A difference approach to organised crime

In the Netherlands a different approach to organised crime has not resulted in the first place in developing new methods of investigation and procedures of evidence. There are, however, important changes to be reported in the police organisation. The new government coalition agreement mentions a national crime squad responsible for tackling the kingpins of Dutch organised crime.

There are no major changes in the actual prosecution or criminal proceedings. But, a separate law has rearranged and restructured special methods of investigation, such as wiretapping, listening in directly and infiltrating. Within the Public Prosecutions Department test procedures have been designed to achieve that there will be a uniform and consistent policy in applying these methods. Whenever the protection of personal liberties is concerned, the European Convention regarding Human Rights is decisive.

In the Netherlands two courtrooms have been fitted out for trying cases related to serious organised crime. These rooms are especially equipped with the view of security measures.

An important development in the Netherlands is the administrative approach of organised crime. After all, criminal organisations depend in certain cases on administrative decision-making processes in order to continue and protect criminal activities. Thus, front stores are founded and illegal transports are carried out with the help of licenses, public financial resources (subsidies) are used for criminal activities and contracts are tendered for in order to launder illegal assets.

In this way the underworld and legitimate business become intertwined. And public interests such as protecting the environment, road safety and the public health are at stake. Not in the last place damage is inflicted on the government's integrity.

This is why before long a bill will become effective in the Netherlands that is called "Promotion Incorruptible Decision-Making Public Administration" (Dutch abbreviation BIBOB). This bill is based on the assumption that an incorruptible government is aware of the possibility of criminals abusing
subsidies, licences and public procurements and that this risk should not be accepted. Facilitating organised crime must be avoided, no matter whether this involves criminal activities that are displayed with the help of a legal enterprise or the investment of funds obtained from previous criminal activities in legal branches.

The bill includes the proposal to establish an Office Promotion Incorruptible Decision-Making Public Administration. This office should advise upon request administrative bodies that grant subsidies and licenses and services that put up work to public tender in order to restrict the risk of criminal abuse. The office bases its advice on investigations making use of public sources and a limitative list of confidential sources, e.g. the registration of persons to which the Act on Police Registers and the Act on Judicial Documentation apply. It may dispose of information that cannot be revealed to the person it concerns for example with a view of a good execution of law enforcement or significant interests of third parties. On the basis of the investigation the office will issue an amply motivated advice. Using this the Public Prosecutor will test whether supplying this information to the authorities requesting the advice harms the interest of the prosecution. The BILOB act ties in with the international wishes laid down in the Action Plan Organised Crime 1997 of the European Union.

In view of the preventive nature of the instrument this does not merely involve sectors already showing criminal interference, but also sectors showing particular characteristics that point out the vulnerability of crime. These sectors include transport, environment, building, the hotel and catering industry, brothels and coffeeshops.

Within the European Union increasingly more co-operative ventures are started to fight organised crime. Thus the investigating services in Europe can use Europol to improve the collaboration in fighting international crime. In order to improve the collaboration between judicial authorities in the member states the European Judicial Network was founded some years ago. March 2002 Pro-Eurojust was added to this as predecessor to the body Eurojust to be established in 2002. Eurojust has to facilitate co-ordinating investigation and prosecution procedures in cases of organised crime that involve the territories of several member states.

A problem remains exchanging information with countries from within and outside of the European Union for administrative purposes. Exchanging information between administrative bodies has not been arranged and does hardly or not happen. Due to this lack the principle of equality can be at stake.

In Amsterdam there have been about 100 screenings by now and it has been proven that the instrument can be applied. The actual result was that in the course of 100 screenings shortcomings were established for 80 companies. The shortcomings were found in the administrative control, the financial basis or in an interlacement of the underworld and legitimate business.

Finally, it is worth noting the changes in the Criminal Code and some other laws in connection with terrorist crimes (Act on Terrorist Crimes). Right now this alteration is still a legislative proposal.

Due to the attacks of 11 September last it is checked internationally and nationally whether criminal law is sufficiently geared to terrorism. Within that context, the European Union has issued a framework decree, as we all know, focused on terrorist felonies. The legislative proposal under consideration implements this framework decree fighting terrorism. With reference to the framework decree, it aims to accentuate the substantive criminal law, so that it expresses better that terrorist felonies are serious crimes.

The framework decree includes several obligations, the most important of which are:
- A number of acts should be penalised as terrorist crimes, if there is a so-called ‘terrorist aim’, and –if possible- should be threatened with a more severe sentence;
- Several crimes that are committed with the aim of an intended terrorist crime should be
punished with a more severe sentence;
- Participating in and leading an organisation that intends to commit terrorist crimes should be threatened with a prison sentence of a minimum of eight, respectively fifteen years;
- The judicial authorities specialised in terrorist crimes should be expanded.

The framework decree indicates that national law should describe the terrorist crimes –not the terrorist intention-. This offers some room in the implementation. The legislative proposal uses that room, in the sense that it opts for an ample implementation involving not only the literal text but also the reasoning behind the framework decree and the included penalisation obligations. The obligations for penalisation and thus the choice of terrorist crimes are also considered while taking into account the penalisation obligations regarding terrorist crimes that are included in other international legal instruments. The implementation also allows for the systematics and basic principles of the Criminal Code.

The intention of the legislative proposal

A central part of the legislative proposal is Article 83 Criminal Code. This includes, in agreement with Article 1 of the framework decree, a definition of the terrorist crime. All crimes included there are understood to be terrorist crimes. The ‘terrorist intention’ is characteristic of these crimes. In agreement with the framework decree this intention is described in Article 3a Criminal Code as ‘the intention to terrorise the population or part of the population of a country or to compel a government or international organisation to do something, refrain from doing something or putting up with something, or to seriously disrupt or destroy the political, constitutional, economic or social structures of a country or an international organisation’.

As explained above, the essence of the framework decree consists of the obligation to impose more severe sentences on the terrorist crimes described there, which have to be defined by national law, than on crimes committed without a terrorist intention.

The legislative proposal under consideration suggests therefore including for the relevant crimes a statutory ground for increasing a penalty (cf. Article 83, section 2, Criminal Code). Each ground for increasing a penalty determines that if a listed crime has been committed with a terrorist intention the temporal prison sentence laid down for that crime can be increased by half. As a consequence of these statutory grounds for increasing a penalty, if a temporal prison sentence of a maximum of fifteen years is laid down for a crime, the court can impose life imprisonment or a temporal prison sentence of a maximum of twenty years. This idea is extended to specific crimes for which a more severe sentence is imposed for the terrorist variety (Article 83, section 3, Criminal Code). The proposed adjustment of Article 10 Criminal Code results in case of a terrorist crime, that if the ground for increasing a penalty makes this possible, a temporal prison sentence between fifteen and twenty years can be imposed.

A statutory ground for increasing a penalty is aimless and without effect, if a crime is already penalised with life imprisonment or a temporal prison sentence of a maximum of twenty years. Nevertheless, also in connection with the proposed Article 140a Criminal Code, the relevant crimes penalised with life imprisonment should be indicated as terrorist crimes if they have been committed with a terrorist intention.

The terrorist intention
From what has been explained above follows that this legislative proposal wishes to link a serious increase of punishment to the presence of the 'terrorist intention', in case of indicated serious crimes not yet penalised by life imprisonment of a maximum of twenty years. According to the government this can be accounted for. The intention lays down a requirement that can be described sufficiently and that can support the proposed increase of punishment.

The description of the terrorist intention in Article 83a Criminal Code is based on two international legal instruments. The first part of the intention has been derived by the framework decree in its essence from the International Convention on the Suppression of the Financing of Terrorism. Article 2, second clause, under b, of that Treaty obliges to penalise behaviour/acts 'intended to cause death or serious bodily injury to a civilian (...) when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act'. This intention also occurs in the draft version of a comprehensive UN-Convention against terrorism; during the negotiations on that treaty the parties agreed on this formulation.

The first part of the intention described in this legislative proposal constitutes an almost literal translation of the intention as included in this convention. For some parts only other phrases were chosen. In the first place, it was decided not to use 'intimidate', but rather 'terrorise', also because the latter concept expresses more clearly that it is not required that the frightening has indeed resulted in the population being intimidated. Furthermore, 'intimidate' is associated in the vernacular with frightening someone in a direct confrontation, while there should be no doubt that also frightening someone indirectly is important in this context. Secondly, 'to compel to do or to abstain from doing any act' has been replaced by the description 'to compel to do something, refrain from doing something or putting up with something'. The definition that was chosen is wider and, moreover, fits in with Article 284 Criminal Code. In that way it has been assured that a concept has been chosen that is known in jurisdiction. The last part of the description of the intention is an addition to the intention in the framework decree formulated within the UN.

In combination with the circumstance that a restricted number of very serious crimes have been listed as terrorist crimes, the description of the intention that was chosen makes it indubitable that criminal offences committed by action groups cannot be characterised as such. These action groups do not commit very serious crimes in order to promote the goals they pursue. In a rare case in which the qualification of one of the crimes listed above would apply, the formulation of the chosen intention makes it indubitable that this does not involve a terrorist crime. In that context one cannot speak of punishable offences that terrorise (parts of) the population. It is not attempted to mobilise the public opinion by frightening people. Furthermore, and in connection with this, the pressure put on a government or an international organisation by such actions cannot be characterised as 'compelling'.

This is because the pressure coming from such actions is not sufficiently forceful. In many cases the crimes are not at all intended, but are a side effect of their action not wished for by the majority of the members of this action group. One cannot speak of a serious disruption of fundamental political (etc.) structures, either.

Finally, in appropriate cases, the framework decree itself and the considerations on which it is based can be appealed to as an interpretation factor when explaining the intention under consideration in a situation in which punishable offences have been committed during demonstrations and such. Application of the penalisations on the basis of the framework decree is explained in a statement with that framework decree in such cases.
**Threatening with a terrorist crime**

A second description of the offence without any terrorist intention concerns the proposed Article 285, third section, Criminal Code. This penalises threatening with a terrorist crime. One could think, for instance, of the threat with an attack on a bridge or a nuclear plant. If they are credible, such threats can cause a lot of fear among the public. This is even more the case if they seem to be connected with other terrorist crimes.

Viewed from that perspective, the government considers a maximum prison sentence of six years fitting.

The description of the offence of threat included in the Criminal Code does not make it explicit against whom the threat must be aimed. Usually, the threat will be aimed at one single person, a number of persons or against one or several organisations or companies. As is proven by the example given, the threat with a terrorist crime can also threaten the entire population. This also justifies a more severe penalisation.

The preparatory crimes include the penalisations of theft, forgery and extortion. The intention to which the possibility of an increase of the sentence is connected in these cases is, just as with the crimes mentioned above in special acts the 'intention to prepare or facilitate a terrorist crime'. The description is derived from Article 312 first clause Criminal Code, in which violence with the intention to prepare or facilitate theft is punished with a stricter sentence. Often the violence does not precede the theft before long. This can also be the case with the preparatory crime. It is, however, possible that the preparatory crime takes place long before the time at which the terrorist crime is planned.

In that case, too, the intention under consideration can very well be deemed to be there. As an aside it must be noted that possessing stolen goods or forged papers meant for committing a terrorist crime can also lead to punishability in pursuance of Article 46 Criminal Code.

In the cases of theft and extortion there are specific penalisations when there has been the intention to prepare or facilitate a terrorist crime. Theft with this intention is punished with a prison sentence of four years. It is proposed that theft with this intention and combined with violence will be punished with a prison sentence of a maximum of twelve years. Finally, extortion committed with the intention to prepare or facilitate a terrorist crime is also punished with a prison sentence of twelve years, in pursuance of the existing third clause of Article 317 Criminal Code, referring to the second clause of Article 312 of the Criminal Code. In case of forgery, the presence of said intention will result in an increase by half of the set prison sentence to nine years.

And finally, the ministerial steering committee for fighting terrorism and for security has composed a set of measures to prevent acts of terrorism.

**Action items:**

1. Expanding intelligence and security services;
2. Improved interaction between intelligence and security services and the police (Dutch police but also Europol);
3. Developing biometrical identification possibilities;
4. Harmonised implementation of visa policies;
5. Expanding the capacity of personal protection by the National Police Agency (KLPD) and the Royal Netherlands Military Constabulary (Kmar);
6. Expanding surveillance equipment;
7. Reinforcement of external border check and reinforcement of the Mobile Border Supervision of Aliens;
8. A set of additional measures for civil aviation security including increased ticket and passport checks, tightening of admission control and intensifying checks in the aeroplanes themselves;
9. The Netherlands is committed to taking over the measures laid down in the ECAC;
10. Under supervision of the Dutch Home Office a cohesive set of measures will be developed to protect the government and business infrastructure (including ICT);
11. Making more investigative and analytical capacity available to fight terrorism (including consequential effects for the Public Prosecutions Department etc. and including capacity to be able to comply with international requests for common actions);
12. Forming a quick response team with the Netherlands Forensic Institute for forensic support when tracing down perpetrators of terrorist attacks;
13. Expanding the varied team with the Alien Smuggling Unit;
14. Concluding the implementation of the regulations regarding wiretapping obligations from the Telecommunications Act;
15. Accelerating the project of revision of wiretapping rooms (planned before the end of 2003);
16. Accelerating decision-making about the lawful access of services and the police in cryptographic facilities to third parties (Trusted Third Parties) and aiming for regulation of forceful cryptography for public use;
17. Investigating the data categories that telecom suppliers keep and the restrictions that the investigating, intelligence and security services faced due to the lack of obligations to retain records for historical communication records. Increasing the possibilities to analyse international telephone communication (fine-tuned with European member states);
18. Expanding the satellite interception capacity for fighting terrorism;
20. Regulating the supervision of money transfer offices;
21. Establishing supervision of trust offices;
22. Reinforcing the supervision of compliance with the Disclosure of Unusual Transactions Act, the Identification Financial Services Act and the Sanctions Act;
23. Further tightening of the law enforcement chain of supervision, investigation, prosecution in the financial supervision legislation, also on the basis of an analysis of reinforcements ensuing from the memorandum integrity financial sector 1997;
24. Reinforcement of the Financial Expert Knowledge Centre (in which the Bank of the Netherlands, Authority of Financial Markets, Pensions and Insurance Supervisory Board, Public Prosecutions Department Disclosure of Unusual Transactions Act, National Police Agency, Amsterdam Police, the Tax Department, Fiscal Intelligence and
Investigation Service/Economic Surveillance Department jointly participate) with the purpose of exchanging information in the best possible way. It must be investigated whether the Dutch National Security Service can join the Financial Expert Knowledge Centre;
25. The financial investigations as carried out by various investigating bodies under responsibility of the Public Prosecutor must be reinforced and concentrated. This should be done with a view to adequately execute (a probably increasing number of) requests for legal assistance from abroad regarding terrorist activities and to carry out more investigations;
26. Improving the exchange of information between the partners involved when investigating financial matters;
27. In order to optimise the information position of the Unusual Transactions Reporting Office (MOT) it should be achieved that information about subjects related to terrorism is reported efficiently to the MOT by financial bodies on the basis of information supplied by the Public Prosecutions Department (no matter what kind of transactions). In order to accelerate and optimise the process of reports by financial institutions to the MOT, it will be investigated within the limits of privacy regulations how existing computerised detection systems with financial institutions can be used efficiently;

28. It must be examined whether a duty to report by the Tax authorities to the MOT could be of practical importance. The knowledge centre Money Laundering instituted with the FIOD/ECD could be used for this;

29. Instituting the duty to report for independent professionals ahead of instituting European regulations;

30. The international information position regarding financial transactions should also be reinforced. For this purpose the Netherlands will commit itself to have realised within the European Union a comprehensive system of Financial Intelligence Units (for the Netherlands the MOT). In December a pilot for the FIU network will become effective within the Netherlands and 5 other EU member states;

31. In May 2001 the OECD has published a report regarding the misuse of corporate entities. Within the context of the FATF this report is used for tightening 40 recommendations. On a national level it must be checked rapidly whether the misuse of Dutch corporate entities is addressed adequately.

32. The legal remedies to freeze suspect accounts will be increased;

33. About the more specific details (including legislation procedures, exact phasing and conversion into staff increases of the various bodies involved) a memorandum "Integrity Financial Sector and fighting terrorism" will be published in the short term;

34. Further analysis and expanding of the Special Assistance Units capacity, both with the police and with the Defence forces (the Royal Netherlands Military Constabulary and the Royal Netherlands Marine Corps);