristische Misdrijven*), Act of 24 June 2004, *Staatsblad* 290. See J.M. Lintz, *De plaats van de Wet terroristische misdrijven in het materiële strafrecht. Een onderzoek naar de wederzijdse beïnvloeding door de Wet terroristische misdrijven en het Wetboek van Strafrecht en enkele bijzondere wetten*, 2007.

16 J. Plooi, 'Terugblik op de Hofstadgroepzaak', lecture, Rotterdam 13 March 2006, p. 1.

17 *Harrison v. United States*, 7 F.2d 259 (2d Cir. 1925), p. 263 (Hand, J.).

18 Cf. S. Klein, 'Conspiracy – the prosecutor's darling', 1957 *Brooklyn Law Review*, pp. 1-11.

19 The lecture was given a few days after the District Court of Rotterdam had convicted most of the defendants (Rechtbank Rotterdam 10 March 2006, *LJN* AV5108). These convictions were overturned on appeal, however. See Section 4.2.

20 In 1870, a State Commission was appointed to formulate a draft Bill with an explanatory memorandum, which was offered to the King in 1875. The subsequent Government Bill was introduced in Parliament in 1879. The Criminal Code was passed on 3 March 1881 (*Staatsblad* 35). Because of problems in harmonising the text with other Acts, the Code did not take effect until 1 September 1886. The Criminal Code has, by now, been frequently amended, but, in general, its underlying principles still apply.

21 C.M. Pelsler, 'Criminal legislation in the nineteenth century: the historic roots of criminal law and non-intervention in the Netherlands', in: P. Alldridge & C.H. Brants (eds.), *Personal autonomy, the private sphere and the criminal law - a comparative study*, 2000, pp. 181-204.

22 H.J. Smidt, *Geschiedenis van het Wetboek van Strafrecht*, vol. I, 1881, p. 21.

23 H. Beliën & M. van Hoogstraten, *De Nederlandse geschiedenis in een notendop*, 1998, p. 85.

24 Smidt, *supra* note 22, p. 11.

bility is based on a theory of voluntary muscular movement. The human will must be disclosed by an outward action, either an act or a failure to perform an act, because only outward action is significant for the sphere of another, and so for human society.<sup>25</sup> Consequently, the drafters of the Dutch Criminal Code adopted a reserved attitude to inchoate crime. The line of criminal responsibility was drawn at the attempt, although an exception was made for a small number of conspiracy (and since 1920<sup>26</sup> preparatory) offences to safeguard the security of the State, e.g. against a coup d'état. Moreover, the law on attempt is rather restricted. Criminal attempts are confined to felonies or indictable offences (*misdrifven*); an attempt to commit a misdemeanour or non-indictable offence (*overtreding*) is not an offence in itself. Besides, offenders receive a lesser punishment than they would receive had their attempts succeeded.<sup>27</sup> The rationale of a sentence reduction is that a criminal attempt is less dangerous to society than a completed offence (the dangerous conduct rationale), and that a sentence reduction may be an incentive not to consummate the crime.

A criminal attempt is defined by Article 45 Criminal Code, which provides that 'an attempt to commit a felony is punishable where the offender's intention manifests itself by a beginning of completion'. 'Intention' is understood as the mental element of intent (*mens rea*). A person has an indirect intent (*i.e.* the lowest level of intent), if he or she 'willingly and knowingly accepts the considerable chance that a certain result may ensue'.<sup>28</sup> Indirect intent is sufficient to support a conviction for attempt, yet the degree of intent required to commit the substantive offence, as specified in the elements of that offence, could in a particular case rule out this category.<sup>29</sup> Intent is proven by testimonies of the defendant and/or witnesses on the intention actually present in the defendant's mind throughout the act or, when these are not conclusive, the actual situation. Then the nature of the act carried out in order to constitute an attempt and the circumstances of that act are taken into account, which are occasionally even decisive.<sup>30</sup>

The *actus reus* of attempt is expressed in the phrase 'beginning of completion'. The expression is unfinished; 'beginning of completion' could refer either to the offender's intent (fitting in with the dangerous person rationale, which dominates subjective attempt theories) or to the substantive offence (fitting in with the dangerous conduct rationale, which dominates objective attempt theories). The Dutch Supreme Court follows the dangerous conduct rationale; according to consistent case law, the phrase must be read as 'beginning the completion of the intended offence'.<sup>31</sup> During the twentieth century, the law of attempt developed from a strict objectivist approach (at times even resulting in a last-act test, requiring that an act, had it been carried out, without the intervention of the perpetrator, would lead to the commission of the offence<sup>32</sup>) to a, what is called in the literature, 'moderate-objectivist' approach since 1978.<sup>33</sup>

Before I go into the test of distinguishing attempts, let me explain that the previously mentioned dangerous conduct rationale also lays the foundations for a defence of voluntary abandonment.<sup>34</sup> The Criminal Code allows for a formal defence of abandonment, since impunity

25 W.P.J. Pompe, *Handboek van het Nederlandse strafrecht*, 1959, p. 3.

26 The Act of 28 July 1920, *Staatsblad* 619 was a reaction to the (unsuccessful) socialist revolution after World War I.

27 The maximum sentence for the substantive offence is reduced by a third.

28 Intent is *colourless*, which means that intent in or by itself does not imply unlawful intent.

29 Hoge Raad 6 February 1951, *NJ* 1951, 475.

30 Hoge Raad 25 March 2003, *NJ* 2003, 552.

31 Hoge Raad 7 May 1906, *W* 8372.

32 Hoge Raad 19 March 1934, *NJ* 1934, p. 450.

33 Hoge Raad 24 October 1978, *NJ* 1979, 52.

34 Art. 46b Criminal Code. The defence is applicable to both incomplete and complete attempts (Hoge Raad 19 December 2006, *NJ* 2007, 29). The failure to consummate the crime must be due to circumstances dependent on the will of the offender ('internal cause'). A combination of internal and external factors is accepted if the offender has an active role in the interference (Hoge Raad 19 December 2006, *NJ* 2007, 29).

may be an incentive not to consummate the crime, and because, as explained in the explanatory memorandum to the 1886 Code, ‘voluntary abandonment demonstrates that the offender’s intentions were not so firm and irrevocable that he should be punished for mere intentions, of which he himself abandoned the realisation’.<sup>35</sup> From an objectivist theory point of view, if this is the case there is no criminal behaviour in legal reality.<sup>36</sup> From the dangerous conduct rationale stem also the impossibility defences that have developed in the case law. In the (moderate) objectivist approach to the law on attempt, an intention to commit the crime, a dangerous disposition, is not enough; there must be a possibility of completion. Dutch doctrine distinguishes between a ‘relative’ (extrinsic) and ‘absolute’ (intrinsic) impossibility of succeeding. Cases in which the commission of the crime failed because of extrinsic facts constitute criminal attempts, e.g. an attempt to kill someone with a non-lethal dose of arsenic or with an unloaded gun.<sup>37</sup> Absolute impossibility, on the other hand, would be a successful defence, as inherently impossible attempts pose no danger of causing harm. In practice, however, the absolute impossibility defence is of marginal significance. Absolute impossibility defences are not readily accepted (e.g., an empty till can be filled tomorrow<sup>38</sup>) and, if evidently so, the case would never come to court, as the prosecutor would drop the case beforehand. A guiding case – actually one of the rare examples that came to court – is that of a woman who had tried to kill her sick husband by serving tea made of copper coins and saffron, six times a day during a three-week period.<sup>39</sup> Nowadays, we would probably say that the case falls within the order of what Maxey, J. in his dissenting opinion in *Commonwealth v. Johnson*<sup>40</sup> calls ‘the category of “trifles,” with which “the law is not concerned”’, but at the time when the case was heard, the law on attempt had yet to take shape.<sup>41</sup> The Supreme Court chose an objectivist approach and upheld the woman’s acquittal, in view of the fact that her brew was unsuitable for the purpose of killing or harming anyone. The defence of legal impossibility (i.e. the defendant has completed all of his intended acts, but his acts fail to fulfil all the required elements of an offence) can be based either on a lack of elements<sup>42</sup> or on a putative offence.<sup>43</sup> Although it is generally assumed that the legal impossibility defence fits the objectivist theory of attempt, the literature is undecided upon the question whether a putative offence should bar liability. Authors who reject impunity usually refer to the example of the person who intends to kill someone but is using icing sugar that the pharmacist accidentally delivered instead of the requested arsenic.<sup>44</sup> Although such defences hardly occur in actual practice,<sup>45</sup> the importance of the issue should not be minimalised as it stems from the fact that the law on attempt is not purely objectivist, but rests upon both objective and subjective elements.<sup>46</sup>

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35 Smidt, *supra* note 22, pp. 423-424.

36 *Kamerstukken II* (Parliamentary Papers) 1990-1991, 22 268, no. 3, p. 21.

37 Hoge Raad 29 March 1949, *NJ* 1949, 422.

38 Hoge Raad 25 August 1932, *NJ* 1932, p. 1255.

39 Hoge Raad 7 May 1906, *W* 8372.

40 *Commonwealth v. Johnson*, 312 Pa. 140, 167 A. 344 (Pa. 1933), p. 348.

41 Cf. Hoge Raad 15 January 1980, *NJ* 1980, 245 (*Th. W. van Veen*).

42 Called in German (as borrowed from our neighbour’s doctrine) *Mangel am Tatbestand*; e.g., shooting a dead body lacks the element that is required for a murder conviction, i.e. a living person (Hoge Raad 28 December 1864, *W* 2663).

43 I.e. the person who mistakenly believes that he or she is committing an offence.

44 Smidt, *supra* note 22, p. 426; J.M. van Bemmelen & W.F.C. van Hattum, *Hand- en leerboek van het Nederlandse strafrecht*, vol. I, 1953, pp. 502-505; Pompe, *supra* note 25, p. 215.

45 A borderline case between legal and factual impossibility was the attempted murder of a woman who had died at some point in the strangulation from alcohol intoxication. The defendant pleaded not guilty, claiming that it is intrinsically impossible to murder a person who is already dead. The Supreme Court, however, held that the woman dying from alcohol intoxication must be considered the extrinsic fact that the strangulation did not lead to her death and upheld his conviction (Hoge Raad 17 March 1987, *NJ* 1988, 166).

46 C. Kelk, *Studieboek Materieel Strafrecht*, 2005, p. 318.

In the (moderate) objectivist theory of attempt, much depends on the act that is carried out in furtherance of the intention. The test that has developed in the case law to distinguish attempt from mere preparation is ‘whether to its outward manifestation the offender’s behaviour can be considered to be aimed at the completion of the offence’.<sup>47</sup> Under this test, ringing the doorbell of an employment agency, while being armed and in disguise and holding an empty overnight bag, is an attempt to commit aggravated robbery,<sup>48</sup> while ‘casing’ a bank from a car with the engine running, in which weapons and disguises are hidden, is not.<sup>49</sup> A man who took his wife out for a drive, taking along some petrol cans, and once he arrived at a parking spot, after closing the doors and windows, he emptied the petrol over his wife and over the upholstery of the car, was convicted of attempted murder when bystanders stopped him before lighting a match.<sup>50</sup> The Supreme Court held, on the other hand, that there had not been attempted arson in order to receive an insurance pay-out in a case in which a cafeteria was indeed burned down, but no conclusive evidence was found as to whether the petrol cans, which for that reason had been stored in a rabbit hutch in the courtyard, had already been emptied or whether a spontaneous petrol explosion had caused the fire.<sup>51</sup> The test can be characterised as rather casuistic and flexible. The outcome is partly dependent on the elements of the substantive offence. Aggravated offences, for example, will much more readily constitute a criminal attempt, as starting to execute the aggravated circumstance is already an attempt (e.g. the breaking and entering part in attempted burglary).<sup>52</sup> The test is, as a result of this and other factors, certainly not too narrow, and, although maybe based on different rationales, in general in its outcome is presumably not fundamentally different from that of other Western countries that use, for instance, an unequivocal test or a ‘more than mere preparation’ test.<sup>53</sup> Nevertheless, once organised crime became prevalent, and more and more people were saying that Dutch criminal law needed new inchoate offences in addition to attempt, a few authors suggested a wider law of attempt instead.<sup>54</sup> However, broadening attempt law would irrevocably alter the dangerous conduct approach into a dangerous person approach, which would have been at odds with the underlying principles of Dutch criminal law. Therefore, preference was given to the creation of new inchoate offences (Section 3).

### 3. Illegal preparatory acts

#### 3.1. Shifting boundaries

At the beginning of the 1980s, when the approach to crime became more punitive, the need was felt to create new inchoate offences that permit earlier law enforcement intervention than attempt law does. In the build-up to new legislation for combating the illegal trade in drugs, there was much discussion in Parliament about expanding conspiracy law, although the Government rejected that option for reasons of principle.<sup>55</sup> An offence of illegal preparatory and promoting activities concerning trafficking in hard drugs would fit better within Dutch criminal law, because

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47 Outward manifestation is not the same as ‘visible’. It is also attempted deception if during the negotiations on the sale of video recorders between the offender and potential victims the boxes filled with sand are still in the (closed) boot of the car (Hoge Raad 8 December 1992, *NJ* 1993, 321).

48 Hoge Raad 24 October 1978, *NJ* 1979, 52.

49 Hoge Raad 8 September 1987, *NJ* 1988, 612.

50 Hoge Raad 21 December 1993, *NJ* 1994, 293.

51 Hoge Raad 24 March 1992, *NJ* 1992, 815.

52 Hoge Raad 8 April 1997, *NJ* 1997, 575; Hoge Raad 22 June 1999, *NJ* 1999, 636.

53 Cf. R.A. Duff, *Criminal attempts*, 1996, pp. 48-53, 57-61.

54 See, amongst others, B. van Baarle, ‘Samenspanning en overvallen’, 1987 *Algemeen Politieblad*, pp. 531-534.

55 M. Rutgers, *Strafbaarstelling van voorbereidingshandelingen*, 1992, pp. 33-34.

of its focus on concrete conduct instead of the mere making of an agreement.<sup>56</sup> The scope of a conspiracy offence would be too broad to guarantee legal security for citizens. More importantly, the Government's preference for illegal preparatory acts was based on law enforcement arguments. It was believed that illegal preparatory acts are easier to prove than a covert conspiracy agreement. Moreover, an offence of illegal preparatory acts should be more effective in combating drug trafficking because of its focus on individual behaviour instead of concerted action.<sup>57</sup> In the literature, the Government's proposal to create an offence of illegal preparatory and promoting activities concerning trafficking in hard drugs was strongly criticised for minimising the individual legal protection in favour of law enforcement. The proposed statutory provision is criticised for being too vague, too wide and emphasising the mental element. It was argued that an offence that consists of putting everyday items to a specific use would still be a penalisation of mere intentions.<sup>58</sup> Despite this wave of criticism, the bill became law in 1985.<sup>59</sup> Although the offence was expected to make the prosecution of organisers and financiers of hard drugs trafficking<sup>60</sup> much easier, the offence is also nowadays used and maybe even principally used against persons at the lowest level of the organisation, like drug runners, who will not fulfil the substantive drug offences.<sup>61</sup>

During the debate on this law, the Minister of Justice promised the Lower House of Parliament that the penalisation of drug-related preparatory acts would remain a once-only measure.<sup>62</sup> However, the Government went back on this promise, when, in view of the 'credibility of criminal law as a law enforcement system',<sup>63</sup> in 1991 a proposal for a general criminal liability for preparatory acts was introduced in Parliament. That bill was passed into law in 1994.<sup>64</sup> Again, in the build-up to this legislation, a discussion about creating new conspiracy offences had started, but this discussion was once more cut short for reasons of principle. The committee that had to advise the Minister of Justice on this legislation concluded that a penalisation of intentions that are not yet materialised would affect the fundamental principle of Dutch criminal law that offences must penalise acts or behaviour.<sup>65</sup>

The explanatory memorandum to the bill was especially built upon some cases in which the offenders had intended to commit aggravated bank robberies, but only the 'casing' of the bank could be proved and the attempt charge had ended in a dismissal, or had led to decisions to drop the case beforehand. All the same, it is an offence to prepare *any* crime that is punishable by a prison sentence of eight years or more: for example, arson, counterfeiting, rape and sexual assault, deprivation of liberty, murder and manslaughter, extortion, as well as shipping and aviation offences also fall within the reach of the preparation law. Without doubt, the *cafeteria*

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56 The acts of promoting or preparation are defined as: '(1) to try to induce a person to commit a drug offence, to be an accessory to a hard drugs offence, or to aid and abet its commission, (2) to try to provide himself or another with the opportunity, the means or the information necessary to commit a hard drugs offence, or (3) to have available means of transport, objects, substances or funds, of which the offender knows or has serious reasons to believe that they are intended for committing a hard drugs offence' (Art. 10a Opium Act, in Dutch: *Opiumwet*).

57 *Handelingen II* (Proceedings of the Lower House) 1984-1985, 72, p. 4640.

58 Rutgers, *supra* note 55, p. 38.

59 Act of 4 September 1985, *Staatsblad* 495. The maximum period of imprisonment that may be imposed is six years. Since the offence is a *delictum sui generis*, voluntary abandonment is no defence (Hoge Raad 29 April 1997, *NJ* 1997, 667).

60 *Kamerstukken II* (Parliamentary Papers) 1982-1983, 17 975, no. 3, pp. 3-4.

61 T. Blom, 'Artikel 10a Opiumwet, noot 7b', in: C.P.M. Cleiren & J.F. Nijboer (eds.), *Tekst & Commentaar Strafrecht*, 2008, p. 2203, who points out that the Supreme Court approved this use (Hoge Raad 23 April 1996, *NJ* 1996, 549).

62 *Handelingen II* (Proceedings of the Lower House) 1984-1985, 72, p. 4640.

63 *Kamerstukken II* (Parliamentary Papers) 1990-1991, 22 268, no. 3, p. 7.

64 Act of 27 January 1994, *Staatsblad* 60.

65 Rutgers, *supra* note 55, pp. 45-46.

arson case, as previously mentioned, would have led to a conviction under this offence, as storing petrol cans with the purpose of using them for arson would satisfy the elements of the offence.

The offence of illegal preparatory acts is used in cases in which the substantive offence is neither consummated nor attempted.<sup>66</sup> The offence does not merge into the offence of participation in a criminal organisation (see Section 4.1).

### 3.2. *Actus reus and mens rea*

Although in comparison to attempt law, the social harm is much more distant, preparation law is also originally based on the dangerous conduct rationale. That follows from the fact that offenders receive a lesser punishment than they would have received had their efforts resulted in a criminal attempt or a completed offence,<sup>67</sup> as well as from the fact that the voluntary abandonment defence can be invoked. More importantly, the legislator had ensured this guarantee by the elements of the offence. Upon their introduction in 1994, illegal preparatory acts were defined as ‘to intentionally acquire, manufacture, import, transit, export or to have at his disposal available objects, substances, funds, information carriers, concealed places or means of transport manifestly intended to commit that crime together with others’ (Article 46 Criminal Code). Of course, the same criticism as raised against drug-related preparatory acts also applies here: the offence is too vague and too wide, its focal point is the offender’s intentions while putting everyday objects to a specific use and, moreover, the offence is dictated by law enforcement arguments rather than by reasons of criminal liability and retribution. Yet, the legislator had meant to guarantee an objectivist approach by inserting the element ‘manifestly’. The materials had to be manifestly for the purpose of committing the crime, which means that for the general onlooker it must be abundantly clear that the materials have a criminal purpose.<sup>68</sup> Furthermore, its use was restricted by a concerted action requirement.

In advance of Section 5, it might be appropriate to point out here the distinction between the concerted action requirements of conspiracy and the offence of illegal preparatory acts (at least in its original form, see below). Both offences require the participation of two or more persons. However, in contrast to conspiracy, the concerted action requirement in the offence of illegal preparatory acts is not fulfilled by jointly preparing crime, but by preparing crime that will be committed by two or more persons.<sup>69</sup> The difference may possibly be explained by the different rationales that underlie these offences. The gist of conspiracy is an agreement between two or more people to commit a crime. Conspiracy is concerned with the general danger of plotting crime; it therefore focuses primarily on the meeting of minds and intent. A basic assumption underlying conspiracy is that concerted action towards the commission of a crime results in greater risks to society than individual action (the specific object rationale). Especially in common law countries, the continuing danger of the existence of a grouping for criminal purposes provides an important rationale for the punishment of conspiracies (the general danger rationale).<sup>70</sup> The offence of illegal preparatory acts is justified by a specific object rationale, too,

66 With the exception of hard drugs cases under the Opium Act (Hoge Raad 29 April 1997, *NJ* 1997, 665).

67 The maximum sentence for the substantive offence is halved.

68 *Kamerstukken II* (Parliamentary Papers) 1990-1991, 22 268, no. 3, p. 18.

69 Cases of multiple offenders are dealt with according to the rules of complicity. A defendant may only be convicted of preparatory acts committed by co-defendants if these acts fall within the united plan and collaboration that are required for complicity to illegal preparatory acts. The offender must have an at least indirect intent, both in relation to the substantive offence and to him being an accomplice. Physical attendance is not required, if the offender has had a substantial role in planning the offence (Hoge Raad 17 November 1981, *NJ* 1983, 84).

70 ‘Developments in the law: criminal conspiracy’, 1959 *Harvard Law Review*, pp. 920-1008, pp. 924-925. See, for example, the description of its gravity by the US Supreme Court in *US v. Rabinowich* (238 US 78, 35 S.Ct. 682): ‘For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws,

but certainly not by a general danger rationale.<sup>71</sup> Following the dangerous conduct rationale, the illegal preparatory acts are connected to specific substantive offences, which ought to be committed together with others. It is argued by the Government that the commission of organised crime is more dangerous to society than singly committed crime and preparatory acts to organised crime must therefore be made a crime. The likelihood that the substantive offence will be committed is, amongst other things, considered as increased because of the difficulty for a person to withdraw, since a reversal of the decision would require the cooperation of others.<sup>72</sup>

The combating of terrorism has led to a widening of the scope of the offence by now. In 2002, the implementation of the International Convention for the Suppression of the Financing of Terrorism<sup>73</sup> led to the removal of the requirement that the intended crime would be committed together with others.<sup>74</sup> The measure was more drastic than it needed to be considering the Convention's limited scope (preventing the financing of terrorism), but lawmakers dissociated themselves from the idea that the commission of organised crime is more dangerous than singly committed crime: in their eyes it was unclear why preparatory acts for a serious crime that was intended to be committed singly should remain unpunished.<sup>75</sup> The same Act also removed the word 'funds', with a simultaneous extension of the meaning of the word 'objects' from only material objects to all objects and property rights. A third amendment was made in 2007, when the element 'manifestly' was removed.<sup>76</sup>

The question is whether these amendments, especially the last-mentioned, have changed the objectivist approach into a subjectivist approach. Lawmakers did not actually expect that the removal of the word 'manifestly' would lead to different results, as in their eyes the Supreme Court already gave a lenient interpretation to the manifest purpose requirement, what in fact served as the reason for its removal. In the literature their case law analysis and subsequent removal has been extensively discussed.<sup>77</sup> The explanatory memorandum to the bill explicitly refers to a case from 2002,<sup>78</sup> in which a man was charged with illegal preparatory acts for aggravated robbery, having at his disposal a balaclava and a stolen car with which he and his co-defendants had been observing security companies, their security delivery vans and employees.<sup>79</sup> From a dangerous conduct rationale point of view, concentrating a charge on a balaclava that was hidden in the boot of a stolen car that the police had come across near a bank makes the criminal case indeed thin – even though the search of their car was justified by the 'suspicious observation' of that bank.<sup>80</sup> Even so, the Supreme Court did not go into the issue of the manifest purpose requirement; the criminal purpose of the balaclava was tacitly accepted. The specific legal question was whether the indictment had incorrectly not been declared null and void for being

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educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered'.

71 P. Smith, *Strafbare voorbereiding*, 2003, p. 196.

72 *Kamerstukken II* (Parliamentary Papers) 1991-1992, 22 268, no. 5, p. 10.

73 Adopted by the General Assembly of the United Nations in resolution 54/109 of 9 December 1999.

74 Act of 20 December 2001, *Staatsblad* 675 (in force since 1 January 2002).

75 *Kamerstukken II* (Parliamentary Papers) 2001-2002, 28 031, no. 5, p. 4.

76 Act of 20 November 2006, *Staatsblad* 580 (in force since 1 February 2007). The proposal was part of a Bill that was introduced to Parliament in 2004, in reaction to the Madrid train bombing, in order to increase the possibilities for investigating and prosecuting terrorist offences.

77 See e.g. E. Prakken, 'Naar een cyclopisch (straf)recht', 2004 *Nederlands Juristenblad*, pp. 2338-2344; S.L.J. Janssen, 'De strafbare intentie is bijna een feit', 2006 *Nederlands Juristenblad*, pp. 1005-1006; E. Gritter & E. Sikkema, 'Bestemming onbekend', 2006 *Delikt en Delinkwent*, pp. 277-302.

78 Hoge Raad 17 September 2002, *NJ* 2002, 626.

79 *Kamerstukken II* (Parliamentary Papers) 2004-2005, 30 164, no. 3, p. 49.

80 For the record, I note that a balaclava is an ordinary form of headgear, e.g. used by motorcyclists under their crash helmets and in outdoor winter sports activities in order to keep warm.

unclear and insubstantial.<sup>81</sup> It so happens that the indictment contained little information about the substantive offences aimed at. Their types, including the relevant sections of the law, were indicated, but a description of the way in which these offences would have been committed or a listing of their elements was lacking. The Supreme Court ruled that a charge under Article 46 Criminal Code does not necessarily need to contain all the elements of the substantive offence, as long as it is made sufficiently clear which criminal offence has been prepared. This apparent procedural ruling affects the (whether or not manifest) purpose test, as such a test does not amount to much if the objective that one was working towards is unexplained (the more so, since in the Netherlands, the facts described in the charge set the limits of the case). Both criticisms must not however disregard the fact that the thinness of the case was also a result of the fact that although the legislator has defined all the elements of the offence of illegal preparatory acts in the plural, the Supreme Court is already satisfied with a few, minor, overt acts. After all, ‘casing’ a bank, on foot, with empty pockets, is not an offence.<sup>82</sup>

### 3.3. *Mens rea: subjective purpose*

Since the removal of the word ‘manifestly’, the subjective purpose, the *mens rea* element (intent), suffices.<sup>83</sup> Assuming that the Supreme Court will hold on to its settled case law, the effect of the removal can be derived from case law under the previous definition of preparatory acts. An important decision in this respect was the ruling in the *Samir A.* case.<sup>84</sup>

In April 2004, a supermarket was robbed in Rotterdam. An employee of the supermarket, a 17-year old Muslim teenager, Samir A., who had been working at the supermarket for a few months, was suspected of complicity in the robbery, as he had opened the roll-down shutter of the stockroom through which the perpetrators entered the building. During a search of his house the police found a cartridge clip, a silencer, an imitation firearm, a bulletproof vest, night-vision glasses, several handmade floor plans of public service buildings (including the Lower House of Parliament, the nuclear power plant in Borssele and Schiphol airport), notes on their locations and security measures, as well as chemicals and electronic equipment (self-assembled materials to create a bomb). The Terrorist Offences Act 2004 (*Wet Terroristische Misdrijven*) being not yet in force,<sup>85</sup> Samir A. was charged with the illegal preparation of murder and the illegal preparation of arson and/or causing an explosion. Experts concluded that the electronic equipment seized (a small plastic bottle with electric fibre and filled with a chemical) was not at all suitable for causing an explosion, if only because the detonator was made of Christmas-tree lights and the artificial fertiliser that was found lacked the necessary ammonium nitrate. The ‘casing’

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81 Among other requirements, a criminal indictment must be precise enough to inform the defendant of the charge against which he or she must defend him/herself (Art. 261 Code of Criminal Procedure (*Wetboek van Strafvordering*)). If an indictment is too vague and indefinite, the court may declare the indictment null and void. Since this decision does not affect the contents of the case, it is not considered double jeopardy when, thereafter, the prosecution brings a new charge against the defendant for the same crime.

82 Assuming that one refrains from any preparatory act as referred to in Art. 46 Criminal Code and that one is not a participant in a criminal organisation (Art. 140 Criminal Code). See e.g. *Rechtbank Dordrecht* 20 December 2007, *LJN* BC1065.

83 *Kamerstukken II* (Parliamentary Papers) 2004-2005, 30 164, no. 3, p. 49.

84 Hoge Raad 20 February 2007, *LJN* AZ0213.

85 The Terrorist Offences Act has declared that Art. 96(2) Criminal Code, which formerly only penalised (*as delictum sui generis*) illegal preparatory acts for offences against the State, is applicable to terrorist offences. The acts of promoting or preparing terrorist offences are defined as: ‘(1) to persuade a person to commit the offence, to be an accessory to the offence, or to aid and abet its commission, (2) to try to provide himself or another the opportunity, the means or the information necessary to commit the offence, (3) to have available objects of which the offender knows or has serious reasons to know that they are intended for committing the offence, (4) to prepare or have available plans for the realisation of the offence, which are intended to be made known to others, (5) to try to obstruct, hinder or thwart measures taken by the government to prevent the committing of the offence. The restriction of section 3 to ‘objects’ (contrary to Article 46 which cites further materials, such as ‘data carriers’) is not, as is apparent from the case law, an obstacle in judicial proceedings. Computers and USB sticks are classified as ‘objects’ (*Rechtbank Rotterdam* 14 February 2006, *LJN* AV1652).

of the buildings was done very amateurishly, too. Most information was simply gathered from the Internet.

At first instance, the Rotterdam District Court acquitted the defendant of preparing an attack as well as the complicity in the robbery charge, but sentenced him to a term of three months imprisonment for the illegal possession of arms and ammunition.<sup>86</sup> The Court considered that it was not necessary that the materials seized were already ready for use. It ruled that most objects seized were indeed for the purpose of committing a crime. However, from the materials seized and information that the Court had acquired about an earlier trip by the defendant when he headed for Chechnya,<sup>87</sup> the Court could only conclude that the defendant had more than an average interest in religious violence. The offender's intention to commit the above-mentioned offences with these materials could not be proved. Finally, the Court noted that the electronic construction was indeed for the purpose of committing a crime, but that it had to be excluded from the evidence for reasons of factual impossibility. On appeal, the defendant was also acquitted, but for different reasons.<sup>88</sup> The Hague Court of Appeal considered it impossible that on basis of this incomplete information a successful attack on the buildings could have been even taken to the preparation stage. The Court of Appeal said that it is not only the question whether materials can contribute to the commission of the intended substantive offence in the abstract. It is also the question what real interest could the materials have for committing the substantive offence and, with that, whether manufacturing materials or having materials at his disposal amount to a concrete and/or actual danger. The Court of Appeal concluded that, in spite of the defendant's terrorist intention, his preparations were at such an early stage and so unwieldy and primitive, that it radiated no actual threat nor would do so within the near future.<sup>89</sup> Although similar in outcome, their reasoning reveals a fine difference in the interpretation of the manifest purpose requirement. The reasoning of the District Court with regard to the constructed electronic equipment seems to be inspired by the legal rule that attempts by absolutely impossible means are not punishable. Although this has never been explicitly discussed as a legal question in case law, the distinction between absolute and relative impossibility is assumed to have significance for the law on preparation, too.<sup>90</sup> The reasoning of the Court of Appeal is based on a dangerous conduct or specific object rationale, in so far as it places the likelihood that the offender might be successful in committing the substantive offences first.

The public prosecutor lodged an appeal with the Supreme Court, which reversed the decision on the preparation charge due to its wrongful interpretation of the legal notion of preparatory acts.<sup>91</sup> The Supreme Court ruled that the Court of Appeal 'had erred in failing to assess whether at the time of the action the objects seized, separate or together, by their outward manifestation, can be suitable for the criminal purpose the defendant has in using them'. The case was returned to the Amsterdam Court of Appeal, which imposed a sentence of four years' imprisonment, after the prosecution had demanded six years.<sup>92</sup> The Amsterdam Court of Appeal

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86 Rechtbank Rotterdam 6 April 2005, *LJN* AT3315.

87 A year before, he and a friend had attempted to travel to Chechnya to help their 'Muslim brothers' in their fight against the Russian Army. However, Ukrainian border guards had detained them and put them back on the train to Amsterdam. Their unsuccessful trip attracted the attention of both the media and the Dutch general intelligence and security service (AIVD). Nine months later, Samir A. was arrested together with four others for planning a terrorist attack. Due to a lack of evidence the group were released shortly afterwards (ANP, 2 September 2004, [http://www.om.nl/terrorisme/\\_terrorisme\\_nieuwsberichten/24211/](http://www.om.nl/terrorisme/_terrorisme_nieuwsberichten/24211/)).

88 Perhaps unnecessarily, I note that in the Netherlands the Court of Appeal re-examines the facts of the case and reaches its own conclusions. Being a continuation of the same trial, this is not double jeopardy.

89 Hof Den Haag 20 November 2005, *LJN* AU6181.

90 C.M. Pelsler, 'Artikel 46, noot 8c', in: Cleiren & Nijboer (eds.), *supra* note 61, pp. 404-405.

91 Hoge Raad 20 February 2007, *LJN* AZ0213.

92 Hof Amsterdam 17 September 2007, *LJN* BB3756.

considered the early stage that gave rise to The Hague Court of Appeal's acquittal to be merely a characteristic of the law on preparation. In order to prevent a conviction based on mere intent, the intent must however follow from objective circumstances, said the Court of Appeal. Therefore, it had to establish an 'externalisation' of the intent. That having been said, the Court of Appeal did not mind that not all of the objects seized were already suitable for use. It ruled that all the belongings of the defendant together and in that connection had a preparatory and criminal nature. The Court of Appeal also took into account that the defendant had expressed sympathy for violence and radical Islam in the past. The Court of Appeal noted that the defendant had chosen to remain silent during the trial; his failure to explain the objects found was taken into account. His lawyer's plea that he had been trained as a laboratory assistant and that was why he was probably interested in chemicals and experiments was rejected. As an aside, the Court noted that such training would even add to his capacities to construct explosives.

Although its effect on the *Samir A.* case is clear, the exact meaning of the ruling by the Supreme Court is still very much in dispute. Some argue that the Supreme Court distanced itself from prior case law; others, by contrast, consider that its decision is a continuation of that case law.<sup>93</sup> The outward manifestation phrase was already known. The phrase is borrowed from the law on attempt and was used, for instance, in a case dating from 2003, in which a man had been observing a bank together with his co-defendant, using a Ford Transit van. The man was charged with preparatory acts for aggravated robbery, having at his disposal a vehicle manifestly for the purpose of committing that crime together with others. On appeal, his lawyer rebutted the charge, as the van was the defendant's company van and thus an everyday object. Decked in bright yellow stripes and noisy (the diesel engine had worn out), it was too striking to use for committing an offence, he stated. The Court of Appeal, however, considered that the defendant had parked the van across the street and, sitting in the car, he and his co-defendant had observed the building for some time. Then he had driven off and pulled up somewhere else, got out of the van, and walked around the building and got in again. From this, the Court of Appeal deduced that the offenders had been apparently observing the bank with the purpose of robbing it. At that time, the offenders were thus using the van for that criminal purpose, said the Court. The Court of Appeal also took into account that three co-defendants, apparently with the same purpose, had been observing the same bank a few days earlier. His conviction was upheld by the Supreme Court. From its reasoning, the Supreme Court drew the conclusion that the Court of Appeal had rightly evaluated the van as to its outward manifestation, its use and the criminal purpose that the offenders had in mind concerning the van.<sup>94</sup> The ruling widened the scope of the offence (insofar as this had not already been done by the *Balaclava* case), since the purpose of an object may be deduced from the entirety of the objects seized, combined with their use and the criminal goal of the offenders. Besides, the ruling departs from a wider interpretation of the offence than its wording implies, as an intended use of the van during the planned robbery was not required.<sup>95</sup>

The *Samir A.* case seems to be pushing the frontiers once again. It is a matter of cause that inchoate offences play their role in cases in which the completion (or even the start of completion) of the substantive offence was halted before the actual danger could be realised and in which it might never be proven that that danger effectively would have been realised. In the *Samir A.* case, the objects seized were perhaps meant to be used for a future attack. However, it

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93 N. Rozemond, 'De subjectivering van het Nederlandse strafrecht', 2007 *Nederlands Juristenblad*, p. 2301-2305; E. Gritter & E. Sikkema, 'Subjectivering van het Nederlandse strafrecht?', 2008 *Nederlands Juristenblad*, p. 99-100; K. Rozemond, 'Hoe subjectief is "daadwerkelijke voorbereiding"?' *Naschrift*, 2008 *Nederlands Juristenblad*, p. 100-101.

94 Hoge Raad 18 November 2003, *LJN* AJ0535.

95 In the literature, this interpretation was already accepted. See G.A.M. Strijards, *Strafbare voorbereidingshandelingen*, 1995, p. 130.

is perfectly clear that the defendant would have had to go a long way before even making a move in that direction, apart from the fact that he could have encountered such obstacles on this path that he would have had to reconsider his decision or would have simply been distracted from his plans. Some authors give the Supreme Court the benefit of the doubt and typify the outward manifestation test as still being an objective test.<sup>96</sup> In my opinion it is objectivity so only on the surface. An evaluation that is not based on preparatory acts that provide a real possibility that the offender might be successful in committing the substantive offence but on a hypothesis that he might ever reach that point results inevitably in a subjective test in which the alleged intention of the defendant plays a leading part.

### **3.4. Do rationales still suffice?**

The early intervention justification of conspiracy offences is based on the idea that the crime is more likely to be committed if there is more than one person involved.<sup>97</sup> In the Dutch dangerous conduct approach to inchoate crime, it is not numbers that are felt to increase the criminal risk, but the acts that are done to attain the criminal goal. The Netherlands has therefore given preference to illegal preparatory acts to combat serious crime. The most important reason for penalising preparatory acts is their causal connection to the aimed substantive offence. The ruling of the Supreme Court in the *Samir A.* case may have affected this causal connection. Despite the use of the familiar test, the conviction seems not to have been so much based on preparatory acts that provide a real possibility that the defendant might be successful in committing the substantive offence, but on the idea that he was maybe incapable of committing terrorist offences on this particular occasion, but has manifested his desire to commit this crime in the future. That raises the troublesome question whether a specific object rationale is still an adequate justification. From a specific object rationale point of view, the scope of the offence ought to be limited to advanced preparations, *i.e.* cases in which there is a real possibility that the offender might be successful in committing the substantive offence. However, the statutory provision misses such limitations and the ruling in the *Samir A.* case may be considered as an affirmation that this principle is not part of the case law. The Supreme Court's ruling, as well as the recent amendments to the provision, gives reason to fear that nowadays the likelihood that the substantive offence will occur may be outweighed by the social danger of preparing crime. Although somewhat premature, given that the Supreme Court has not yet dealt with cases under the current provision, one could hardly conclude otherwise than that a 'general danger' rationale is becoming a more appropriate foundation.<sup>98</sup> It is tentatively concluded that an offence has been created that is proven on the basis of (a few) overt acts, but especially of intentions.

## **4. Participation in a criminal or terrorist organisation**

### **4.1. Inchoate group acts**

The facts that Dutch criminal law has no broad concept of conspiracy and the danger that a substantive crime will occur is countered by the offence of illegal preparatory acts, do not result in a disregard for the other aspect of conspiracy law – the ongoing dangers of 'partnership in crime'.<sup>99</sup> The Netherlands, however, has taken the civil law approach; under Article 140 of the

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<sup>96</sup> Gritter & Sikkema, *supra* note 93, p. 100.

<sup>97</sup> R. Hazell, *Conspiracy and civil liberties*, 1974, p. 94.

<sup>98</sup> Cf. Hazell, *supra* note 97, p. 95.

<sup>99</sup> *Pinkerton v. United States*, 328 US 640 (1946); Hoskins, *supra* note 6, p. 247.

Dutch Criminal Code, it is an offence to participate in an organisation whose object is the commission of crimes.<sup>100</sup>

Participation in a criminal organisation is an inchoate offence, as it is sufficient to be involved in the organisation; an actual contribution to the commission of the offences that the organisation intends to commit is not required. It is even not required that the organisation's object be already realised; the organisation does not need to have already committed offences. In other words, the offence includes preparatory acts of entering into and maintaining a long-lasting collaboration, which is aimed at the commission of crimes.<sup>101</sup> Now that a direct relation between the preparatory behaviour and the commission of crimes is lacking, the offence extends over preparatory conduct at an even earlier stage than the offences of illegal preparatory acts do, as well as over discussions preceding a conspiracy agreement.<sup>102</sup> Nonetheless, the offence hardly played a role in the discussions concerning the penalisation of illegal preparatory acts twenty-five years ago. At that time, Article 140 was an impractical provision dealing with illegal participation in a legal person and was rather unknown. In 1988, the element 'legal person' was changed into 'organisation'.<sup>103</sup> Since then the offence has often been used, not only for typical organised crime cases (e.g. drug trafficking, fraud, money laundering, trafficking in women for the purpose of prostitution), but also for groups like squatters and graffiti gangs.<sup>104</sup>

#### 4.2. *Actus reus and mens rea*

'Organisation' is a factual term. According to the case law, its meaning is a structured and lasting form of collaboration between two or more persons.<sup>105</sup> Not only members of established groups with clear hierarchies and defined roles, but also persons in looser criminal networks fall within the reach of this definition. Family relations, too, such as a father and son working together in the hemp trade.<sup>106</sup> The composition of the cooperative group may vary.<sup>107</sup> Furthermore, it is not required that a participant actually cooperated with, or even knew all the other persons who belonged to the organisation.<sup>108</sup> Therefore, two separate groups can be considered as one organisation due to the collaboration of two of the kingpins.<sup>109</sup> A 'chain' is also possible: one can participate in a criminal organisation, which in its turn participates in another criminal organisation.<sup>110</sup> The organisation must have the direct goal of committing crimes, to be exact felonies (*misdrifven*). In other words, its actual activities must be directed towards the commission of crimes (the dangerous conduct rationale). It is not required, however, that the commission of crimes is the only purpose of the organisation; its aims and goals may be also legal.<sup>111</sup> The

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100 The offence of participation in a criminal organisation carries a maximum penalty of six years' imprisonment; participation in the continuation of the activities of a prohibited organisation is punishable by a maximum penalty of one year imprisonment. The maximum penalties are increased by a third for founders, leaders and directors of the organisation.

101 *Kamerstukken II* (Parliamentary Papers) 1984-1985, 17 476, nos. 5-7, p. 8.

102 M.J.H.J. de Vries-Leemans, *Art. 140 Wetboek van Strafrecht: een onderzoek naar de strafbaarstelling van deelneming aan misdaadorganisaties*, 1995, pp. 23-24.

103 Act of 17 March 1988, *Staatsblad* 104. The term legal person was an element of the offence from 1976-1988. Before 1976, the word 'association' (*vereniging*) was used, which was derived from the French offence of 'association de malfaiteurs' (Art. 265 Code Pénal). 'Association' was a factual term. It included gangs and incorporated societies. De Vries-Leemans, *supra* note 102, pp. 28-30.

104 Hoge Raad 10 July 2001, *NJ* 2001, 687; Rechtbank Den Haag 28 May 2004, *LJN* AP0265. Football hooligans do not amount to a criminal organisation (Hoge Raad 10 July 2001, *LJN* ZD2826).

105 Hoge Raad 16 October 1990, *NJ* 1991, 442; Hoge Raad 26 October 1993, *NJ* 1994, 161; Hoge Raad 10 July 2001, *NJ* 2001, 687.

106 Hoge Raad 11 April 2006, *NJ* 2006, 393.

107 Hoge Raad 29 January 1991, *Nederlands Juristenblad* 1991, 50; Hoge Raad 22 January 2008, *NJ* 2008, 72.

108 Hoge Raad 9 November 2004, *LJN* AQ8470.

109 Hoge Raad 22 January 2008, *NJ* 2008, 72.

110 Hoge Raad 13 October 1987, *NJ* 1988, 425.

111 E.g. Hoge Raad 8 May 1978, *NJ* 1978, 314; Hoge Raad 8 May 1978, *NJ* 1978, 315; Hoge Raad 26 June 1984, *NJ* 1985, 92; Hoge Raad 26 February 1991, *NJ* 1991, 499.

organisation's objective is defined in the plural; the commission of a single offence or the intention to commit a single offence is not sufficient.<sup>112</sup> However, recently the Supreme Court has weakened the multiple offences requirement, which will be discussed below (Section 4.3).

In line with Dutch criminal law principles, the offence is based on an individual's participation in the group, rather than membership. He or she must belong to the organisation and take an active part in or support behaviour that serves directly or that is directly connected with the purpose of the organisation.<sup>113</sup> The rather lenient intent requirements in the case law may however tend to point towards membership, as the individual must know that the organisation has the object of committing a crime, but he or she does not need to have knowledge of any specific offence, not even when the offences vary.<sup>114</sup> For example, a man who participated in a joint venture that imported t-shirts from China, and was made responsible for sales, had forged invoices of the enterprise. He was charged with both forgery and participation in an organisation whose object was to commit forgery and evading customs formalities. The defendant's plea that he was not informed that the t-shirts were fraudulently imported into the EEC was considered not to be relevant, since he had knowledge of the criminal objectives of the organisation, given that he himself had regularly forged invoices for the benefit of the organisation.<sup>115</sup>

In 2004, because of the Council Framework Decision of 13 June 2002 on combating terrorism,<sup>116</sup> the previously mentioned Terrorist Offences Act introduced the offence of participation in an organisation whose object is the commission of terrorist offences (Article 140a).<sup>117</sup> Besides, Article 140 is added with the clarification that participation is also the granting of financial or other material support to, as well as the acquisition of money or persons in favour of the organisation. Except for the terrorist purpose,<sup>118</sup> the elements of the offence of participation in a terrorist organisation are derived from the existing offence of participation in a criminal organisation and must therefore be interpreted in the same way.<sup>119</sup> Apart from the numbers (two or more versus more than two), the elements of a criminal organisation within the meaning of the Dutch Criminal Code and its case law and a terrorist organisation within the meaning of the Council Framework Decision link up with each other perfectly. Nevertheless, the feasibility of the offences is tested in terrorist cases with varying success at present, not only because of evidentiary problems but also because of disagreements over the interpretation of the elements of the offence. An important case in this respect is the case that was discussed in the aforementioned prosecutor's lecture (Section 1).

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112 De Vries-Leemans, *supra* note 102, p. 44.

113 Hoge Raad 29 January 1991, *DD* 91.168; Hoge Raad 29 January 1991, *DD* 91.169; Hoge Raad 18 November 1997, *NJ* 1998, 225.

114 Hoge Raad 18 November 1997, *NJ* 1998, 225; Hoge Raad 8 October 2002, *NJ* 2003, 64; Hoge Raad 5 September 2006, *NJ* 2007, 336.

115 Hoge Raad 18 November 1997, *NJ* 1998, 225.

116 Art. 2 of the Framework Decision (2002/475/JHA): '1. For the purposes of this Framework Decision, "terrorist group" shall mean: a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist offences. "Structured group" shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure. 2. Each Member State shall take the necessary measures to ensure that the following intentional acts are punishable: (a) directing a terrorist group; (b) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group.'

117 Following the Council Framework Decision, illegal participation in a terrorist organisation shall be punished with a maximum prison sentence of 15 years. Founders, leaders and directors of the terrorist organisation will be punished with life imprisonment or a maximum period of thirty years' imprisonment.

118 A terrorist purpose is defined as 'the purpose to terrify the population or a part of the population of a country, or to unlawfully force a government or international organisation to do, to refrain from or to tolerate something, or to seriously disrupt or destroy the fundamental political, constitutional, economic or social structures of a country or an international organisation' (Art. 83a Criminal Code).

119 *Kamerstukken II* (Parliamentary Papers) 2002-2003, 28 666, no. 1, p. 3.

In the case concerned, members of the so-called *Hofstad* Group,<sup>120</sup> a group of young Muslim men and women connected with the murderer of film director and publicist Theo van Gogh, who was killed in November 2004, were prosecuted. These young men and women were not experienced perpetrators of violence, but, as some say, rather ‘a chaotic bunch of terrorist kids’.<sup>121</sup> The previously mentioned Samir A. is believed to have been a member of this group. They met each other in different compositions at someone’s home – everybody went when he or she had time and felt like it – for social reasons and to discuss Islam and, according to the authorities, to discuss and glorify violent Jihad. Soon after the murder of Van Gogh, some of them were arrested and charged with participation in an organisation whose object is the commission of criminal or terrorist offences. In December 2006, the District Court of Rotterdam convicted nine of them (five ‘followers’ were acquitted).<sup>122</sup> The District Court considered that the nine formed an organisation whose object was to promote documents and pictures that promote or glorify hate and violence, to sow the seeds of hate and to threaten with terrorist offences. The Court ruled that the actions of the defendants that supported the purpose of the organisation included organising or facilitating meetings where sedition or sowing the seeds of hate took place, being speakers or discussion leaders at these meetings, the propagation of the ideology of the group (including recruiting and calling for martyrdom), as well as creating, having at their disposal, distributing within or outside the group and showing documents and video material that sow the seeds of hate and are threatening and, finally, facilitating their distribution (by making someone a member of an MSN group and repairing computers).<sup>123</sup> Acts that were considered *not* to be concerted actions were attending the meetings in question, having at their disposal (for private use), receiving, reading, watching and listening to the materials mentioned; occasionally driving a group member, lending a car, keeping goods for another member, sheltering someone, if these acts were for reasons that were not connected to the criminal purpose. The convictions were however reversed on appeal. In January 2008, The Hague Court of Appeal ruled that the *Hofstad* Group was not a criminal or terrorist organisation, since no durable and structured cooperative bond, nor a common ideology, could be found.<sup>124</sup> Based on expert evidence, the Court of Appeal concluded that the defendants had no shared ‘radical political ideology, based on an extremist, Takfir interpretation of Tawheed’ or of a shared ‘jihadist’ ideology. Furthermore, the Court of Appeal considered that the group had no stability and common rules and no common objective, to which the individual members were committed and which collectivity put pressure on members to keep to the rules and to feel tied to its objective. Besides, violence and violent Jihad was not their nearest goal but rather a final goal, which does not satisfy the elements of the offence. The public prosecutor has lodged an appeal at the Supreme Court that, at the time of writing this article, is still to be heard.<sup>125</sup> In the meantime, The Hague Court of Appeal has convicted Samir A. and co-defendants of participation in

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120 The English translation of *Hofstad* is court-capital; the group is named after their domicile in The Hague, which is the residence of Queen Beatrix.

121 E. Vrijzen, ‘Terrorisme: Zonen van de Syriër’, *Elsevier* 22 July 2005, <http://www.elsevier.nl/web/1041702/Dossiers/Opinie-Hofstadgroep/Terrorisme-Zonen-van-de-Syriër.htm>

122 Rechtbank Rotterdam 10 March 2006, *LJN* AV5108.

123 For an analysis of the freedom of speech issue in this case, see M. van Noorloos, ‘De “Hofstadgroep” voor het Haagse hof; over de vrijheid van radicale uitingen in het publieke debat’, 2008 *Delikt en Delinkwent*, pp. 475-498.

124 Hof Den Haag 23 January 2008, *LJN* BC2576, Hof Den Haag 23 January 2008, *LJN* BC4129, Hof Den Haag 23 January 2008, *LJN* BC4171, Hof Den Haag 23 January 2008, *LJN* BC4177, Hof Den Haag 23 January 2008, *LJN* BC4178, Hof Den Haag 23 January 2008, *LJN* BC4182, Hof Den Haag 23 January 2008, *LJN* BC4183.

125 In a case against co-defendants, the District Court of Rotterdam applied the same interpretation (Rechtbank Rotterdam 25 March 2008, *LJN* BC7531; Rechtbank Rotterdam 25 March 2008, *LJN* BC7539). Moreover, the District Court criticised the Court of Appeal’s ruling for being too stringent and not in line with the Supreme Court’s rulings on illegal participation in a criminal organisation.

a terrorist organisation, in the period subsequent to that of the *Hofstad* case.<sup>126</sup> Their lawyers have now lodged an appeal at the Supreme Court.

### **4.3. Group danger rationale**

Participation in a criminal or terrorist organisation is a substantive offence; it is classified as a public order offence. It does not merge into the subjective offences committed when contributing to that organisation. A person may be charged with and be convicted of both substantive offences and participation in a criminal or terrorist organisation whose object is to commit those very offences.<sup>127</sup> As regards their inchoate nature, the offence of participation in a criminal or terrorist organisation shows similarity to the offence of illegal preparatory acts, but because of their different approach and rationale these offences do not merge either.<sup>128</sup> The prosecutor has the option of combining the offences in a cumulative charge or to choose between them. A charge of illegal preparatory acts has the advantage that no concerted action has to be proven; a charge of participation in a criminal organisation has the advantage that the prosecutor does not have to prove individual contributions to the commission of crimes.<sup>129</sup> Criminal liability for participation in a criminal organisation, separate from and in addition to that imposed for the substantive offences which the organisation intends to commit, has been justified by a group danger rationale. The idea is that collaborative criminal activities pose a greater potential threat to the public than individual acts and that group dynamics increase the chances that the object of the organisation will be achieved.<sup>130</sup> A cumulative charge gives a possibility to impose extra punishment on those who threaten society through concerted group action.<sup>131</sup>

Because of this rationale and its functioning, the offence of participation in a criminal or terrorist organisation shares certain similarities with common law conspiracy offences. Stenson argues that the differences between the civil law and common law approach are minimal. ‘Only those conspiracies which do not involve an organized group would fall outside the civil law model of “criminal organization.” The number of groups outside that European model will be small, as a criminal agreement could be construed, essentially, as the formation of an organization toward that criminal end.’<sup>132</sup> I think that he is right in his conclusion, but it should be remembered that the ‘concerted action’ requirements of participation in a criminal organisation are much more stringent. Whereas an agreement to commit a single crime is sufficient to meet the elements of conspiracy, participation in a criminal organisation requires long-lasting collaboration along established lines and multiple offences.<sup>133</sup> Only those conspiracies that consist of close collaboration and a plurality of offences could be construed as participation in a criminal organisation, which, in fact, is regularly done as part of the dual criminality test in extradition procedures.<sup>134</sup>

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126 Hof Den Haag 2 October 2008, *LJN* BF3987 (*Piranha* case).

127 However, it is standard to impose one sentence. The maximum penalty that may be imposed is that of the addition of all the maximum penalties, with the exception of the sentence of imprisonment. The maximum term of imprisonment may be added to the maximum penalty for the most serious offence plus one-third (Art. 57 Criminal Code).

128 Hoge Raad 20 April 1997, *NJ* 1997, 667 (*A.C. 't Hart*).

129 Rutgers, *supra* note 55, pp. 144-145.

130 A.H.J. Swart, ‘Verboden organisaties en verboden rechtspersonen’, in: Ch. J. Enschedé *et al.* (eds.), *Naar eer en geweten*, 1987, pp. 607-624, p. 610.

131 S.A.M. Stolwijk, ‘Criminele organisaties en artikel 140 Sr’, 2002 *Delikt en Delinkwent*, pp. 429-435.

132 T. Stenson, ‘Inchoate crimes and criminal responsibility under international law’, 2003-2004 *The Journal of International Law & Policy*, Volume I, pp. 12-13, <http://www.pennjil.com/jilp.html>

133 *Kamerstukken II* (Parliamentary Papers) 1984-1985, 17476, nos. 5-7, p. 17.

134 See *e.g.* Hoge Raad 20 June 2000, *NJ* 2000, 493; Hoge Raad 30 March 2004, *NJ* 2004, 522; Hoge Raad 20 June 2006, *NJ* 2006, 382.

However, in a case dealt with by the Dutch Supreme Court in 2007, the interpretation of participation in a criminal organisation is almost like that of a (common law) conspiracy case.<sup>135</sup> The facts of the case were as follows. In May 1999, a container, which according to the documents would contain boxes with frozen mango and papaya pulp, was transported by ship from Colombia to Europe. In July 1999, the container arrived in Italy. During a search, the Italian customs authorities found 1,442 kilograms of cocaine (1,203 packages) in the container, packed in barrels. All the packages were seized, except for two, which were put in a barrel and put back in the container. By doing this, the intention was to find out who were the persons behind the scenes concerning this transport. The container was shipped to the Greek port of Thessaloniki, where it arrived in August 1999. In the meantime, investigations had raised the suspicion that the final destination of the transport could be the Netherlands. In Thessaloniki port, a Dutchman requested the departure of the container from the free zone. After permission, the goods in the container were transferred to a Greek refrigerator truck. Via Igoumenitsa port, the truck went to the Italian port city of Trieste. From Trieste, it travelled further to Austria, where the truck was seized in Vienna.

The defendant was charged with participation in a criminal organisation whose object was to repeatedly deliver and transport goods containing cocaine, although the evidence produced did not include other offences than the drugs transportations concerned. The Amsterdam Court of Appeal ruled that the realisation of a narcotics transport of a scope and complexity as the one in question requires a criminal organisation whose object is to commit several indictable offences. In its execution – among other things – goods are repeatedly transported, delivered and cleared. Each next link and stage demanded on each occasion new decisions and activities to bring, or to allow the narcotics to be brought to the next destination. The defendant lodged an appeal at the Supreme Court, pleading that that the Court of Appeal had erred in its ruling, since the cocaine transport did not concern the required multiple offences. The Supreme Court explained that for proving the organisation's objective value may be attached to amongst other things the indictable offences which have already been committed within the framework of the organisation, the durable or structured character of the cooperation, which can be proved by the mutual allocation or attuning of the activities of the participants within the organisation with a view to reaching the common aim of the organisation, and, more generally, the systematic or consistent character of the activities of the participants within the organisation that are performed with a view to this aim. The Supreme Court rejected the defendant's complaint, since 'the decision process and activities of the different participants within the organisation in the several countries concerning the transport, delivery and export of the cocaine were mutually narrowly coordinated and had a systematic character'.

Article 140 does not require that the offender intended to commit (more) indictable offences or that he or she was actually involved in indictable offences that are committed within the organisation. It is sufficient that it is proven that the offender participated in an organisation, whose object is the commission of (several) crimes. Therefore, it did not matter that the defendant was acquitted of the charge that he was involved in an attempt to import cocaine into the Netherlands. Still, a criminal organisation is a structured and lasting form of collaboration between two or more persons. At trial, the defendant had argued that it was only one drugs transport, based on the sole intention to bring the quantity of cocaine from its place of departure to its final destination. Nevertheless, the Supreme Court regarded the drugs transport in its

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135 Hoge Raad 15 May 2007, *LJN* BA0502, *NJ* 2008, 559.

complexity as the organisation's objective. Based upon a single offence, although complex in its execution, we could hardly conclude otherwise than that the Supreme Court's ruling reduces the gap between the common law and the Dutch civil law approaches.<sup>136</sup>

## 5. Conspiracy law

### 5.1. Scope and use

In the traditional Dutch approach to inchoate crime, the focus is on the penalisation of acts or behaviour. This position leaves no place for a broad concept of conspiracy, as these offences have no direct relationship between acts and the intended substantive offence. Therefore, the concept of conspiracy is largely absent from Dutch criminal law, restricted to only the most serious substantive offences. Originally, these were mainly offences against the State, viz. conspiracy to attack the King or Queen, conspiracy to subject the State to foreign rule, conspiracy to unlawfully overthrow the Government, conspiracy to use violence against the Council of State or a meeting of the Cabinet, conspiracy to assist the enemy, or conspiracy to use violence against Parliament.<sup>137</sup> Because of its very narrow scope, conspiracy law was almost dormant. On one occasion, in the mid 1970s, the offence of conspiracy to attack the Queen was used against a group of South Moluccan activists who had intended to take the former Queen Juliana hostage.<sup>138</sup> The hostage taking was meant as a lever to get the Dutch Government to acknowledge the South Moluccan Republic (*Republik Maluku Selatan*), an independent state, and to try to make the Indonesian Government to do the same. Their plan failed when the police, who had been tipped off shortly before the intended hostage taking, stopped two of them while driving some 35 kilometres from the royal palace with a car full of weapons and ammunition.<sup>139</sup>

The South Moluccan actions (and other political violence) raised the question whether conspiracy law should be extended to terrorist crime, but the discussion thereon petered out when these actions ended.<sup>140</sup> As mentioned before, in the 1980s discussions about widening the scope of conspiracy law started once again, but ended with the appropriate conclusion that conspiracy offences do not fit within Dutch criminal law. The current fight against terrorism has however made the Government change its mind. Although conspiracy offences are very rarely used and the Criminal Code has seen the addition of other inchoate offences in the meantime, the scope of Dutch conspiracy law has, by now, been widened. In 2004, Dutch conspiracy law saw the addition of almost thirty terrorist conspiracy offences.<sup>141</sup> Examples of terrorist conspiracy offences vary from conspiracy to attack, with a terrorist purpose, the head of a friendly nation, to conspiracy to destroy, with a terrorist purpose, waterworks, conspiracy to commit arson with a terrorist purpose, conspiracy to murder with a terrorist purpose, conspiracy to deprive someone of his/her liberty with a terrorist purpose and even conspiracy to commit grievous bodily harm with a terrorist purpose.

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136 Cf. Hoge Raad 15 May 2007, *NJ* 2008, 559 (P.A.M. Mevis).

137 In 1971, conspiracy to hijack aircraft was made an aggravated circumstance if an aircraft is hijacked (Act of 31 March 1971, *Staatsblad* 166).

138 Rechtbank Arnhem 8 July 1975, *NJ* 1975, 418; Hoge Raad 22 June 1976, *NJ* 1976, 563; Hoge Raad 15 February 1977, *NJ* 1978, 6.

139 Some individuals were charged with both conspiracy and illegal preparatory acts for offences against the State (Art. 96 lid 2 Criminal Code).

See *supra*, note 85. In the literature, the charge of conspiracy to attack the Queen was criticised for being in violation of the principle of legality. Authors argued that the offence did not apply here, since the activists' objective was hardly subversive. Queen Juliana was most probably selected for being a lovable and prominent Dutch citizen, not for being the Head of State. See A.A.M. Orié & J.J.I. Verburg, 'De Koningin bedreigd', 1975 *Delikt & Delinkwent*, pp. 475-489. However, a charge of attempted hostage taking would most certainly have led to an acquittal, the activists' conduct being mere preparation.

140 Rutgers, *supra* note 55, pp. 23-30. See on the South Moluccan actions R. Janse, 'Fighting terrorism in the Netherlands; a historical perspective', 2005 *Utrecht Law Review*, no. 1, pp. 55-67, <http://www.utrechtlawreview.org>

141 Act of 24 June 2004, *Staatsblad* 290.

The terrorist conspiracy offences have been introduced as a part of the aforementioned Terrorist Offences Act that implemented the Council Framework Decision of 13 June 2002 on combating terrorism. It is, however, a generally accepted fact that the terrorist conspiracy offences went beyond the Council Framework Decision. The previously discussed offence of participation in a terrorist organisation would have been sufficient to meet its requirements in Article 2. The legislation process is also not beyond reproach. The terrorist conspiracy offences were added, at a later stage and unexpectedly, by a Government amendment to the bill; neither the Council of State was consulted, nor the advisory bodies of the judiciary, the prosecution service, the police and the Bar Association, as is customary. The Minister of Justice argued that the creation of terrorist conspiracy offences was desirable because of their gravity.<sup>142</sup> They should be a useful addition to the offence of participation in a criminal or terrorist organisation, because terrorist networks that cannot be proved to be a criminal organisation will probably fall within the scope of conspiracy. Conspiracy offences would also be a useful addition to the offence of illegal preparatory acts, in view of the fact that the latter provision specifies conduct and is oriented towards material goods. Acquiring knowledge and skills (*e.g.* taking flying lessons), for example, does not satisfy the elements of the offence of illegal preparatory acts, but can be considered as overt acts in furtherance of a conspiracy agreement.<sup>143</sup> Besides, the Minister argued that the offences might do much to further international cooperation in criminal matters. The efforts of a Member of Parliament to drop the offences from the bill ended in failure; the amendment to that end was turned down.<sup>144</sup>

## 5.2. *Actus reus and mens rea*

The Dutch conspiracy offences are substantive offences, but the gist of conspiracy is laid down in a provision in the general part of the Criminal Code. Article 80 Criminal Code defines conspiracy as the situation where two or more persons have agreed to commit an offence. In the literature, it is emphasised that it is not a definition, as the description only contains minimum requirements. However, I assume that a Dutch conspiracy case will probably focus on these requirements, as Dutch criminal law has other offences to deal with subsequent crimes committed in the furtherance of the conspiracy. Dutch conspiracy consists of three elements: (1) an agreement between at least two parties, (2) to commit a substantive offence, (3) where the parties have a double intent, *i.e.* the agreement to commit as well as the intention of committing the substantive offence. Conspiracy is a continuing offence, which is complete as soon as the agreement is made. Dutch criminal law does not require an overt act in furtherance of the conspiracy. A proposal to introduce an overt act requirement was explicitly turned down by the Minister of Justice during the parliamentary debate on the Terrorist Offences Act 2004. The Minister argued that such a requirement would not only fit poorly with the gravity of the offence, but would also make the offence difficult to prove.<sup>145</sup> The agreement itself is the *actus reus*, he said.<sup>146</sup> The lack of an overt act requirement seems to be contrary to the basic idea underlying Dutch criminal law that criminal sentences should penalise criminal acts or behaviour.<sup>147</sup> Even so, the Minister opposed

142 *Kamerstukken II* (Parliamentary Papers) 2002-2003, 28 463, no. 8, p. 5.

143 *Kamerstukken I* (Parliamentary Papers) 2003-2004, 28 463, C, p. 9; *Kamerstukken II* (Parliamentary Papers) 2003-2004, 28 463, no. 10, p. 22.

144 *Kamerstukken II* (Parliamentary Papers) 2003-2004, 28 463, nr. 17; *Handelingen II* (Proceedings of the Lower House) 2003-2004, 34, p. 2388.

145 *Kamerstukken I* (Parliamentary Papers) 2003-2004, 28 463, C, pp. 8-9.

146 The Minister did not refer to a source, but his statement is strongly reminiscent of *US v. Shabani*, 513 US 10 (1994): 'The prohibition against criminal conspiracy, however, does not punish mere thought; the criminal agreement itself is the *actus reus* (...).'

147 T. de Roos, *Uitbreiding strafbaarheid van voorbereidingshandelingen?*, 1989 *Nederlands Juristenblad*, pp. 845-849, p. 847; C.M. Pelsler, 'Samenspanning: over overt act en uiterlijke verschijningsvorm', in: M. Boone *et al.* (eds.), *Discretie in het strafrecht*, 2004, pp. 175-196.

the view that conspiracy is a ‘thought’ crime where mere ideas are penalised. He argued that a conspiracy agreement is ‘reprehensible and dangerous conduct’.<sup>148</sup> Yet, he admitted that the emphasis is more on the idea than on its result.<sup>149</sup>

In the literature, it is emphasised that Dutch conspiracy law may not be compared to common law conspiracy offences.<sup>150</sup> It is true that its scope is smaller, as it only relates to subversive and terrorist crime. Besides, Dutch conspiracy lacks the elasticity of common law conspiracy.<sup>151</sup> However, many questions as to its possible use remain, as legal doctrine has hardly developed.<sup>152</sup> For example, what will be the implication of the fact that Dutch doctrine does not acknowledge the existence of unilateral and bilateral theories of conspiracy, even though the above-mentioned description of conspiracy is put in bilateral language?<sup>153</sup> May we consider this to be an implicit acknowledgement of a unilateral theory or should we conclude that these theories do not fit within Dutch doctrine? In the opinion of the Minister of Justice, pressure or a mental disorder does not affect a conspiracy agreement, but these conditions can be used as a defence at trial (*e.g.* duress or insanity).<sup>154</sup> It is however still unclear what the decision of the court would be concerning a defence that the crime has not been committed since the defendant agreed with someone who feigned participation in the conspiracy. Is it an offence to conspire with an undercover agent, who has no intention of committing a crime?<sup>155</sup>

What we do know is that contract law is not applicable. The agreement is free in form; a simple understanding will do.<sup>156</sup> In the literature, it is accepted that the agreement must be definitive, seriously thought through and concrete,<sup>157</sup> but again, without case law, it is not clear to what extent.<sup>158</sup> Furthermore, although it is clear that it goes beyond the rules of complicity,<sup>159</sup> it is uncertain how far the concerted action requirement can reach. In the above-mentioned *South Moluccan* case, the Supreme Court held that the offence of conspiracy to attack the Queen is not restricted to those who agree to play an active role in the commission of the aimed substantive offence. The offence also extends to those who accept a task in the commission of the offence, without agreeing to participate directly in the intended crime. Accordingly, the conviction of the person who had made the plan of action was upheld.<sup>160</sup> In the case against the spokesperson of the group, who had joined later on, the Supreme Court ruled that it is not conspiracy if a person neither takes up the aimed at substantive offence nor joins others who have committed themselves to the commission of the intended offence.<sup>161</sup> In the criminal case against a person who had

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148 *Kamerstukken I* (Parliamentary Papers) 2003-2004, 28463, C, p. 8.

149 *Handelingen II* (Proceedings of the Lower House) 2003-2004, 33, p. 2351.

150 M. Groenhuijsen, ‘P.M.F. Mols, Strafbare samenspanning. Een rechtshistorisch en rechtsvergelijkend onderzoek. Dissertatie Utrecht, Arnhem 1982, XII + 191 pp’, 1983 *Recht en Kritiek*, pp. 493-497.

151 *Cf. Krulwich v. US*, 336 US 440, 69 S.Ct. 716, pp. 447-448 (Jackson, J. concurring).

152 The Dutch trader Frans van Anraat, who was suspected of selling chemicals to the regime of Saddam Hussein, was charged with both conspiracy to commit and complicity in war crimes. The charge as far as it related to conspiracy was however declared null and void, since it was insufficiently clear for what the defendant could be blamed (Hof Den Haag 9 May 2007, *LJN* BA4676). In charges against members of the Hofstad Group, the offence was also used, but these charges did not lead to convictions either. In *Rechtbank Rotterdam* 1 December 2006, *LJN* AZ3589 the conspiracy charge was dropped. In *Rechtbank Rotterdam* 25 March 2008, *LJN* BC7531 and *Rechtbank Rotterdam* 25 March 2008, *LJN* BC7539, the conspiracy offences were listed as offences that the criminal or terrorist organisation was intending to commit. The defendants were acquitted of that charge.

153 See on these theories, Burgman, *supra* note 1.

154 *Kamerstukken I* (Parliamentary Papers) 2003-2004, 28 463, C, p. 8.

155 See C.M. Pelsler, ‘Het opzet van de samenspanner’, in: A.A. Franken *et al.* (eds.), *Constante waarden. Liber Amicorum Prof. mr. Constantijn Kelk*, 2008, pp. 251-260.

156 J. Rummelink, ‘Samenspanning’, in: H. Franken *et al.* (eds.), *Ad Personam*, 1981, pp. 223-236, p. 228.

157 Rutgers, *supra* note 55, pp. 126-136.

158 Rummelink (*supra* note 156, p. 230) does not find it necessary that the conspirators have already determined their modus, nor is it required that they have already picked a victim.

159 G. Mols, *Strafbare samenspanning*, 1982, pp. 82-83.

160 Hoge Raad 8 July 1975, *NJ* 1975, 418.

161 Hoge Raad 22 June 1976, *NJ* 1976, 563.

backed out of the offence after an argument, the Supreme Court ruled that voluntary abandonment is not a defence.<sup>162</sup> However, this ruling related to the defendant annulling the agreement; the defendant was not made liable for the subsequent crime in furtherance of the agreement. A troublesome aspect is that Dutch conspiracy law does not follow ‘the principle that there is no such thing as an inchoate form of an inchoate offence’.<sup>163</sup> The parliamentary debate on the Terrorist Offences Act shows that a charge of attempted conspiracy is allowed, as the Minister of Justice argued that the first conversation before the actual agreement takes shape is attempted conspiracy.<sup>164</sup> Moreover, an amendment barring criminal liability for attempted conspiracy and illegal preparation of conspiracy was turned down.<sup>165</sup> Another indication that this principle does not exist is the finding that many of the substantive offences that are made a terrorist conspiracy offence are offences of explicit endangerment.<sup>166</sup>

In Dutch doctrine, the inchoate aspect of conspiracy is put before the concerted action aspect; conspiracy offences are intended for use in cases in which the social harm is very distant. It is hardly conceivable that in practice a charge of conspiracy will be combined with substantive offences, because if such were the case a charge of illegal preparatory acts would presumably be more appropriate (*e.g.* possession of firearms can be construed as illegal preparatory acts). Nevertheless, for the sake of completeness, I note that the merger doctrine is not likely to be applicable.

## 6. Final remarks on the Dutch approach to inchoate offences

In this article, the Dutch approach to inchoate offences is explained. Dutch criminal law prescribes three stages in the commission of an offence: the preparation of an offence, the attempt and the completed offence. The substantive offences of participation in a criminal or terrorist organisation and the conspiracy offences are inchoate crimes too, but they do not fit easily within this time sequence. The offence of participation in a criminal or terrorist organisation covers, in fact, criminal behaviour in all its stages. Conspiracy permits law enforcement before criminal plans are carried out, but even a conspiracy agreement may need preparation. Therefore, illegal preparatory acts can be committed in furtherance of a conspiracy agreement, but can also be committed ‘when the conspiracy is still on the horizon, and will follow’.<sup>167</sup>

The discussed inchoate offences overcome the problem that is inherent in the law on attempt, ‘that in order to constitute attempt the preparations have to proceed so far toward actual commission of a crime as to itself create an intolerable danger to society’.<sup>168</sup> Even though social harm is distant, Dutch doctrine strives to hold on to a dangerous conduct rationale and a specific object rationale by demanding a causal connection between acts and the substantive offence aimed at. The terrorist conspiracy offences present difficulties in this respect. For example, Dutch criminal law does not require an overt act in furtherance of the conspiracy; the *actus reus* is the agreement. Their exceptional position is due to the grave character of the related offences. However, the other inchoate offences have difficulties, too. On the surface, both the offences of illegal preparatory acts and participation in a criminal or terrorist organisation overcome the

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162 Hoge Raad 15 February 1977, *NJ* 1978, 6.

163 P.R. Glazebrook, ‘The Twelfth Vinerian Professor: Rupert Cross and Criminal Justice’, 1985 *Oxford Journal of Legal Studies*, pp. 113-131, p. 117.

164 *Handelingen II* (Proceedings of the Lower House) 2003-2004, 33, p. 2352.

165 *Kamerstukken II* (Parliamentary Papers) 2003-2004, 28 463, no. 24.

166 Prakken, *supra* note 77, p. 2340.

167 *Handelingen II* (Proceedings of the Lower House) 1919-1920, 428, p. 2735.

168 P. Buscemi, ‘Conspiracy: Statutory Reform since the Model Penal Code’, 1975 *Columbia Law Review*, pp. 1122-1188, p. 1122.

objections that conspiracy offences present. The general picture that emerges from the preceding sections, however, is that in some respects these offences actually undermine general principles and fundamentals too. The offence of illegal preparatory acts focuses on actual conduct, but the prescribed acts are vague and leave us with the tricky problem of proving whether these acts are indeed intended to amount to the commission of the crime. Case law on the intent requirement for the offence of participation in a criminal organisation actually comes close to strict liability.

In addition, it should be mentioned that the Dutch offence of participation in a criminal organisation has lenient requirements in comparison with international agreements to approximate substantive criminal law on this issue.<sup>169</sup> In the case law of the Supreme Court, a criminal organisation is defined as a structured and lasting form of collaboration between two or more persons that is directed at the commission of crimes (*i.e.* felonies or indictable offences). Following the 1998 Joint Action and the Palermo Convention, the Framework Decision on the fight against organised crime requires the presence of an association with at least three persons. In the Framework Decision, the applicability of the concept of criminal organisation is restricted to serious crimes. The organisation's objective must include offences punishable with a prison sentence of a maximum of at least four years.<sup>170</sup>

Approximation of substantive criminal law is based on 'the idea of making two different systems more similar by eliminating some of the differences between them'.<sup>171</sup> The Palermo Convention as well as the Framework Decision on combating terrorism establish only minimum rules in relation to the constituent elements of participation in a criminal or terrorist organisation.<sup>172</sup> Consequently, the ratification of the Palermo Convention did not provide a reason for adaptation, with the exception of the already mentioned clarification of financial support.<sup>173</sup> The measures taken to comply with the Framework Decision on combating terrorism include the introduction of the offence of participation in a terrorist organisation. However, the offence is based on the concept of a criminal organisation, which has remained the same. Whereas the Framework Decision on the fight against organised crime largely adheres to the definitions of 'criminal organisation' provided by the 1998 Joint Action and 'organized criminal group' provided by the Palermo Convention, changes are also not to be expected in the near future.<sup>174</sup>

In a reaction to the new forms of serious crime that have developed, partly as a side-effect of globalisation, there has been an expansion of inchoate offences in the Netherlands. Notwithstanding the efforts of both the legislature and the judiciary to hold on to the fundamentals of criminal law, this development should be a subject of concern. The fight against organised crime and terrorism cannot be used as a pretext to set aside fundamental issues of substantive criminal law.<sup>175</sup> For that reason, the introduction of the terrorist conspiracy offences, which went beyond the Framework Decision on combating terrorism, should be disapproved of. Besides, approximation of substantive criminal law may be an ideal moment for reflection. A conclusion that

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169 See B.F. Keulen, 'Artikel 140 Sr. Vier internationale ontwikkelingen en een begrafenis?', in: B.F. Keulen *et al.* (eds.), *Pet af Liber amicorum D.H. de Jong*, 2007, pp. 225-244, who concludes that Article 140 should be amended.

170 Art. 1: 'For the purposes of this Framework Decision: 1) "criminal organisation" means a structured association, established over a period of time, of more than two persons acting in concert with a view to committing offences which are punishable by deprivation of liberty or a detention order of a maximum of at least four years or a more serious penalty, to obtain, directly or indirectly, a financial or other material benefit (...).'

171 F.M. Tadić, 'How harmonious can harmonisation be? A theoretical approach towards harmonisation of (criminal) law', in: A.H. Klip & H.G. van der Wilt (eds.), *Harmonisation and Harmonising measures in criminal law*, 2002, pp. 1-21, p. 9.

172 See: Green Paper on the approximation, mutual recognition and enforcement of criminal sanctions in the European Union, COM(2004) 334 final.

173 *Staten-Generaal* (States General) 2003-2004, 29 512 (R 1757), A and no. 1, p. 5.

174 *Kamerstukken I* (Parliamentary Papers) 2005-2006, 23 490, BB, p. 8.

175 See: Section I – General Criminal Law – The expanding forms of preparation and participation - Resolution Draft (<http://www.penal.org/pdf/ResSectionIEN.pdf>).

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national requirements are below the minimum standards of international duties should be no reason to sit still, but instead should be taken as an indication that we have to take into consideration that national rules may need tightening.