SELF-STUDY, OBTAINING OR VIEWING TERRORIST MATERIAL OVER THE INTERNET

A legitimacy test of consumer-oriented criminal law provisions
in four Western-European countries

1. INTRODUCTION

The point of intervention on the *iter criminis* (i.e. 'the route to crime') is no longer as clear-cut as it used to be. Whereas criminal law traditionally targeted the full completion of an offence, and to some extent its attempt, it has now become the preferred tool to intervene in cases of preparatory or facilitatory conduct or even mere risk-involving behaviour.[1] The proliferation of laws that target remote harms is seen as "a fundamental evolution of the criminal law system",[2] but is at the same time criticised by scholars.[3] This development manifests itself in multiple domains, but especially in the context of counter-terrorism.[4] The "offences related to terrorist activities"[5] vary from membership offences, incitement offences, to travelling offences. These offences have received much attention, given the fact that they often restrict our fundamental rights and freedoms.

This contribution aims to highlight one fundamental right in particular, namely the right to seek, receive, and impart information and ideas. This right is incorporated in the unanimously recognised right to freedom of expression.[6] Given the fact that this freedom of information is not an absolute

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[1] K.S. Stubbs and F. Galli, 'Inchoate Offences: The Sanctioning of an Act Prior to and Irrespective of the Commission of Any Harm', in F. Galli and A. Weyembergh, eds., *EU Counter-Terrorism Offences: What Impact on National Legislation and Case-Law?* (Brussels: Editions de L'Université de Bruxelles, 2012) pp. 291-303.

[2] See for example in Belgium: *Amendement van 7 juli 2016 bij het wetsvoorstel tot wijziging van het Strafwetboek wat betreft de bestraffing van terrorisme, Parl.St.* Kamer 2015-16, nr. 54 1579/005, p.6.

[3] See R.V. Ericson, 'The State of Preemption: Managing Terrorism Risk through Counter Law', in L. Amoore and M. De Goede, eds., *Risk and the War on Terror*, (New York: Routledge, 2008) pp. 57-76; D.W. Fitzgibbon, 'Institutional Racism, Pre-Emptive Criminalisation and Risk Analysis', 46(2) *The Howard Journal* (2007) 128-44; H.M. Lomell, 'Punishing the Uncommitted Crime: Prevention, Pre-Emption, Precaution and the Transformation of Criminal Law', in S. Ugelvik and B. Hudson, eds., *Justice and Security in the 21st Century: Risks, Rights and the Rule of Law* (Oxon: Routledge, 2012) pp. 83-100; J. McCulloch and S. Pickering, 'Pre-Crime and Counter-Terrorism', 49 *British Journal of Criminology* (2009), 628-45; J. McCulloch and D. Wilson, *Pre-Crime: Preemption, Precaution and the Future* (London and New York: Routledge, 2015); C. Murphy, *EU Counter-Terrorism Law: Pre-Emption and the Rule of Law* (Oxford: Hart, 2012); K.S. Stubbs and F. Galli, *op. cit.*; M. van der Woude, *Wetgeving in een Veiligheidscultuur: Totstandkoming van Antiterrorismewetgeving in Nederland Bezien vanuit Maatschappelijke en (Rechts)Politieke Context* (Leiden University, 2010); L. Zedner, 'Pre-Crime and Post-Criminology?', 11 *Theoretical Criminology* (2007) 261-81.

[4] See, *inter alia*, M. Hill QC and C. Walker, 'Counter Terrorism and Border Security Bill: Submission in Relation to Clause 3' (2018).

[5] On the level of the European Union, this categorisation is used in Directive 2017/541 under Title III. See Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, OJ L 88/6 (entered into force 20 April 2017) (*further*: Directive 2017/541 or the Directive).

[6] In addition to the right to seek, receive and impart information, this fundamental freedom entails the right to hold opinions without interference and the right to express, or disseminate, information and ideas. For a similar study on the latter component, see S. De Coensel, 'Incitement to Terrorism: The Nexus between Causality & Intent and the Question of Legitimacy', in C. Paulussen and M. Scheinin, *Human Dignity and Human Security in Times of Terrorism*

right, certain limitations are allowed in accordance to the restriction clauses foreseen in the human rights instruments. Both on a supranational and domestic level, various information-related criminal offences have been formulated in the fight against terrorism and have developed in scope over time. For the purposes of this contribution, the focus will be on the phenomenon of self-study and the broader conduct of obtaining or viewing terrorist material over the internet. The relevant criminal law provisions will be studied on the level of the Council of Europe, the European Union, and four European domestic legal frameworks (i.e. Belgium, the Netherlands, France and the United Kingdom).[7]

Academia has primarily focussed on existing policies regarding prevention strategies, surveillance,[8] blocking or removal of online content,[9] etc., and concentrates on substantive criminal law to a far lesser extent. Especially the criminal liability of the information consumer, rather than the distributor or publisher thereof, is more scarcely covered in legal doctrine and jurisprudence.[10] Moreover, a comparative approach on this topic has been absent in the literature. This research gap generates the need to investigate the legitimacy of consumer-oriented information-related offences,

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(The Hague: Asser Press, 2019) 269-98. The legal basis of the right can be found in the following instruments: European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, ETS 5 (entered into force 3 September 1953) (*further*: ECHR), art. 10; UN General Assembly, Universal Declaration of Human Rights of 10 December 1948, 217 A (III); International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), art. 19.2; Charter of Fundamental Rights of the European Union, 2012/C 326/02 (26 October 2012), art. 11. See also United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information, 'Joint Declaration on Freedom of Expression and Countering Violent Extremism' (3 May 2016), general principles (1.a.).

[7] See for a justification of the selection of these countries: section 2.1. (*infra*).

[8] See for example I. Brown and D. Korff, 'Terrorism and the Proportionality of Internet Surveillance', 6(2) *European Journal of Criminology* (2009).

[9] Terrorist content online is a topic high on the political agenda. In the EU Directive 2017/541, an article was inserted on measures against public provocation content online. In the same year, the European Commission launched a communication giving guidelines and principles on prevention, detection and removal of illegal content online. In March 2018, the Commission adopted a recommendation with non-binding operational measures. Nevertheless, the European Commission decided to go further and proposed a new regulation with legally binding measures concerning terrorist content (more in particular: removal orders, referrals and proactive measures), which is currently negotiated. In these instruments, a similar shift can be found to intervene in earlier stages by, for example, broadening the meaning of 'terrorist content'. Although these instruments are not addressed within the scope of this article, they are important to understand the current evolutions. See Directive 2017/541, *op. cit.*, art. 21; Communication of the European Commission and the Commission Recommendations: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Tackling Illegal Content Online: Towards an Enhanced Responsibility of Online Platforms, COM(2017) 555 final (28 September 2017); Commission Recommendation on measures to effectively tackle illegal content online, C(2018) 1177 final (1 March 2018); Proposal for a Regulation of the European Parliament and of the Council on preventing the dissemination of terrorist content online, COM (2018) 640 final (12 September 2018).

[10] The main exception in this context is the offence of "knowingly obtaining access to child pornography", as introduced by art. 20, 1 (f) of the Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, adopted on 12 July 2007, CETS no. 201 (entered into force 1 July 2010) and by art. 5, 3 of Directive 2011/93/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, *OJ L* 335/1.

especially given the speediness of the changes in this field.[11] This contribution, therefore, aims to subject these consumer-oriented information-related offences to a legitimacy test, measured by a remote harm analysis, a human rights assessment, and a necessity argument. Privacy-related issues will not be covered within the scope of this contribution.

This paper argues that the legitimacy of criminal law provisions on the consumption of terrorist material over the internet comes under threat. Section 2 presents a justification for the selection of the four Western-European countries and a schematic overview of the relevant criminal law provisions, of which the legitimacy is analysed in-depth under section 3. This third section focuses on a remote harm analysis, a human rights assessment and a necessity argument. The paper ends with a critical conclusion in section 4, which argues that in order for legislation to be legitimate, a criminal law provision must be strictly construed and the constitutive elements of *actus reus* and *mens rea* must guarantee the blameworthiness of the conduct. As a result, there must be a sufficient level of active conduct, the substance of the online content must be limited to practical assistance and the act must be conducted for the purposes of committing a terrorist offence. These recommendations aim to adhere to the harm principle, to assure the democratic necessity of a limitation of the fundamental freedom of information, and to reflect on the necessity of criminal means.

2. OVERVIEW OF THE LEGAL FRAMEWORK

2.1. Justification selected countries

This research paper focusses on the legal framework of Belgium, the Netherlands, France and the United Kingdom. A delineation to these four countries is the result of an analysis of the EU Terrorism Situation & Trend Reports, which showed that Belgium, the Netherlands, France and the United Kingdom rank rather high concerning (1) the number of arrests; (2) the number of individuals in concluded court proceedings for a terrorist offence; and (3) the number of verdicts. For the same reasons, other countries, such as Italy, Germany and Spain, could also be included in the analysis, but it was a deliberate choice to exclude these based on the fact that (1) the author is educated in Belgian law and has the knowledge of the Dutch, French and English language; and (2) an analysis of more than four countries would exceed the scope of this article. The four selected countries present a diverse picture regarding historical background in terrorist threats and legal framework pre- and post-9/11. Given that the United Kingdom and France have faced a significantly higher number of incidents in the twentieth century compared to Belgium and the Netherlands, their legal framework regarding terrorism was installed at a much earlier point in time. In Belgium and the Netherlands, terrorism as a separate offence type was only introduced following the EU Framework Decision of 2002. This diversity is an interesting element, which becomes also

[11] The increasing threat of lone wolves is a worrisome evolution that has caused policymakers to take new steps and broaden their legal frameworks. This is clearly evident in EU Directive 2017/541, which introduces a new provision on receiving training for terrorist purposes – including self-study – for the aim of addressing "the threats resulting from those actively preparing for the commission of terrorist offences, *including those ultimately acting alone*" (see recital 11). This evolution is also clearly present at a national level, which will be extensively addressed in this paper. The heightened attention on terrorist content online is not only evident on the level of substantive criminal law, but also through other means (see footnote 9). These evolutions in the past few years make it necessary to evaluate the policy choices made and to formulate some recommendations for legitimate legislation in the future.

evident in the context of terrorism-related offences, and more specifically in the context of consuming terrorism-related information over the internet. This article will show that the legal framework of the United Kingdom and France is much broader, whilst the Netherlands and especially Belgium more closely align the EU minimum standards.

2.2. Schematic overview of the relevant criminal law provisions

Before turning to the legitimacy test, the most intrusive criminal law provisions that target self-study (primarily through offences related to receiving terrorist training) and obtaining or viewing terrorist material over the internet are schematically summarised for the purpose of clarity. More generic offences on preparatory acts are not incorporated within the study, although they might cover said conduct. Afterwards, the most crucial elements of these provisions will be critically analysed.

Legal system	Legal basis	Year of introduction	Brief overview content
Council of Europe	Art. 3 Additional Protocol Convention on the Prevention of Terrorism[12]	2015	Receiving training for terrorism "from another person" (criminalising self-study free to Parties).
European Union	Recital 11 *juncto* art. 8 Directive 2017/541[13]	2017	Receiving training for terrorism, including self-study.
Belgium	Art. 140quinquies Strafwetboek (Sw.)	2013; amended in 2019	Receiving training for terrorism: previous formulation suggested a concrete relationship between trainer and trainee.[14] This resulted in an amendment in 2019, which made self-study punishable.[15]
	/	2017	Idea of an autonomous criminalisation of the consultation of online material that incites terrorism was raised by the federal prosecutor; rejected by the parliamentary

[12] Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism, opened for signature 22 October 2015, CETS 217 (entered into force 1 July 2017).
[13] Directive 2017/541, *op. cit.*, recital 11 *juncto* art. 8.
[14] See A. Fransen and J. Kerkhofs, 'Het Materieel Terrorismestrafrecht', in J. Kerkhofs, A. Schotsaert, and P. Van Linthout, eds., *Contra-Terrorisme: De Gerechtelijke Aanpak van Terrorisme in België* (Brussel: Larcier, 2018) 3-98.
[15] Belgium, *Wet van 5 mei 2019 houdende diverse bepalingen in strafzaken en inzake erediensten, en tot wijziging van de wet van 28 mei 2002 betreffende de euthanasie en van het Sociaal Strafwetboek*, *BS* 24 May 2019, 50023, art. 79, 2° (*further*: DB II). See also S. De Coensel, 'De Wet Diverse Bepalingen in Strafzaken II: Terroristische Misdrijven in Lijn Met De Europese Verplichtingen?', 40(3) *Panopticon* (2019).

			committee of inquiry (which was installed after the attacks of 2016).[16]
The Netherlands	Art. 134a Wetboek van Strafrecht (Sr.)	2009	Receiving training for terrorism; terminology does not stand in the way of criminalising self-study.
France	Art. 421-2-6 Code pénal (CP)	2014	"*Entreprise individuelle*", covering the conduct of receiving training for terrorism and habitually consulting public communication services or holding documents that directly provoke or glorify the commission of terrorist acts (when in conjunction with other constitutive elements).[17]
	Art. 421-2-5-2 Code pénal (CP) (annulled, see below)	2016; 2017	Habitually accessing online public communication services that exhibit messages, images or representations that directly encourage the commission of terrorist acts, or defend these acts.
The United Kingdom	Section 54.2 of the Terrorism Act 2000 (TACT 2000)	2000	Receiving weapons training.
	Section 6.2 of the Terrorism Act 2006 (TACT 2006)	2006	Receiving training for terrorism: terminology does not stand in the way of criminalising self-study (but other provisions may be of more value in this context).

[16] See VRT News, 'Procureur Van Leeuw: "Bestraf mogelijke terroristen die jihad-propaganda zoeken' (2017); Parlementaire Onderzoekscommissie Terroristische Aanslagen, 'Parlementair onderzoek namens de Parlementaire Onderzoekscommissie belast met het onderzoek naar de omstandigheden die hebben geleid tot de terroristische aanslagen van 22 maart 2016 in de luchthaven Brussel-Nationaal en in het metrostation Maalbeek te Brussel, met inbegrip van de evolutie en de aanpak van de strijd tegen het radicalisme en de terroristische dreiging: Vierde tussentijds verslag over het onderdeel "Radicalisme"' (2017); De Morgen, 'Bezoeken van jihadistische websites toch niet strafbaar' (2017).

[17] This provision is widely criticised by scholars due to its complexity: C. Mauro, 'Une nouvelle loi contre le terrorisme: Quelles innovations? À propos de la loi n° 2014-1353 du 13 novembre 2014', 48 *La Semaine juridique – Édition générale* (2014); H. Rouidi, 'La loi n° 2014-1353 du 13 novembre 2014 renforçant les dispositions relatives à la lutte contre le terrorisme: Quelles évolutions?', *AJ Pénal* (2014); S. Detraz, 'Le délit de préparation d'une infraction en lien avec une entreprise individuelle terroriste', 55 *Gazette du Palais* (2015); C. Lazerges and H. Henrion-Stoffel, 'Le déclin du droit pénal: L'émergence d'une politique criminelle de l'ennemi', *RSC* (2016); N. Catelan and J-B. Perrier, 'L'entreprise individuelle et les axiomes du Conseil Constitutionnel', 20 *Recueil Dalloz* (2017).

	Section 57 of the Terrorism Act 2000 (TACT 2000)	2000	Possession for terrorist purposes.
	Section 58 of the Terrorism Act 2000 (TACT 2000)	2000; amended in 2019	Collecting, making, possessing, viewing or otherwise accessing (by means of the internet) information of a kind likely to be useful for terrorism.

3. LEGITIMACY

Legitimacy is a complex notion, that for the purposes of this contribution is used as an evaluative concept. Legitimacy is understood in a *normative* sense, which entails that well-developed principles and values should lie at the basis of criminalisation policy.[18] Whilst existing research has presented multiple variations on a normative theory on criminalisation,[19] this paper focuses solely on the following aspects: a remote harm analysis, a human rights assessment and a necessity argumentation.[20] As a result, there are three sub research questions that are answered within this legitimacy test: (1) to what extent is the harm principle the leading ground for criminalisation? (i.e. a remote harm analysis in section 3.1.); (2) to what extent is a criminal law approach in accordance with human rights standards? (i.e. a human rights assessment in section 3.2); and (3) to what extent is there any need for a criminal law approach? (i.e. a necessity argument in section 3.3.).

[18] See N. Persak, *Legitimacy and Trust in Criminal Law, Policy and Justice: Norms, Procedures, Outcomes* (New York: Routledge, 2014) p. 3 and 180.

[19] See, *inter alia*, T. De Roos, *Strafbaarstelling Van Economische Delicten: Een Crimineel-Politieke Studie* (Arnhem: Gouda Quint, 1987); J. Schonsheck, *On Criminalization* (Dordrecht: Kluwer Academic Publishers, 1994); A. Ashworth, 'Is the Criminal Law a Lost Cause?', 116(2) *Law Quarterly Review* (2000): 14 *et seq*.; N. Jareborg, 'Criminalization as Last Resort (Ultima Ratio)', 2 *Ohio State Journal of Criminal Law* (2005); D. Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford: Oxford University Press, 2008); European Criminal Policy Initiative (ECPI), 'The Manifesto on European Criminal Policy', 1(1) *European Criminal Law Review* (2011), 86-103; A.P. Simester and A. von Hirsch, *Crimes, Harms and Wrongs. On the Principles of Criminalisation* (Oregon: Hart Publishing, 2011); N. Persak, 'EU Criminal Law and Its Legitimation: In Search for a Substantive Principle of Criminalisation', 26 *European Journal of Crime, Criminal Law and Criminal Justice* (2018): 20-39.

[20] These research delineations draw partly from the filtering model of Persak (based upon Schönsheck), which consists of (1) a filter on the main substantive criminalisation principle; (2) a filter on normative limiting factors; and (3) a filter on pragmatic limiting factors. See N. Persak, *Criminalising Harmful Conduct : The Harm Principle, Its Limits and Continental Counterparts* (New York: Springer, 2007); N. Persak, *Legitimacy and Trust in Criminal Law, Policy and Justice: Norms, Procedures, Outcomes* (New York: Routledge, 2014); N. Persak, 'EU Criminal Law and Its Legitimation: In Search for a Substantive Principle of Criminalisation', 26 *European Journal of Crime, Criminal Law and Criminal Justice* (2018): 20-39; J. Schonsheck, *On Criminalization* (Dordrecht: Kluwer Academic Publishers, 1994).

3.1. Remote harm analysis: Harm as the leading ground for criminalisation?

Criminal law is "the most intrusive means available to the legislator".[21] In order to clarify "what sort of human conduct, and for what reasons or under which conditions, it is legitimate to criminalize (and consequently punish) (…)",[22] legal theorists have searched for sound grounds for (or principles of) criminalisation. Four main "liberty-limiting principles"[23] can be distinguished in the literature, namely the harm principle, the offence principle, legal paternalism and legal moralism.[24] Considering that the preparatory works of all instruments make clear that the underlying reasoning of the criminal law provisions is the prevention of the potential commission of a terrorist act, and thus the prevention of *harm*, this contribution will solely focus on this ground of criminalisation.[25]

3.1.1. The issue of remote harms

Given that the conduct of self-study, obtaining or viewing material over the internet only gives rise to a danger that the harm may be inflicted in the future, the issue raised is one of "*remote harms*".[26] The legislation can be categorised as a "mediating intervention", in which the proscribed conduct "has no ill consequences in itself, but which is thought to induce or lead to further acts (by the

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[21] S. Melander, 'Ultima Ratio in European Criminal Law', 3(1) *Onati Socio legal series* (2013) 49.

[22] N. Persak, 'Norms, Harms and Disorder at the Border: Legitimacy of Criminal Law Intervention through the Lens of Criminalisation Theory', in N. Persak, *Legitimacy and Trust in Criminal Law, Policy and Justice: Norms, Procedures, Outcomes* (New York: Routledge, 2014) p. 13.

[23] Terminology of Joel Feinberg, who has made a major contribution in this context with his famous tetralogy on the grounds of criminalisation: J. Feinberg, *Harm to Others* (New York: Oxford University Press, 1984); J. Feinberg, *Harm to Self* (New York: Oxford University Press, 1986); J. Feinberg, *Harmless Wrongdoing* (New York: Oxford University Press, 1988); J. Feinberg, *Offense to Others* (New York: Oxford University Press, 1985).

[24] Especially legal paternalism and legal moralism may play a role in the context of consuming terrorism-related content over the internet. Legal paternalism might provide for a reason for criminalisation when it prevents harm to the actor himself. Existing research has established that watching gruesome content can profoundly impact the psyche of an individual and influence the neuro-agency of that person (e.g. desensitising effects and mass indifference). See W. Noble, 'Something You Wish You Had Never Seen – Videos of Death & Murder on Facebook, YouTube and Other Media Platforms', in T. Owen, W. Noble and F. Christabel Speed, eds., *New Perspectives on Cybercrime*, (London: Palgrave Macmillan, 2017). Proponents of legal moralism could also claim that immorality is a sufficient reason for criminalising certain conduct. However, from a liberal predisposition, legal paternalism and legal moralism may present relevant reasons for criminalisation, but these grounds do not constitute a sufficient and decisive reason.

[25] The origin of the existence of the harm principle goes back to Mill who introduced the principle first as the Principle of Liberty: J.S. Mill, *On Liberty* (London: John W. Parker and son, 1859). The harm principle is considered the most widely recognised among the grounds of criminalisation. See N. Peršak, *Criminalising Harmful Conduct: The Harm Principle, its Limits and Continental Counterparts* (New York: Springer, 2007).

[26] For more information on (remote) harms, see: A. von Hirsch, 'Extending the Harm Principle: 'Remote' Harms and Fair Imputation', in A.P. Simester and A.T.H. Smith, *Harm and Culpability* (Oxford: Clarendon Press, 1996); A.P. Simester and A. von Hirsch, 'Remote Harms and Non-constitutive Crimes', 28(1) *Criminal Justice Ethics* (2009); A.P. Simester and A. von Hirsch, *Crimes, Harms and Wrongs. On the Principles of Criminalisation* (Oregon: Hart Publishing, 2011); J. ten Voorde, 'Prohibiting Remote Harms: On Endangerment, Citizenship and Control', 10(1) *Utrecht Law Review* (2014); R.A. Duff and S.E. Marshall, 'Abstract Endangerment, Two Harm Principles, and Two Routes to Criminalisation', 3(2) *Bergen Journal of Criminal Law and Criminal Justice* (2015). See more generally on prevention and criminalization: A. Ashworth and L. Zedner, 'Prevention and Criminalization: Justifications and Limits', 15 *New Criminal Law Review* (2012).

defendant or a third person) that create or risk harm".[27] The consultation of a certain website or the possession of a manual is in itself without danger, but the further acting upon the knowledge found in these manuals may lead to the commission of a terrorist attack. It may be clear that the envisaged conduct can be considered as an externalisation of a subjective view of endangerment, namely that the dangerousness of the conduct depends on the intent of the actor, even without the act itself being objectively dangerous.[28]

A frequently used tool to assess whether a given type of risk satisfies the requirements of the harm principle, is the 'Standard Harm Analysis' (SHA).[29] The SHA provides for three main considerations, namely (1) the *gravity* of the eventual harm, and its *likelihood*; (2) the *social value* of the conduct, and the degree of intrusion upon actors' choices that criminalisation would involve; and (3) certain *side-constraints* that would preclude criminalisation. Although this common approach is sufficient for analysing immediate harms, further principles are necessary in order to adequately address the issues surrounding remote harms. Simester and von Hirsch (2011) have, therefore, developed an 'Extended Harm Analysis' (EHA). In addition to the *empirical* link between the prohibited conduct and the undesired harmful result (step 1 SHA), a *normative* link becomes essential - which focuses on the questions "why and to what extent the defendant committing a given act should be held responsible or to blame for its remote consequences or risks" (i.e. fair imputation).[30] This section will first examine the existing laws and the incorporation of the terrorist link, after which existing research on the empirical link will be explored. The section will end with a critical note on the normative link. The second and third step of the SHA, namely the social value of the conduct, the degree of intrusion upon actors' choices that criminalisation would involve, and the side-constraints, refer mainly to the infringement of fundamental freedoms. These elements are, therefore, given a central place in the human rights assessment (*infra*, section 3.2.).

3.1.2. The terrorist link in the existing criminal law provisions

Following courses online (e.g. chemistry courses), searching information on the internet, viewing online content and downloading certain material is in itself harmless and lawful. However, this conduct turns into unlawful behaviour when there is a terrorist link. This link differs from provision to provision. It will be demonstrated that the crime descriptions have been increasingly stretched, leading to the criminalisation of conduct that is even further removed from the actual harm.

The minimum standard of the European Union with regard to self-study (as incorporated in the offence of receiving training for terrorism) calls upon Member States to criminalise conduct that is executed "for the purpose of committing, or contributing to the commission of" a terrorist offence

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[27] A.P. Simester and A. von Hirsch (2011), *op. cit.*, p. 58.
[28] J. ten Voorde, 'Prohibiting Remote Harms: On Endangerment, Citizenship and Control', 10(1) *Utrecht Law Review* (2014) 168.
[29] Simester and von Hirsch have labelled the common approach to analyse direct, primary harms the 'Standard Harm Analysis'. However, they argue that there is a need for an 'Extended Harm Analysis' to deal with the special issues raised by remote harms. See A.P. Simester and A. von Hirsch (2011), *op. cit.*, p. 53 *et seq.*
[30] A.P. Simester and A. von Hirsch (2011), *op. cit.*, p. 56.

"when committed intentionally" (art. 8 Directive 2017/541).[31] The domestic legal frameworks do not explicitly refer to self-study within their crime descriptions of receiving terrorism for terrorist purposes. However, the conduct will often be prohibited in an implicit way, or through other criminal law provisions. The broadening to include *contributions* to the commission of a terrorist offence enlarges the scope of the offences significantly. The conduct of self-study, viewing or obtaining material over the internet is in itself considered to be an act preparatory to terrorism. When this preparatory conduct is not only for the purpose of actually committing a terrorist offence, but also for the purpose of contributing to a terrorist offence (i.e. other preparatory acts), these provisions can be seen as "double preparation offences",[32] of which the ancillary offences may again be considered a crime.[33] Ten Voorde (2012) cites in this context examples such as language courses, the training in writing inflammatory speeches and in the ability to express threats.[34] By combining multiple offences with each other and with ancillary offences, there is a risk that the threshold of punishable conduct lies at a very early stage far removed from the actual terrorist offence. Moreover, even though there *is* a requirement of intent, the threshold is rather low. This intent can, for example, be inferred from "the type of materials and frequency of reference"[35] or "what is known about the background of the suspected person", such as "information known about the suspect's hatred of the Western world, his fascination with terrorist violence or about the person's radicalisation process".[36] Ten Voorde (2014) warns that "too much focus on intent could lead to the criminalization of one's political, societal or religious background, or the orientation of the offender".[37] Such an interpretation of intent is a dangerous one, which should be avoided at all times.

Whereas in the case of self-study the terrorist link has clearly been stretched, some provisions are formulated in a manner implying a lower threshold or not even demanding a terrorist purpose at all.

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[31] On an EU level, the evolution concerning training offences is remarkable. In 2002, the cornerstone instrument of the criminal justice response to counter terrorism (Council Framework Decision 2002/475/JHA), did not make mention of any training offence. In 2008, the latter instrument was amended and the provision on providing training for terrorism was introduced (Council Framework Decision 2008/919/JHA). Almost a decade later, Directive 2017/541 replaces these Framework Decisions and has added 'receiving training for terrorism' to the list of punishable behaviour. Although self-study was not incorporated in the initial proposal, it is explicitly included in the recital of the final Directive.

[32] J.M. ten Voorde, 'Het Deelnemen en Meewerken aan Training voor Terrorisme Getoetst aan Criteria voor Strafbaarstelling in de Voorfase', 42(2) *Delikt en delinkwent* (2012) p. 106.

[33] The Meijers Committee (2016) has also criticised the addition of 'contributing'. See Meijers Committee, 'Note on a Proposal for a Directive on Combating Terrorism' (2016).

[34] J.M. ten Voorde, *op.cit.*, p. 108-09.

[35] Directive 2017/541, recital 11.

[36] Translation of The Netherlands, *Wetsvoorstel wijziging van het Wetboek van Strafrecht, Wetboek van Strafvordering en enkele aanverwante wetten in verband met de strafbaarstelling van het deelnemen en meewerken aan training voor terrorisme, uitbreiding van de mogelijkheden tot ontzetting uit het beroep als bijkomende straf en enkele andere wijzigingen*, Tweede Kamer 2007–08, *Kamerstuk* 31 386, nr. 8, *Nota naar aanleiding van het verslag*, p. 6. J.M. ten Voorde (2012) (*op. cit.*) warns that certain groups of the population might be targeted by this specification. He, therefore, pleads for a strict interpretation by the Courts.

[37] J. ten Voorde, 'Prohibiting Remote Harms: On Endangerment, Citizenship and Control', 10(1) *Utrecht Law Review* (2014), p. 176.

In the UK, two parallel[38] provisions on collecting, making or possessing material both entail a different standard. According to section 57 of the Terrorism Act 2000, "a person commits an offence if he possesses an article *in circumstances which give rise to a reasonable suspicion* that his possession is for a purpose connected with the commission, preparation or instigation of an act of terrorism". Section 58 of the same act, however, punishes a person if he (a) collects or makes a record, (b) possesses a document or record, or (c) views, or otherwise accesses, by means of the internet a document or record, "*of a kind likely to be useful* to a person committing or preparing an act of terrorism". This third element (c) was recently inserted by the Counter-Terrorism and Border Security Act in 2019.[39] However, the standard "*of a kind likely to be useful*" says nothing about the terrorist intent of the perpetrator. Although the House of Lords held prior to this amendment that the information must be of "practical assistance",[40] human rights organisations are rightly concerned that the formulation itself is too ambiguous and that mere propaganda videos would also fall within its scope. Even though the newly amended article contains a defence clause for those with a "reasonable excuse" (s.58, 3), this does not rule out the conviction of a person with no terrorist intent.[41] The absence of a link between the defence and a terrorist intent is demonstrated by the fact that the Crown Prosecution Service "does not take the view that mere curiosity will always be a reasonable excuse".[42] Nevertheless, it is not because someone knows that the content of a website is of a terrorist nature, that he has a terrorist intent.[43] As Professor Emeritus Walker (2018) rightly states, "every citizen might have research purposes".[44] Moreover, the reversed burden of proof "runs afoul of the fundamental principle that the main burden of proof should reside with the prosecution".[45]

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[38] For example, in *Siddique v. Her Majesty's Advocate*, it was argued that the charge under s.58 was an alternative to the charge under s.57. In other words, a conviction under s.57 did not require to consider and return a verdict on a charge under s.58 (*Mohammed Atif Siddique v. Her Majesty's Advocate*, 29 January 2010, [2010] HCJAC 7). See A. du Bois-Pedain, 'Terrorist Possession Offences: Curiosity Kills the Cat?', 68(2) *The Cambridge Law Journal* (2009). and J. Hodgson and V. Tadros, 'How to Make a Terrorist out of Nothing', 72(6) *Modern Law Review* (2009). These authors have openly criticised these sections. The focus will be on s.58 (although s.57 may also be applicable in some cases).

[39] Although the offence has been the subject of much debate before and after its amendment, it must be noted that the more general preparation offence of section 5 of TACT 2006 has been used more often.

[40] See United Kingdom, *R v. G and J*, 4 March 2009, [2009] UKHL 13, para. 43. This 'practical use test' consequently leads to the fact that a document that "simply encourages the commission of acts of terrorism does not fall within the ambit of the section" (see B. Middleton, 'Terrorism-Related Documents: Defining the Ambit of S.58 of the Terrorism Act 2000', 72(2) *J. Crim. L.* (2008)). Hodgson and Tadros (2009) (*op. cit.*), however, argue that in *R v. G ([2009] UKHL13)* the Court failed to give the section a suitably constrained meaning.

[41] Especially since the House of Lords has argued that "to have a defence, the defendant must have had *an objectively reasonable excuse* for collecting the information", overruling the previous standard "that a reasonable excuse is 'simply an explanation that the document or record is possessed for a purpose other than to assist in the commission or preparation of an act of terrorism'". See the United Kingdom, *R v. K*, [2008] EWCA Crim 185 and the United Kingdom, House of Lords, 4 March 2009, ([2009] UKHL 13.

[42] Independent Reviewer of Terrorism Legislation, 'Report on the Operation in 2010 of the Terrorism Act 2000 and of Part 1 of the Terrorism Act 2006' (July 2011), p.89.

[43] Liberty, 'Liberty's Briefing on the Counter-Terrorism and Border Security Bill for Second Reading in the House of Lords' (2018), p. 10.

[44] C. Walker, 'Written Evidence (Cbs0001) in Response to the Joint Committee on Human Right's Call for Evidence in Connection with the Counter Terrorism & Border Security Bill 2017-19' (2018), p. 12.

[45] M. Hill QC and C. Walker, *op. cit.*, para. 2(c).

In France, art. 421-2-5-2 CP punished "the act of habitually accessing online public communication services that exhibit messages, images or representations that directly encourage the commission of terrorist acts, or defend these acts, when this service has the purpose of showing images or representations of these acts that consist of voluntary harm to life".[46] This provision did not contain a single demand of a terrorist intent nor proof whether the defendant embraces the particular ideology, prior to its first annulment.[47] The French legislator later added the latter requirement, but the *Conseil constitutionnel* again ruled that this was not sufficient and that a terrorist intent was still lacking.[48] Moreover, the scope of the "*bonne foi*" defence was considered insufficiently precise.

3.1.3. The empirical link between the conduct and the undesired harmful result

The gravity of the potential eventual harm, namely the commission of a terrorist act, is of such a magnitude that counter-terrorism measures often escape scrutiny by the legislator in the name of security. However, not only the gravity must be taken into account, but also the likelihood that the harm will be caused. Scientific research on the empirical link between the prohibited conduct (i.e. self-study, obtaining or viewing certain terrorism-related content over the internet) and the undesired harmful result (i.e. a terrorist attack) shows some interesting – but also very divergent – findings. Although scholars are still divided on the extent and practical significance of the internet, there is little doubt on the fact that the internet is commonly used for terrorist purposes.[49]Another point of agreement is that "radicalisation of opinion" should be separated from "radicalisation of action".[50] Due to the wide array of prohibited conduct under the studied provisions, it is useful to make a distinction between (a) seeking actual manuals and other information that provide *practical assistance* in the preparation of a terrorist offence, and (b) accessing websites that provide inciting propaganda texts, images and videos or viewing/obtaining certain material (no practical assistance, e.g. language courses or religious content).

Concerning practical information, a study of lone actors has shown that almost half of the sample of Al-Qaeda related lone actors learned through virtual sources and held bomb-making manuals

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[46] France, *Loi n° 2016-731 du 3 juin 2016 renforçant la lutte contre le crime organisé, le terrorisme et leur financement, et améliorant l'efficacité et les garanties de la procédure pénale*, JORF no. 0129, 4 June 2016, art. 18 : « *Le fait de consulter habituellement un service de communication au public en ligne mettant à disposition des messages, images ou représentations soit provoquant directement à la commission d'actes de terrorisme, soit faisant l'apologie de ces actes lorsque, à cette fin, ce service comporte des images ou représentations montrant la commission de tels actes consistant en des atteintes volontaires à la vie (…)* » . This provision is confined to images or representations showing "*des atteintes volontaires à la vie*", which is a specific category of crimes in the French Penal Code entailing "*meurtre*", "*l'assassinat*" (i.e. premeditated murder), and "*l'empoisonnement*" (i.e. poisoning). The death of the victim is the distinguishing criterion between attacks on life and attacks on the integrity of the person.

[47] France, *Conseil constitutionnel*, no. 2016-611 QPC, 10 February 2017, para. 14.

[48] France, *Conseil constitutionnel*, no. 2017-682 QPC, 15 December 2017, para. 14.

[49] T. Zeman, J. Bren, and R. Urban, 'Role of Internet in lone wolf terrorism', 7(2) *Journal of Security and Sustainability Issues* (2017).

[50] C. McCauley and S. Moskalenko, 'Understanding Political Radicalization: The Two-Pyramids Model', 72(3) *American Psychologist* (2017) 205-16.

within their homes.[51] Notwithstanding these high figures, other scholars question the significance of information on the internet, either on the basis of the poor quality or inaccuracies or on the basis of the simple fact that some skills demand practical experience.[52] Zeman, Břeň and Urban (2017) even conclude that "the significance of the internet as a communication tool in the transfer of practical information or in the planning of a terrorist attack seems to be at least marginal".[53] Instead, these authors have found in their review on the role of the internet in lone wolf terrorism that the internet rather plays a crucial role in transferring theoretical information or changing ideological perspectives.[54]

When it comes to propaganda, research has shown that there is a wide spectrum of people exposed to the propaganda machine, whilst only a very small proportion proceeds to action.[55] In the survey of Cunliffe and Cottee (2017), 57% of the young adult respondents has watched an IS video before (beyond TV clips and online news material), and 46% of the latter category has even seen more than 10 videos. From that perspective, it is astonishing that under UK law, criminal liability is triggered even from a single viewing. In spite of a lack of further empirical data, these scholars argue that "while sustained exposure to extremist online material is not in itself a sufficient cause of radicalization, it can reinforce existing assumptions and beliefs that are already tending toward the extreme".[56] In other words, effective propaganda catalyses the radicalisation process of those individuals who already hold extreme sympathies. Koch (2018), on the other hand, describes multiple cases in which beheading videos did have an influence on the actions of an individual, also outside the Jihadi context (i.e. copycat behaviour).[57]

These results show that no unequivocal conclusions can be drawn on the likelihood of harm. There is a high need for further *empirical* data. Moreover, it is not always easy to draw a clear line between seeking practical information and other sources. Although these types of activities are distinctive in nature, many sources contain both propaganda and instructional content (e.g. online Jihadi magazines, such as IS's *Rumiyah*).

3.1.4. The normative link: fair imputation

The foregoing has made clear that the risk of harm does not arise straight away from the prohibited act. Instead, a further intervention or subsequent choice of the actor is required in order for the harm to arise. As Simester and von Hirsch (2011) note, this technique criminalises conduct that is not inherently wrong.[58] The mere potential to lead to harm as a rationale for criminalisation undermines the idea of the actor "as a moral agent, capable of deliberation and self-control" (i.e.

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[51] P. Gill, J. Horgan, and P. Deckert, 'Bombing Alone: Tracing the Motivations and Antecedent Behaviors of Lone-Actor Terrorists', 59(2) *Journal of Forensic Sciences* (2014) p. 434.
[52] T. Zeman, J. Bren, and R. Urban, *op. cit.*; D.C. Benson, 'Why the Internet Is Not Increasing Terrorism', 23 *Security Studies* (2014), 293–328; J. Mueller, M.G. Stewart, 'Terrorism, counterterrorism, and the Internet: The American cases', 8 *Dynamics of Asymmetric Conflict* (2015), 176–190.
[53] T. Zeman, J. Bren, and R. Urban, *op. cit., p. 187.*
[54] T. Zeman, J. Bren, and R. Urban, *op. cit.*
[55] See S. Cottee, 'Why Do We Want to Watch Gory Jihadist Propaganda Videos?', in The New York Times (2017).
[56] S. Cottee, 'Why Do We Want to Watch Gory Jihadist Propaganda Videos?', in The New York Times (2017).
[57] Ariel Koch, 'Jihadi Beheading Videos and Their Non-Jihadi Echoes', 12(3) *Perspectives on Terrorism* (2018).
[58] A.P. Simester and A. von Hirsch (2011), *op. cit.*, p. 80.

personal agency).[59] In the case of a remote harm, it is therefore needed not only to investigate the empirical link, but also the normative link of fair imputation: "why and to what extent should the defendant committing a given act be held responsible or to blame for its remote consequences or risks"?[60] This question differs from a purely empirical account of causality (*supra*, 3.1.3.) as well as from the traditional criminal law notions of fault and culpability (*mens rea*) (*supra*, 3.1.2.). It is quite possible that the prohibited conduct is done intentionally, but the question remains whether the potential ultimate consequences should be seen asthe responsibility of the actor. The answer may lie, in part, in the political and social obligations of a certain person. In other words, the reasons are 'role-dependent' and may relate to a social or economic role (e.g. a vendor, manufacturer, civil servant) or simply the responsibilities as a citizen that every person has.[61]

Criminalising the consumer of online information might endanger this principle of fair imputation. A consumer does not act in a specific capacity or has no specific obligations.[62] Given that there is no specific social role attributed to a consumer, one could ask whether consuming terrorism-related information is in violation of our general (political) duties as a citizen. However, Simester and von Hirsch (2011) stress that "grounds for imputation cannot be drawn straightforwardly from everyday morality".[63] Ten Voorde (2014) clarifies this concept of citizenship, by discussing two separate visions: a liberal and a republican vision on citizenship. He argues that "criminalizing remote harms can, from a liberal point of view, be allowed as long as those offences do not interfere too much with the freedom and independence of citizens, or, from a republican point of view, as long as criminalization is not based on or does not lead to distrust among citizens within the polity".[64] As a liberal proponent, this paper argues that when *mens rea* is not sufficiently taken into account, the preventive strategy is a too drastic interference in a citizen's life. But even from a republican perspective, only a 'public wrong' may be criminalized.[65] Whilst there is no doubt that actual preparatory conduct with the intention to commit a terrorist act transcends the level of morality and undoubtedly constitutes a 'public wrong', the same conclusion does not apply to broader offences (e.g. the UK and French provisions, *supra*).

This section on remote harms has shown that legislators increasingly criminalise conduct while, at the same time, omit the needed safeguards regarding the ultimate harm (i.e. the terrorist link and the *mens rea* requirement). This is especially the case with the UK offence on collecting information and the annulled French provision on habitually accessing websites. Combined with the unequivocal findings regarding the empirical link between the conduct and the ultimate harm,

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[59] A.P. Simester and A. von Hirsch (2011), *op. cit.*, p. 61, 62 and 81.
[60] A.P. Simester and A. von Hirsch (2011), *op. cit.*, p. 56.
[61] A.P. Simester and A. von Hirsch (2011), *op. cit.*, p. 64. See also J. Ten Voorde, 'Prohibiting Remote Harms: On Endangerment, Citizenship and Control', 10(1) *Utrecht Law Review* (2014).
[62] As Ten Voorde (2014, *op. cit.*, p. 172) explains, "the content of social obligations can be found in written texts (protocols, guidelines or legislation), but can also take the form of unwritten obligations (principles of carefulness) and are directed at a person who acts in a certain capacity, such as a civil servant or employee (we could call these types of social obligations functional obligations), or someone who lacks that formal capacity, but who is held to certain social obligations because of the specific context within which he acts (e.g., any person who sells goods via the internet, whether as a professional or not, must act in accordance with certain social obligations)."
[63] A.P. Simester and A. von Hirsch (2011), *op. cit.*, p. 64.
[64] J. Ten Voorde, *op. cit.*, p. 174.
[65] J. Ten Voorde, *op. cit.*, p. 173.

and the questionable imputation on the consumer of online information, the criminal law provisions do not always satisfy the requirements of the harm principle.

3.2. Human rights assessment: Freedom of information breached?

The second part of the legitimacy test answers the question to what extent a criminal law approach is in accordance with human rights standards? In the following subsections, it will be demonstrated that the internet plays a central role within the right to freedom of information and, as a consequence, all restrictions must be as limited as possible. Since the case law on consumer-oriented criminal law provisions is scarce, an *a fortiori* argument based upon the criteria within the case law on the dissemination limb of freedom of expression is made.

3.2.1. Freedom of information and access to internet

This paper focusses on the fundamental freedom of information, which is – *inter alia* –[66] incorporated in article 10 of the European Convention on Human Rights: "Everyone has the right to freedom of expression. This right shall include *freedom to hold opinions and to receive and impart information and ideas* without interference by public authority and regardless of frontiers (…)". Although this right has primarily been interpreted as an intellectual right, it "has become one of the most important social rights since it is a precondition for participation in the various socio-economic and political activities of a modern knowledge society".[67] Within the context of the criminal law interventions on self-study, obtaining and viewing terrorist material over the internet, it is the negative obligation under article 10 ECHR that is of importance. This negative obligation "prohibits a Government from restricting a person from receiving information that others wish or may be willing to impart to him".[68] There is no doubt that the internet falls within the scope of

[66] See fn. 6. Although other instruments – such as the EU Charter – are also relevant in the debate, it is a deliberate choice to delineate this research paper solely to the European Convention/Court on Human Rights. This choice is motivated by the fact that, in the context of counter-terrorism, the European Court of Justice has primarily ruled upon executive decisions, terrorist lists and the restricting (economic) measures imposed upon designated individuals ('smart sanctions', mostly related to the freezing of assets) (see e.g. the *Kadi* cases). In the context of the free movement of information society services, it is the liability of service providers that has primarily been the subject of court rulings (see, *inter alia*, ECJ, *Eva Glawischnig-Piesczek v. Facebook Ireland Limited*, C- 18/18, 3 October 2019). Although highly interesting subjects, a thorough study would go beyond the scope of the paper.

[67] P.J. Lor and J.J. Britz, 'Is a Knowledge Society Possible without Freedom of Access to Information?' 33(4) *Journal of Information Science* (2007) p. 388.

[68] ECtHR, *Leander v. Sweden*, no. 9248/81, 26 March 1987, para. 74. In addition to this negative obligation, freedom of information is often understood as the right of access to information held by public bodies. See Article 19, 'The Public's Right to Know: Principles on Freedom of Information Legislation' (1999); P. Birkinshaw, *Freedom of Information: The Law, the Practice and the Ideal* (Cambridge: Cambridge University Press, 2010); T. Mendel, *Freedom of Information: A Comparative Legal Survey* (Paris: UNESCO, 2008). However, the European Court of Human Rights has been reluctant to recognise such general right of access to information held by public bodies.

article 10.[69] The European Court of Human Rights has stressed the importance of the internet for the freedom of information in its case law. [70, 71]

Restrictions must, therefore, be as limited as possible and must satisfy the three-step test of the Court (*infra*). Most cases deal with measures blocking access to the internet[72] and the removal of defamatory blog posts and comments[73]. Concerning criminal liability, the cases before the Court have always been related to the publisher of certain content.[74] Consequently, the criminal liability of the consumer who merely viewed or downloaded content has not yet been subjected to close scrutiny of the Court. The only exception was the case of *Jobe v. The United Kingdom*, in which the Court declared inadmissible a complaint on s. 58 of the terrorism Act 2000 under article 7 and 10 of the Convention. The considerations of the Court under the article 10 complaint were very brief:

> "The Court considers that this complaint is also manifestly ill-founded. Even assuming that there was an interference with the applicant's Article 10 rights, it was justified under Article 10 § 2. For substantially the same reasons given in respect of Article 7 above, any interference was prescribed by law. It was clearly justified by the legitimate aims of the interests of national security and the prevention and disorder of crime. It was also necessary in a democratic society, particularly when section 58 did not criminalise in a blanket manner the collection or possession of material likely to be useful to a person committing or preparing an act of terrorism; it only criminalised collection or possession of that material without a reasonable excuse. In the Court's view, this is an entirely fair balance to strike."[75]

This demonstrates that the Court is rather lenient in terrorism cases, and that there will hardly ever be an issue with regard to the first two steps of the limitation clause of article 10, namely the "prescribed by law" requirement and the legitimate aim of the interference. However, as Hill and Walker (2018) rightly state: "To date, the section 58 offence has been upheld as ECHR-compliant by domestic courts and even the ECtHR. Nevertheless, as the boundaries of the criminal law are expanded, so are the impingements on thought and expression and so are the arguments about legal (un)certainty".[76] The question arises to what extent the current (expanded) criminal law provisions on self-study, obtaining and viewing terrorist material over the internet would amount to a breach

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[69] Research Division European Court of Human Rights, 'Internet: Case-Law of the European Court of Human Rights' (2015), p. 40.
[70] ECtHR, *Cengiz and others v. Turkey*, nos. 48226/10 and 14027/11, 1 December 2015, para. 49 and 52.
[71] The importance of the internet has also been reaffirmed on the level of the United Nations. Parallel to freedom of expression, the right of access to information must be embedded in a legal framework in which the requirements of necessity and proportionality are of central importance when dealing with restrictions. See UNESCO, *Unesco's Internet Universality Indicators: A Framework for Assessing Internet Development* (United Nations Educational, Scientific and Cultural Organization, 2019), p. 27.
[72] E.g. ECtHR, *Yildirim v. Turkey*, no. 3111/10, 18 December 2012; ECtHR, *Akdeniz v. Turkey*, no. 20877/10, 11 March 2014; ECtHR, *Cengiz and others v. Turkey*, nos. 48226/10 and 14027/11, 1 December 2015 (respectively on the blocking of Google Sites, MySpace and Youtube).
[73] E.g. ECtHR, *Delfi AS v. Estonia*, no. 64569/09, 16 June 2015; ECtHR, *PIHL v. Sweden*, no. 74742/14, 7 February 2017; ECtHR, *Tamiz v. UK*, no. 3877/14, 19 September 2017.
[74] See for example ECtHR, *Perrin v. UK*, no. 5446/03, 18 October 2005.
[75] ECtHR, *Jobe v. UK*, no. 48278/09, 14 June 2011 (*further*: *Jobe v. UK*).
[76] M. Hill QC and C. Walker, *op. cit*.

of article 10. This question is especially relevant in terms of compliance with the third step of the limitation clause, namely whether the interference is necessary in a democratic society.

3.2.2. Necessity in a democratic society

The democratic necessity test has been extensively developed under the freedom of *expression* limb of article 10 ECHR. The long-standing rule that even offending, shocking or disturbing content constitutes protected speech is among the most important elements in the Court's jurisprudence.[77] The assessment demands a fair balance between the general interest of the community and the interests of the individual,[78] taking into account the criteria that have characterised the case law on freedom of expression. On the whole, these criteria are translated in the following elements: "who is invoking the right to freedom of expression, what was published, broadcasted or imparted, who was eventually criticized or insulted, how the opinions or statements were formulated or what medium was used, to whom the message was directed or who could receive the information, when something was published, broadcasted or imparted, where and under which circumstances something was made public, with what intention information was made public or allegations or opinions were formulated, and what the possible effect or impact of the message was".[79] Finally, the Court will also take into account the character of the interference and the severity of the sanctions.[80]

A similar detailed standard is not yet developed under the freedom of *information* limb of article 10 ECHR, especially not concerning the criminal liability of consumers of certain online content. However, given the detailed and traditional high standard in relation to the *dissemination* of certain content,[81] it may – *a fortiori* – be assumed that an even higher standard is appropriate in the context of *receiving* that same content. At the very least, the same standard and contextual criteria (as cited above) should be used as guiding principles. The following paragraphs will, therefore, focus on the different criteria of the person subjected to the criminal law measure, the substance of the online content, the *actus reus* and the intent of the actor.

3.2.2.1. Person subjected to criminal law measure

The first question, namely the who-question, concerns the person subjected to a criminal law measure. Whilst personal characteristics, such as the level of authority of the person, are of

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[77] ECtHR, *Handyside v. UK*, no. 5493/72, 7 December 1976, para. 49.
[78] Research Division European Court of Human Rights, *op. cit.*, p. 42.
[79] D. Voorhoof, 'Freedom of Expression, Media and Journalism under the European Human Rights System: Characteristics, Developments, and Challenges', in P. Molnar, ed., *Free Speech and Censorship around the Globe*, (Budapest - New York: Central European University Press, 2015), pp. 23-24.
[80] D. Voorhoof, 'Freedom of Expression, Media and Journalism under the European Human Rights System: Characteristics, Developments, and Challenges', in P. Molnar, ed., *Free Speech and Censorship around the Globe*, (Budapest - New York: Central European University Press, 2015), pp. 23-24.
[81] See D. Voorhoof, 'Freedom of Expression, Media and Journalism under the European Human Rights System: Characteristics, Developments, and Challenges', in P. Molnar, ed., *Free Speech and Censorship around the Globe*, (Budapest - New York: Central European University Press, 2015). However, as Voorhoof describes in his contribution, a worrying trend of less protection is emerging– which is also challenged in multiple dissenting opinions.

importance in assessing the influence of their disseminated messages, this factor seems to be irrelevant in passively viewing or obtaining terrorism-related content. Every single consumer becomes the possible target of a criminal law measure, given that the terrorist link within these crime descriptions is stretched, weak or absent - resulting in a predominantly negative answer concerning the likelihood of harm. Nonetheless, research has repeatedly shown that "there is no clear production line from viewing extremism or even being 'radicalised' into becoming an active terrorist".[82] Efforts should, therefore, be "directed towards creators and publishers, including passive platforms such as social media" instead of "picking off individuals with disquieting tastes in internet materials which they indulge in isolation".[83] This approach would certainly be more effective, and would ensure that criminal liability is reserved for those who intentionally distribute terrorist material and that non-criminal means effectively target the spread of illegal online content.

3.2.2.2. Substance of the online content

The exact content of the message (what?) depends upon the criminal law provision. With regard to self-study, the minimum standard of the EU is formulated as follows: "*instructions* on the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or on other specific methods or techniques" (art. 8 Directive 2017/541). Belgium, France and the United Kingdom have transposed this standard in similar terms in their provisions on receiving training for terrorist purposes (respectively art. 140quinquies *juncto* 140quater Sw., art. 421-2-6 I, 2°, b CP and s.54.2 TACT 2000 *juncto* s.6 TACT 2006), whereas the Netherlands uses the more vague and broader terms of "*knowledge or skills*" without further specifications (art. 134a Sr.). The annulled French provision on the habitually accessing certain websites is not aimed at instructions, but at "communication services that exhibit *messages, images or representations that directly encourage the commission of terrorist acts, or defend these acts*, when this service has the purpose of showing images or representations of these acts that consist of voluntary harm to life". The prime example in this context is footage of a decapitation or similar propaganda material. The recently amended UK provision on the collection of information (s.58 TACT 2000), on the other hand, is less precise and merely envisages "a document or record, *of a kind likely to be useful* to a person committing or preparing an act of terrorism".[84] These instructions, "messages, images or representations" or information are often widely available to everyone on the internet through a simple Google search. Delineating the content to material that provides practical assistance, as developed under the EU standard for example, would constitute a more legitimate basis for criminalisation.

3.2.2.3. *Actus reus*

Not only is it important to take into consideration the content of the message envisaged, but also the *actus reus* that is targeted by the offence. All criminal law provisions on self-study within the

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[82] C. Walker, 'Written Evidence (Cbs0001) in Response to the Joint Committee on Human Right's Call for Evidence in Connection with the Counter Terrorism & Border Security Bill 2017-19' (2018) p. 8.
[83] C. Walker, *op. cit.*, p. 9. See also Liberty, *op. cit.*, p. 11.
[84] This vagueness has been criticised by Liberty (2018). See Liberty, 'Liberty's Report Stage Briefing on the Counterterrorism and Border Security Bill' (2018), p. 11.

provisions on receiving training for terrorist purposes do not specify the question of 'how' these instructions are received. The minimum standard within recital 11 of Directive 2017/541 only specifies that the act must result from "active conduct".[85] The annulled French provision, on the other hand, demanded the "habitually accessing" for conduct to be punishable, whereas s.58 TACT 2000 in the UK holds the array of collecting, making, possessing, viewing or otherwise accessing those specific documents or records. The Bill initially envisaged to criminalise the viewing of such material "on three or more different occasions", in order to reflect a pattern of behaviour.[86] The 'three clicks rule' was heavily criticised. Nonetheless, the eventual offence does not even demand a repetitious viewing.[87] Moreover, individuals are not only targeted when they are "in control of the computer", but also when they are "viewing the material, for example, over the controller's shoulder".[88] These differences are important for an assessment by the Court. The act of transmitting, collecting or downloading may inherently bear more potential risk than the mere (single) viewing of a webpage.[89]

3.2.2.4. Intent of the actor

The intent of the actor plays an important role within the assessment. The case law of the French *Conseil constitutionnel* may set an example for future cases before the European Court of Human Rights. In addition to the argument that the authorities already have a plentitude of means at their disposal (*infra*), the French *Conseil constitutionnel* annulled the provision twice on the grounds that there was not even a terrorist intent required and that the scope of the "*bonne foi*"-defence was insufficiently precise.[90] Although the European Court found in *Jobe v. UK* that the "reasonable excuse"-defence ensures a fair balance, the French *Conseil constitutionnel* clearly believed that higher standards are required in cases of limitations on the right to freedom of expression.[91] As demonstrated, these defences often are meaningless with regard to the intent of the defendant.

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[85] It is criticised that a similar clause is not included in the body of the Directive itself. See Meijers Committee, *op. cit.*; Amnesty International, the International Commission of Jurists, the Open Society Justice Initiative, and the Open Society European Policy Institute, 'Joint Submission on the European Commission's Proposal for a Directive of the European Parliament and of the Council on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA' (2016).

[86] See Explanatory Notes to the Counter-Terrorism and Border Security Bill (June 2018), para. 37; Home Office, 'Memorandum Counter-Terrorism and Border Security Bill: European Convention on Human Rights' (6 June 2018), para 29.

[87] Article 19, 'House of Commons Public Bill Committee – Counter-Terrorism and Border Security Bill 2018' (2018), para. 12; Liberty, *op. cit.*, p. 8.

[88] Explanatory Notes to the Counter-Terrorism and Border Security Bill (June 2018), para. 37.

[89] C. Walker, *op. cit.*, p. 9.

[90] France, *Conseil constitutionnel*, no. 2016-611 QPC, 10 February 2017, para. 14-15; France, *Conseil constitutionnel*, no. 2017-682 QPC, 15 December 2017, para. 14.

[91] See M.P. David, 'Commentary on France, *Conseil constitutionnel*, no. 2017-682 QPC, 15 December 2017', p.18 on the issue of a legitimate motive. He argues that although the same wording is used in other provisions, the subjective assessment is more important in cases of freedom of expression.

3.3. Necessity argument: A need for a specific criminal law approach?

The third subpart of this legitimacy analysis consists of a necessity argument. In other words, the author argues that the legislature must always substantiate the need for a specific criminal law approach, before turning to this *ultimum remedium*. Although in legal doctrine, and even in policy documents, it is stressed that the legislator needs to analyse whether other measures address or could address the issue at hand more effectively,[92] courts are in general reluctant to question the relevance of a criminal law provision. The French *Conseil constitutionnel*, however, has put this question at the forefront of its judgment in regard to the provision on habitually accessing certain online public communication services (art. 421-2-5-2 CP). The *Conseil constitutionnel* argued that the existing powers and means are already sufficiently broad.[93]

By analysing its necessity, the *Conseil constitutionnel* "questions the relevance of the creation of the offence, not so say its very usefulness".[94] The focus of the *Conseil constitutionnel* on this principle of necessity has caused a lot of debate amongst scholars. Sizaire (2017), for example, refers to the decision and the "rediscovery of the principle of necessity" as "*une petite révolution*".[95] Baranger (2017), on the other hand, criticises the political dimension of the decision and questions the authority of the *Conseil constitutionnel* in this context.[96] Within weeks, the French government reinstated the provision, making only a few amendments. At the end of 2017, the *Conseil constitutionnel* annulled the article again on the same grounds.[97] The entire saga has attracted much attention from scholars and legal practitioners.[98]

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[92] See S. Melander, *op. cit.* See also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law, COM/2011/0573 final (20 September 2011).

[93] France, *Conseil constitutionnel*, no. 2016-611 QPC, 10 February 2017, para. 13.

[94] Translation of A. Gogorza and B. de Lamy, 'La Seconde Mort Constitutionnelle du Délit de Consultation Habituelle de Sites Terroristes', 5 *La Semaine juridique. Édition générale* (2018).

[95] V. Sizaire, 'Mort et Résurrection du Principe de Nécessité Pénale: A Propos de la Décision du Conseil Constitutionnel du 10 Février', *La Revue des droits de l'homme* (2017).

[96] D. Baranger, 'Consultation de Sites Djihadistes: Il ne Faut pas Réduire le Parlement au Silence', in *JP blog* (2017). See also T. Hochmann, 'Consultation Habituelle, Censure Habituelle (À Propos de la Décision QPC Rendue le 15 Décembre 2017 par le Conseil Constitutionnel)', in *JP blog* (2018); P. Conte, 'Conformité aux Principes du Droit Pénal Constitutionnel', 6 *Droit pénal* (2017); P. Conte, 'Nouvelle abrogation de l'article 421-2-5-2 du Code Pénal: Consultation habituelle d'un site provoquant à la commission d'actes de terrorisme ou faisant l'apologie de tels actes', 2 *Droit pénal* (2018).

[97] France, *Conseil constitutionnel*, no. 2017-682 QPC, 15 December 2017.

[98] See for example C. Ribeyre, 'Loi n° 2016-731 du 3 juin 2016 renforçant la lutte contre le crime organisé, le terrorisme et leur financement, et améliorant l'efficacité et les garanties de la procédure pénale - Et maintenant?', 9 *Droit pénal* (2016); N. Houry, 'French legislators rebuked for seeking to criminalize online browsing: court ruled provision was too restrictive of freedoms', *Human Rights Watch* (2017); V. Goesel-Le Bihan, 'Une Grande Décision: La Décision N° 2016-611 QPC', 8 *Actualité juridique. Droit administratif* (2017) ; A. Gogorza and B. de Lamy, 'L'abrogation par le Conseil Constitutionnel du délit de consultation habituelle de sites terroristes', 13 *La Semaine juridique. Édition général* (2017); B. Boutin, 'Excesses of Counter-Terrorism and Constitutional Review in France: The Example of the Criminalisation of the Consultation of Websites', in *Asser Institute* (2018); A. Gogorza and B. de Lamy, *op. cit.*; Y. Mayaud, 'Consultation de Site Internet: Seconde Censure. De la Difficulté de Légiferer en Matière Terroriste', 2 *Recueil Dalloz* (2018).

The European Court of Human Rights (in the context of other offences) has taken a more lenient stance in the sense that "the fact that there may be other measures available to protect against the harm does not render it disproportionate for a Government to resort to criminal prosecution, particularly when those other measures have not been shown to be more effective".[99] Although there is clearly no global or EU-wide trend of a reintroduction of the principle of necessity, the case law of the French *Conseil constitutionnel* might be considered as a positive evolution. From the point of view that the criminal law, and thus the introduction of new autonomous offences, should be regarded as a last resort, the French decision is a pioneer in the field. Hopefully, their judgment will act as an example for other jurisdictions.

4. CONCLUSION

The right to seek, receive and impart information is a fundamental freedom, which – at first glance – seems to stand far apart from terrorism cases. Nonetheless, policymakers increasingly restrict this right with the aim to prevent the commission of a terrorist offence. New autonomous offences are enacted or the scope of existing offences is expanded to trigger the procedural set of tools of a criminal investigation in an earlier stage and to allow the prosecution of conduct that would not meet the threshold of long-established provisions. Especially the emergence of lone wolves and the rise of the internet as a training ground for terrorists have contributed to this evolution.

The key message is justly summarised by the Joint Committee on Human Rights (2018) in the UK: "criminalisation of passive activity is a dangerous direction of travel".[100] Although the European Court of Human Rights, as a court of last resort, seems to have "a more forgiving attitude" in its counter-terrorism jurisprudence,[101] this contribution has aimed to demonstrate that the criminal law should adhere to the harm principle and that legislators should take greater account of the right to seek, receive and impart information so as to withstand any legitimacy challenges. There is no doubt that limiting illegal content can be justified when a person uses the internet to prepare a terrorist attack. However, the link with a potential terrorist offence in the future is often too tenuous in current legislation. The attributes of risk must incontestably be apparent from the wording of the criminal law provisions, which is not always the case. As human rights organisation Liberty (2018) rightly states, "overreliance on prosecutorial discretion can be no substitute for a sufficiently tightly drawn offence in the letter of the law itself".[102] The criminal liability of consumers of online content should, therefore, be limited to those cases in which there is a risk to future harm. Given the fact that scientific research has shown that there is no direct link between viewing terrorist content and becoming a terrorist (and thus disputing the 'conveyor belt' thesis), the constitutive elements of *actus reus* and *mens rea* must guarantee the blameworthiness of the conduct. Concerning the *actus reus*, the line should be drawn at the deliberate collection of information by which a consumer actively collects or downloads terrorist material that provides practical assistance for the commission of a terrorist attack. As such, the mere viewing of propaganda, for example, should

[99] ECtHR, *Perrin v. UK*, no. 5446/03, 18 October 2005, p. 8.
[100] Joint Committee on Human Rights, 'Legislative Scrutiny: Counter-Terrorism and Border Security Bill' (2018), para. 30.
[101] C. Walker, *op. cit.*, p. 13.
[102] Liberty, *op. cit.*, p. 9.

not be tackled by means of criminal law. The inclusion of a *mens rea* requirement that the act must be conducted for the purposes of the commission of a terrorist offence is necessary to limit the offence to only cover those persons that actually pose a risk. Moreover, these elements have to be formulated in clear language to ensure the accuracy, clarity, accessibility and predictability of the offence – hereby contributing to the principle of legality.[103] All these safeguards could avoid an interference in a too early stage of the *iter criminis*, rendering the term itself meaningless by combining various criminal offences to punish – so to speak – the preparation of the preparation of a preparatory act. Above all, the necessity of new measures must always be balanced against the existing tool set, especially given the *ultimum remedium* nature of criminal law. In sum, even though remote harm offences are undeniably a part of our criminal law system in the twenty-first century, a clear framework is indispensable. The conclusions drawn in this contribution, therefore, offer an initial incentive to reflect upon some fundamental values when drafting far-reaching legislation. Future research should look into the adjudication in practice of these terrorism-related provisions and should invest in a similar critical-legal analysis of non-criminal law instruments that target terrorist content online.

[103] The principle of legality has not been considered an actual issue in case law. In France, for example, the elements of the crime description on « *une entreprise individuelle* » (art. 421-2-6 Code Pénal), were considered sufficiently precise by the *Conseil constitutionnel*, save the term "*rechercher*" (France, *Conseil constitutionnel*, no. 2017-625 QPC, 7 April 2017). The Belgian Constitutional Court has come to a parallel conclusion with regard to the offences on providing and receiving terrorist training (art. 140quater and quinquies Sw.) (Belgium, Constitutional Court, *Algemeen Belgisch Vakverbond and Ligue des Droits de l'Homme et al*, no. 9/2015, 28 January 2015, Application Nos. 5710 and 5711, paras. B.41.2; B.41.4; B.48-50). Only the French provision on habitually accessing online public communication services (art. 421-2-5-2 CP) was twice annulled by the *Conseil constitutionnel* on multiple grounds (France, *Conseil constitutionnel*, no. 2016-611 QPC, 10 February 2017; France, *Conseil constitutionnel*, no. 2017-682 QPC, 15 December 2017). The rather lenient stance of the judiciary towards the legality principle raises questions and invites scholars to critically watch over the principle.