Max-Planck-Institut
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internationales Strafrecht

Benjamin Vogel (ed.)

Secret Evidence in Criminal Proceedings

Balancing Procedural Fairness and Covert Surveillance

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Herausgegeben von Ulrich Sieber

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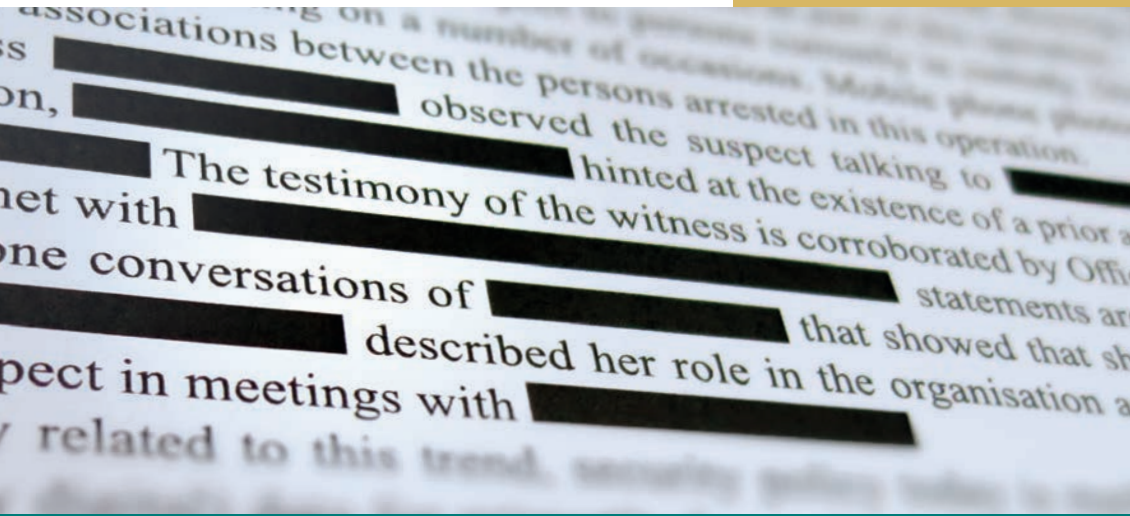

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Edited by Ulrich Sieber

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Preface

Confronted with politically motivated violence and profit-driven organised criminality, legal orders extensively rely on covert surveillance measures to detect, avert, and investigate offences. The rise of such measures and the increasing role of intelligence gathering as a criminal policy tool does, however, pose considerable challenges to the fairness of criminal proceedings. The following analysis is particularly inspired by the establishment of processes, in several legal orders, that allow for the imposition of restrictive measures on suspects even in cases when key underlying evidence is not disclosed to them or their counsel. This volume seeks to address these challenges by inquiring how legal orders, in the context of criminal trials and related provisional preventive measures, deal with confidential information that must not be disclosed to the defence and how they respond to resulting fair trial concerns. To this end, it analyses the criminal procedure law of numerous European countries as well as related frameworks at the UN and EU levels. Comparing these findings and adding an analysis of the jurisprudence of the European Court of Human Rights (ECtHR), the volume then outlines ways to safeguard fair trial guarantees while respecting the operational needs of investigative authorities and intelligence agencies. The findings highlight how legal orders have increasingly accepted that the courts will oftentimes assess the reliability of incriminating evidence also based on information that is, at no point during the proceedings, disclosed to the defence. From that ensues an urgent need to develop novel procedural approaches to improve judicial scrutiny of confidential material through strengthening the involvement of the accused and, at the same time, to prevent triers of fact at trial from becoming exposed to undisclosed material. This need is further amplified by the ECtHR's currently rather flexible stance towards the use of absent and anonymous witnesses. While the Court supplements this flexibility with a demand that countries must counterbalance secrecy at trial with adequate safeguards, its jurisprudence so far provides rather little detail as to the design of such safeguards. Moreover, the following findings demonstrate that further development of the law is also needed with regard to the evidentiary rules applicable to preliminary preventive measures in order to ensure the effectiveness of judicial scrutiny. For although the ECtHR is, at the pre-trial stage, rather sympathetic towards the judicial use of incriminating evidence undisclosed to the defence, it is not yet clear how exactly national courts tasked with reviewing preliminary measures should offset the unfairness that, in principle, results from closed material proceedings.

The editor is profoundly grateful for the opportunity to collaborate with the contributors to this volume, who, through an initial workshop at the Max Planck Institute

in Freiburg and numerous exchanges and discussions over recent years, allowed the project to benefit from their extensive insights and refined analysis. Of course, any mistakes within the comparative analysis remain the sole responsibility of the editor. Last but not least, this book would never have been possible without the diligent work of the editorial team at the Max Planck Institute; particular thanks are due to Yvonne Shah-Schlageter, Ines Hofmann, Christopher Murphy, and Indira Tie.

Freiburg i.Br., July 2021 The editor

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Between the Adversarial Principle and a Resurgence of the Inquisitorial Process

Benjamin Vogel

I. Secrecy as a pressing challenge of criminal procedure

In recent years, many countries have seen a continuous expansion of covert methods of information gathering for the purpose of criminal investigations and the use of this information as evidence in criminal proceedings. On the one hand, police authorities have been granted more powers to secretly investigate suspects, in particular in the field of terrorism and other forms of organised crime, a development which is complemented and partially also stimulated by a legislative trend towards criminalising harm-oriented behaviour already at the planning or preparatory stage.[1] On the other hand, intelligence agencies, whose tasks have historically

[1] See for example M Engelhart, Countering Terrorism and the Limits of Criminal Liability in Germany, in: M Dyson/B Vogel, The Limits of Criminal Law, Anglo-German Concepts and Principles, 2018, p. 435–466.

often been limited to providing policymakers with information in matters of national security and thus to a preventive role, are now increasingly also involved in the sphere of criminal justice, with information frequently being shared between intelligence agencies and police authorities with the aim of triggering or otherwise supporting criminal investigations.[2]

Secret investigation techniques and the greater role of intelligence gathering are regularly perceived as necessary steps to counter transnational organised crime and terrorism,[3] reflecting the view that more traditional investigative approaches are too inflexible to counter highly dynamic criminal networks, not least due to the ability of these actors to conceal incriminating evidence by means of intimidation or to hide individual responsibility and criminal assets behind clan structures.[4] Investigating such structures usually involves not only covert surveillance technologies, such as wiretapping and the infiltration of digital devices, but also reliance on undercover police officers and informants whose identity and modi operandi need to be protected.[5] Closely related to this trend, security policy today is marked by the extensive collection of (mainly digital) data for primarily forward-looking purposes aimed at the prevention of crimes and the facilitation of future criminal proceedings.[6] This leads to an ever growing amount of information in the hands of public authorities and in the private sector that not only directly serves as evidence, but also, through the analysis of this data, serves as the basis for the production of intelligence that is relevant for criminal proceedings, even though the methods used for the information gathering and subsequent analysis may not be disclosed by the respective agency. At the same time, the more frequent occurrence of investigations into criminal conduct committed outside the enforcement jurisdiction's national territory – for instance in the case of the activities of a foreign terrorist organisation or the laundering of assets initially generated by crimes committed abroad – means that courts will sometimes rely on information gathered by domestic or foreign intelligence agencies, which will in turn insist on safeguarding the confidentiality of their sources.[7]

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[2] See JAE Vervaele, Terrorism and Information Sharing between the Intelligence and Law Enforcement Communities in the US and the Netherlands: Emergency Criminal Law? (op. cit.), p. 420–425; Germany II.B.2.

[3] To this effect already ECtHR, Kostovski v. Netherlands, 20 October 1989 – app. no. 11454/85 –, para. 44.

[4] For an illustrative example of such phenomena, see N dalla Chiesa, The long march of the 'Ndrangheta in Europe, Zeitschrift für die gesamte Strafrechtswissenschaft 133 (2021), p. 563–586.

[5] See to this effect also S Maffei, The Right to Confrontation in Europe, 2nd edt. 2012, p. 58–59.

[6] M Jimeno-Bulnes, The use of intelligence information in criminal procedure: A challenge to defence rights in the European and the Spanish panorama, New Journal of European Criminal Law 2017, vol. 8(2), p. 172–175.

[7] FF Manget, Intelligence and the Criminal Law System, Stanford Law and Policy Review 17 (2006), p. 415–422; on the resulting challenges and procedural remedies intro-

While covert investigative measures and intelligence gathering are of increasing relevance for criminal justice, the potential impact of these developments on the fairness of court proceedings often is not fully taken into account by procedural laws.[8] One could of course argue that existing evidentiary rules and judicial scepticism towards hearsay and anonymous witnesses may constitute sufficient safeguards against unreliable evidence. Such an optimistic view does however potentially underestimate the impact of (real or perceived) preventive needs on judicial decision-making, as becomes most obvious in terrorism cases, which can tip the balance between fairness-oriented evidentiary standards and the desire for effective law enforcement towards the latter. In fact, insofar as the criminal justice system plays an increasingly preventive role aimed at a risk emanating from particular individuals, the non-admission of relevant (albeit not thoroughly tested) evidence can sometimes seem equally problematic, not least because the rights of persons outside the proceedings may be at stake. Confidentiality-preserving procedural measures may then not only be required to resolve a conflict between the rights of the accused and the rights of other parties to the proceedings (such as in the case of endangered witnesses),[9] but also to dissolve a conflict between the rights of the accused and the rights of potential future victims.

Only limited guidance has thus far been provided by the jurisprudence of the European Court of Human Rights (ECtHR). What can however be seen is that, over the last decade, the Court has softened its previously rigid approach towards the use of witness testimony given in absentia or anonymous witness testimony.[10] Insofar as such testimony usually restricts the defendant's right to examine adverse witnesses or have them examined, the more recent ECtHR jurisprudence in fact underscores a need for national legislators and courts to develop procedural mechanisms that adequately compensate for the fair trial limitations brought about by the use of hearsay and anonymous testimony. Even less clarity is provided for the evidentiary standards applicable to preventive measures (such as pre-trial detention or asset freezing) adopted prior to a criminal conviction, be it as part of criminal

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duced in the United States before the attacks of 9/11, see already J Fredman, Intelligence Agencies, Law Enforcement and the Prosecution Team, 16 (1998) Yale Law and Policy Review, p. 331–371.

[8] For a comparative analysis of the ability of courts in EU Member States to effectively adjudicate in the face of the withholding of secret information by the executive, see D Bigo et al., National Security and Secret Evidence in Legislation and before the Courts: Exploring the Challenges, European Parliament Committee on Civil Liberties, Justice and Home Affairs Paper no. 78, 2015.

[9] See on this line of argument to justify the use admission of evidence from anonymous witnesses ECtHR, Doorson v. Netherlands, 26 March 1996 – app. no. 20524/92 –, para. 70; on this multipolar conflict of interests see also F Meyer, in J Wolter (ed.), Systematischer Kommentar zur Strafprozessordnung, volume X, 5th edt. 2019, Art. 6 EMRK, para. 495.

[10] See *infra* III.B.

proceedings or in functionally similar civil or administrative proceedings.[11] As information on how incriminating evidence was obtained usually remains largely undisclosed during the investigative stage, the suspect's ability to challenge preliminary preventive measures will then be even more limited than at the trial stage, thereby exacerbating the conflict between preventive needs and procedural fairness.

After providing a short overview on the different ways in which secrecy appears within criminal proceedings (II), this chapter will first identify and compare how legal orders use different approaches to try to balance secrecy needs and procedural fairness (III). These findings will then provide the basis for further reflection on how to address the shortcomings of hearsay and anonymous witnesses at trial and in proceedings aimed at the imposition of preliminary preventive measures (IV).

II. Manifestations of secrecy in criminal proceedings

Secrecy in criminal proceedings can take various forms. In many cases, it will be characterised by the non-disclosure of the identity of the source of incriminating evidence or, even where this identity is disclosed to the defendant and his or her counsel, the unavailability of the source for questioning by a court[12] or the unavailability of information about how the evidence was collected. Courts may then have no other option but to admit what can be labelled "indirect evidence", meaning that the defendant and counsel have no or at least no full access to the original source of incriminating information (be it a witness, document, or other object).[13] Going even further, courts will sometimes allow for the use of "undisclosed evidence", meaning that a judge deciding on pre-trial measures or even a trial court may use some information to the detriment of the defendant – in particular to verify the reliability of incriminating indirect evidence – even if this information is not disclosed to the defendant or even to the defence counsel.[14]

Non-disclosure of the identity of the source will usually be explained by fear of reprisals against an undercover officer/agent or a private informant or by a desire not to compromise the source for the purpose of continuing to use the source to gather information.[15] If the court hears an anonymous witness, the defendant will often not be in a position to effectively scrutinise the reliability of the witness by detecting reasons that may motivate the latter to make false statements.[16] Concerns

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[11] See for example Belgium IV; France III.A.

[12] See in more detail S Maffei, The Right to Confrontation in Europe, p. 55–58.

[13] Belgium II.A; Germany III.B.1; Italy III.B.2, Spain III.

[14] See Belgium III.B.2; England II; Ireland I.B; Spain II.C.

[15] Belgium II.A.2, 3; England I.A.1; France I.A.1; Ireland I.A.1.

[16] *Infra* III.B.

to this effect are obviously particularly high where testimony stems from a source that is both anonymous and at the same time unwilling or unable to testify in court.[17] In such instances, the defendant usually will not even have the opportunity to directly press an anonymous witness to produce spontaneous oral explanations for any gaps and inconsistencies in the testimony.

Unavailability of the source of incriminating evidence may be due not least to the unwillingness of a witness to repeat statements previously made to an undercover officer or to an informant.[18] The unavailability of information about how or from whom incriminating evidence was obtained can furthermore be the consequence of an authority's unwillingness to publicly reveal how it reached certain insights, because it would otherwise be forced to disclose its operational strategies and methods and thereby weaken their usability in future operations.[19] Concern for the non-disclosure of investigative methods and the identity of sources will often go hand in hand, for example when the mere knowledge that a particular piece of information originates from an unspecified undercover agent or informant would enable those targeted by the investigation to uncover that person's identity.

Beyond the use of testimony originating from anonymous witnesses, secrecy may especially take the form of reports from police or intelligence agencies, irrespective of whether they are introduced into criminal proceedings only as documentary evidence or through the oral testimony of their author or another representative of the agency.[20] Insofar as such reports do summarise findings or present an opinion of the respective authority, they can raise difficulties that may go well beyond the testimony of an unavailable or anonymous witness, because the court and the defendant will oftentimes not be able to establish the source of the findings and methods by which the author of a report came to a particular conclusion.[21] The reliability of a report's content will then frequently depend on a number of factors, the identity and trustworthiness of which the court and the defendant cannot examine. The evidentiary value of police and intelligence reports is thus not only weakened by the possibility that their content has been distorted by investigative bias, but also by the lack of transparency surrounding a report's factual basis.[22]

Especially reports by police or intelligence agencies underscore the fact that the topic of secrecy in criminal investigations must not be limited to the issue of possible curtailments of the defendant's right to examine incriminating witnesses or have them examined. For even in cases in which incriminating evidence does not consist of hearsay testimony stemming from unavailable or anonymous sources,

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17 *Infra* III.C; England I.A.2, Spain III.D.

18 *Infra* IV.C.

19 Belgium II.A.1, 2; England I.A.3; Germany III.B.1; Ireland I.D.1.

20 *Infra* III.C.

21 England I.A.2, Germany II.D; Ireland I.A.2; Spain IV.

22 *Infra* IV.C.

undisclosed information about the methods employed in its gathering and processing may still be capable of undermining the reliability of the evidence or point to other exculpatory elements.[23] The curtailment of a defendant's right to confront incriminating witnesses is of course a key reason why secrecy in criminal proceedings can constitute a major obstacle to a fair trial.[24] However, non-disclosure of information that relates to the methods and circumstances of the evidence-gathering can be of comparable importance for the accused's ability to effectively challenge the reliability of the presented evidence.[25] It follows that any assessment of the impact of secrecy on criminal proceedings must take into consideration not only the (generally limited) quality of hearsay and anonymous testimony but first and foremost the impact of authorities' refusal to disclose information pertaining to the circumstances under which the evidence was obtained. Due to the potential impact of undisclosed information and the (in)ability of defendants to challenge the incriminating evidence, the withholding of such information can be highly detrimental to those on trial. While judges may be aware of the fact that the reliability of incriminating evidence will usually be limited if information about the gathering of this evidence is withheld from the court, they will actually oftentimes not be able to fully gauge the relevance of the undisclosed information and its capacity to undermine the incriminating evidence for the simple reason that they will not see this information.[26] Even if information must be fully disclosed to the defendant in order to become admissible as evidence, the non-disclosure of information by investigating authorities thus by no means necessarily favours him or her.[27] This also demonstrates that reliability concerns related to anonymous testimony and to police and intelligence reports must, in essence, be understood as specific manifestations of the broader problem of non-disclosure of relevant evidence, a fact that also explains why procedural mechanisms to scrutinise the non-disclosure of relevant evidence and mechanisms to scrutinise the reliability of anonymous witnesses and hearsay may be closely interlinked.[28]

To understand how legal orders may deal with the aforementioned challenges of accommodating a need for secrecy when balancing the public interest in prosecuting crime and the right to a fair trial, it seems helpful to differentiate hereinafter between four areas of concern, even if they will in part overlap: first, the non-disclosure of potentially exonerating information; second, anonymous testimony; third, reports from police or intelligence agencies that reproduce specific findings

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23 *Infra* III.A.

24 *Infra* III.B.

25 *Infra* IV.A; England I.A.1, Spain II.A.

26 *Infra* IV.D.

27 See England I.A.1.; Ireland I.A.1.; Italy III.C.2; cf. Germany III.B.1.

28 See *infra* IV.A, B, C.

or summarise results of their investigation; fourth, the non-disclosure of incriminating and exonerating information during the implementation of preventive measures at the pre-trial stage.

III. Solutions at the ECHR and national levels

A. Non-disclosure of information about covert investigations

The reliability of covertly obtained evidence and ultimately the fairness of criminal proceedings will often depend on the trial court's knowledge of the circumstances under which the covert operation was conducted. The more such information is disclosed to the trial court and the defendant by the investigating authority, the greater the chances that the trial will uncover possible inaccuracies or manipulation. Accordingly, material that contains information on how incriminating evidence was obtained and may therefore relate to the "admissibility, reliability and completeness of the directly relevant evidence"[29] usually constitutes evidence that is relevant for determining a defendant's guilt.[30] Yet, its disclosure to the defence will oftentimes conflict with a need to protect covert sources and investigative methods, thereby giving rise to tensions between the rights of the defendant and other interests. According to the jurisprudence of the ECtHR, Article 6 para. 1 ECHR requires "that the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused".[31] Having said this, "the entitlement to disclosure of relevant evidence is not an absolute right", because "there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused". The Court adds, "only such measures restricting the rights of the defence which are strictly necessary are permissible". Lastly, "in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities".[32]

The aforementioned requirements present legal orders with considerable challenges. The assessment of the relevance of the undisclosed material for the case

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[29] ECtHR, Matanovic v. Croatia, 4 April 2017 – app. no. 2742/12 –, para. 170.

[30] See ECtHR, Mirilashvili v. Russia, 11 December 2008 – app. no. 6293/04 –, para. 200; ECtHR, Leas v. Estonia, 6 March 2012 – app. no. 59577/08 –, para. 82.

[31] ECtHR (GC), Jasper v. United Kingdom, 16 February 2000 – app. no. 27052/95 –, para. 51; ECtHR (GC), Rowe and Davis v. the United Kingdom, 16 February 2000 – app. no. 28901/95 –, para. 60.

[32] ECtHR (GC), Jasper v. United Kingdom, 16 February 2000 – app. no. 27052/95 –, para. 52; ECtHR (GC), Rowe and Davis v. the United Kingdom, 6 February 2000 – app. no. 28901/95 –, para. 61.

must, according to the ECtHR, not be carried out solely by the prosecuting authorities themselves without any further procedural safeguards.[33] The decision on whether it is strictly necessary to withhold confidential material will often make it necessary for a court to review this material. Otherwise, it might be impossible to verify to what extent a disclosure will in fact endanger other important interests without effectively delegating this assessment to the executive.[34] At the same time, given that it requires a balancing of the interests at stake, the decision on disclosure needs to consider the potential impact of the withheld material on the outcome of the trial. After all, it is only by looking at the specific allegations and the incriminating and exonerating evidence laid before the trial court that the decision-maker can determine to what extent the disclosure of withheld material is capable of supporting the accused as well as whether – in balancing this possible benefit with the degree of endangerment disclosure that would be posed to other important interests – a withholding of the material under consideration is strictly necessary.[35]

In addressing the need to ensure judicial control over the decision not to disclose relevant material to the defence, national legal orders have adopted various approaches,[36] three types of which deserve particular attention: procedural frameworks that provide the trial court with full disclosure on withheld material in order to decide on disclosure; frameworks that involve the trial court in the decision on disclosure and at the same time bar the trier of fact[37] from accessing withheld material; and frameworks in which the decision on disclosure is kept strictly separate from the trial court. When comparing these different approaches, it becomes apparent that the issue of disclosure of relevant material is closely linked to a review of the lawfulness of how the incriminating evidence presented by the prosecution was obtained. This is due to the fact that the reasons advanced by the defence to challenge the reliability or admissibility of covertly obtained incriminating evidence will frequently pertain to the lawfulness of how covert investigative measures were

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[33] ECtHR, Matanovic v. Croatia, 4 April 2017 – app. no. 2742/12 –, para. 158.

[34] See ECtHR (GC), Rowe and Davis v. the United Kingdom, 6 February 2000 – app. no. 28901/95 –, para. 63.

[35] To this effect ECtHR (GC), Jasper v. United Kingdom, 16 February 2000 – app. no. 27052/95 –, para. 56; ECtHR, McKeown v. United Kingdom, 11 January 2011 – app. no. 6684/05 –, para. 52.

[36] See also M Engelhart/M Arslan, Schutz von Staatsgeheimnissen im Strafverfahren: Eine Studie zur Europäischen Menschenrechtskonvention, 2020, p. 69–87. On a very similar approach to the disclosure of evidence in the United States under the Classified Information Procedures Act: United States v. Yunis, 687 F.2d 617 (D.C. Cir. 1989), para. 623–625, which defines as threshold for discovery of classified information that the latter must be at least helpful to the defence.

[37] Note that "trier of fact" is for the present purpose used to exclude the trial judge in a common law-inspired jury trial, a differentiation that seems necessary in light of the fact that ECtHR jurisprudence on disclosure obligations has largely been developed in cases pertaining to the English criminal process.

implemented.[38] Grounds that render a measure unlawful (such as violations of an obligation to document the measure or not to exert undue pressure on a suspect or witness) will usually impact on the reliability or even the admissibility of the incriminating evidence unlawfully obtained. As the lawfulness cannot, in many cases, be determined without knowing details about the circumstances of a covert investigation, the request for disclosure is then usually an integral part of an attempt by the defence to scrutinise the reliability of incriminating evidence. It is therefore unsurprising that the decision on disclosure and the review of the lawfulness of a particular investigative measure often overlap and may be the task of one and the same judicial body. For the same reason, where important interests militate against disclosure of information pertaining to the implementation of an investigative measure, a finding of lawfulness of the measure is likely to strengthen the case for non-disclosure.

The first of the three aforementioned models is based on the assumption that the rights of the accused are protected best by granting the trial court full access to all relevant evidence, even if some of the evidence is, in the interest of protecting confidentiality, permanently withheld from the defence. Given that the use of undisclosed incriminating evidence is hardly reconcilable with the requirement that criminal proceedings "should be adversarial and that there should be equality of arms between the prosecution and the defence",[39] the use of such evidence to the detriment of the accused would not conform to the fairness standards of Article 6 para. 1 ECHR.[40] The ECtHR has however accepted that the trial court or a member of it may be allowed to inspect confidential material in order to decide on its disclosure,[41] even while seemingly recognising that access to undisclosed material by trial judges may create prejudice, in particular due to the possibility that the subsequent guilty verdict may be influenced by the confidential material of which they become aware when deciding on disclosure.[42]

A second model provides for a functional separation between the trier of fact (i.e. the trial judges or, where applicable, the jury) and another judicial body (i.e.

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[38] See ECtHR, van Wesenbeeck v. Belgium, 23 May 2017 – app. nos. 67496/10 and 52936/12 –, para. 107, and also ECtHR, Schenk v. Switzerland, 12 July 1988 – app. no. 10862/84 –, para. 47–48.

[39] ECtHR (GC), Jasper v. United Kingdom, 16 February 2000 – app. no. 27052/95 –, para. 51.

[40] To this effect also ECtHR (GC), Edwards and Lewis v. United Kingdom, 27 October 2004 – app. nos. 39647/98 and 40461/98 –, para. 46–47; ECtHR, van Wesenbeeck v. Belgium, 23 May 2017 – app. nos. 67496/10 and 52936/12 –, para. 82.

[41] See ECtHR, Mirilashvili v. Russia, 11 December 2008 – app. no. 6293/04 –, para. 203–205; ECtHR, Leas v. Estonia, 6 March 2012 – app. no. 59577/08 –, para. 85–90; ECtHR, Berardi v. San Marino, decision of 1 June 2017 – app. no. 24705/16 –, para. 68–69; see also Ireland I.A.3., D.1; Turkey III.B.

[42] ECtHR, McKeown v. United Kingdom, 11 January 2011 – app. no. 6684/05 –, para. 48.

a judge outside the trial court[43] or, in case of some jury trials, the trial judge[44]) who alone reviews the confidential material to decide on its disclosure or non-disclosure. This model offers the advantage that it ensures a high level of equality of arms between prosecution and defence before the triers of fact, as the latter are not granted access to withheld material and therefore not exposed to the risk that they may, wittingly or unwittingly, base their verdict of guilt or innocence on evidence that the accused never had a chance to comment on. In order to decide about the non-disclosure of withheld material, the judge tasked with deciding on the non-disclosure must of course have a thorough understanding of the trial, and in particular of the evidence presented by the prosecution, and of the arguments of the defence.[45] Such an understanding is necessary to properly balance the interests at stake in the individual case in order to determine whether non-disclosure is strictly necessary and – more particularly – to be able to scrutinise the investigative measure whose evidentiary outcome the defence is ultimately challenging. While the judge tasked with the non-disclosure decision will thus necessarily need to consider the current state of affairs at the trial – notably by giving due regard to the trial file – developments at the trial that occur *after* his or her non-disclosure decision may give rise to an obligation (on the initiative of the trial court or upon application by the defence) to reconsider this decision. This can be the case for example when disclosure is initially refused because the respective investigative measure was at first found lawful and subsequent developments at trial lead to the discovery of facts that nourish doubts to this effect. Due to the resulting need to continuously scrutinise non-disclosure decisions throughout the entire trial,[46] ECtHR jurisprudence has consistently pointed out the advantages of a separation of functions in a jury trial in which the trial judge, while not being the trier of fact, is tasked with examining undisclosed evidence and deciding on its disclosure.[47] By participating throughout the entire trial while at the same time having seen the undisclosed material, the trial judge is well positioned to monitor whether new evidence or arguments advanced by the parties may necessitate a disclosure of the withheld material and then to order such disclosure on his or her own initiative even when the

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[43] See ECtHR, McKeown v. United Kingdom, 11 January 2011 – app. no. 6684/05 –, para. 52 for a non-jury trial in Northern Ireland.

[44] ECtHR (GC), Jasper v. United Kingdom, 16 February 2000 – app. no. 27052/95 –, para. 54; England I.A.3.; Ireland I.A.3.

[45] See ECtHR, McKeown v. United Kingdom, 11 January 2011 – app. no. 6684/05 –, para. 24 and 51–52. For a possible need in such disclosure decisions to rely on additional undisclosed evidence, for example by asking the prosecution to present witnesses to authenticate documents whose disclosure is requested by the defence, see Ireland I.A.3.

[46] See ECtHR, McKeown v. United Kingdom, 11 January 2011 – app. no. 6684/05 –, para. 52.

[47] ECtHR (GC), Jasper v. United Kingdom, 16 February 2000 – app. no. 27052/95 –, para. 56.

defence, not having seen the undisclosed material, does not itself reiterate its application for disclosure.

Opting for a third approach, national frameworks may provide for a more comprehensive judicial oversight of the covert investigative measures of police authorities, entrusting out-of-trial judges (such as investigative judges) with full access to the confidential files that contain details about the implementation of the measures.[48] Such a judicial control body will not be allowed to disclose contents of a confidential file to the trial court or to the accused, and, as a result of its unfettered access to confidential material, can in principle obtain a full picture of the manner in which covert measures were carried out.[49] Due to this privileged position, the control body is, at the same time, able to verify the continued need to withhold relevant information and may, insofar as the withholding is not necessary, transfer this information to the trial file and thereby disclose it or, at the very least, publicly state that the file is incomplete and thereby suggest its disclosure to the investigative authorities.[50] From the accused's perspective, the drawback of such a framework lies in the fact that his or her role as a party to these review proceedings is heavily restricted or even completely lacking as large parts and often key elements of the information relevant to the review decision will not be seen by him or her. The simultaneous benefit for the accused is significant however as investigative authorities are then not entitled to withhold information from the out-of-trial judge tasked with reviewing a covert investigative measure. In essence, this model of judicial control reflects the view that the operational need for covert investigative methods should not lead to a de facto erosion of the judiciary's ability to effectively control executive action. At the same time, by handing the task of reviewing covert investigative measures to out-of-trial judges instead of the trial court and by introducing a separation between a confidential file that is accessible to the out-of-court judge and an open file that is open to the trial court and the defence, this procedural model ensures that judgements of the trial court are based on full equality between the accused and the prosecution as regards the information used against the accused. Insofar as the trial court is empowered to trigger a review of a particular investigative measures by out-of-trial judges,[51] this model may furthermore enable the trial court – if doubts appear during the trial as to the lawfulness of the manner in which covert measures were carried out – to initiate a thorough inquiry into such questions without being prevented from doing so by confidentiality claims on the part of the investigative authority. In accordance with this approach, the review of covert investigative measures is consequently of a two-track nature.

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[48] Belgium III.B.2; France I.C.1., D.1.

[49] See ECtHR, van Wesenbeeck v. Belgium, 23 May 2017 – app. nos. 67496/10 and 52936/12 –, para. 15–19.

[50] ECtHR, van Wesenbeeck v. Belgium, 23 May 2017 – app. nos. 67496/10 and 52936/12 –, para. 78–79; Belgium II.B.5.

[51] To this effect see the role of the indictments chamber in Belgium II.A.2.

On the one hand, the accused can, during the trial, challenge the way in which the investigation was conducted and thereby invite the trial court to scrutinise the lawfulness of investigative measures on the basis of information contained in the trial file and other accessible evidence.[52] On the other hand, investigative measures may additionally be reviewed by an out-of-trial judge, either automatically or on the initiative of another party to the proceedings or the trial court who may, on this occasion, inform the out-of-trial judge about the arguments put forward by the defence.

B. Anonymous testimony

Particularly in cases of organised crime and terrorism, the jurisprudence of the ECtHR as well as national legal frameworks recognise a need for criminal proceedings to shield the identity of a witness: both for the purpose of protecting him or her (or third parties) against threats and reprisals and for the purpose of preserving the continued use of an anonymous witness as a source of information in future criminal proceedings.[53] Anonymity may therefore be granted to private individuals, not least to informers and to state agents, in particular undercover investigators. However, it is also recognised that the use of anonymous testimony constitutes an interference into the right to a fair trial and in particular the right to examine incriminating witnesses or have them examined under Article 6(1)(d) ECHR.[54] The reason for this is that the lack of knowledge about the witness' identity usually makes it difficult and sometimes impossible for the accused to effectively challenge the testimony, as the defence "may be deprived of the very particulars enabling it to demonstrate that the witness is prejudiced, hostile or unreliable".[55] As a result of measures designed to protect the identity of the witness through visual and acoustic barriers, additional infringements to the right to a fair trial can result from the fact that the accused and their counsel may be prevented from observing the witness during testimony and from asking the witness questions that could lead to a disclosure of his or her identity.[56]

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[52] See ECtHR, van Wesenbeeck v. Belgium, 23 May 2017 – app. nos. 67496/10 and 52936/12 –, para. 72.

[53] Cf. on the rather far-reaching limitations on the use of anonymous testimony under Italian law: S Maffei, The Right to Confrontation in Europe, p. 213–214 and 218–219; cf. Italy III.B.2.c.

[54] ECtHR, Doorson v. Netherlands, 26 March 1996 – app. no. 20524/92 –, para. 69; ECtHR, van Mechelen and Others v. Netherlands, 23 April 1997 – app. nos. 21363/93, 21364/93, 21427/93 and 22056/93 –, para. 54.

[55] ECtHR, Kostovski v. Netherlands, 20 October 1989 – app. no. 11454/85 –, para. 42; ECtHR, Boshkoski v. North Macedonia, 4 June 2020 – app. no. 71034/13 –, para. 38.

[56] ECtHR, Kostovski v. Netherlands, 20 October 1989 – app. no. 11454/85 –, para. 42–43.

In response to the difficulties that exist with regard to anonymous witnesses,[57] the ECtHR has, under Article 6(3)(d) ECHR, developed criteria meant to ensure the overall fairness of the trial.[58] First, there must be good reasons why the identity of the witness cannot be disclosed.[59] These conditions will be met when a witness would otherwise be unwilling to testify owing to fear, based on objective grounds, of death or injury of the witness or another person.[60] The same applies when, for the reasons mentioned above,[61] it is strictly necessary to withhold the identity of the witness.[62] Although the admission of the testimony of an anonymous witness in the absence of such good reasons will not necessarily lead to the determination that the trial as a whole has been unfair and Article 6 para. 1 and para. 3(d) thus infringed, the Court has bolstered this requirement, stating that "the absence of good reason for the non-disclosure of the identity of the witness" constitutes "a very important factor to be weighed in the balance when assessing the overall fairness of a trial".[63] Second, the ECtHR requires national courts to be mindful of the limited reliability of such evidence and therefore to establish, in every case, whether the testimony of an anonymous witness has served as the sole or decisive evidence against the accused or whether it has at least been of significant weight and its admission have handicapped the defence, even if it remains unclear whether this testimony was decisive for the eventual verdict.[64] Even though a conviction may, in exceptional cases, be based on the testimony of an anonymous witness, when this

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[57] ECtHR (GC), Al-Khawaja and Tahery v. United Kingdom, 15 December 2011 – app. nos. 26766/05 and 22228/06 –, para. 127; ECtHR, Ellis, Simms and Martin v. United Kingdom, decision of 10 April 2012 – app. nos. 46099/06 and 46699/06 –, para. 75; ECtHR, Scholer v. Germany, 18 December 2014 – app. no. 14212/10 –, para. 50; ECtHR, Asani v. Former Yugoslav Republic of Macedonia, 1 February 2018 – app. no. 27962/10 – para. 33–37.

[58] See ECtHR, Doorson v. Netherlands, 26 March 1996 – app. no. 20524/92 –, para. 72.

[59] ECtHR, Scholer v. Germany, 18 December 2014 – app. no. 14212/10 –, para. 51; ECtHR, Asani v. Former Yugoslav Republic of Macedonia, 1 February 2018 – app. no. 27962/10 – para. 34.

[60] See ECtHR (GC), Al-Khawaja and Tahery v. United Kingdom, 15 December 2011 – app. nos. 26766/05 and 22228/06 –, para. 124; ECtHR, Asani v. Former Yugoslav Republic of Macedonia, 1 February 2018 – app. no. 27962/10 – para. 39.

[61] *Supra* III.A.

[62] For the hearing of police agents as anonymous witnesses, see ECtHR, Bátěk and Others v. the Czech Republic, 12 January 2017 – app. no. 54146/09 –, para. 46–47 and ECtHR, van Wesenbeeck v. Belgium, 23 May 2017 – app. nos. 67496/10 and 52936/12 –, para. 101–102.

[63] ECtHR, Boshkoski v. North Macedonia, 4 June 2020 – app. no. 71034/13 –, para. 44.

[64] See ECtHR (GC), Schatschaschwili v. Germany, 15 December 2015 – app. no. 9154/10 –, para. 116; ECtHR, van Wesenbeeck v. Belgium, 23 May 2017 – app. nos. 67496/10 and 52936/12 –, para. 105. See also ECtHR, Ellis, Simms and Martin, decision of 10 April 2012 – app. nos. 46099/06 and 46699/06 –, para. 81; ECtHR, Boshkoski v. North Macedonia, 4 June 2020 – app. no. 71034/13 –, para. 40; F Meyer, Systematischer Kommentar zur Strafprozessordnung (op. cit.), Art. 6, para. 489.

testimony constitutes decisive evidence against the accused,[65] national courts must, as in the case of merely absent witnesses, subject such evidence "to the most searching scrutiny".[66] As a third criterion for the treatment of such evidence where it is at least of significant weight for the verdict, the ECtHR requires "sufficient counterbalancing factors, including the existence of strong procedural safeguards" that "permit a fair and proper assessment of the reliability of that evidence".[67]

The trial court must thus provide for measures that counterbalance the handicap suffered by the accused as a result of the withheld identity of the witness. The ECtHR does not however conclusively define what sufficient counterbalancing measures are and leaves national legal orders with considerable flexibility in this regard. While the diversity of solutions adopted at the national level does not allow for a differentiation between clear-cut categories, it is possible to identify several distinctive features that not only reflect fundamental differences in opinion on how to accommodate anonymity in the criminal trial, but also represent differing degrees of judicial involvement.

Arguably constituting the most far-reaching departure from the concept of an adversarial trial, the ECtHR has accepted that the trier of fact may directly examine an undercover officer (with whom the accused had previously been in contact, but of whom he or she knew neither the identity nor any details beyond the officer's direct involvement in the event forming the subject of the indictment) in the absence of the accused and counsel if the accused is subsequently provided with a transcript or a summary of the testimony and offered the opportunity to address written questions to the witness.[68] However, if the witness had been completely unknown to the accused and this witness' anonymous testimony constituted decisive evidence, the ECtHR found that the possibility for the accused to put written questions to the witness would not provide a sufficient procedural safeguard to counterbalance the handicap caused by the trial court's examination of the anonymous witness in the absence of the defence.[69] Going further, if an anonymous

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[65] For a critique of the more inflexible handling of the "sole or decisive" rule by the ECtHR prior to the Grand Chamber's decision in Al-Khawaja, see A du Bois-Pedain, Onlinezeitschrift für Höchstrichterliche Rechtsprechung zum Strafrecht 2012, p. 134–138.

[66] See ECtHR (GC), Al-Khawaja and Tahery v. United Kingdom, 15 December 2011 – app. nos. 26766/05 and 22228/06 –, para. 147; ECtHR, Asani v. Former Yugoslav Republic of Macedonia, 1 February 2018 – app. no. 27962/10 – para. 36.

[67] See ECtHR (GC), Al-Khawaja and Tahery v. United Kingdom, 15 December 2011 – app. nos. 26766/05 and 22228/06 –, para. 147; ECtHR, van Wesenbeeck v. Belgium, 23 May 2017 – app. nos. 67496/10 and 52936/12 –, para. 94.

[68] ECtHR, Doncev and Burgov v. Former Yugoslav Republic of Macedonia, 12 June 2014 – app. no. 30265/09 –, para. 53–57. See also ECtHR, Ivannikov v. Russia, 25 October 2016 – app. no. 36040/07 –, para. 26.

[69] ECtHR, Asani v. Former Yugoslav Republic of Macedonia, 1 February 2018 – app. no. 27962/10 – para. 40–42. See also ECtHR Sapunarescu v. Germany, decision of

witness had not been examined by the trial court but his statements were relevant for the testimony of a senior police officer at trial, the ECtHR accepted that, while this testimony had not been the sole or decisive evidence against the accused but carried "some weight", the trier of fact was entitled to seek additional information by reviewing, in private outside the trial, the files on which the officer based his testimony "in order to assess the adequacy and reliability" of this testimony.[70] Constituting a more reticent example of preferential access by the trial court to relevant information, the ECtHR accepted as conforming to Article 6 para. 1 ECHR a procedural setting marked by a cumulation of the following elements: the anonymous testimony was of considerable weight; the triers of fact were allowed to directly observe the anonymous witness; the witness was shielded from the accused and counsel and was only audible via a sound link distorting his voice;[71] the defence was able to put live questions to the witness and the latter had been examined by the president of the court, who was aware of the identity of the witness and also participated in the deliberations on the verdict.[72]

Other procedural settings are characterised by greater concern for ensuring the equality of arms between the defence and the prosecution, meaning that the trial court and the defence should in principle have exactly the same level of knowledge as regards any evidence used against the accused.[73] To this end, anonymous witnesses may, through disguise, a screen, or distorted live audio or audio-video streaming, be examined at trial and thereby be shielded not only from the accused and counsel but equally from the fact-finder.[74] Some legal orders also allow for statements of anonymous witnesses to be introduced into the trial through an intermediary, such as the testimony of an investigative judge, a police officer, or an

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11 September 2006 – app. no. 22007/03 –; ECtHR, Süleyman v. Turkey, 17 November 2020 – app. no. 59453/10 –, para. 95.

[70] ECtHR, Donohoe v. Ireland, 12 December 2013 – app. no. 19165/08 –, para. 87–88; see Ireland I.B., D.1 and similarly also Germany III.B.2.b.

[71] See also ECtHR, Papadakis v. Former Yugoslav Republic of Macedonia, 26 February 2013 – app. no. 50254/07 –, para. 91; ECtHR, Rozumecki v. Poland, decision of 1 September 2015 – app. no. 32605/11, para. 64; England I.A.1.

[72] ECtHR, Pesukic v. Switzerland, 6 December 2012 – app. no. 25088/07 –, para. 50; in a similar vein:

ECtHR, Bátěk and Others v. Czech Republic, 12 January 2017 – app. no. 54146/09 –, para. 56; see also F Meyer, Systematischer Kommentar zur Strafprozessordnung (op. cit.), Art. 6 EMRK, para. 494.

[73] Belgium II.A.3; France I.A.3; Germany III.B.2.a; Italy III.B.2.c; Netherlands II.B.2; but see ECtHR, Ellis, Simms and Martin v. United Kingdom, decision of 10 April 2012 – app. nos. 46099/06 and 46699/06 –, para. 75, where only the defence counsel, but not also the accused, was enabled to directly observe the anonymous witness and listen to him without any voice distortion.

[74] See for example ECtHR, Ellis, Simms and Martin v. United Kingdom, decision of 10 April 2012 – app. nos. 46099/06 and 46699/06 –, para. 82; ECtHR, Boshkoski v. North Macedonia, 4 June 2020 – app. no. 71034/13 –, para. 46.

intelligence agent who previously examined the anonymous witness in person.[75] Despite the fact that the absence of the anonymous witness entails an additional curtailment of the accused's right to confront incriminating witnesses,[76] this solution generally offers a way of introducing anonymous testimony without granting the trial court preferential access to the witness.

Constituting a compromise between the aforementioned approaches, some national legal orders provide for the introduction of anonymous testimony as evidence through the oral or written testimony of a judge who is not a member of the trial court and who has previously examined the anonymous witness in person in knowledge of his or her identity.[77] Such an out-of-trial hearing may also be performed in the presence of the defence and rely on questions put forward by the defence, whereby the witness will then of course be shielded and questions that could lead to a disclosure of the identity of the witness may not be asked.[78] The report of the examining judge will be inserted into the trial file and can include not only the anonymised content of the witness' testimony, but also observations regarding the reliability of the witness.[79] This is essentially meant to ensure that the trial court receives an assessment of the reliability of the witness without being equipped with superior knowledge vis-à-vis the accused and counsel. At the same time, by allowing the examining judge to access the witness' identity, this approach provides for an additional measure of judicial scrutiny of the anonymous witness' reliability on the basis of information that is not accessible to the trial court. This additional scrutiny does not of course replace the trial court's assessment, the latter's findings having the great advantage of contextualising individual witness testimony within the broader mosaic of the other evidence presented at trial. Having said that, such involvement on the part of an examining judge can extend beyond the pre-trial stage. In particular, when the trial court requests the involvement of an examining judge to examine the anonymous witness,[80] in parallel to an ongoing trial, he or she will be able to assess the reliability of the witness in light of previous findings of the trial court and thus contextualise the witness testimony. Furthermore, examining judges outside the trial are not only a means to protect the anonymity of the witness and, knowing his or her true identity, assess the reliability of their testimony. Recourse to such judges also allows a judicial authority, having knowledge of the witness' identity, to scrutinise whether the witness does in fact

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[75] Germany III.B.2.b.

[76] See *infra* III.C.

[77] Netherlands II.B.2, C; see also France I.A.2.; Germany III.B.2.b.

[78] Belgium II.A.3.

[79] See ECtHR, van Mechelen and Others v. Netherlands, 23 April 1997 – app. nos. 21363/93, 21364/93, 21427/93 and 22056/93 –, para. 24; ECtHR, Doorson v. Netherlands, 26 March 1996 – app. no. 20524/92 –, para. 73.

[80] See ECtHR, Doorson v. Netherlands, 26 March 1996 – app. no. 20524/92 –, para. 73.

deserve to be granted anonymity.[81] Though it is also conceivable that the lawfulness of granting anonymity be reviewed out of trial by a judge, without this judge being further involved in the gathering of evidence,[82] the combination of a review of the lawfulness of anonymity and a review of the examination of the witness in the hands of one and the same examining judge allows for a more comprehensive assessment of the former.[83] This follows because, as in any decision on the disclosure of relevant material withheld by the prosecuting authorities,[84] the decision to grant anonymity will usually depend on an overall assessment of, on the one hand, the risks that a disclosure of the witness' identity would entail and, on the other hand, the relevance of the testimony for the trial.

C. Testimony and reports by police or intelligence agencies

In addition to anonymous witnesses, other forms of evidence that deserve particular attention in the present context are oral testimony and written reports from police or intelligence agencies that reproduce investigative findings by reporting what the suspect, an informer, or other individuals said out-of-court and/or by summarising or assessing the results of covert measures or an intelligence analysis.[85] Such evidence can pose challenges for a fair trial, particularly as it may in essence constitute hearsay, possibly derived from a mixture of identified and anonymous sources.[86] As with any hearsay evidence, the use of the resulting information at trial poses a particular reliability problem because it can be difficult to verify whether and exactly how the original statements were made. Such concerns are amplified when the witness is closely aligned with the prosecuting authority and therefore less neutral than a disinterested witness. This applies not least to the danger that the original statement may have been the result of manipulation employed by the agent to confirm a suspicion[87] or may even have been completely fabricated by an informer hoping to ingratiate himself with the police,[88] possibly to

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[81] See Belgium II.A.3; France I.A.1.a; Spain II.B.2.

[82] Germany II.C.

[83] In this vein also ECtHR, Taxquet v. Belgium, 13 January 2009 – app. no. 926/05 –, para. 64.

[84] *Supra* III.A.

[85] See in more detail Germany III.B.2.c; Spain IV.

[86] See to this effect the example of so-called "gang evidence" in England I.A.2 and "belief evidence" in Ireland I.B., D.2; see also Netherlands II.A.

[87] On limitations on the use of hearsay as being sometimes less motivated by reliability concerns and instead more by a desire to protect against governmental overreach: M Damaška, Of Hearsay and Its Analogues, Minnesota Law Review 76 (1992) p. 445; see also A von Kries, Das Prinzip der Unmittelbarkeit im Beweisverfahren der deutschen Prozeßordnung, Zeitschrift für die gesamte Strafrechtswissenschaft 6 (1886), p. 93 and 105.

[88] JR Spencer, Hearsay Evidence in Criminal Proceedings, 2ed ed. 2014, at 10.12.

avoid being prosecuted him- or herself or to avoid other detriments, such as deportation,[89] or to earn or increase remuneration for his or her services.[90]

As regards out-of-court statements by the suspect or witnesses, one can, for the present purpose, exclude testimony and written records that essentially reproduce the content of formal police interrogations, as the gathering of information is in this case not conducted covertly. Obviously, the evidentiary use of such hearsay can be of great relevance for procedural fairness, as the interrogation may have been influenced by circumstances and methods that impaired the interrogated person's autonomous choice to testify and, as written interrogation records may only reproduce a selection of the original testimony, been distorted by the investigative presumptions of the interrogating agent.[91] Due to such concerns, the ECtHR and national laws provide for formal requirements as to the conduct of interrogations and limit the use of police interrogation records at trial accordingly.[92] These rules raise secrecy issues however only if the acting agent, through deceit and with the aim of acquiring incriminating information, concealed the fact that he or she was treating the interlocutor as a suspect or witness. As recognised by the ECtHR, statements made by a suspect may be inadmissible as evidence if the deceptive conduct, due to an element of coercion or oppression, amounts to a circumvention of the rules governing a formal interrogation.[93]

Insofar as they reproduce the results of covert measures, testimony and reports by police and particularly intelligence agencies can raise reliability problems if they state findings without specifying exactly how the underlying information was obtained. Police reports will however usually allow the trial court and the accused to understand what kind of investigative measure was used to obtain the incriminating information and specify further details necessary to demonstrate the lawfulness of the measure. More importantly, covert police operations will in most cases be subject to some form of judicial supervision, thereby usually reducing the risk that

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89 G Van Harten, Weaknesses of adjudication in the face of secret evidence, The International Journal of Evidence & Proof (2009) 13, p. 12.

90 W Wohlers, Art. 6 Abs. 3 lit. d) EMRK als Grenze der Einführung des Wissens anonym bleibender Zeugen, in: A Donatsch/M Forster/C Schwarzenegger (eds.), Festschrift für Stefan Trechsel zum 65. Geburstag, 2002, p. 828; highlighting such dangers even with regard to informers whose identity is known to the accused: ECtHR, Habran and Dalem v. Belgium, 17 January 2017 – app. nos. 43000/11 and 49380/11 –, para. 100–103.

91 On the latter concern: D Negri, Das Unmittelbarkeitsprinzip in der italienischen Strafprozessordnung, Zeitschrift für die gesamt Strafrechtswisenschaft 126 (2014), p. 219.

92 ECtHR (GC), John Murray v. United Kingdom, 8 February 1996 – app. no. 18731/91 –, para. 45; ECtHR (GC), Ibrahim and Others v. United Kingdom, 13 September 2016 – app. nos. 50541/08, 50571/08, 50573/08 and 40351/09 –, para. 267; for the national level, see in particular the respective reforms regarding the admissibility of police hearsay in Italy III.B.2.a; see also Spain III.H.

93 See ECtHR (GC), Bykov v. Russia, 10 March 2009 – app. no. 4378/02 –, para. 102; ECtHR, Allan v. United Kingdom, 5 November 2002 – app. no. 48539/99 –, para. 51–52.

the report contains untruths or inaccuracies.[94] Insofar as such judicial control exists, national legal orders regularly recognise police reports as being sufficiently reliable to constitute full-fledged evidence.[95]

In contrast, given that they are regularly based on a plurality of unspecified sources and furthermore that how this information was obtained is rarely disclosed, the evidentiary value of reports produced by intelligence services is generally more limited.[96] A different conclusion may be reached when a report essentially reproduces information obtained from a particular informer whose assertions can be scrutinised by the trial court and the accused, notably by having this source examined as an anonymous witness before a court[97] or by addressing questions to him or her through an intermediary, such as an employee of the intelligence service.[98] Conversely, if the assertions made in the report of an intelligence agency largely rely on statements stemming from particular individuals without these individuals being directly or indirectly questioned by the court or the accused, such reports, constituting hearsay and relying on anonymous sources, are of questionable reliability.[99] Some jurisdictions will, in the interest of ensuring the fairness of the criminal proceedings, sometimes even go as far as to discontinue the prosecution, seemingly out of concern that a criminal case might be unduly based on unreliable material.[100] Reflecting a willingness to facilitate greater involvement on the part of intelligence agencies in criminal proceedings, some countries have created mechanisms designed to improve information-sharing between authorities from both sides through procedures meant to accommodate conflicting operational interests. They may also serve to verify the lawfulness or reliability of the reports of intelligence agencies provided to criminal justice authorities. Such mechanisms can in particular take the shape of special prosecutors who are authorised to review internal files

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[94] See ECtHR, Lüdi v. Switzerland, 15 June 1992 – app. no. 12433/86 –, para. 49.

[95] Belgium II.A.2; France I.A.2, 4 (providing the notable example of undercover agents, who usually cannot be examined directly by the court, but only indirectly through the testimony of the supervising judicial police officer, and stating furthermore that convictions may even to a decisive degree be based on such testimony; for exceptions to this rule: J Leblois-Happe, Das Unmittelbarkeitsprinzip im französischen Strafverfahrensrecht, Zeitschrift für die gesamt Strafrechtswisenschaft 126 (2014), p. 190), Spain III.F; see also S Maffei, The Right to Confrontation in Europe, p. 194–196.

[96] See for example the German Federal Court of Justice decision of 26 March 2009 – StB 20/08 –, para. 31.

[97] See for example Netherlands II.B.2.

[98] See France III.A.2.

[99] But cf. the analysis of the jurisprudence of the Spanish Supreme Court by M Jimeno-Bulnes, The use of intelligence information in criminal procedure: A challenge to defence rights in the European and the Spanish panorama (op. cit.), p. 183–188, regarding the value of intelligence reports that, as expert evidence, are "a 'means of assistance' when the judge alone is unable to verify the truth of the facts"; ibid., p. 186. See also England I.A.2 with regard to the treatment of some forms of police testimony.

[100] Germany III.C; Netherlands II.B.2.

before a report is transferred to a judicial authority.[101] Another example is constituted by independent committees that, in addition to serving as a filter between intelligence agencies and criminal justice authorities, are tasked with authorizing certain particularly intrusive covert measures and reviewing their implementation by the intelligence agency on request of the trial court.[102]

As a particularly relevant point for the present purpose of balancing the right to a fair trial and the need to protect confidential information is that some national legal orders[103] impose limitations on the use of hearsay to the effect that hearsay evidence may usually not be combined with guarding the anonymity of the source. The exclusion of anonymous hearsay evidence can of course significantly curtail the ability of prosecuting authorities to rely on information provided by anonymous informers as evidence at trial. Though the exclusion of anonymous hearsay is in no way universally recognised,[104] it reflects a realisation that it is particularly difficult and often impossible to challenge the reliability of hearsay testimony if the source of the hearsay cannot be examined in person and this source's identity is at the same time unknown to the accused and counsel. Even if they do not provide for a general exclusion of anonymous hearsay, other legal orders may sometimes adopt similar approaches, for example by staying criminal proceedings when the case against the accused relies on hearsay testimony of a state agent, and the investigating authorities, contrary to the trial court's request to this effect, prevent the source underlying the hearsay evidence from testifying before a judge.[105]

D. Evidentiary standards applicable to preliminary measures

Particular difficulties as to the fairness of judicial measures can arise in the context of a review of preliminary measures adopted during the investigative stage, as a disclosure of information will frequently entail the risk of evidence-tampering by the suspect and might thereby compromise the outcome of the investigation. Substantive standards applicable to preliminary measures, such as a reasonable suspicion for the purpose of pre-trial detention,[106] are certainly lower than those required

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[101] Netherlands II.A.2.

[102] Belgium II.A.1; for a judicial supervision of inquiries of an intelligence service, see Spain IV.

[103] England I.A.2, I.A.3; Italy III.B.2.a; see also Spain III.D; JR Spencer, Hearsay Evidence in Criminal Proceedings, at 2.72–2.76.

[104] See for example ECtHR, Guerni v. Belgium, 3 October 2018 – app. no. 19291/07 –, para. 67; Germany III.B.2.c. Cf. also the rules on the hearing of judicial police officers on findings made by undercover agents in France I.A.2 and the use of so-called "belief evidence" in Ireland I.A.2.

[105] See Netherlands II.A.1; cf. Germany III.C.

[106] ECtHR (GC), Labita v. Italy, 6 April 2000 – app. no. 26772/95 –, para. 153; ECtHR, Becciev v. Moldova, 4 October 2005 – app. no. 9190/03–, para. 70.

for a criminal conviction, thereby arguably allowing for greater flexibility as to the types of the evidence used at this stage.[107] Nevertheless, ECtHR jurisprudence requires that courts, when reviewing the detention of a suspect, must ensure equality of arms in the sense that the defence should, in principle, have "access to those documents in the investigation file which are essential in order to challenge effectively the lawfulness of [the] detention"[108] or at least access to essential information contained in these documents.[109] The ECtHR adds that "restrictions on the right of the detainee or his representative to have access to documents in the case file which form the basis of the prosecution case against him must be strictly necessary in the light of a strong countervailing public interest. Where full disclosure is not possible, Article 5 § 4 requires that the difficulties this causes are counterbalanced in such a way that the individual still has a possibility effectively to challenge the allegations against him".[110] In any case, "where there is evidence which", not least in view of the submissions of the defence, "prima facie appears to have a material bearing on the issue of the continuing lawfulness of the detention, it is essential, for compliance with Article 5 § 4, that the domestic courts examine and assess it".[111] However, while the ECtHR states that proceedings under Article 5 para. § 4 ECHR should "to the largest extent possible under the circumstances of an ongoing investigation" meet "the basic requirements of a fair trial", in particular "the right to an adversarial procedure", the Court accepts that "national law may satisfy the requirement in various ways".[112]

In observing how different jurisdictions deal with the withholding of relevant information in the context of preliminary measures, one can again differentiate between opposite and what may be described as conciliatory solutions. On the one hand, some procedural settings may accommodate the need to protect the confidentiality of evidence during the pre-trial phase by allowing the pre-trial court (and sometimes the prosecutor) to authorise preliminary measures on the basis of evidence not disclosed to the suspect and counsel.[113] As a result, the ability of the suspect to challenge the measure can be considerably hampered, as he

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[107] See ECtHR (GC), Nikolova v. Bulgaria, 25 March 1999 – app. no. 31195/96 –, para. 61; ECtHR, Sher and Others v the United Kingdom, app. no. 5201/11, 20 October 2015, para. 147–148.

[108] ECtHR (GC), Mooren v. Germany, 9 July 2009 – app. no. 11364/03 –, para. 124; ECtHR, Fodale v. Italy, judgement 1 June 2006 – app. no. 70148 –, para. 41.

[109] See ECtHR, Mooren v. Germany, 13 December 2007 – app. no. 11364/03 –, para. 92; see ECtHR (GC), Mooren v. Germany, 9 July 2009 – app. no. 11364/03 –, para. 125; Ovsjannikov v. Estonia, 20 February 2014 – app. no. 1346/12 – para. 77.

[110] ECtHR, Piechowicz v. Poland, 17 April 2012 – app. no. 20071/07 – para. 203; ECtHR, Ovsjannikov v. Estonia, 20 February 2014 – app. no. 1346/12 – para. 73.

[111] ECtHR, Becciev v. Moldova, 4 October 2005 – app. no. 9190/03 –, para. 72; Ţurcan and Ţurcan v. Moldova, 23 October 2007 – app. no. 39835/05 –, para. 67.

[112] ECtHR, Garcia Alva v. Germany, 13 February 2001 – app. no. 23541/94, para. 39.

[113] See England II; Spain II.C.

or she may not be aware of key pieces of information underlying the decision. Usually, the suspect must then be informed of at least the main reasons for imposing a preliminary measure so that he or she is able to challenge the allegations in a meaningful way, even without having access to the underlying evidence.[114]

On the other hand, on the occasion of a review of the ordering of preliminary measures, other procedural frameworks may provide that the pre-trial courts are not allowed to withhold relevant evidence from the suspect and counsel. Consequently, preliminary measures can then be based only on evidence that is disclosed to the suspect, at the latest at the moment of review of the measures by a court.[115] Compared to the aforementioned approach, this solution may, at first glance, appear more attractive from the point of view of the suspect insofar as he or she is informed of all incriminating evidence used by the court and thereby enabled to comprehensively scrutinise the allegations. Yet, every framework ultimately remains confronted with the inherent conflict between a need to preserve the confidentiality of some investigative measures during the investigative stage, on the one hand, and the need to adopt preliminary measures, on the other. Insofar as a pre-trial court is in no case allowed to base such measures on undisclosed incriminating evidence, it will likely make use, and potentially extensively so, of indirect forms of evidence (such as hearsay and summaries of investigative measures) that allow investigative authorities to keep parts of the evidence undisclosed.[116] Applications for preliminary measures may then rely on a mere selection of evidence that, in particular, excludes information about the circumstances of how the evidence was obtained[117] and may thereby omit material that could put the reliability of the presented incriminating evidence in a less favourable light. For the purpose of the pre-trial ordering of preliminary measures, a requirement to fully disclose evidence to both the court and the suspect, therefore, comes at a price. This becomes even more obvious if, in order to limit the disclosure obligations at the investigative stage while at the same time avoiding the use of undisclosed incriminating evidence,

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[114] To this effect ECtHR, Sher and Others v the United Kingdom, app. no. 5201/11, 20 October 2015, para. 149; ECtHR, Podeschi v. San Marino, 13 April 2017 – app. no. 66357/14 –, para. 176; but cf. the decision of the UK Supreme Court regarding the review of the lawfulness of a warrant to search premises and seize documents in R (Haralambous) v. Crown Court at St Albans and another {2018} UKSC 1, para. 61–64, where the Court accepted that even such limited disclosure may be denied if the measure is only about the performance of investigative measures, which does not entail a deprivation of liberty or an extensive freezing of assets; see *infra* IV.D.

[115] See for the situation in Germany B Vogel, Zeitschrift für Internationale Strafrechtsdogmatik 2017 (1), p. 31–32, and also France II, Italy III.C.2.

[116] See ECtHR, O'Hara v. United Kingdom, 16 October 2001 – app. no. 37555/97 –, para. 40, which affirms the lawfulness of the arrest of the applicant where it had essentially been based on anonymous hearsay originating from four police informers.

[117] Italy III.C.2; see also Netherlands II.A.2.

national legislation provides for a partial reversal of the burden of proof applicable to preliminary preventive measures.[118]

To find a middle ground between the reliance of pre-trial preliminary measures on undisclosed incriminating evidence and the reliance on lesser-quality evidence, some jurisdictions adopt a compromise: They may require pre-trial preliminary measures to be based exclusively on evidence that already is or will be fully disclosed to the suspect, at the latest at the moment when the measures are reviewed by a court. But at the same time they may allow the pre-trial judge to access undisclosed information (such as background information about the circumstances under which a particular piece of incriminating evidence was obtained) in order to verify whether this information may undermine the merit of the disclosed evidence.[119] This solution has the benefit of providing the suspect with a detailed account of the incriminating evidence while simultaneously protecting the authorities' interest in at least temporarily keeping details of the investigation secret. Yet, it still cannot be overlooked that the suspect will sometimes be unable to mount an effective challenge against the disclosed incriminating evidence if he or she is unaware of details on how this evidence was obtained,[120] for example that key elements originated from a witness who may have reasons to wrongfully accuse the suspect.

IV. Developing measures to counterbalance the impact of secrecy

A. Non-disclosure of information about covert investigations

Any withholding by the prosecution of evidence about how a covert investigation was conducted potentially constitutes a restriction of the accused's right to a fair trial, as it may make it impossible for the court to thoroughly examine the lawfulness and reliability of covertly obtained incriminating evidence and for the accused to effectively challenge such evidence. As results from ECtHR jurisprudence, the non-disclosure of evidence to the court and the defence is thus

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[118] For an example to this effect, see the evidentiary standards developed by the European Court of Justice for the targeted sanctions of the European Union as part of its Common Foreign and Security Policy. In essence, these sanctions usually aim to impose preventive measures (in particular the freezing of assets in the case of a suspicion of terrorism financing) in particular when a criminal investigation regarding the commission or support of relevant criminal offences have been initiated by a national investigative authority; see European Union I.A.1, II.A.1 and B Vogel, Targeted Sanctions against Economic Wrongdoing at the UN and EU Level, in: U Sieber (edt.), Prevention, Investigation, and Sanctioning of Economic Crime: Alternative Control Regimes and Human Rights Limitations, 2019, p. 136–150.

[119] Belgium III.B, C.

[120] See Italy III.C.2.

frequently anything but beneficial for the accused, even if the undisclosed material itself is not cited as evidence against him or her. The question then arises for national legal orders as to how to sufficiently counterbalance the difficulties caused to the defence by a limitation on its rights.

While some national legal orders allow the trier of fact to inspect undisclosed material him- or herself in order to decide on whether or not this material must be disclosed to the defence,[121] it appears that the cure could be worse than the disease. After all, as applications for disclosure of withheld material are usually aimed at challenging the lawfulness and reliability of incriminating evidence produced by the prosecution, it is very difficult to imagine – to say the least – that a trier of fact who inspected such material would not, in his or her assessment of incriminating evidence, be influenced by what he or she saw in this very material.[122] Insofar as ECtHR jurisprudence considers it a relevant counterbalancing measure that the triers of fact do not explicitly rely on the undisclosed material in their assessment of the evidence,[123] it is to be feared that the fairness standards under Article 6 para. 1 ECHR are based on an unrealistic concept of human cognition and decision-making in this regard.[124] Despite being motivated by a desire to subject the executive's confidentiality claims to judicial scrutiny, such procedural frameworks appear difficult to reconcile with the concept of an adversarial trial in which "both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party".[125] In this context, one should recall that the decision on whether or not to disclose material to the defence will in many cases essentially entail a prognosis of whether this material is capable of undermining the credibility of related incriminating evidence that the prosecution presents at trial,[126] for this question is of central relevance when weighing the rights of the accused and other competing interests.[127]

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[121] See *supra* III.A.

[122] See Turkey III.B; cf. ECtHR (GC), Al-Khawaja and Tahery v. United Kingdom, 15 December 2011 – app. nos. 26766/05 and 22228/06 –, para. 88.

[123] See ECtHR, Mirilashvili v. Russia, 11 December 2008 – app. no. 6293/04 –, para. 199; ECtHR, Berardi v. San Marino, decision of 1 June 2017 – app. no. 24705/16 –, para. 70.

[124] To this effect regarding the admissibility of evidence more generally F Meyer, Systematischer Kommentar zur Strafprozessordnung (op. cit.), Art. 6, para. 471.

[125] ECtHR, Brandstetter v. Austria, 28 August 1991 – app. no. 13468/87 –, para. 67.

[126] See ECtHR (GC), Jasper v. United Kingdom, 16 February 2000 – app. no. 27052/95 –, para. 52; ECtHR (GC), Rowe and Davis v. the United Kingdom, 6 February 2000 – app. no. 28901/95 –, para. 61.

[127] See notably ECtHR, Donohoe v. Ireland, 12 December 2013 – app. no. 19165/08 –, para. 88, where the Court seems to recognise that the judicial control over the question of disclosure would entail an assessment of the "adequacy and reliability" of the disclosed evidence, but then nevertheless welcomed the fact that the trial court had "expressly excluded from its consideration any information it had reviewed". For a similar implicit review of the reliability of secret sources within disclosure decisions taken in the context

Consequently, insofar as the trier of fact assesses the undisclosed material, a key question for the assessment of incriminating evidence, and thus ultimately the trial court's verdict on guilt, is then dealt with by the court without the information considered for this purpose being fully subjected to adversarial argument.

In view of the above, it appears that the problem of non-disclosure of relevant material is one that the trier of fact must not be primarily responsible for.[128] In order to avoid a severe weakening of the adversarial nature of the trial and of the equality of arms between the parties, the decision on disclosure should instead be allocated to a judge who is not the trier of fact and whose knowledge of undisclosed material can therefore not directly influence the assessment of evidence by the trial court.[129] However, a decision still needs to be taken as to exactly what competences this judge should have. To this end, one must recall[130] that a decision on the lawfulness of the decision not to disclose information pertaining to a covert investigative measure will – besides the nature of the undisclosed material and its potential to endanger important public or private interests – usually also need to consider the lawfulness of this measure's implementation. It therefore seems sensible to task one and the same judicial body with the review of the lawfulness of covert measures and with the decision whether or not to disclose any evidence related to the implementation of these measures.[131] This body should be tasked with reviewing the lawfulness of investigative measures on the initiative of the trial court or the defence. Conversely, insofar as legislators opt for a framework in which the decision on the lawfulness of non-disclosure is taken neither by a judge in charge of reviewing investigative measures nor by another distinct judicial body who is intimately familiar with the particular criminal investigation,[132] the quality

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of criminal proceedings by administrative courts, see the jurisprudence of the German Federal Administrative Court in its decision of 2 July 2009 – 20 F 4/09, BeckRS 2009, 35992, para. 9, and the decision of 29 April 2015 – 20 F 8/14, BeckRS 2015, 48337, para. 20.

[128] In contrast, the question whether the conduct of the investigation (for example in the case of provocation by the authorities) might have affected the criminal responsibility of the accused should in any case be decided by the trial court; see ECtHR, Guerni v. Belgium, 3 October 2018 – app. no. 19291/07 –, para. 57.

[129] To this effect also K Gaede, Schranken des fairen Verfahrens gemäß Art. 6 EMRK bei der Sperrung verteidigungsrelevanter Informationen und Zeugen, Strafverteidiger 10/2006, p. 605–606.

[130] *Supra* III.A.

[131] On this option ECtHR, van Wesenbeeck v. Belgium, 23 May 2017 – app. nos. 67496/10 and 52936/12 –, para. 78–79.

[132] As pointed out by ECtHR (GC), Jasper v. United Kingdom, 16 February 2000 – app. no. 27052/95 –, para. 56, the separation between trier of fact and trial judge within a common law-inspired jury trial insofar constitutes a convincing solution for the problem at hand, because it attributes the disclosure decision to a judge who, while not being the trier of fact, is well acquainted with the investigation as well as with the arguments of both parties and therefore in a particularly good position to assess the potential relevance of undisclosed material. See also England I.A.3.

of the review of the disclosure decision will likely be impaired.[133] At the same time, given that trial courts should not, and usually will not, have extensive access to undisclosed information about the implementation of covert investigative measures, they are rather unsuited to reviewing the lawfulness of such measures and to thereby counterbalancing the difficulties of the defence resulting from the non-disclosure of information pertaining to the implementation of such measures. Insofar as national legal frameworks nevertheless task trial courts with reviewing the lawfulness of investigative measures taken at the pre-trial stage, one can expect that this setup significantly limits the effectiveness of such review.

In order to ensure an effective review of the lawfulness of a non-disclosure decision pertaining to how evidence was covertly obtained, the competent judge should have comprehensive access to all details of the implementation of such a measure, including access to information whose disclosure the investigative authorities are entitled not to reveal to the trial court. Insofar as this judge will inspect and assess undisclosed material, the involvement of the defence within such review proceedings will obviously be limited. In any case, according to the ECtHR, the defence should be "kept informed and permitted to make submissions and participate"[134] as far as possible in the review proceedings. In fact, such participation is usually a necessary precondition for ensuring the effectiveness of the review.[135] This may not least require the review body to order the prosecuting authority to provide the defence with redacted versions of the confidential files or with summaries of their non-confidential content.[136] If the accused can initiate a review of investigative measures and provide reasons why the investigative methods employed to this end were deficient in his or her opinion,[137] also during an ongoing trial, these reasons can assist the judge charged with review to spot any grounds of unlawfulness related to the investigative measure.

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[133] But cf. Germany III.B.1.

[134] ECtHR (GC), Jasper v. United Kingdom, 16 February 2000 – app. no. 27052/95 –, para. 55, commenting on the requirements of disclosure proceedings before a trial court in jury trials.

[135] On the central role of the defendant to inform the court about weak spots of the evidence, see *infra* IV.D.

[136] For a comparison of the relevant powers of trial judges in the United States and England K Roach, Secret Evidence and its Alternatives, in: A Masferrer (ed.), Post 9/11 and the State of Permanent Legal Emergency: Security and Human Rights in Countering Terrorism, 2011, p. 191–193.

[137] See ECtHR, Leas v. Estonia, 6 March 2012 – app. no. 59577/08 –, para. 81; to this effect also Netherlands IV.B.

B. Anonymous testimony

The protection of the identity of the sources of incriminating information is oftentimes an unavoidable necessity in investigations into organised crime. It is however also true that, insofar as such information is admitted as evidence, anonymity poses a significant risk for the effectiveness of judicial fact-finding because it can facilitate the introduction of manipulative statements into the trial. Particularly in the context of organised crime, false accusations under the cover of anonymity may in many cases be a means to deflect responsibility for wrongdoing to criminal competitors or to more junior members of one's own criminal organisation. Especially senior members within a criminal organisation may often have detailed knowledge of relevant facts while at the same time being able to instigate their subordinates to present the court with a false but persuasive story.

If, in a particular case, it is necessary to withhold the identity of the witness from the defence, and the incriminating testimony of this witness is nonetheless of significant weight for justifying a conviction, the central question then is whether the judicial authorities will adopt adequate counterbalancing measures to compensate for the handicap suffered by the defence as a result of granting the anonymity.[138] Recognising differences in national procedural frameworks, the ECtHR does not define an exhaustive list of possible counterbalancing measures, but its jurisprudence allows features to be identified that could guide their design. They primarily relate to two distinct areas of concern, namely the quality of corroborative evidence and that of procedural safeguards.

Depending on the circumstances of the particular case, corroborative evidence can of course be capable of confirming the reliability of anonymous testimony.[139] The ECtHR accordingly accepts that such evidence may counterbalance the handicap caused by anonymity. However, greater differentiation appears necessary in this regard to ensure that the limited reliability of sources who the defence was unable to challenge directly is not obscured through reliance on other similarly (un)reliable evidence.[140] On the one hand, corroborative evidence may consist of material that supports the reliability of the anonymous witness with regard to trustworthiness, that is facts that are inherent to him or her (such as the lack of motifs to falsely incriminate the accused or other facts that demonstrate that

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[138] See *supra* III.B.

[139] ECtHR (GC), Schatschaschwili v. Germany, 15 December 2015 – app. no. 9154/10 –, para. 128.

[140] See for concerns to this effect also ECtHR, Haas v. Germany, decision of 17 November 2005 – app. no73047/01 –; J Renzikowski, Das Konfrontationsrecht im Fokus des Anspruchs auf ein faires Verfahren, in: S Hiebl et al. (eds.), Festschrift für Volkmar Mehle, 2009, p. 546, and also S Maffei, The Right to Confrontation in Europe, p. 108–109, who questions the consistency of the ECtHR approach to corroboration and qualifies it as "the most significant shortcoming" in the ECtHR'S case law on the right to confrontation.

the witness was bona fide).[141] On the other hand, corroborative evidence may be evidence that supports the content of the anonymous testimony through additional sources. The latter type of corroborative evidence appears especially vulnerable to the danger that supposed corroborative evidence may in fact add little to confirm an anonymous testimony's reliability, as such testimony may well have been purposefully tailored to coincide with other evidence. The risk of such false, anonymous testimony is especially high where the anonymous witness – not least through his or her involvement in the crime that the accused is suspected of having committed or as an undercover officer investigating the particular case[142] – may have extensive knowledge of relevant details of the investigation. Similar concerns arise all the more if anonymous testimony is ostensibly backed up by other anonymous statements, by the testimony of a co-accused[143] or that of other persons who may have been involved in the crimes that the accused has been charged with. In such cases, the trial court will at least have to establish beyond a reasonable doubt that the anonymous testimony and the additional evidence have not manipulatively been coordinated between them. Article 6 para. 3 (d) ECHR can therefore be understood as effectively providing a presumption against a conviction that would give considerable weight to anonymous statements where corroborative evidence in turn consists of evidence of comparably questionable reliability.[144] Such a presumption may however be overcome by further evidence, for example by further evidence that corroborates the testimony of a second anonymous witness.[145] Without such rigorous scrutiny, recourse to corroborative evidence as a means to justify reliance on anonymous testimony will allow mala fide witnesses, and in particular individuals with detailed knowledge of the case, to hide the truth

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[141] See for examples to this effect ECtHR, Pesukic v. Switzerland, 6 December 2012 – app. no. 25088/07 –, para. 50; ECtHR, Ellis, Simms and Martin v. United Kingdom, decision of 10 April 2012 – app. nos. 46099/06 and 46699/06 –, para. 86; cf. ECtHR, Asch v. Austria, 26 April 1991 – app. no. 12398/86 –, para. 28.

[142] On the latter scenario W Wohlers, Art. 6 Abs. 3 lit. d) EMRK als Grenze der Einführung des Wissens anonym bleibender Zeugen (op. cit.), p. 822.

[143] On the generally limited reliability of the testimony of co-accused, see ECtHR, Karpenko v. Russia, 13 March 2012 – app. no. 5605/04 –, para. 66; F Meyer, Systematischer Kommentar zur Strafprozessordnung (op. cit.), Art. 6, para. 503; for a comparative analysis of the treatment of the out-of-trial testimony of a co-accused, see S Maffei, The Right to Confrontation in Europe, p. 203–206, and especially on the traditionally reluctant approach to such testimony under English law JR Spencer, Hearsay Evidence in Criminal Proceedings, at 10.8–10.35.

[144] To this effect ECtHR, Kostovski v. Netherlands, 20 October 1989 – app. no. 11454/85 –, para. 43; ECtHR, Craxi vs. Italy, 5 December 2002 – app. no. 34896/97 –, para. 88; ECtHR, Rachdad v. France, 13 November 2003 – app. no. 71846/01 –, para. 25; ECtHR, Damir Sibgatullin v. Russia, 24 April 2012 – app. no. 1413/05 –, para. 56–57.

[145] But cf. ECtHR, Scholer v. Germany, 18 December 2014 – app. no. 14212/10 –, para. 22–24 and 58–61, where parts of the conviction were to a decisive degree based on the observations of an anonymous witness and the latter's statement had ultimately been corroborated in particular by the testimony of a co-accused and another (absent) anonymous witness.

behind a plurality of consistent and therefore ostensibly convincing, yet substantially weak, pieces of evidence.

As regards counterbalancing measures in the form of procedural safeguards, their design must be guided by the reasons why anonymous testimony is in principle of limited evidentiary value. This means that, despite the accused's lack of knowledge of the witness' identity and the resulting inability of the trial court to rely on the accused's input, the measures must ensure that the trustworthiness of witnesses is tested as thoroughly as possible. The ECtHR therefore rightly recognises that the mere fact that the trial court or one of its members had direct access to the protected witness and was present during the giving of testimony is not an adequate substitute for the opportunity for the defence to question the witness in their presence.[146] Providing trial courts with such knowledge may of course sometimes improve their ability to detect inconsistencies in the anonymous testimony. However, it is normally the accused and not the judges who are best placed to spot reasons that may explain false accusations. Insofar as it is only the trial court and not the defence to whom the identity of the witness is disclosed, the trial court's superior knowledge will not compensate for the considerable disadvantage of the accused in this regard. On the contrary, the superior knowledge of the trial court entails the risk that the its assessment of the reliability of the anonymous witness may be influenced by material that was withheld from the defence – to the detriment of the accused.[147] In this respect, one should also note that such a situation must not be equated with the problems that will often arise when evidence is declared inadmissible, especially in jurisdictions with a continental law tradition. In the latter case, the trial judges will be required to disregard inadmissible information previously brought to their attention, thereby of course also increasing the danger that they may subconsciously be influenced by the inadmissible material after all.[148] However, the accused and counsel will then normally still be aware of this material and thereby be able to address its reliability and potential influence on the verdict, a possibility that is not available when relevant material had at no time been disclosed to them.

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[146] ECtHR, Papadakis v. Former Yugoslav Republic of Macedonia, 26 February 2013 – app. no. 50254/07 –, para. 91; ECtHR, Doncev and Burgov v. Former Yugoslav Republic of Macedonia, 12 June 2014 – app. no. 30265/09 –, para. 54; ECtHR, Asani v. Former Yugoslav Republic of Macedonia, 1 February 2018 – app. no. 27962/10 – para. 52.

[147] But cf. ECtHR, Donohoe v. Ireland, 12 December 2013 – app. no. 19165/08 –, para. 88.

[148] MR Damaška, Evidence Law Adrift, 1997, p. 48–49, therefore describes the operation of exclusionary rules within a continental procedural setting as being surrounded by an "aura of unreality" resulting in particular from "the unitary court environment" in which the triers of fact are usually aware of any tainted (and therefore potentially inadmissible) evidence. It would however appear that, as a result of the ECtHR's insistence to ensure an effective judicial control of non-disclosure decisions, the traditional unitary structure of continental criminal trials is ultimately difficult to uphold.

Compared to anonymous testimony that is introduced merely through hearsay or through a written declaration, the position of the defence is less impaired if it can directly follow the testimony given by the anonymous witness[149] – also if transmitted through an audio-video link – even if the witness' voice and appearance are altered to avoid identification.[150] By allowing the defence to listen to the testimony, observe changes in speech or even manner of the witness and, most importantly, by ensuring a live setting in which the witness is forced to spontaneously respond to questions, the defence's ability to challenge the testimony can be safeguarded to some degree. Nevertheless, this ability remains considerably impaired, not least because of the limitations on the defence to ask questions that could lead to a disclosure of this identity.[151]

Moreover, the participation of the accused and counsel in the hearing of anonymous witnesses is oftentimes not even possible, because it is not least the requirement to spontaneously answer questions that may expose the witness to a risk of unwittingly disclosing identifying information.[152] In this respect, the ECtHR points to the possibility of submitting written questions to the witness as a possible counterbalancing measure.[153] Compared to a live hearing, the potential of written questions to counterbalance anonymous testimony is much more limited,[154] however, because the witness does not need to undergo the spontaneity of a live hearing and may instead benefit from the opportunity to compile his or her answers with the advantage of considerable time and even assistance by third parties, thereby greatly enhancing the possibility to draft a seemingly coherent story that, even if untrue, is fully coherent with regard to other available evidence. Furthermore, if subsequent rounds of submitting questions are not allowed, written questions entail the significant disadvantage that the defence may not be able to adjust the questions to unforeseen developments during the examination.[155] In any case, the possibility to submit questions to the anonymous witness in writing does not normally reduce

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[149] ECtHR, Lüdi v. Switzerland, 15 June 1992 – app. no. 12433/86 –, para. 49.

[150] R Esser, in: Löwe-Rosenberg, Großkommentar zur Strafprozessordnung, volume 11, 26th ed. 2012, EMRK Art. 6/Art. 14 IPBPR, para. 794.

[151] See ECtHR, Kostovski v. Netherlands, 20 October 1989 – app. no. 11454/85 –, para. 42–43; ECtHR, Windisch v. Austria, 27 September 1990 – app. no. 12489/85 –, para. 28; ECtHR, Asani v. Former Yugoslav Republic of Macedonia, 1 February 2018 – app. no. 27962/10 – para. 42.

[152] See Scholer v. Germany, 18 December 2014 – app. no. 14212/10 –, para. 57; ECtHR, Guerni v. Belgium, 3 October 2018 – app. no. 19291/07 –, para. 12; cf. S Maffei, The Right to Confrontation in Europe, p. 41–42 and 100–101.

[153] Scholer v. Germany, 18 December 2014 – app. no. 14212/10 –, para. 60; cf. See also F Meyer, Systematischer Kommentar zur Strafprozessordnung (op. cit.), Art. 6 EMRK, para. 500.

[154] Similarly, F Meyer, Systematischer Kommentar zur Strafprozessordnung (op. cit.), Art. 6, para. 500.

[155] S Maffei, The Right to Confrontation in Europe, p. 42–43.

the handicap suffered by the defence as a result of not knowing the witness' identity; at best, it serves to somewhat reduce the additional handicap caused by an anonymous witness' unavailability for a live hearing.

Insofar as an anonymous testimony cannot be supplemented by additional, more reliable evidence that significantly reduces the former's overall relevance for a conviction, counterbalancing measures will likely never completely remedy the handicap caused to the accused by the withholding of the witness' identity. However, to ensure that the rights of the defence are nevertheless safeguarded to the greatest extent possible, the hearing of anonymous witnesses before a judge other than the trial court may, in light of the preceding concerns, offer considerable advantages.[156] If the appearance of the anonymous witness before the trial court is considered too risky, such an examining judge can hear the witness in person, also in parallel to an ongoing trial.[157] If strictly necessary, especially if even a mere (distorted) audio link[158] to the hearing would already entail an unreasonable risk of the disclosure of confidential information, this should be possible in the absence of the defence. Based on this hearing, the examining judge can then provide the trial court with an open summary of the hearing that will not contain confidential information and could thus be fully disclosed to the defence. If so required by the trial court – on the trial court's own motion or on the application of the accused – the examining body should address follow-up questions to the witness.[159] If, as an exception, the defence is not allowed to attend the hearing (not even through an audio-video link), it should at least be entitled to submit its questions to the examining body in

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[156] To this effect also ECtHR, Kostovski v. Netherlands, 20 October 1989 – app. no. 11454/85 –, para. 43; ECtHR, Taxquet v. Belgium, 13 January 2009 – app. no. 926/05 –, para. 64.

[157] Due to a need of keeping the investigation secret, a confrontation of the witness by the defence will, especially when the investigations is conducted largely in a covert way, only be feasible at trial and not already at the investigative stage; see W Beulke, Konfrontation und Strafprozessreform, in: E-W Hanack et al. (eds.), Festschrift für Peter Riess, 2002, p. 18; K Gaede, in: C Knauer (ed.), Münchener Kommentar zur Strafprozessordnung, vol. 3/2. 2018, Art. 6 EMRK, para. 245.

[158] On this possibility ECtHR, Kok v. Netherlands, decision of 4 July 2000 – app. no. 43149/98. For the need to adequately justify the non-use of less far-reaching limitations of Art. 6 para. 3 (d), see: ECtHR, van Mechelen and Others v. Netherlands, 23 April 1997 – app. nos. 21363/93, 21364/93, 21427/93 and 22056/93 –, para. 60; ECtHR, Balta et Demir v. Turkey, 23 June 2015 – app. no. 48628/12 –, para. 47. On the growing (albeit still limited) role of the proportionality test in the ECtHR's more recent jurisprudence on Art. 6 para. 3 (d), see: M Engelhart/M Arslan, Schutz von Staatsgeheimnissen im Strafverfahren (op. cit.), p. 164–168.

[159] On a possible need to re-examine the witness if, in the course of proceedings, further relevant information appears, see W Beulke, Konfrontation und Strafprozessreform (op. cit.), p. 22–23; J Renzikowski, Das Konfrontationsrecht im Fokus des Anspruchs auf ein faires Verfahren (op. cit.), p. 536; K Gaede, Münchener Kommentar zur Strafprozessordnung (op. cit.), Art. 6 EMRK, para. 246.

order for them to be posed to the witness during the hearing.[160] Given that the witness is thereby forced to respond to the questions spontaneously, this solution allows for a more thorough questioning than in the case of written questions and written answers. As an additionally significant advantage,[161] if the examining judge is allowed to know the identity of the witness and his or her relationship with the accused, this provides background knowledge that will allow the judge to assess the actual relevance of questions submitted by the defence. Based on the judge's assessment of whether the questions submitted by the defence are founded on correct or erroneous assumptions, the judge can inform the trial court to what extent the defence had actually been able to effectively challenge the testimony.[162] Even more importantly, besides allowing the decision on whether or not to withhold the witness' identity to be reviewed on a more comprehensive understanding of the relevant facts, knowledge of the witness' identity and his or her relationship with the accused can potentially enable the examining judge to establish whether there may be ways to completely replace the testimony of the anonymous witness by less problematic means of evidence .[163] This would ensure that any curtailment of the right to a fair trial by the use of anonymous testimony is always truly necessary and proportionate.[164] A mechanism of this design may not always fully counterbalance the handicap of the defence, but it can significantly improve the quality of the examination of anonymous witnesses, especially in cases in which their testimony would be of considerable weight for the verdict. In any case, such a mechanism provides the accused with greater safeguards than in cases in which out-of-court statements of informers or other anonymous sources are introduced into the trial through the testimony of a police officer or intelligence agent.[165]

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[160] See for example ECtHR, Guerni v. Belgium, 3 October 2018 – app. no. 19291/07 –, para. 12.

[161] See ECtHR, Kostovski v. Netherlands, 20 October 1989 – app. no. 11454/85 –, para. 43; ECtHR, Taxquet v. Belgium, 13 January 2009 – app. no. 926/05 –, para. 64.

[162] See also ECtHR, Doorson v. Netherlands, 26 March 1996 – app. no. 20524/92 –, para. 73.

[163] To this effect RW Kirst, Hearsay and the Right of Confrontation in the European Court of Human Rights, Quarterly Law Review 21 (2003), p. 806–807, who criticises relevant ECtHR jurisprudence for not discussing "whether the national courts could increase the amount of evidence without decreasing the rights of the defendant […] leaving reducing the rights of the defendant as the only possible step", such as "the use of witness protection" or "immunity to permit or persuade an accomplice to testify in open court". See also R Costigan, Anonymous Witnesses, Northern Ireland Legal Quarterly 51 (2000), p. 331.

[164] On these requirements K Gaede, Münchener Kommentar zur Strafprozessordnung (op. cit.), Art. 6 EMRK, para. 260.

[165] See ECtHR, Scholer v. Germany, 18 December 2014 – app. no. 14212/10 –, para. 61; ECtHR, van Wesenbeeck v. Belgium, 23 May 2017 – app. nos. 67496/10 and 52936/12 –, para. 109.

C. Testimony and reports by police or intelligence agencies

By requiring that there must be good reasons for a criminal court to rely on incriminating statements of a witness whom the defence had no opportunity to examine in person at any time during the proceedings,[166] ECtHR jurisprudence limits the use of testimony that reproduces out-of-court statements of witnesses who have not been examined before a judge and in the presence of the defence. According to the Court, if the absence of a witness is owed to fear, "allowing the admission of a witness statement in lieu of live evidence at trial must be a measure of last resort. Before a witness can be excused from testifying on grounds of fear, the trial court must be satisfied that all available alternatives, such as witness anonymity and other special measures, would be inappropriate or impracticable".[167] While a lack of good reasons for the absence of the witness will not invariably establish the unfairness of the trial, a violation of Article 6 para. 1 and para. 3(d) ECHR is particularly likely if the untested statements are of considerable or even decisive weight for a conviction.[168] By thereby effectively requiring that the trial court should principally use the evidence that is closest to the relevant facts, the ECtHR confirms that hearsay is generally taken to be of limited evidentiary value.[169] This limitation on the use of absent witnesses still allows courts to rely on the testimony of absent witnesses provided that the weight of such testimony for a conviction is not considerable,[170] but it is clear that the concept of a fair trial under the ECHR is opposed to an uninhibited use of the statements of witnesses that are, at no point, examined in the presence of the defence. This state of the law obviously has important repercussions for the use as evidence of oral testimony and written[171] reports of police or

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166 ECtHR (GC), Al-Khawaja and Tahery v. United Kingdom, 15 December 2011 – app. nos. 26766/05 and 22228/06 –, para. 120.

167 ECtHR, Scholer v. Germany, 18 December 2014 – app. no. 14212/10 –, para. 46; see also ECtHR, van Mechelen and Others v. Netherlands, 23 April 1997 – app. nos. 21363/93, 21364/93, 21427/93 and 22056/93 –, para. 58.

168 See ECtHR (GC), Al-Khawaja and Tahery v. United Kingdom, 15 December 2011 – app. nos. 26766/05 and 22228/06 –, para. 147; ECtHR (GC), Schatschaschwili v. Germany, 15 December 2015 – app. no. 9154/10 –, para. 113 and 116; F Meyer, Systematischer Kommentar zur Strafprozessordnung (op. cit.), Art. 6 EMRK, para. 502.

169 See also F Meyer, Systematischer Kommentar zur Strafprozessordnung (op. cit.), Art. 6, para. 498.

170 See ECtHR (GC), Schatschaschwili v. Germany, 15 December 2015 – app. no. 9154/10 –, para. 112.

171 While one may, in respect of written statements, question whether such a limitation results directly from Article 6 para. 3(d) or only from para. 1 ECHR (but cf. ECtHR, Georgios Papageorgiou v. Greece, 9 May 2003 – app. no. 59506/00 –, para. 30–40; ECtHR, Mirilashvili v. Russia, 11 December 2008 – app. no. 6293/04 –, para. 159), the differentiation seems to be of limited importance, in particular following the ECtHR decision in Al-Khawaja and the more flexible application of the "sole or decisive" rule adopted therein. In any case, Article 6 para. 3(d) ECHR could be easily circumvented if its requirements were not substantially imported into the application of Article 6 para. 1 ECHR with regard to

intelligence agents, because such evidence must not serve as a means to extensively introduce incriminating statements of absent witnesses into the trial.[172] The ECtHR's reluctance towards the testimony of absent witnesses reflects the understanding that the accused normally has a pivotal role in establishing the truth,[173] as weaknesses in the testimony of the direct witness will best (and in many cases only) be identified if he or she is allowed to directly challenge the witness.[174] For it is primarily through an examination of the direct witness in the presence of the accused[175] that the latter can acquire knowledge of what exactly this witness says and how the witness says it. Knowledge of these details can enable the accused to highlight remarks that are of key importance for assessing the credibility of the testimony but that had not appeared relevant in the eyes of the police officers or intelligence agent who initially questioned the direct witness and therefore may have neither scrutinised nor recorded these remarks.[176] The importance of direct confrontation is also not lost if the witness, when being examined in the presence of the defence, refuses to repeat a previously made incriminating statement; at least if the alleged out-of-court statements had never been made or were made under significantly different terms, one can normally expect that the witness will distance him- or herself from the allegations, thereby providing an important safeguard against the characteristic danger of incriminating hearsay.

The limitations just described do not rule out that the case against the accused may extensively rely on the testimony of the police through which the prosecution presents findings obtained by covert investigative measures. Insofar as a police

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written statements. See R Esser, Löwe-Rosenberg (op. cit.), EMRK Art. 6/Art. 14 IPBPR, para. 763.

[172] But cf. on the use of hearsay evidence in Germany and France in JD Jackson/SJ Summers, The Internationlisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions, 2012, p. 333–334.

[173] The importance of the accused for the purpose of fact-finding can sometimes be blurred behind dignitarian justifications of the right to confrontation; see for a historical account of the long-held skepticism of both common law and Roman-canon law towards the use of hearsay M Damaška, Of Hearsay and Its Analogues, Minnesota Law Review 76 (1992) p. 425–449.

[174] For a comparatively demanding understanding of the right to confrontation, see notably also the more recent turn in the jurisprudence of the United States Supreme Court in Crawford v. Washington, 541 U.S. 36 (2004); for a critique of the previous state of the law that – in the end quite similar to current ECtHR jurisprudence – regularly admitted hearsay evidence in particular when such evidence was considered "reliable": RW Kirst, A Decade of Change in Sixth Amendment Confrontation Doctrine, International Commentary on Evidence 6(2) (2009), Article 5.

[175] To this effect, an audio-video recording may however constitute an adequate substitute for an examination in the presence of the accused; see W Beulke, Konfrontation und Strafprozessreform (op. cit.), p. 24.

[176] On the danger that triers of fact may systematically underestimate the value of personal confrontation, see U Sommer, Das Fragerecht der Verteidigung, seine Verletzung und die Konsequenzen, Neue Juristische Wochenschrift 2005, p. 1241–1242.

agent describes events that he or she observed, for example observations regarding activities of the accused, no issues of hearsay arise, let alone issues of Article 6 para. 3(d) ECHR. But even when the police reproduce out-of-court statements of third parties – such as the transcript of a telecommunications surveillance measure – they will not fall under the ambit of the accused's right to confrontation if the author of the statement, when making it, was not aware that the authorities were listening. This is the case because the right to examine witnesses or have them examined does not apply to statements if their author was, at no point, willing to share the respective information with the authorities and, when making the statements, was not even anticipating the possibility that they may find their way into the hands of the investigative authorities.[177] Insofar as police or intelligence agents acting as witnesses at trial describe observations made through covert investigations, fairness concerns may of course still arise,[178] depending on whether or not the accused had adequate opportunity to challenge the truthfulness of the testimony. The availability of such an opportunity usually depends not least on whether or not the accused is provided with sufficient access to information on the implementation of the covert measures and thus on the question of whether relevant information was disclosed or whether it was strictly necessary to withhold it from the defence.[179]

Questions as to Article 6 para. 3(d) ECHR arise however when oral testimony and written reports of police and intelligence agents substantially reproduce incriminating statements made to the authorities out-of-trial by co-accused,[180] informers, or other witnesses, including other police or intelligence agents who have not been examined in the presence of the defence either during the investigative phase or at trial.[181] In addition to the existence of a good reason for their non-appearance, the usability of their statements as evidence will depend on the evidentiary weight for

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[177] See ECtHR, Kostovski v. Netherlands, 20 October 1989 – app. no. 11454/85 –, para. 40; ECtHR, Lucà v. Italy, 27 February 2001 – app. no. 33354/96 –, para. 41; ECtHR, A. S. v. Finland, 28 December 2010 – app. no 40156/07 –, para. 57; ECtHR, Sharkunov and Mezentsev v. Russia, 10 June 2010 – app. no. 75330/01 –, para. 111; ECtHR, Chap Ltd v. Armenia, 4 May 2017 – app. no. 15485/09 –, para. 48; J Renzikowski, Das Konfrontationsrecht im Fokus des Anspruchs auf ein faires Verfahren (op. cit.), p. 533–534; JR Spencer, Hearsay Evidence in Criminal Proceedings at 2.17–2.18; R Esser, Löwe-Rosenberg (op. cit.), EMRK Art. 6/Art. 14 IPBPR, para. 769; for a potentially broader concept of witness statements, cf. ECtHR, Georgios Papageorgiou v. Greece, 9 May 2003 – app. no. 59506/00 –, para. 37; O Sidhu, The Concept of Equality of Arms in Criminal Proceedings under Article 6 of the European Convention on Human Rights, 2017, p. 124.

[178] Obviously, further issues under Article 6 para. 3 (d) ECHR arise if such witnesses do not testify in person or if their identity is withheld from the defence.

[179] See *supra* III.A and IV.A.

[180] See ECtHR, Kaste and Mathisen v. Norway, 9 November 2006 – app. nos. 18885/04 and 21166/04 –, para. 53.

[181] ECtHR, Taal v. Estonia, 22 November 2005 – app. no. 13249/02 –, para. 32–35.

the verdict[182] and, insofar as this weight is at least significant, on the presence of adequate counterbalancing measures.[183] In view of the characteristic evidentiary shortcomings of hearsay evidence, counterbalancing measures should in particular serve to establish the precise content of what was said by the direct witness and how it was said or to corroborate the truthfulness of the hearsay testimony by additional, reliable evidence. The ability of the accused to effectively challenge out-of-court statements[184] will be particularly restricted if these statements originate from a source whose identity is not disclosed to the defence, which is the case especially when the testimony or the report of a police or intelligence agent references out-of-court statements made by an informer or undercover officer.[185] In this case, the accused can neither directly challenge the immediate witness nor uncover personal motifs that could explain why he or she may be lying. Under such conditions, the possibility of bad faith or mistakes on the part of the anonymous source or the hearsay witness can hardly ever be dismissed. This is even more the case when anonymous hearsay statements are introduced at trial by a witness who remains anonymous, such as an anonymous undercover agent who testifies about what he or she learned from an unspecified informer. It may of course still be possible to establish the reliability of anonymous hearsay through corroborative evidence,[186] but only under the condition that the trial court can establish that the anonymous hearsay testimony and the corroborative evidence were manipulatively coordinated.[187] Assuming that it is impossible to conclusively rule out this possibility in most cases, in view of the anonymity of the source of hearsay, it will usually be difficult to assume that a conviction could attribute decisive weight to incriminating anonymous hearsay evidence without questioning the overall fairness of the trial.[188]

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[182] On a narrower approach to the admissibility of out-of-court testimony as evidence at trial, see the analysis of Italian law by S Maffei, The Right to Confrontation in Europe, p. 201–203; D Negri, Das Unmittelbarkeitsprinzip in der italienischen Strafprozessordnung, Zeitschrift für die gesamt Strafrechtswisenschaft 126 (2014), p. 214–238.

[183] See ECtHR, Haas v. Germany, decision of 17 November 2005 – app. no. 73047/01 –; *supra* IV.B.

[184] On the possibility of introducing statements of an anonymous witness at trial through the testimony of an examining judge, see *supra* IV.B.

[185] See ECtHR, Guerni v. Belgium, 3 October 2018 – app. no. 19291/07 –, para. 12.

[186] For an example to this effect, see ECtHR, Guerni v. Belgium, 3 October 2018 – app. no. 19291/07 –, para. 60.

[187] See *supra* IV.B.

[188] See Netherlands II.B.2, C; W Wohlers, Art. 6 Abs. 3 lit. d) EMRK als Grenze der Einführung des Wissens anonym bleibender Zeugen (op. cit.), p. 822–823; S Maffei, The Right to Confrontation in Europe, p. 100–101; F Meyer, Systematischer Kommentar zur Strafprozessordnung (op. cit.), Art. 6 EMRK, para. 499; but cf. Ireland I.D.1 and Scholer v. Germany, 18 December 2014 – app. no. 14212/10 –, para. 60–61; in the latter case, the Court accepted that anonymous hearsay stemming from a police informer had been decisive for two of the three counts of drug trafficking of which the accused was convicted, but then considered that there had been sufficient counterbalancing factors, stressing that the accused had been able to address questions to the informer in writing and furthermore

Accordingly, at least insofar as the anonymous source is of considerable weight for the case and it therefore cannot be ruled out that it may even have been decisive for the conviction,[189] the source should at least be examined by a judge outside the trial and answer questions of the defence through this intermediary.[190]

The preceding observations also suggest that criminal convictions will usually not be able to give significant weight to information provided by intelligence agencies – be it introduced at trial through the oral testimony of an agency's representative or through written reports –insofar as the agency is unwilling to publicly disclose the sources of its findings.[191] Furthermore, even if the immediate sources of the intelligence agency are disclosed, it will, in particular because of the secretive nature of international intelligence cooperation and the possibility that information may have been provided through a chain of various agencies and countries, often be impossible – even for the agency appearing before the trial court – to determine the ultimate source and conclusively assess its reliability.[192] Insofar as a domestic agency has been authorised to disclose information in judicial proceedings by a foreign partner, this agency may also be reluctant to publicly question the reliability of its source, given that safeguarding a good working relationship with partner agencies will usually be of pivotal importance for the effective performance of its

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pointing out that the "cautious evaluation of the evidence by the trial court" had been demonstrated not least by the fact that "the additional evidence obtained in respect of the third and most serious offence" – for which the statements of the absent anonymous informer had not been decisive, but merely of "considerable" weight (because insofar the trial court had additionally relied on statements of a co-accused that had been introduced into the trial through the testimony of an investigative judge) – "served to corroborate the hearsay evidence in respect of the first and second drug transactions between the same persons". Consequently, the Court accepted that the decisive anonymous hearsay testimony could be corroborated by a finding that the accused had committed another similar offence. Cf. ECtHR, Windisch v. Austria, 27 September 1990 – app. no. 12489/85 –, para. 31; ECtHR, Birutis and Others v. Lithuania, 28 March 2002 – app. nos. 47698/99 and 48115/99 –, para. 32–34.

189 See ECtHR (GC), Schatschaschwili v. Germany, 15 December 2015 – app. no. 9154/10 –, para. 116.

190 See IV.B.

191 See notably Netherlands II.C. For a critical account of the reliability of intelligence used in immigration proceedings in the United States, see J Ramji-Nogales, A Global Approach to Secret Evidence: How Human Rights Law Can Reform Our Immigration System, 39 Columbia Human Rights Law Review (2008), p. 307–313.

192 G Van Harten, Weaknesses of adjudication in the face of secret evidence (op. cit.), p. 17. As regards the assessment of the reliability of intelligence by the agencies themselves, media reports suggest that even the most serious intelligence-based action may not unfrequently be subject to grave errors of judgements. See for example a report on the war in Afghanistan by B Sarwary, The plane hit the tower and all our lives changed, bbcnews.com, accessed 26 August 2021, https://www.bbc.com/news/world-south-asia-58071592, claiming that "[m]any of the US airstrikes were led by false intelligence, provided by someone who wanted to settle a bitter personal rivalry or land dispute at a village level".

tasks.[193] Caution is also advised with regard to the possible admission of police or intelligence reports as expert evidence, as their use by a court may ultimately mean that other evidence is assessed on the basis of information and methods not disclosed to the court and the defence.[194]

These caveats do not however rule out that reliance on intelligence agencies in criminal proceedings may constitute a proportionate interference into defence rights, especially at the pre-trial stage. First, intelligence agencies can provide criminal justice authorities with investigative leads that may trigger criminal investigations.[195] Second, under the condition of effective judicial oversight,[196] they may also corroborate other, more reliable evidence to justify the imposition of preliminary measures, such as searches or even preventive measures,[197] especially if such measures are of limited duration or, in the case of a longer-term prolongation, no longer rely on the initial intelligence to a decisive degree. Insofar as intelligence agencies effectively exercise some degree of influence over criminal proceedings, however, it would seem necessary not only to set clear rules on when and to what precise ends intelligence agencies may provide information for criminal investigations,[198] but also to develop procedures to ensure respect for such rules. As in the case of evidence gathered by the police, the reliability of evidence provided by intelligence agencies will not least depend on whether criminal courts can establish that no relevant material has been withheld without lawful reason, especially not material that could exonerate the suspect. To this end, courts may in particular review the decision of an intelligence agency to withhold a specific piece of information[199] and, at least to some extent, sometimes even scrutinise the lawfulness of certain covert measures.[200] In cases in which an accused claims the existence of exonerating evidence and this claim is rejected by the respective intelligence agency, it seems much less realistic however and also not desirable, for operational reasons, that the agency be forced to completely open up to the judiciary in order to allow the latter to search the agency for as yet unidentified information that may or

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[193] Ibid., p. 18: "An agency's responsibility to serve the court may be important, but it remains one consideration alongside others in the agency's pursuit of its mission to identify and protect against threats."

[194] To this effect, see the English jurisprudence presented in England I.A.2.

[195] Germany II.B.2., III.D.1; Netherlands II.A; JAE Vervaele, Terrorism and Information Sharing between the Intelligence and Law Enforcement Communities in the US and the Netherlands: Emergency Criminal Law? (op. cit.), p. 435–436.

[196] See *infra* IV.D.

[197] See Belgium III.B.1.

[198] For a rather extensively regulated framework to this effect, see the detailed overview in Germany II.B, C; but cf. on informal exchange practices existing beside a regulated framework Belgium II.A.1.

[199] See *supra* III.A and IV.A.

[200] See *infra* IV.D on options to ensure judicial control over preliminary measures at the pre-trial stage.

may not exist. In order to balance intelligence agencies' operational needs to ensure the confidentiality of their internal processes and the accused's right to a fair trial, legislators may therefore consider the creation of mechanisms to improve accountability, in particular independent bodies composed – at least partially – of prosecutors or judges authorised to access confidential information within agencies.[201] This mechanism could, on request of an investigative judge or a trial court, perform an ex post inquiry into information that had initially been communicated to the criminal justice authorities and used in criminal proceedings, in particular as a basis for preliminary measures. The inquiry should be triggered if there are reasons to believe that the information provided to the criminal justice authorities was incomplete or, in deliberate circumvention of the rules of criminal procedure, collected by intelligence agencies on behalf of investigative authorities.[202] This would have the purpose of detecting undisclosed information inside the intelligence agency that may undermine the reliability of evidence and then informing the requesting court whether such information has been found. At the same time, the independent body carrying out the inquiry should not be allowed to provide any information to the court or any other party without the agency's consent.[203] Such an arrangement has the advantage of enhancing the accountability of intelligence agencies insofar as they exert influence over criminal proceedings while at the same time providing these agencies with the assurance that their active contribution to such an internal inquiry will not lead to an unwanted disclosure of information.[204]

D. Evidentiary standards applicable to preliminary measures

As regards mitigation of the tension that frequently exists between the adoption of intrusive pre-trial measures, in particular pre-trial detention and asset freezing, and the need to keep details of an ongoing investigation secret, national legal orders follow varying approaches that, from the viewpoint of the defence, each offer distinct advantages and disadvantages.[205] Insofar as the suspect is entitled to have full access to all incriminating evidence used by the pre-trial judge, the authorisation and review of preliminary measures will frequently be based in large parts on comparatively weak forms of evidence, for example police summaries of investigative

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[201] See Belgium II.A.1; Netherlands II.A.2.

[202] On this risk resulting from close operational cooperation between investigative authorities and intelligence agencies JAE Vervaele, Terrorism and Information Sharing between the Intelligence and Law Enforcement Communities in the US and the Netherlands: Emergency Criminal Law?, Revue Internationale de Droit Pénal 2005 (vol. 76), p. 420–425.

[203] For a mechanism that does partially resemble this concept, see United Nations III.A.

[204] To this effect also Netherlands, IV.B.

[205] See *supra* III.D.

findings and interrogation protocols.[206] The more the ordering and review of preliminary measures relies on such evidence instead of an examination of the underlying sources by the judge him- or herself, the more the assessment of the incriminating evidence and consequently the decision on preliminary measures is effectively delegated to the investigative authorities.[207] Even if individual sources of evidence, such as key witnesses, are examined by the pre-trial judge,[208] their reliability will frequently be less scrutinised than at trial insofar as a disclosure of additional details of the investigation would compromise the outcome of the ongoing investigation and disclosure is therefore postponed.

In contrast, as explained above,[209] some jurisdictions have adopted procedures that limit the extent to which relevant evidence considered by the pre-trial court must simultaneously be disclosed to the suspect. Such closed material proceedings reflect the idea that the depth of judicial scrutiny of pre-trial measures should not be constrained by legitimate claims of the investigative authorities to keep details of an ongoing investigation secret.[210] Over recent years, this view has been increasingly promoted not least by the ECtHR. Outside the context of a criminal trial, the Court opened the doors rather widely to closed material proceedings in which courts test the lawfulness of executive and judicial measures partially or wholly on the basis of evidence that is not disclosed to the suspect at any point during the proceedings.[211] In Europe, this approach has seemingly been most prominently

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[206] In this vein Netherlands II.A, C; Spain II.D. But cf. Italy III.B.2.a., III.C.2 for an application of limitations pertaining to the admissibility of informer hearsay to decisions on pre-trial detention and to some other preliminary decisions.

[207] See for a rather explicit example of such delegation at the trial stage: Ireland I.C (national courts stating that they were far less qualified than senior police officers to review confidential material). Similarly the Supreme Court in Spain as regards the function of reports from intelligence services: "intelligence reports are merely the conclusion of experts at which the relevant intelligence services arrive […] and which in view of the new forms of organised crime […] appear as an instrument of evaluation that are as important as they are necessary for the Courts"; cited by M Jimeno-Bulnes, The use of intelligence information in criminal procedure: A challenge to defence rights in the European and the Spanish panorama (op. cit.), p. 172–175.

[208] On the obligation to perform such examination ECtHR, Becciev v. Moldova, 4 October 2005 – app. no. 9190/03 –, para. 72; Ţurcan and Ţurcan v. Moldova, 23 October 2007 – app. no. 39835/05 –, para. 67.

[209] *Supra* III.D.

[210] See to this effect in particular European Court of Justice (GC), Yassin Abdullah Kadi and Al Barakaat International Foundation, 3 September 2008 – app. no. C-402/05 P and C-415/05 P –, para. 344, which, while not pertaining to criminal proceedings in a formal sense, dealt with preventive measures adopted against an individual due to a criminal suspicion, namely the latter's alleged support of terrorism.

[211] ECtHR (GC), Chahal v. United Kingdom, 15 November 1996 – app. no. 22414/93 –; ECtHR (GC), A. and Others v. the United Kingdom, 19 February 2009 – app. no. 3455/05.

followed in the United Kingdom[212] and has, in the context of targeted sanctions, also been adopted by the European Union within its Common Foreign and Security Policy.[213] Essentially equivalent or similar frameworks may be found in continental national jurisdictions with regard to the judicial supervision of measures adopted during criminal investigations. As described above, some procedural frameworks may differentiate between incriminating evidence and potentially exonerating evidence and, only for the purpose of identifying exonerating information, allow pre-trial judges to consider evidence without disclosing it to the suspect and counsel.[214] However, even in cases of such differentiation, it appears adequate to characterise the respective pre-trial measures as being, at least partially, based on material not disclosed to the suspect. For insofar as judges are allowed to consider potentially exonerating evidence – such as confidential police records documenting how a particular covert investigative measure was carried out – and at the same time withhold it from the suspect and counsel, the assessment of the disclosed incriminating evidence will in fact be influenced or may even to a decisive extent be determined by the undisclosed material. In other words: While the differentiation between incriminating evidence and potentially exonerating evidence does, in principle, make good sense in order to determine when undisclosed information may or may not be taken into account by the judge to decide on pre-trial measures, the differentiating line between the two categories is necessarily blurry in practice. If, for example, a pre-trial decision is based decisively on the disclosed testimony of a police informer, and the judge considers the informer reliable only because the undisclosed confidential material does not – in the eyes of the judge – contain information to the opposite effect, one may conclude that the use of undisclosed information has then been decisive for the decision.

The use of undisclosed evidence in remand – and a fortiori in asset freezing – proceedings should not hastily be rejected without first scrutinising the effectiveness of hitherto existing judicial review frameworks that may currently force pre-trial judges to defer extensively, and at times excessively, to the assessment of the evidence by investigative authorities.[215] Given that less detailed and less reliable

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[212] See ECtHR, Sher and Others v the United Kingdom, app. no. 5201/11, 20 October 2015, para. 100–102; for an extension of closed material proceedings to the broader area of civil proceedings, including employment-related disputes, see the decision of the UK Supreme Court in Tariq v. Home Office [2011] UKSC 35. For a comparative analysis of the use of special advocates, see J Jackson, Special Advocates in the Adversarial System, 2020.

[213] European Union I.B.

[214] *Supra* III.D; see Belgium III.B.1, 2, C.

[215] See notably also the ECtHR's jurisprudence in cases where applicants suffered economic disadvantages due to a revocation of security clearance or other covert security assessments, where the Court stresses a need for national courts to base their decision on an assessment of all relevant evidence, including confidential material that is not disclosed to the affected person: ECtHR (GC), Regner v. the Czech Republic, 19 September 2017 – app. no. 35289/11 –, para. 148–162; ECtHR, Tinnelly & Sons Ltd and Others and

pieces of evidence will usually be the only alternative, the use of undisclosed material by the pre-trial court may sometimes well be in the best interest of the suspect.[216] However, while closed material proceedings will, in some cases, enable the judicial body to scrutinise the evidence more thoroughly than it could if it were merely considering anonymous testimony and other rather unreliable types of evidence, one should emphasise that such proceedings do not, in principle, offer a procedural model of equal value to an open hearing in which all the evidence used is fully disclosed to all parties. Closed material proceedings are structurally biased because, in the absence of the suspect, the most effective instrument to scrutinise the reliability of evidence is lacking,[217] as the court will not be made aware of exculpatory evidence that the suspect alone may be able to supply or uncover.[218] Arguably the biggest risk for the fairness of such proceedings lies in the possibility that a court may erroneously assume that, even in the absence of the suspect, it is able to detect inconsistencies in the evidence as reliably as it would in the presence of the suspect.[219] Ultimately, the assessment of evidence within closed material proceedings is therefore at risk of circular reasoning to the effect that the court will consider access of the suspect to the evidence to be unnecessary precisely because, due to the suspect's absence, the court does at no point become aware of reasons to doubt this evidence.[220] It follows that the judicial use of undisclosed evidence can

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McElduff and Others v. the United Kingdom, 10 July 1998, app. no. 62/1997/846/1052–1053, para. 78; ECtHR, Dağtekin and Others v. Turkey, judgement 13 September 2007, app. no. 70516/01 –, para. 34; ECtHR, Gulamhussein and Tariq v. United Kingdom, decision of 3 April 2018 – app. nos. 46538/11 and 3960/12 –, para. 84.

216 To this effect ECtHR (GC), A. and Others v. the United Kingdom, 19 February 2009 – app. no. 3455/05 –, para. 210. Cf. for example Ireland II (Chief Superintendent's opinion that refusal of bail is reasonably necessary admissible as evidence in bail proceedings).

217 Recalling that the right to challenge witnesses ought be understood "not as operating as a restraint on the accuracy of the verdict, but as integral to the truth-finding process" JD Jackson/SJ Summers, The Internationlisation of Criminal Evidence (op. cit.), p. 363–364. To this effect also S Walther, Zur Frage eines Rechts des Beschuldigten auf ‚Konfrontation von Belastungszeugen', Goltdammer's Archiv für Strafrecht, 2003, p. 217, J Renzikowski, Das Konfrontationsrecht im Fokus des Anspruchs auf ein faires Verfahren (op. cit.), p. 537; K Gaede, Münchener Kommentar zur Strafprozessordnung (op. cit.), Art. 6 EMRK, para. 264; F Meyer, Systematischer Kommentar zur Strafprozessordnung (op. cit.), Art. 6, para. 471.

218 G Van Harten, Weaknesses of adjudication in the face of secret evidence (op. cit.), p. 10; K Roach, Secret Evidence and its Alternatives, in: A Masferrer (ed.), Post 9/11 and the State of Permanent Legal Emergency: Security and Human Rights in Countering Terrorism, 2011, p. 184.

219 See on these limitations on the court's ability to establish relevant facts the analysis of administrative detention proceedings in D Barak-Erez/MC Waxman, Secret Evidence and the Due Process of Terrorist Detentions, 48 (2009) Columbia Journal of Transnational Law, p. 20–25.

220 See Lord Kerr of the UK Supreme Court in Al Rawi and others v. The Security Service and others [2001] UKSC 34, para. 93: "The central fallacy of the argument [that placing before a judge all relevant material is, in every instance, preferable to having to with-

be in the best interest of the suspect only under the condition that both legislators and courts fully apprehend the structural bias of this solution and therefore implement additional counterbalancing safeguards.

The ECtHR provides national legislators with considerable leeway as regards the use of undisclosed evidence when deciding on the lawfulness of pre-trial detention and other preliminary measures.[221] As remand proceedings under Article 5 para. 4 ECHR must usually meet, to the largest extent possible, the basic requirements of a fair trial,[222] the Court requires that the withholding of relevant evidence must be necessary to protect a significant public interest.[223] If this condition is fulfilled, the ECtHR however accepts that pre-trial detention may be imposed at a moment when information that is relevant or even essential for the assessment of the lawfulness of the detention cannot be disclosed to the suspect yet,[224] especially when a terrorist threat or a complex investigation into organised crime has created a strong public interest in obtaining more relevant information and therefore in maintaining the secrecy of the sources of such information[225] or in preventing evidence tampering by the suspect.[226] Even less demanding limitations on the use of undisclosed evidence apply when the withheld information is not essential for assessing the lawfulness of the detention[227] and the pre-trial judge's access to it would merely improve the suspect's ability to effectively challenge the allegations. This is the case in particular where judicial access to undisclosed material would enhance

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hold potentially pivotal evidence] lies in the unspoken assumption that, because the judge sees everything, he is bound to be in a better position to reach a fair result. That assumption is misplaced. To be truly valuable, evidence must be capable of withstanding challenge. […] Evidence which has been insulated from challenge may positively mislead. It is precisely because of this that the right to know the case that one's opponent makes and to have the opportunity to challenge it occupies such a central place in the concept of a fair trial. However astute and assiduous the judge, [closed material proceedings hand] over to one party considerable control over the production of relevant material and the manner in which it is to be presented. The peril that such a procedure presents to the fair trial of contentious litigation is both obvious and undeniable."

221 F Meyer, Systematischer Kommentar zur Strafprozessordnung (op. cit.), Art. 5, para. 282–284.

222 ECtHR, Garcia Alva v. Germany, 13 February 2001 – app. no. 23541/94, para. 39.

223 See ECtHR (GC), A. and Others v. the United Kingdom, 19 February 2009 – app. no. 3455/05 –, para. 205; ECtHR, Ţurcan and Ţurcan v. Moldova, 23 October 2007 – app. no. 39835/05 –, para. 60.

224 ECtHR, Sher and Others v the United Kingdom, app. no. 5201/11, 20 October 2015, para. 42–49 and 155–156; ECtHR, Podeschi v. San Marino, 13 April 2017 – app. no. 66357/14 –, para. 179.

225 See ECtHR (GC), A. and Others v. the United Kingdom, 19 February 2009 – app. no. 3455/05 –, para. 216; ECtHR, Sher and Others v the United Kingdom, 20 October 2015 – app. no. 5201/11, para. 149.

226 ECtHR, Podeschi v. San Marino, 13 April 2017 – app. no. 66357/14 –, para. 176.

227 For an apparent example to this effect, see ECtHR, Podeschi v. San Marino, 13 April 2017 – app. no. 66357/14 –, para. 190.

the judge's ability to scrutinise the reliability of the disclosed evidence in light of arguments from the defence.

Insofar as the pre-trial judge withholds information from the suspect that is essential for assessing the lawfulness of the detention, the ECtHR requires that any resulting difficulties of the defence be counterbalanced in a way that still allows him or her to effectively challenge the allegations.[228] At a minimum, this means that the "allegations" that result from the material to which the suspect is granted access be "sufficiently specific",[229] so that he or she can "lead evidence to refute them".[230] According to the Court, in cases of threats to national security (even with regard to long-term detention), this does not however rule out that most or possibly even all of the underlying evidence can remain undisclosed as long as the open material does not consist "purely of general assertions".[231] In this case, it would not even be necessary for the suspect "to know the detail or sources of the evidence which formed the basis of the allegations".[232] It follows from these standards that the ECtHR effectively allows national legislators to extensively limit the suspect's ability to scrutinise incriminating evidence at the pre-trial stage. Of course, insofar as the suspect is informed about the specific details of the alleged crime, he or she is allowed to challenge these allegations by presenting evidence that contradicts them, in particular an alibi or an alternative, innocent explanation for the alleged facts. But if the evidence that underpins the allegations is not disclosed to the suspect, he or she will be unable to challenge the reliability of the evidence on the basis of factors that are inherent to it, such as motives indicating that a key witness may be lying.[233] To compensate for this deficiency, the ECtHR emphasises the possibility that national legal frameworks may use "special advocates", that is independent counsel who have the necessary security clearance to access the withheld evidence and who are instructed by the suspect but who are, in principle, not entitled to communicate with the suspect after having seen this evidence. According to the Court, such advocates "could perform an important role in counter-

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[228] ECtHR, Piechowicz v. Poland, 17 April 2012 – app. no. 20071/07 – para. 203; ECtHR, Ovsjannikov v. Estonia, 20 February 2014 – app. no. 1346/12 – para. 73.

[229] See ECtHR (GC), A. and Others v. the United Kingdom, 19 February 2009 – app. no. 3455/05 –, para. 220.

[230] ECtHR, Piechowicz v. Poland, 17 April 2012 – app. no. 20071/07 – para. 186; also F Meyer, Systematischer Kommentar zur Strafprozessordnung (op. cit.), Art. 5, para. 284..

[231] See ECtHR (GC), A. and Others v. the United Kingdom, 19 February 2009 – app. no. 3455/05 –, para. 220.

[232] Ibid.

[233] To this effect ECtHR, Garcia Alva v. Germany, 13 February 2001 – app. no. 23541/94 –, para. 41: "it is hardly possible for an accused to challenge the reliability of [the information provided in the arrest warrant] properly without being made aware of the evidence on which it is based". See also ECtHR, Lamy v. Belgium, 30 March 1989 – app. no. 10444/83 –, para. 29; ECtHR, Schöps v. Germany, 13 February 2001 – app. no. 25116/94 –, para. 50; cf. ECtHR, Al Husin v. Bosnia and Herzegovina (no. 2), 25 June 2019 – app. no. 10112/16 –, para. 121.

balancing the lack of full disclosure and the lack of a full, open, adversarial hearing by testing the evidence and putting arguments on behalf of the detainee during the closed hearings".[234] Yet, if neither the pre-trial judge nor the special advocate are able to identify inherent weak spots of undisclosed evidence without the assistance of the suspect, the ability of such advocates to effectively counterbalance the lack of full disclosure remains limited, thereby leaving open the question of whether the suspect is really able to effectively challenge the allegations.[235]

Despite these caveats, and especially when the need for preventive and time-limited measures seems overwhelming, the pre-trial court's access to, and scrutiny of, undisclosed material may nevertheless constitute a way of providing the suspect with more effective judicial protection.[236] To ensure that such proceedings then do serve this purpose and do not instead become an instrument to shield authorities from scrutiny of unreliable evidence, the confidentiality claims underlying the withholding of relevant evidence must be thoroughly scrutinised in order to prevent an arbitrary limitation of procedural fairness. Furthermore, given that the equality of arms between the parties is considerably weakened in the case of closed material proceedings, instances of the use of undisclosed evidence by a pre-trial judge must be adequately limited. A departure from adversarial proceedingsshould be confined to cases in which such a procedure is strictly necessary, having regard particularly to the intrusiveness and length of the preliminary measure, the weight of the preventive need at stake, and the importance of the secret whose protection is sought with the non-disclosure of relevant evidence. Furthermore, judicial proceedings pertaining to pre-trial detention must principally always comply with the standard disclosure requirements under Article 5 para. 4 ECHR, in particular meaning that "information which is essential for the assessment of the lawfulness of a detention should be made available in an appropriate manner to the suspect's lawyer".[237] This does not necessarily include access to the source of the incriminating information, but the suspect must then "be given a sufficient opportunity to take cognisance of statements and other pieces of evidence underlying them, such as the results of the police and other investigations".[238] Notably, this may mean that such information is made available to the suspect through the transcripts of key incriminating testimo-

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[234] See ECtHR (GC), A. and Others v. the United Kingdom, 19 February 2009 – app. no. 3455/05 –, para. 220.

[235] See Lord Dyson in the UK Supreme Court decision in Al Rawi and others v. The Security Service and others [2001] UKSC 34, para. 36; N Blake et al., Evidence submitted by a number of Special Advocates to the Select Committee on Constitutional Affairs of the UK Parliament of 7 February 2005, para. 9.

[236] To this effect ECtHR, Sher and Others v the United Kingdom, app. no. 5201/11, 20 October 2015, para. 153.

[237] ECtHR, Garcia Alva v. Germany, 13 February 2001 – app. no. 23541/94 –, para. 42; Ţurcan and Ţurcan v. Moldova, 23 October 2007 – app. no. 39835/05 –, para. 60.

[238] ECtHR, Garcia Alva v. Germany, 13 February 2001 – app. no. 23541/94 –, para. 41; ECtHR, Schöps v. Germany, 13 February 2001 – app. no. 25116/94 –, para. 50.

ny and other relevant documents. Insofar as the defence, in response to this evidence, puts forward plausible arguments that question the reliability of the disclosed incriminating evidence, the prosecuting authority could then be allowed to rely on undisclosed evidence for the purpose of refuting such arguments if the disclosure of this evidence were to endanger the investigation. Only if even the aforementioned essential information cannot be disclosed to the suspect due to a preponderant public interest may preliminary measures be temporarily authorised essentially on the basis of undisclosed evidence and the suspect provided with merely a summary of the allegations originating from this evidence.

To ensure equality of arms as much as possible between the suspect and the prosecution, prosecutorial applications for the use of undisclosed evidence at the pre-trial stage could be supplemented by a declaration, under oath of officers testifying within closed proceedings, that no relevant material is being withheld from the court.[239] Moreover, any recourse to closed material proceedings should also recognise that the longer a highly intrusive preventive measure stays in force, the greater the evidentiary requirements must be.[240] Especially in case of long-lasting pre-trial detention or an extensive freezing of assets, additional procedural requirements could partially counterbalance the handicap of the defence and thereby improve the fairness of proceedings. This could be achieved in particular by rules to enhance the effectiveness of exactly how the pre-trial judge is expected to scrutinise undisclosed material, for example a requirement that, with increasing duration of a preventive measure, he or she must personally examine the officers and other witnesses who were at the origin of allegations and whose reliability is being challenged by the suspect.[241] Furthermore (and as already provided for by the ECtHR), legislators may then consider the involvement of special advocates or comparable, security-cleared counsel to represent the suspect in the consideration of undisclosed material and allow such counsel to request the taking of further undisclosed evidence within closed material proceedings. While not fully compensating for the suspect's absence in the closed parts of the review proceedings, the participation of such security-cleared counsel would ensure that the pre-trial judge's perception of such material is subjected to an adversarial challenge concerning the undisclosed evidence and thereby render it less likely that the objectivity of the judge's assessment may fall victim to a one-sided presentation of the prosecu-

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[239] See to this effect the UK Supreme Court in R (Haralambous) v Crown Court at St Albans and another {2018} UKSC 1, para. 25.

[240] To this effect ECtHR (GC), Labita v. Italy, 6 April 2000 – app. no. 26772/95 –, para. 159.

[241] On the obligation of the judge to examine key evidence in remand proceedings ECtHR, Becciev v. Moldova, 4 October 2005 – app. no. 9190/03 –, para. 72; Ţurcan and Ţurcan v. Moldova, 23 October 2007 – app. no. 39835/05 –, para. 67.

ECtHR, Becciev v. Moldova, 4 October 2005 – app. no. 9190/03, para. 72–75.

tion's case.[242] Lastly, in particular as far as a lengthy freezing of assets is concerned, legislators should keep in mind the danger that decisions of criminal courts may increasingly be perceived as the result of a secret interaction between courts and investigative authorities, thereby undermining public confidence in the impartiality of criminal courts and, as a consequence, making it less likely that their decisions will be respected by those who are directly affected by them.[243] In the interest of safeguarding the integrity of the judiciary as an impartial arbiter and instead of relying on closed material proceedings, it may then still be better to adapt the substantive law in a way that makes reliance on confidential information less necessary, in particular through a partial shifting of the burden of proof. Though such solutions could conflict with fair trial requirements, not least the right to remain silent and not to incriminate oneself,[244] and may therefore require additional safeguards (for example prohibition of using, at a subsequent trial, declarations made by the suspect in proceedings reviewing preliminary measures), they might ultimately be preferable to the use of undisclosed evidence.

V. Concluding remarks

With increasing reliance on covert investigative methods and sources whose identity needs to be protected, the ability of criminal trial courts, and often even more so of pre-trial judges ordering preliminary measures, to inquire into the origins of incriminating evidence and thus establish its reliability is hampered. The judiciary will thereby frequently be put into a position where it may be forced to either limit the depth of its inquiry or introduce procedural mechanisms to gain access to and scrutinise evidentiary material that will not be disclosed to the accused at any point. In this regard, it is crucial to recognise that, even when a judicial decision is ostensibly only concerned with testing whether or not it is lawful to withhold the sources of incriminating evidence from the accused, in many if not most cases such a decision will necessarily also entail an assessment of the relevance of the withheld information for the guilt or innocence of the accused. More precisely: insofar as a request for the disclosure of withheld information is usually aimed at questioning the reliability of the incriminating evidence brought forth

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[242] On this risk F Meyer, Systematischer Kommentar zur Strafprozessordnung (op. cit.), Art. 5, para. 288; on options to strengthen the role of special advocates within closed material proceedings, see J Jackson, Special Advocates in the Adversarial System, 2020, p. 223–283.

[243] To this effect Al Rawi and others v. The Security Service and others [2001] UKSC 34, para. 83.

[244] But see on the limits of this right ECtHR (GC), John Murray v. United Kingdom ECtHR (GC), 8 February 1996 – app. no. 18731/91 –, para. 47; Ibrahim and Others v. United Kingdom, 13 September 2016 – app. nos. 50541/08, 50571/08, 50573/08 and 40351/09 –, para. 269–274.

against the accused, any assessment as to whether the withheld information should be disclosed or not necessarily entails an (at least implicit) assessment of whether it is capable of undermining the reliability of the open evidence.[245] Only through such an assessment is it usually possible to balance the interests of the defence and the interests of the State to withhold confidential information.[246] As the judicial review of the non-disclosure of confidential information can thus essentially entail a decision on the reliability of the open incriminating evidence, without allowing the trial court and the defence to be involved in this decision, increasing judicial scrutiny of undisclosed methods and sources effectively leads to closed material proceedings within criminal proceedings, that is proceedings in which relevant information that underpins the ultimate judgement is withheld from the accused.

Unlike in preventive civil or administrative proceedings,[247] the use of undisclosed evidence in the criminal trial to the detriment of the accused is ostensibly still largely taboo according to the ECHR,[248] even if the jurisprudence of the ECtHR already implies some rather explicit, albeit limited, exceptions.[249] However, insofar as judicial decisions about the disclosure of relevant information entail an assessment of the reliability of incriminating evidence, based on the undisclosed information in question, this effectively constitutes an outsourcing of closed material proceedings to judges other than the triers of fact.[250] This is not to say that such

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[245] See ECtHR (GC), Jasper v. United Kingdom, 16 February 2000 – app. no. 27052/95 –, para. 56; ECtHR, McKeown v. United Kingdom, 11 January 2011 – app. no. 6684/05 –, para. 52.

[246] See notably the observations of Lord Mance in Al Rawi and others v. The Security Service and others [2001] UKSC 34, para. 100–121, highlighting the similarity of, on the one hand, judicial proceeding deciding on the (non-)disclosure of information and, on the other hand, proceedings that allow a court to decide a case on the basis of withheld information. See similarly ECtHR (GC), A. and Others v. the United Kingdom, 19 February 2009 – app. no. 3455/05 –, para. 206–208 and 217, where the Court indicates a close similarity between both types of proceedings, thereby seemingly using the acceptance, in the Court's case law, of the former type of proceedings to justify the conformity with Article 6 ECHR of closed material proceedings that impose highly intrusive measures on the basis of undisclosed evidence. Ultimately, the Court's analogy to this effect seems convincing in principle (even if the substantive conclusions of A v. UK may be debatable), given that judicial proceedings on (non-)disclosure will regularly entail an assessment of the reliability of disclosed incriminating evidence; see *supra* IV.A.

[247] B Vogel, Targeted Sanctions against Economic Wrongdoing at the UN and EU Level (op. cit.), p. 129–156; for similar mechanisms at the national level, see for example Ireland III.A.1; Italy III.B.2.a.

[248] See ECtHR (GC), Edwards and Lewis v. United Kingdom, 27 October 2004 – app. nos. 39647/98 and 40461/98 –, para. 44–46 and *supra* III.B, C.

[249] To this effect notably ECtHR, Donohoe v. Ireland, 12 December 2013 – app. no. 19165/08.

[250] The difference between, on the one hand, closed material proceedings (such as those contemplated by the Rules of Procedure of the Court of Justice of the European Union (see European Union I.A)) that allow the court to use undisclosed evidence to the detriment of one party and, on the other hand, an extensive use of anonymous testimony and hearsay

developments are to be categorically rejected. Insofar as it is sometimes unavoidable to withhold relevant information from the accused, judicial scrutiny of non-disclosure does in fact have a significant advantage. For without such judicial scrutiny, trial courts may effectively be forced to delegate the assessment of the reliability of the sources of evidence – be it an anonymous witness or a covert investigative measure – in part to the investigative authorities.[251] Moreover, to ensure judicial scrutiny, reliance on judicial bodies outside the trial is preferable to procedures in which the triers of fact themselves decide on the disclosure of, and therefore access to, confidential material.[252]

Yet, if, in taking decisions about the disclosure of evidence or the granting of anonymity, judges other than the triers of fact are regularly forced to assess the reliability of incriminating evidence by inquiring into information that is not disclosed to the defence, questions must be raised concerning how such practices impact on the overall fairness of the trial and what reforms may possibly be needed in order to better balance secrecy and the rights of the accused. In order to prevent covert investigations from leading to a weakening of the trial, legal orders will need to be alert to the potential of non-disclosure decisions to become a kind of "satellite proceedings"[253] in which evidentiary questions of considerable relevance for the outcome of the trial are dealt with without being subject to adequate procedural safeguards. Though the lawfulness of the non-disclosure of the sources of incriminating evidence should be determined by judicial bodies other than the triers of fact, legislators need to ensure that such disclosure proceedings do not lead to an unnecessary curtailment of the right to a fair trial. As a starting point, the law should, whenever possible, avoid inquiries into confidential material from being required in the first place. This can be achieved by restricting the admissibility of evidence of an undisclosed origin, by limiting the power of courts to attribute considerable weight to such evidence (in particular to anonymous testimony and especially to anonymous hearsay testimony), and, where possible, by requiring prosecuting authorities to gather alternative evidence that would require no or less withholding of source-related information. Insofar as reliance on evidence of an undisclosed origin is necessary, however, legislators need to put in place proce-

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evidence at a criminal trial may therefore be rather quantitative than qualitative in nature. In both cases, the courts may base their decision on evidence whose source is, at no moment, disclosed to the suspect. In the former framework, it is the court who may, in camera and ex parte, review the undisclosed source; in the latter, this may instead be done by a judge outside the trial. The main difference between the two frameworks will usually lie in the level of detail to which allegations will need to be disclosed; see for example European Court of Justice (GC), European Commission and Others v Yassin Abdullah Kadi, 18 July 2013 – Cases C-584/10 P, C-593/10 P and C-595/10 P –, para. 135–163.

[251] See for an example ECtHR, Windisch v. Austria, 27 September 1990 – app. no. 12489/85 –, para. 14.

[252] *Supra* IV.A.

[253] See Al Rawi and others v. The Security Service and others [2001] UKSC 34, para. 43.

dures that ensure an effective involvement of the accused in non-disclosure decisions, especially where such decisions are relevant for the reliability of key incriminating evidence. Today, the need for such procedures seems particularly urgent in view of the ECtHR's willingness to accept that convictions may be founded on hearsay or anonymous testimony, even where this evidence is decisive or at least of considerable weight, and the Court's demand that the handicap of the defence must be offset by adequate counterbalancing measures in such cases. For this purpose, it is important to keep in mind that a trial court's careful assessment of anonymous statements, of police summaries of covert measures, or of intelligence reports will in many cases hardly suffice to compensate for the accused's inability to comprehensively challenge the reliability of the evidence. Insofar as ECtHR jurisprudence is, for the time being, only providing tentative guidance on how to design the required counterbalancing measures, national legislators are called upon to develop and refine procedural mechanisms that uphold the ability of trial courts to scrutinise the reliability of evidence originating from fully or partially undisclosed sources, where necessary with the assistance of out-of-trial mechanisms that enhance oversight over confidential sources.[254] Given that the effectiveness of such mechanisms largely depends on taking into consideration the viewpoint of the accused, the accused must remain actively involved in decisions about non-disclosure and witness anonymity. This involvement should ensure that findings on the reliability of evidence that may determine the outcome of the trial do not, as far as possible, suffer from an implicit bias towards the prosecution's case – a risk that is characteristic for closed material proceedings. The effectiveness of such judicial oversight is not only crucial for counterbalancing the handicap of the defence but, even more importantly, for ensuring that relevant information is only withheld from the defence where this is strictly necessary.[255] After all, this preliminary question is decisive for protecting the fairness of the trial against unnecessary secrecy, as is rightly stressed by the ECtHR.[256] Somewhat different solutions may be found to counterbalance handicaps of the defence in the context of preliminary preventive measures at the pre-trial stage, where the requirement to keep relevant information secret will regularly be particularly strong. In the same way as at trial, legal orders should, in this context, also guard against an extensive judicial use of surrogates for original evidence, such as hearsay and mere summaries of investigative findings. However, insofar as preventive measures are only in force for a limited period of time, prudent use of undisclosed incriminating evidence by the judicial body tasked with reviewing preventive

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[254] *Supra* IV.A, B, C.

[255] See to this effect S Maffei, The Right to Confrontation in Europe, p. 98–99, with a critical appraisal of the ECtHR's standards on the granting of anonymity.

[256] See ECtHR, Boshkoski v. North Macedonia, 4 June 2020 – app. no. 71034/13 –, para. 43.

measures can potentially better serve the interests of the suspect than a procedural framework in which all the evidence must be disclosed to him or her.

Consequences should also be drawn from the increasing involvement of intelligence agencies in criminal investigations. In contrast to the collection of evidence under rules of criminal procedure, the informal and largely unsupervised gathering of intelligence makes it particularly vulnerable to error and manipulation; such information will therefore usually not satisfy the reliability standards required to justify a criminal conviction. In the area of intelligence gathering, a level of oversight comparable to that of judicial proceedings is typically not realistic, so national legislators will increasingly need to address the question of to what extent information provided by intelligence agencies should be admissible as evidence in criminal proceedings and, insofar as it should be, to conceptualise mechanisms that strengthen scrutiny of the reliability of such information. However, given that informality seems to be a necessary prerequisite for effective intelligence gathering, scrutiny of intelligence is necessarily limited. Realistically, the tension between intelligence and the evidentiary standards of criminal procedure can thus never be fully dissolved. Legislators should therefore ensure that the involvement of intelligence agencies in criminal proceedings remains confined to cases of high importance and does not mutate into a largely unregulated practice in which criminal courts may, wittingly or unwittingly, increasingly be influenced by information of limited reliability or in which criminal proceedings may effectively be unduly controlled by the policy choices of intelligence agencies. In any case, insofar as ECtHR jurisprudence stresses the need for the non-disclosure of relevant evidence to be reviewed by a judicial organ, it creates a strong incentive for intelligence agencies to limit their involvement in criminal proceedings, as any information they provide may then give rise to the right of the accused to have the methods of the collection of such information reviewed by a court.[257] One may therefore conclude that the ECtHR's jurisprudence on disclosure has effectively defined a generic partition between criminal investigations and intelligence gathering, a partition that, though subject to exceptions, essentially reflects the divide between a judicially controlled sphere and a largely unsupervised sphere. Political choices as regards the involvement of intelligence agencies in matters of criminal justice therefore depend first and foremost on the question of to what extent intelligence agencies should be required to disclose information to the judiciary, and any answer to this must pay due regard to the consequences that increased judicial involvement would have on the effectiveness of intelligence gathering.[258] Insofar as such involvement

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[257] In a similar vein JAE Vervaele, Terrorism and Information Sharing between the Intelligence and Law Enforcement Communities in the US and the Netherlands: Emergency Criminal Law? (op. cit.), p. 431–432.

[258] FF Manget, Intelligence and the Criminal Law System (op. cit.), p. 422–428 and id. p. 435: "At some point, compromises to solve those conflicts by meeting the needs of both systems may degrade both systems beyond what is acceptable."

is politically intended, it is up to legislators to put in place mechanisms that ensure effective scrutiny of non-disclosure decisions. In doing so, policymakers should in turn be aware that such scrutiny will, in many cases, effectively lead to an assessment of the reliability of criminal evidence on the basis of information that is at no point made available to the defence.

Finally, and despite the above-mentioned challenges brought about by the judicial control of executive non-disclosure decisions, it appears that such control, in addition to the paramount judicial virtue of scepticism towards anonymity and hearsay, nevertheless constitutes the central bulwark for protecting the criminal procedure from the dangers of secrecy. By contrast, the trial court's careful assessment of the evidence alone is increasingly unlikely to constitute a sufficient safeguard to this end, especially in a world in which intelligence gathering has become a ubiquitous feature of security policy[259] and where, as a consequence, a growing information asymmetry between the executive and the criminal courts can make the latter more susceptible to being misled as a result of one-sided disclosure of relevant evidence.

[259] For an example of an extensive collection of intelligence by the private sector which may ultimately be used to support criminal proceedings, even when the precise circumstances of the generation of this intelligence may oftentimes be scrutinised by judicial bodies only to a limited extent, see B Vogel/J-B Maillart (eds.), National and International Anti-Money Laundering Law, 2020.

Secret Evidence in Criminal Proceedings in Belgium

Michele Panzavolta and *Ward Yperman*

I. General introduction and structure of the analysis

With the rise of international terrorism, Belgium was confronted with a new phenomenon, which required new forms and means of both prevention and repression. A new wave of legislation expanded the powers available to criminal justice authorities to fight terrorism (and other similarly dangerous offences). This chapter discusses the Belgian rules of criminal procedure on the relationship between information to be kept secret and the imposition of restrictive measures (detention, house arrest, and the freezing of assets).

Throughout the chapter we differentiate between indirect evidence and undisclosed evidence. According to the stipulations specifically set out for this volume, 'indirect evidence' refers to cases where the evidence, with the exception of the source (the original carrier) of the information, is disclosed to the parties. It is in essence a case of partial disclosure, where the information is made available but not its source. 'Undisclosed evidence' is information that either remains entirely undisclosed to the party (suspect and counsel) or is disclosed only to counsel but with a prohibition to further disclose it to the client. An important problem with regard to undisclosed evidence is the non-disclosure of exculpatory evidence. Attention will therefore also be paid to this topic.

This chapter consists of three main parts. The first part (I.) focuses on restrictive measures imposed following a criminal trial, the second (II.) on restrictive measures imposed in criminal pre-trial proceedings, and the third (III.) on restrictive measures imposed in non-criminal proceedings against individuals.

II. Evidence in the criminal trial

Before going into detail on the rules concerning the use of incriminating (indirect or undisclosed) evidence, it is useful to briefly clarify the context of Belgian criminal proceedings. As is the case in many other legal systems, Belgian criminal proceedings consist of an investigation phase and a trial phase. The trial phase can take place before different courts depending on the severity of the crime. For the most serious crimes (*crimes* in French*; misdaden* in Dutch),[1] the competent court is the assize court, a court composed of a hybrid panel of three professional judges and a jury of 12 lay persons. For the other crimes,[2] the competent courts are the lower courts (*tribunal correctionnel; correctionele rechtbank* and *tribunal de police; politierechtbank*), which are composed of professional judges only.[3] The procedure before the assize court differs from that before the lower courts. The main difference is the stronger protection of the principles of orality and immediacy in front of the assize court. Article 280 Code of Criminal Procedure (CCP) states that the trial procedure before the assize court takes place orally. In consequence the law normally requires that witnesses be heard at the trial stage and allows the reading of prior witness statements (*i.e.* given by a witness during the investigation) only if the summoned witness does not appear or if the witness has passed away.[4] The same rules do not apply before lower courts. These courts can use all the information that is present in the file, as long as the principle of confrontation is not breached. In other words, these courts do not have to hear the witness in court unless the parties explicitly request this (and as long as the request is not deemed superfluous by the judge).[5]

The CCP allows courts to use any available means of evidence for the decision on the merits of the case. The system is therefore organised around the 'freedom of evidence' (or 'free availability of evidence' (*système de preuve libre; vrij*

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[1] Throughout the text, translations will always be provided in this order: first French and then Dutch.

[2] Being standard offences (*délits; wanbedrijven*) and contraventions (*contraventions; overtredingen*).

[3] It should be briefly mentioned that the usual practice is to employ a procedural device (*correctionalisation; correctionalisatie*) by which many of the most serious offences (*crimes*; *misdaden*) can be adjudicated before the lower courts through the application of mitigating circumstances.

[4] Art 316 CCP.

[5] Art 153 CCP; BE, Cass 17 December 2002, P.02.0027.N, [2002] Arr Cass 2775.

bewijsstelsel)), meaning that the proof can be offered by the parties (or sought by the judge) by any means.[6] However, this principle is not absolute. As already mentioned, statements of witnesses made during the investigation can be used before the assize court to a more limited extent. The right to confrontation forbids the use of incriminating evidence if the defence was not allowed to contradict the evidence. Some further general limits are codified in Article 32 preliminary title CCP.[7] The Article states that irregularly obtained evidence[8] can be used, except in three specific situations. Firstly, it is impermissible to use evidence that would lead to a breach of the right to a fair trial. Secondly, irregular evidence is excluded if obtained by means of a significant procedural flaw (one which the legislator has specifically labelled as a nullity: *nullité; nietigheid*). Thirdly, evidence is excluded if the reliability is affected.

As a general rule, all the evidence is contained within the file. During the trial phase this file is accessible to all the parties. Thus, the defendant has a full right of access to the file at the latest at the trial stage. It is not possible to base a court decision on evidence that is not disclosed. The general rule is that all the evidence is disclosed to the defence and the use of undisclosed evidence at trial is therefore impossible. Belgian law allows the use of indirect incriminating evidence in a few instances, which are discussed below; the problem of non-disclosure of exculpatory evidence is covered in section I.2. further below.

In conclusion, the trial courts can use all types of evidence to make their decisions and deliver their judgments. In particular, there is no explicit rule that precludes the courts from using hearsay (or second-hand) evidence, as long as the just-mentioned general principles are complied with. The principle of free collection of evidence applies insofar as there are no explicit legal limits.

A. The use of incriminating 'indirect evidence'

As mentioned before, the general rule is that only evidence that has been disclosed can be used at trial. Nonetheless, there are exceptions which make it possible for certain information to be used despite the fact that its source(s) were not disclosed to the parties. Four such situations will be addressed in this section: 1. the use of information coming from the intelligence services; 2. the use of information obtained from special investigative techniques; 3. the use of anonymous witness testimony; 4. the use of codes in official reports.

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[6] Philip Traest, *Het bewijs in strafzaken* (Mys en Breesch, 1992) 95.

[7] This Article is a codification of the case law of the Court of Cassation: DY, Cass 14 October 2003, P.03.0762.N, [2003] NjW 1367.

[8] Meaning evidence obtained in breach of a procedural rule.

1. Intelligence gathering

In recent times, new provisions were introduced which allow the courts to make use of information obtained by the intelligence services. These developments fall within the larger trend of overlap and cooperation between intelligence functions and judicial functions.[9] In Belgium, just like in most other countries, the fight against terrorism follows a multipronged strategy. The recourse to classic (*i.e.* reactive) criminal law is complemented by the use of preventative tools and measures. The focus on prevention has led to the strengthening of the powers of the security and intelligence services and to new forms of cooperation between the security services and the authorities competent for the enforcement of criminal law.

The most significant change in this respect was brought about by the Act of 4 February 2010 on the methods for the collection of information by the intelligence services (*Loi relative aux méthodes de recueil des données par les services de renseignement et de sécurité; Wet betreffende de methoden voor het verzamelen van gegevens door de inlichtingen- en veiligheidsdiensten*), normally abbreviated as BIM Act.[10]

The BIM Act introduces new provisions concerning the prerogatives of the intelligence services to collect information in order to protect the security of the state. In doing so, the Act largely innovates the Act of 30 November 1998 on the general organization of intelligence services (*Loi organique des services de renseignement et de securite; Wet houdende regeling van de inlichtingen- en veiligheidsdiensten*, hereafter 'Security Act') and other special statutes. The BIM Act provides for three types of methods the intelligence services can employ to collect information, listed in order of increasing intrusiveness: ordinary methods, special methods, and extraordinary methods.[11] The ordinary methods comprise the possibility to acquire information from governmental agencies, private organizations, even by interviewing people or accessing, observing, and searching publicly accessible places. The special methods are more intrusive. They include the possibility to access subscriber data and traffic data of postal and digital communications and to carry out observations

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[9] John Vervaele, 'Terrorism and information sharing between the intelligence and law enforcement communities in the US and the Netherlands: Emergency criminal law?' [2005] 1 Utrecht Law Journal 1.

[10] See Bart Vangeebergen and Dirk van Daele, 'De wet op de bijzondere inlichtingenmethoden: een reus op lemen voeten' [2010] Nullum crimen 147.

[11] The specific methods are listed in Art 18/2–18/8 Security Act, and the extraordinary methods are listed in Art 18/2 and 18/9–18/18. For a short description see also Hugo Vandenberghe and Thomas Van Ongeval, 'Genese en krachtlijnen van de Wet van 4 februari 2010 op de bijzondere inlichtingenmethoden' in Wauter Van Laethem, Dirk Van Daele and Bart Vangeebergen (eds), *De Wet op de bijzondere inlichtingenmethoden* (Intersentia 2010) 8–15; Wauter Van Laethem, 'Een revolutie in de Belgische inlichtingensector' [2011] 56 De orde van de dag 29–37; Alain Winants, 'drie jaar BIM-wet: een eerste analyse' in Henri Berkmoes et al, *strafrecht in breed spectrum* (die Keure, 2014), 188–190.

and searches in publicly accessible places by technical means.[12] Lastly, the intelligence services can resort to the extraordinary methods, whereby they can access, search, and observe private places, create fictitious organizations, obtain bank and financial information, enter computer systems, and intercept communications. The BIM Act also established a special administrative committee (*commission administrative; bestuurlijke commissie*, als known as BIM committee) that is tasked with supervising the specific and extraordinary methods.[13] The BIM Committee is composed of three members coming from the judiciary (a prosecutor, an investigating judge and a judge).

The strengthening of the prerogatives for collecting information facilitated more frequent situations for the intelligence and security services to gain knowledge about crimes committed or the concrete possibility that crimes will be committed in the near future. Consequently, the BIM Act introduced provisions concerning the circumstance that the intelligence services collect information relevant to criminal justice authorities in that they concern past, current, or future offences. In general terms, the Belgian intelligence services are only allowed (or required) to share information with the judicial authorities if it was obtained legally and if doing so benefits national security, although the applicability and the enforcement of these conditions remain largely disputed.[14] Here the suspect does not have access to the source of the information, but neither do the public prosecution service or the courts.[15] This still raises issues for the rights of defence.[16]

The most relevant provision can be found in Article 15 BIM Act, which introduced a new Article 19/1 into the Security Act. According to this provision, if the intelligence services, when using the specific or extraordinary methods, acquire information which leads to a 'reasonable suspicion or serious indication of a serious or ordinary offence'[17] being committed, already committed or still to be committed, they are bound to immediately communicate such information to the administrative

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[12] See also Orde van Vlaamse balies, Jo Stevens and vzw Liga voor Mensenrechten, Constitutional Court 22 September 2011, 145/2011, [2011] A GrwH 2433 and, with specific regard to special methods of collecting evidence, Constitutional Court 19 July 2018, 96/2018.

[13] Art 43/1 Security Act, introduced by the BIM Act.

[14] Art 19 Security Act; Bart Vangeebergen, *Het gebruik van inlichtingen in het strafproces* (Intersentia, 2017), 282–286.

[15] Jan Theunis, 'De toetsing aan grondrechten door het Grondwettelijk Hof – Overzicht van rechtspraak 2011' [2012] TBP 624.

[16] Orde van Vlaamse balies, Jo Stevens and vzw Liga voor Mensenrechten, Constitutional Court 22 September 2011, 145/2011, [2011] A GrwH 2433; Jan Theunis, 'De toetsing aan grondrechten door het Grondwettelijk Hof – Overzicht van rechtspraak 2011' [2012] TBP 624.

[17] Note: this does not include the contraventions, the lowest category of offences. However, Belgian criminal law does not have many contraventions.

committee with a view to further communicating the information to the prosecutor.[18] The law directly refers to the application of Article 29 CCP, which contains a duty for all public officers to inform the criminal justice authorities of offences so that a criminal investigation can be started (see *infra* this Section). The duty of Article 19/1 Security Act however applies only insofar the information on the offences was obtained by using more intrusive methods. If the information was obtained using the less intrusive ordinary methods, there is no duty to communicate under Article 19/1 Security Act. Moreover, this communication duty requires that the information collected compellingly points to the commission of offences, hence a general suspicion need not be communicated. The parliamentary committee established after the terrorist attacks in Brussels and Zaventem in 2016 proposes to relax the duty of Article 19/1 Security Act by deleting the word 'immediately'.[19] This would allow intelligence services to delay information sharing until such time as there is no longer a risk of endangering their intelligence work.

The introduction of such a sharing duty also required a procedure by which the information could be communicated without unwarranted breaches of the secrecy shielding the actions of the intelligence services. To this end the BIM Act established a special procedure, which gives the administrative committee a crucial role.

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[18] Art 19/1 Security Act; Frank Schuermans, 'Het gebruik van gegevens afkomstig van de inlichtingendiensten in de strafprocedure: is er nood aan een "BIM-Wet"?' [2008] T Strafr 322; Jan Theunis, , 'De toetsing aan grondrechten door het Grondwettelijk Hof – Overzicht van rechtspraak 2011' [2012] TBP 624; Hugo Vandenberghe and Thomas Van Ongeval, 'Genese en krachtlijnen van de Wet van 4 februari 2010 op de bijzondere inlichtingenmethoden' in Wauter Van Laethem, Dirk Van Daele and Bart Vangeebergen (eds), *De Wet op de bijzondere inlichtingenmethoden* (Intersentia 2010) 22; Johan Vanderborght and Bart Vangeebergen, 'De wet op de bijzondere inlichtingenmethoden: "la clé de voute" van de wettelijke omkadering voor de inlichtingendiensten?' [2011] 56 De orde van de dag 16–17; Bart Vangeebergen, *Het gebruik van inlichtingen in het strafproces* (Intersentia, 2017), 291–293; Wauter Van Laethem, 'Een revolutie in de Belgische inlichtingensector' [2011] 56 De orde van de dag 39; Paul Van Santvliet, 'De commissie BIM uit de startblokken' [2011] 56 De orde van de dag 56; Alain Winants, 'drie jaar BIM-wet: een eerste analyse' in Henri Berkmoes et al, *strafrecht in breed spectrum* (die Keure, 2014), 196–197.

[19] Third intermediate report of 15 June 2017 of the parliamentary committee (Troisieme rapport intermédiaire, sur le volet 'architecture de la sécurité' de 15 juin 2017 fait au nom de la commission d'enquête parlementaire chargée d'examiner les circonstances qui ont conduit aux attentats terroristes du 22 mars 2016 dans l'aéroport de Bruxelles-National et dans la station de métro Maelbeek à Bruxelles, y compris l'évolution et la gestion de la lutte contre le radicalisme et la menace terroriste/ Derde tussentijds verslag over het onderdeel 'veiligheidsarchitectuur' van 15 juni 2017 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, *Parl.St.* Kamer 2016–2017, no 54-1752/008, 310).

The committee examines the collected information. It is the task of the committee to scrutinize whether the transmitted information in fact contains elements related to criminal offences. If the committee finds that there are compelling indications of the commission of crimes or the likelihood that crimes will be committed, it is then the task of the chairman to draft a non-classified report to be sent to the public prosecution service.[20] The logic of the report is to allow the authorities to investigate and prosecute the crimes without jeopardizing the confidentiality of the information, of the methods used, and of the people involved. The report must list the elements – pointing directly and compellingly to perpetrated offences – that could be used in legal proceedings.[21]

The report must then be sent to the prosecutor, after a consultation with the department head of the security services on the contents of the report and on the proper way for its transmission of the report and its contents (so as to avoid improper leaks). The prosecutor should also inform the chairman of the BIM-committee of the judicial developments following the transmission of the report. The chairman, in turn, shares this the information with the head of the competent intelligence service.

A very important rule is the one contained in a series of new articles introduced to the CCP by the BIM Act: Articles 131*bis*, 189*quater*, and 279*bis* CCP (the first applicable before the courts exercising supervision at the end of the investigation, the second to proceedings before the *tribunal correctionel*, the third in the procedure in front of the assize court). The Articles cover the judicial use of the unclassified report drafted by the administrative committee.

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[20] Jan Theunis, 'De toetsing aan grondrechten door het Grondwettelijk Hof – Overzicht van rechtspraak 2011' [2012] TBP 624; Johan Vanderborght and Bart Vangeebergen, 'De wet op de bijzondere inlichtingenmethoden: "la clé de voute" van de wettelijke omkadering voor de inlichtingendiensten?' [2011] 56 de orde van de dag, 17; Bart Vangeebergen, *Het gebruik van inlichtingen in het strafproces* (Intersentia, 2017), 291–294.

[21] Art 19/1 Security Act. The statute used to state that the report must clarify the circumstances and the goal of the intelligence gathering, and the context in which the information was obtained. See Frank Schuermans, 'Het gebruik van gegevens afkomstig van de inlichtingendiensten in de strafprocedure: is er nood aan een "BIM-Wet"?' [2008] T Strafr 322; Hugo Vandenberghe and Thomas Van Ongeval, 'Genese en krachtlijnen van de Wet van 4 februari 2010 op de bijzondere inlichtingenmethoden' in Wauter Van Laethem, Dirk Van Daele and Bart Vangeebergen (eds), *De Wet op de bijzondere inlichtingenmethoden* (Intersentia 2010) 22; Bart Vangeebergen, *Het gebruik van inlichtingen in het strafproces* (Intersentia, 2017), 294; Alain Winants, 'drie jaar BIM-wet: een eerste analyse' in Henri Berkmoes et al, *strafrecht in breed spectrum* (die Keure, 2014), 198. This was changed because parliament felt that the original wording could lead to reports that may contain too much information and reveal the modus operandi of the intelligence services and compromise their sources. See Exposé des motifs de projet de loi de 20 septembre 2016 modifiant la loi du 30 novembre 1998 organique des services de renseignement et de sécurité et l'article 259*bis* du Code pénal/Memorie van toelichting bij wetsontwerp van 20 september 2016 tot wijziging van de wet van 30 november 1998 houdende regeling van de inlichtingen- en veiligheidsdienst en van artikel 259*bis* van het Strafwetboek, *Parl. St.* Kamer 2015–2016, no 54-2043/001, 72.

Articles 189*quater* and 279*bis* CCP address particularly the use of the unclassified report at trial. The problem with the use of this report is that it contains information obtained as a result of the intelligence services activity but does not disclose the sources of the information and the way in which the information was obtained. Particularly this last point might raise the question whether the information is reliable and lawfully obtained, two points that are crucial with a view to a judicial decision on the merits. Furthermore, the report might contain only part of the information collected by the intelligence services, because the rest of the information might need to remain confidential to protect state security and to ensure that the intelligence services can further identify threats and perils for the security of the country.

Articles 189*quater* and 279*bis* CCP state that when assessing the merits of an unclassified report the trial court can (*motu proprio* or upon application by the parties, prosecutor included) request a written opinion from Permanent Committee I (the oversight committee for intelligence services: *Comité Permanent R; Vast Comité I*) on the methods employed to collect the information. The parties must make their application before having raised any other challenge or appeal, unless the application relates to new information that first surfaced during trial. This mechanism has been put in place in order to ensure the legality of the material collected and to afford some protection to the rights of the defence. Such a procedure permits to test, albeit only indirectly, the legality of the means employed. Nonetheless, two significant problems remain. The first concerns the value and the role of the opinion delivered by the Permanent Committee I. The opinion is not legally binding but *de facto* it is, because it is difficult for courts to justify any departure from it.[22] It is difficult to see how the parties and the courts could challenge the opinion. It remains questionable whether such a mechanism provides proper protection for the rights of the defence. Furthermore, it must be noted that even the opinion requested of the Permanent Committee I covers merely the legality of the data collected and does not extend to testing the reliability or verifying whether other relevant information for the case was available which remained unduly ignored.

Lastly, Article 19/1 Security Act explicitly states that the report cannot be the sole or the main basis for convicting a person. The elements mentioned in the report must be corroborated by other pieces of evidence.

Outside of this duty to communicate information included in Article 19/1 Security Act, some discussion remains about further channels of information exchange between the intelligence services and the judicial authorities. Article 19/1 refers explicitly to information collected using special or extraordinary methods. This begs the question whether a similar duty exists with regard to the information collected with ordinary means. There is a general duty for public servants to immediately inform the public prosecution service of any serious or ordinary offences discovered in the

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[22] Bart Vangeebergen, *Het gebruik van inlichtingen in het strafproces* (Intersentia, 2017), 436.

performance of their duties. Since people working for the intelligence services are public servants, many assume that this general duty applies to them as well.[23] This approach, however, seems to defy the logic of the Security Act, because such a general duty does not offer adequate protection to confidential information. Furthermore, within the Security Act the sharing of information is coupled with specific protection mechanisms. Not surprisingly, the application of Article 29 CCP has been criticized because immediately informing the public prosecution service is not always conducive to national security.[24] On a practical level the problem finds an unorthodox solution in the fact that Article 29 CCP does not contain a criminal penalty for non-compliance, so members of the intelligence services can fail to comply with the duty without consequences.[25]

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[23] Johan Vanderborght and Bart Vangeebergen, 'De wet op de bijzondere inlichtingenmethoden: "la clé de voute" van de wettelijke omkadering voor de inlichtingendiensten?' [2011] 56 de orde van de dag, 17; Bart Vangeebergen, *Het gebruik van inlichtingen in het strafproces* (Intersentia, 2017), 290–293; Wauter Van Laethem, 'De verhouding tussen inlichtingendiensten en het gerecht gisteren, vandaag en morgen' [2007] Vigiles 5; Wauter Van Laethem, 'Een revolutie in de Belgische inlichtingensector' [2011] 56 de orde van de dag 39; Vast Comité I, *Activiteitenverslag 2004*, 2005, www.comiteri.be, 117–119; Alain Winants, 'drie jaar BIM-wet: een eerste analyse' in Henri Berkmoes et al, *strafrecht in breed spectrum* (die Keure, 2014), 194–196. Although there is no legal provision exempting them from this duty, the preparatory works of Art 19/1 Security Act seem to exclude them from the duty of Art 29 CCP. See Amendment to the proposal concerning the methods for the gathering of information by the intelligence and security services, *Parl. St.* Senaat 2008–2009, no 4-1053/2.

[24] Third intermediate report of 15 June 2017 of the parliamentary committee (Troisieme rapport intermédiaire, sur le volet 'architecture de la sécurité' de 15 juin 2017 fait au nom de la commission d'enquête parlementaire chargée d'examiner les circonstances qui ont conduit aux attentats terroristes du 22 mars 2016 dans l'aéroport de Bruxelles-National et dans la station de métro Maelbeek à Bruxelles, y compris l'évolution et la gestion de la lutte contre le radicalisme et la menace terroriste/Derde tussentijds verslag over het onderdeel 'veiligheidsarchitectuur' van 15 juni 2017 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), *Parl.St.* Kamer 2016–2017, no 54-1752/008, 310); Johan Vanderborght and Bart Vangeebergen, 'De wet op de bijzondere inlichtingenmethoden: "la clé de voute" van de wettelijke omkadering voor de inlichtingendiensten?' [2011] 56 de orde van de dag 17; Bart Vangeebergen, *Het gebruik van inlichtingen in het strafproces* (Intersentia, 2017), 290; Wauter Van Laethem, 'De verhouding tussen inlichtingendiensten en het gerecht gisteren, vandaag en morgen' [2007] Vigiles 5; Wauter Van Laethem, 'Een revolutie in de Belgische inlichtingensector' [2011] 56 de orde van de dag 39; Vast Comité I, *Activiteitenverslag 2004*, 2005, www.comiteri.be, 117–119; Alain Winants, 'drie jaar BIM-wet: een eerste analyse' in Henri Berkmoes et al, *strafrecht in breed spectrum* (die Keure, 2014), 194–196.

[25] Bart Vangeebergen, *Het gebruik van inlichtingen in het strafproces* (Intersentia, 2017), 291; Vast Comité I, *Activiteitenverslag 2004*, 2005, www.comiteri.be, 117–119; Alain Winants, 'drie jaar BIM-wet: een eerste analyse' in Henri Berkmoes et al, *strafrecht in breed spectrum* (die Keure, 2014), 195.

The other possibility is that the services decide to share their intelligence via an informal exchange of information with the criminal justice authorities, which could happen based on Articles 19 and 20 Security Act. Article 20 Security Act establishes an obligation of loyal and fruitful cooperation between the intelligence services and, among others, the criminal justice authorities, and Article 19 Security Act permits the intelligence services to share their information with, among others, the criminal justice authorities.[26] In doing so, the intelligence services need to take several things into account, such as the safety of their sources and the rules on classified information.[27]

The sharing of intelligence through informal channels predates the BIM Act of 2010. An important case was the so-called *GICM* (*Group Islamique combatant Marocain*) case, where several men stood accused of being part of a terrorist group (the *GICM* group) and several other crimes. Some of the incriminating information against the defendants came from intelligence collected by the intelligence services, which was shared with the criminal justice authorities on the basis of a voluntary transmission. The defendants were convicted by the court of first instance. The Brussels Court of Appeal turned down the complaints against intelligence information coming from the intelligence services being added to the file of the trial court and used for the conviction.[28] The appeal court deliberated particularly whether the use of such information could breach the principles of equality of arms and of adversariality (*le principe du contradictoire; recht op tegenspraak*). It concluded that intelligence information coming from the intelligence services should be treated according to the regime applicable to anonymous statements given outside of the procedure set out in the CCP (see *infra* Section II.A.3*)*. The court clarified that such evidence could only be used to verify and corroborate the other pieces of evidence on which the conviction was based. On this ground the conviction was upheld. The Court of Cassation further upheld the decision.[29]

2. Special investigative (policing) techniques

In recent times the lawmaker has also significantly strengthened the prerogatives of criminal justice authorities in the fight against the major forms of crime (such as terrorism and organized crime). One of the steps taken was the introduction of 'special investigative techniques'.

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[26] Bart Vangeebergen, *Het gebruik van inlichtingen in het strafproces* (Intersentia, 2017), 281–286.

[27] Bart Vangeebergen, *Het gebruik van inlichtingen in het strafproces* (Intersentia, 2017), 281, 286–289.

[28] Court of Appeal, Brussels, 19 January 2007 (2008) 4 T Strafr, 281; Bart Vangeebergen, *Het gebruik van inlichtingen in het strafproces* (Intersentia, 2017), 430–431.

[29] EAEM, BK, et al, Cass., 27 June 2007 (P.07.0333.F) ([2008–2009] *Rechtskundige Weekblad*) RW 1634.

These special investigative techniques (also called BOM techniques from the acronym of the Dutch term '*bijzondere opsporingsmethoden*') are very similar to the methods employed by the intelligence services, but they are carried out by the criminal justice authorities. Observation, infiltration by the police (which could also be a purely online infiltration),[30] civilian infiltration,[31] and the use of informants:[32] these are activities carried out in secret with a view to collecting information not just for repressing but also for preventing crimes. Evidently, the use of these measures must not amount to entrapment.[33] It is for the police, under the supervision of the prosecutor and with judicial oversight of the indictments chamber, to use these methods to discover serious crimes that have been committed, are in the making, or even might (with reasonable probability) be committed. These techniques[34] were first introduced by an Act of 2003, generally named the BOM Act.[35] The original Act was then quashed by the Belgian Constitutional Court because several points were found to be unconstitutional, with particular regard to the lack of adequate judicial supervision.[36]

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[30] In addition to the infiltration by the police in the physical world, the online infiltration was introduced in 2016 (Art 46*sexies* CCP). The procedural rules for this online infiltration are less strict than the ones for an infiltration in the physical world (see also footnote 37). This different regime was not found to be discriminatory, nor in violation of the legality principle, by the Constitutional Court. See: Constitutional Court 6 December 2018, 174/2018, [2019] Computerr 134. See also: Ward Yperman, Sofie Royer and Frank Verbruggen, 'Vissen op de grote datazee: digitale informatievergaring in vooronderzoek en strafuitvoering' [2019] Nullum Crimen 389, 400–402.

[31] A civilian infiltration is an infiltration where the person executing it, is a civilian working with the police and not a police officer. This possibility was introduced only in 2018 by the *Loi de 22 juliette 2018 modifiant le Code d'instruction criminelle et le titre préliminaire du Code d'instruction criminelle en vue d'introduire la méthode particulière de recherche d'infiltration civile; Wet van 22 juli 2018 tot wijziging van het Wetboek van strafvordering en van de voorafgaande titel van het Wetboek van strafvordering met het oog op het invoeren van de bijzondere opsporingsmethode burgerinfiltratie.*

[32] Art 47*ter* CCP; Lawrence Verhelst, 'Enkele bijzondere machten van de KI' [2011–2012] Jura Falconis 2011–2012, Jg 48, no 3, 561. The system for observations and infiltrations is exactly the same; see KS, Glencore Grain Rotterdam, MC and GA, Cass 29 April 2009, P.09.0163.F, [2009] Arr Cass 2009, afl 4, 1141.

[33] Entrapment is defined in legislation as the situation when the intention to commit the offence originated directly, was strengthened, or was confirmed while the perpetrator was planning not to go through with it, through the intervention of a police officer or somebody acting at the explicit request of the police. See: Art 30 preliminary title CCP. See also: Luiz De Baets, 'Het vertrouwelijk dossier: een noodzakelijk kwaad in strafzaken?' [2016] Nullum Crimen 2016, special edition April 2016, 18; Frank Verbruggen and Raf Verstraeten, Strafrecht en strafprocesrecht voor bachelors (part I, 10th edn, Maklu 2017) 210; Raf Verstraeten, *Handboek Strafvordering* (5th edn, Maklu, 2012) 358–359.

[34] Being the observation, infiltration by the police and the use of informants.

[35] *Loi 6 Janvier 2003 concernant les méthodes particulières de recherche et quelques autres méthodes d'enquête; Wet van 6 Januari 2003 betreffende de bijzondere opsporingsmethoden en enige anderen onderzoeksmethoden*.

[36] Ligue des droits de l'homme ea, Constitutional Court 21 December 2004, 202/2004, [2005] NjW 340.

These techniques share with traditional intelligence activities the need for secrecy. The exact methods employed and the people involved need to remain secret if these activities are to be useful and effective tools on more than one occasion. For these reasons the law provides for specific rules intended to protect the secrecy needed to ensure that these investigative techniques remain effective. As with every investigative activity, the police must draft reports attesting to all the steps taken and the results obtained. For these special activities, however, the law expressly establishes that the reports drafted by the police officers during the activity are to be kept in a separate confidential file.[37] Because of its confidential nature the file cannot be disclosed to the private parties and it can also never reach the trial judge, while the prosecutor and the investigating judge can instead have access to it.[38]

Initially the lawmaker had strengthened the level of secrecy of this secret file to the point that no judicial supervision of the secret activity was possible. The Constitutional Court found that the absence of any judicial scrutiny breached fundamental rights and required Parliament to introduce some level of judicial supervision.[39] With a subsequent Act the legislature introduced judicial safeguards by empowering the indictments chamber with an oversight role.[40] The chamber has access to the confidential file and is tasked with monitoring the correct use of the special investigative techniques of observation, infiltration, and civilian infiltration.[41] The legislature believed that it was preferable to entrust the supervision to the indictments chamber, a

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[37] Art 47*octies* §1, 47*novies* §1, 47*novies*/3 §1 and Art 47*decies* §6 CCP. In case of an online infiltration, there is a confidential file only if the agent executing the infiltration was given permission to commit criminal offences or if a civilian expert was used. See: Art 46*sexies* §3 sections 3 and 7 CCP. See also above footnote 32.

[38] Art 47*septies* and 47*novies* CCP; Luiz De Baets, 'Het vertrouwelijk dossier: een noodzakelijk kwaad in strafzaken?' [2016] Nullum Crimen special edition april 2016, 24–25, and 32; Johan Delmulle, 'Wat na het arrest van 21 december 2004 van het Arbitragehof? De kamer van inbeschuldigingstelling als onpartijdige en onafhankelijke rechter belast met de controle over de toepassing van de bijzondere opsporingsmethoden observatie en infiltratie? Een eerste toetsing aan de praktijk', note under KI Gent 6 December 2004 [2005] T Strafr 231; Steven Vandromme and Chris De Roy, 'Het vertrouwelijk dossier: Quo vadit?', note under GwH 21 December 2004, [2004–2005] RW 1295; Lawrence Verhelst, 'Enkele bijzondere machten van de KI' [2011–2012] Jura Falconis 564; Raf Verstraeten, *Handboek Strafvordering* (5th edn, Maklu, 2012) 363 and 366–367.

[39] Ligue des droits de l'homme ea, Constitutional Court 21 December 2004, 202/2004, [2005] NjW 340.

[40] *Loi de 27 decembre 2005 portant des modifications diverses au Code d'instruction criminelle et au Code judiciaire en vue d'améliorer les modes d'investigation dans la lutte contre le terrorisme et la criminalité grave et organisée; Wet van 27 december 2005 houdende diverse wijzigingen van het Wetboek van strafvordering en van het Gerechtelijk Wetboek met het oog op de verbetering van de onderzoeksmethoden in de strijd tegen het terrorisme en de zware en georganiseerde criminaliteit.*

[41] Art 235*ter* and 235*quater* CCP; Henri Berkmoes, 'De B.O.M.-reparatiewet: over de inhoud en over de lichtheid van sommige kritiek' [2006] Vigiles 3; Lawrence Verhelst, 'Enkele bijzondere machten van de KI' [2011–2012] Jura Falconis 574–576; Raf Verstraeten, *Handboek Strafvordering* (5th edn, Maklu, 2012) 363–364 and 771–777.

court tasked with the supervision of the investigation, than to the trial court, because – as the Minister said during the discussion – the trial courts could not take a decision on the basis of information of which they have become aware and which had not been disclosed to the parties, as this would breach the fairness of the trial.[42]

The indictments chamber is entrusted with two types of judicial review: one is automatic and the other is optional. The latter can be initiated upon request of the prosecutor, the investigating judge, and even by the indictments chamber of its own motion when a judicial investigation has been opened.[43] At a later stage, the trial courts are also given a chance to trigger the supervision of the indictments chamber. Either way, the indictments chamber must always scrutinize the proper application of the special investigative techniques at the end of the investigation (that is, at the end of the preliminary investigation of the public prosecutor when he or she intends to bring the case directly to trial[44] or at the end of the judicial investigation of the investigating judge[45]).[46] With a view to this supervisory task, the indictments chamber can consult and examine the entirety of the confidential file (which remains undisclosed to the parties).[47] The indictments chamber checks whether the activities performed and the evidence collected conform to the law. Parties have the right to be individually heard (without the other parties being present, exception made for the prosecution service, which must always be present when a criminal court sits).[48] Failure to arrange the hearing results in a violation of the right of the defence.[49] The Constitutional Court and the Court of Cassation have ruled that this procedure, in

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[42] *Parl. St.* Kamer 2005–2006, no 51-2055/005, 38. This logic was criticized during the preparatory works, also because making the trial court "blind" to the underlying secret information would in no way redress the restrictions suffered by the defence of the private parties due to the denial of the disclosure, and at the same time it might even affect the possibility for the trial judge to properly assess the reliability of the results of the infiltration and/or observation. The rationale of the legislature was however endorsed by the Constitutional Court in its decision of 19 July 2007 (B.13.4), which dismissed the criticism. For different opinions in the literature, see Luiz De Baets, 'Het vertrouwelijk dossier: een noodzakelijk kwaad in strafzaken?' (2016) Nullum crimen 1 and 38 and Steven Vandromme and Chris De Roy, 'Het vertrouwelijk dossier: Quo vadit?', note under GwH 21 December 2004, [2004–2005] RW 1297.

[43] Art 235*quater* §1 CCP.

[44] Art 235*ter* §1 section 2, CCP.

[45] Art 235*ter* §1, section 3 CCP.

[46] Henri Berkmoes, 'De B.O.M.-reparatiewet: over de inhoud en over de lichtheid van sommige kritiek' [2006] Vigiles 3.

[47] Michel Rozie, 'De controle op de bijzondere opsporingsmethoden door de kamer van inbeschuldigingstelling' [2006] Nullum crimen 154.

[48] LL et al, Constitutional Court 19 July 2007, 105/2007, [2007] NjW 695–700; AZ and CNM, Cass 23 June 2009, P.09.0855.N, [2009] Arr Cass 1813; Luiz De Baets, 'Het vertrouwelijk dossier: een noodzakelijk kwaad in strafzaken?' [2016] Nullum Crimen special edition April 2016, 41; Raf Verstraeten, *Handboek Strafvordering* (5th edn, Maklu, 2012) 772–774.

[49] EREVH v. Belgian State, Cass 4 November 2008, P.08.1440.N, [2008] Arr Cass 2526; Raf Verstraeten, *Handboek Strafvordering* (5th edn, Maklu, 2012) 772–773.

combination with the fact that the information in the confidential file cannot be used as evidence and that suspects can defend themselves based on the evidence available in court, ensures that there is no violation of the rights of the defence.[50] In other words, it is not necessary for suspects to be able to check the legality of the measure themselves, but it is sufficient (and necessary) for an independent court to do so.[51] In both automatic and facultative supervisions, the indictments chamber must deliver a judgment attesting to the correctness of the procedure followed in light of all the applicable rules and fundamental rights, but it cannot include information from the confidential file in its ruling.[52]

The information contained in the confidential file cannot be used in evidence at any stages of the proceedings.[53] Nevertheless, this does not completely exclude that the results obtained during the special investigative techniques can be used to decide the case on the merits. In addition to the confidential reports (inserted in the confidential file) the police also draft a non-secret report on the special investigative activities carried out. In essence, when the police employ a special investigative technique they draft two separate reports: on the one hand the confidential report with the information to be kept secret, on the other hand the open report, which contains non-secret information. The latter is placed in the ordinary file and is processed according to the general rules on discovery. The parties can have access to it and the trial judge can use the information contained therein.[54]

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[50] LL et al, Constitutional Court 19 July 2007, 105/2007, [2007] NjW 695–700; TB, Cass 25 September 2007, P.07.0677.N, [2007] Arr Cass 1769; HE and REI, Cass 2 March 2010, P.10.0177.N, [2010] Arr Cass 612; IMLVD, JLMJVDB, WMACVDB and GM-CV, Cass 20 April 2010, P.10.0128.N, [2010] Arr Cass 1108; Raf Verstraeten, *Handboek Strafvordering* (5th edn, Maklu, 2012) 370.

[51] ME, PP, ME, KY, Cass 23 August 2005, P.05.0805.N, [2005] Arr Cass 1520; TB, Cass 25 September 2007, P.07.0677.N, [2007] Arr Cass 1769; Henri Berkmoes, 'De B.O.M.-reparatiewet: over de inhoud en over de lichtheid van sommige kritiek' [2006] Vigiles 10; Luiz De Baets, 'Het vertrouwelijk dossier: een noodzakelijk kwaad in strafzaken?' [2016] Nullum Crimen special edition April 2016, 26; Steven Vandromme and Chris De Roy, 'Het vertrouwelijk dossier: Quo vadit?', note under GwH 21 December 2004, [2004–2005] RW 1296.

[52] HE and REI, Cass 2 March 2010, P.10.0177.N, [2010] Arr Cass 612; AA, NA, MT and SHE, Cass 28 May 2014, P.14.0424.F, [2014] Arr Cass 1361; AS, SS and NM, Cass 17 February 2016, P.16.0084.F, http://www.cass.be; Luiz De Baets, 'Het vertrouwelijk dossier: een noodzakelijk kwaad in strafzaken?' [2016] Nullum Crimen special edition April 2016, 25, 40, and 42; Lawrence Verhelst, 'Enkele bijzondere machten van de KI' [2011–2012] Jura Falconis 575; Raf Verstraeten, *Handboek Strafvordering* (5th edn, Maklu, 2012) 771–772 and 774.

[53] This holding is clearly stated in the preparatory works; see *Parl.St.* Kamer, 2005–2006, no 51-2055/005, 66.

[54] Art 47*septies* §2 and 47*novies* §2 CCP; Luiz De Baets, 'Het vertrouwelijk dossier: een noodzakelijk kwaad in strafzaken?' [2016] Nullum Crimen special edition April 2016, 26, and 33; Lawrence Verhelst, 'Enkele bijzondere machten van de KI' [2011–2012] Jura Falconis 565; Raf Verstraeten, *Handboek Strafvordering* (5th edn, Maklu, 2012) 364 and 549. Although neglecting to add these reports to the file within that specified period of time does

The report available to the parties shall not contain information that might endanger the people who carried out the special investigative activity or that could jeopardize the implementation of the methods used.[55] All other information should be made available to the parties, thus reducing the exception to the rule that the information gathered during criminal proceedings should be made available to the parties (and particularly to the defendant) at least before the beginning of the trial.

While the open reports are included in the case file and available to the trial judge, the confidential file is held separately from the case file, and the trial courts do not have access to it. The trial courts can request the indictments chamber to (further) scrutinize the confidential file, if the appropriateness of the use of the special techniques is questioned or if the parties challenge the procedural regularity and correctness of the activities.[56]

Nevertheless, the point remains that certain information could be used at trial without the entirety of the information collected during the same activity being disclosed and without disclosure of its source. This might cause some problems. One such problem could be that the trial court cannot properly assess the possible illegalities in the collection of the evidence. This point is partly addressed by ensuring that another court exercises the supervision of the activities by having access to all information, including the secret file. As said, this role is given to the indictments chamber. The trial court can only refer issues of illegality raised during trial for decision to the indictments chamber. Unlike intelligence information (see *supra* Section II.A.1) and anonymous witness testimony (see *infra* Section II.A.3), the evidentiary value of non-confidential reports resulting from an observation or infiltration is not limited. A similar rule exists only for the more recent measure of civilian infiltration.[57] The CCP in fact states that evidence gathered through civilian infiltration can only be used if it is sufficiently corroborated by other evidence.

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not lead to the nullity of the observation or infiltration; see KA, Cass 18 January 2005, P.05.0037.N, [2005] Arr Cass 132.

[55] Art 47*septies* §2 and 47*novies* §2 CCP; LL et al, Constitutional Court 19 July 2007, 105/2007, [2007] NjW 695–700, B.12.3; Luiz De Baets, 'Het vertrouwelijk dossier: een noodzakelijk kwaad in strafzaken?' [2016] Nullum Crimen special edition April 2016, 26, and 32; Johan Delmulle, 'Wat na het arrest van 21 december 2004 van het Arbitragehof? De kamer van inbeschuldigingstelling als onpartijdige en onafhankelijke rechter belast met de controle over de toepassing van de bijzondere opsporingsmethoden observatie en infiltratie? Een eerste toetsing aan de praktijk', note under KI Gent 6 December 2004, [2005] T Strafr 231; Lawrence Verhelst, 'Enkele bijzondere machten van de KI' [2011–2012] Jura Falconis 565; Raf Verstraeten, *Handboek Strafvordering* (5th edn, Maklu, 2012) 364 and 367.

[56] See Art 189*ter* CCP for the correctional tribunal and Arts 279 and 321 for the assize court.

[57] Art 47*novies*/3 CCP.

For informants, the system is slightly different. If an informant discovers compelling information on crimes committed or about to be committed, he or she informs the supervising police officer, who in turn informs the public prosecutor.[58] These reports are kept in a separate confidential file accessible only to the prosecutor (and, in case of a judicial investigation, the investigating judge).[59] The public prosecutor can then decide to draft an official report, which is added to the general file.[60] If the prosecutor decides not to add it to the file, the suspect may never find out that an informant was involved. If it turns out that information was obtained by entrapment or by crimes committed by the informant, the information cannot be included in the official report.[61] The above-mentioned procedure of supervision by the indictments chamber is not applicable here; according to the Constitutional Court and the Court of Cassation, this does not violate the rights of the defence since this confidential file does not contain evidence that can be used at trial.[62] While this is true, the reports included in the general file can influence the judge's decision. However, a major difference between informants and other BOM methods is that informants can be interviewed as (anonymous) witnesses at trial.[63]

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[58] Art 47*decies* §6 CCP; Luiz De Baets, 'Het vertrouwelijk dossier: een noodzakelijk kwaad in strafzaken?' [2016] Nullum Crimen special edition April 2016, 36; Tom Decaigny, *Tegenspraak in het vooronderzoek* (Intersentia, 2013) 250; Raf Verstraeten, *Handboek Strafvordering* (5th edn, Maklu, 2012) 371–372.

[59] Luiz De Baets, 'Het vertrouwelijk dossier: een noodzakelijk kwaad in strafzaken?' [2016] Nullum Crimen special edition April 2016, 36; Lawrence Verhelst, 'Enkele bijzondere machten van de KI' [2011–2012] Jura Falconis 565; Raf Verstraeten, *Handboek Strafvordering* (5th edn, Maklu, 2012) 372.

[60] Luiz De Baets, 'Het vertrouwelijk dossier: een noodzakelijk kwaad in strafzaken?' [2016] Nullum Crimen special edition April 2016, 36; Tom Decaigny, *Tegenspraak in het vooronderzoek* (Intersentia, 2013) 250; Lawrence Verhelst, 'Enkele bijzondere machten van de KI' [2011–2012] Jura Falconis 565–566.

[61] Luiz De Baets, 'Het vertrouwelijk dossier: een noodzakelijk kwaad in strafzaken?' [2016] Nullum Crimen special edition April 2016, 36; Tom Decaigny, *Tegenspraak in het vooronderzoek* (Intersentia, 2013) 250; Raf Verstraeten, *Handboek Strafvordering* (5th edn, Maklu, 2012) 372.

[62] Ligue des droits de l'homme ea, Constitutional Court 21 December 2004, 202/2004, [2005] NjW 340; GFD, TRH and PJAD, Cass 25 May 2010, P.10.0200.N , [2010] Arr Cass 1512; KI Antwerpen 9 February 2007, [2007] RABG 833; Luiz De Baets, 'Het vertrouwelijk dossier: een noodzakelijk kwaad in strafzaken?' [2016] Nullum Crimen special edition April 2016, 36; Tom Decaigny, *Tegenspraak in het vooronderzoek* (Intersentia, 2013) 251–252; Steven Vandromme and Chris De Roy, 'Het vertrouwelijk dossier: Quo vadit?', note under GwH 21 December 2004, [2004–2005] RW 1297; Lawrence Verhelst, 'Enkele bijzondere machten van de KI' [2011–2012] Jura Falconis 571; Raf Verstraeten, Handboek Strafvordering (5th edn, Maklu, 2012) 372.

[63] Luiz De Baets, 'Het vertrouwelijk dossier: een noodzakelijk kwaad in strafzaken?' [2016] Nullum Crimen special edition April 2016, 34; Raf Verstraeten, *Handboek Strafvordering* (5th edn, Maklu, 2012) 371.

3. Anonymous witness testimony

Under the heading of anonymous testimony (*temoignages anonymes; anonieme getuigenissen*) Belgian law permits witnesses to be heard in ways that cover their identity partly or fully.

The CCP provides for two types of protection for witnesses who want to remain anonymous. The first is a mild protection. It simply consists in omitting certain identifying information from the official reports (name, age, profession, etc.).[64] However, the witness is heard without any special protection. It is a measure which grants the witness only partial anonymity. This measure can be taken where there is reasonable suspicion indicating that disclosing the information might entail a significant disadvantage for the witness or a person close to them.[65] It can be taken for the first time at trial or even earlier, during the investigation, in which case the effects of the measure are extended into the trial phase.[66] For police officers heard as witnesses, the law explicitly states that official reports can only mention their work address instead of their home address (without the requirement of a significant disadvantage for them).[67]

The second type permits hearing the witness in full anonymity, that is by keeping the identity of the declarant completely concealed.[68] If necessary this is achieved by putting extra measures in place during the interrogation. This measure offers more comprehensive protection than partial anonymity and is only available where partial anonymity is deemed insufficient.[69] The law demands more serious conditions to put it in place, because it constitutes a more significant limitation of the right of defence to confront witnesses and makes assessing the reliability of the evidence more difficult. According to Article 86*bis* CCP, full anonymity is possible in two cases: (a) when the witnesses or a person close to them feel reasonably threatened by giving a statement to the point that they would be unwilling to testify; (b) if the witness is a police officer, where there are clear and serious indication that the witness or a person close to them is in danger.[70] Thus, the law requires a higher and more objective

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[64] Art 75*bis*, 155*bis* and 296 CCP. On these issues see Chris Van Den Wyngaert and Bart De Smet, *Strafrecht en strafprocesrecht in hoofdlijnen* (book 2, Maklu, 2014) 1045; Raf Verstraeten, *Handboek Strafvordering* (5th edn, Maklu, 2012) 490.

[65] Art 75*bis*, section 1 CCP.

[66] Arts 155*bis* and 296 CCP.

[67] Art 75*ter* Sv.

[68] Art 86*bis* CCP.

[69] Art 86*bis*, §2 CCP; Chris Van Den Wyngaert and Bart De Smet, *Strafrecht en strafprocesrecht in hoofdlijnen* (book 2, Maklu, 2014) 1046; Raf Verstraeten, *Handboek Strafvordering* (5th edn, Maklu, 2012) 491.

[70] Art 86*bis,* §1 CCP; Tom Decaigny, *Tegenspraak in het vooronderzoek* (Intersentia, 2013) 268; Chris Van Den Wyngaert and Bart De Smet, *Strafrecht en strafprocesrecht in hoofdlijnen* (book 2, Maklu, 2014) 1046; Raf Verstraeten, *Handboek Strafvordering* (5th edn, Maklu, 2012) 491.

threshold for full anonymity for police officers.[71] Moreover, the law requires further conditions for having recourse to the measure of full anonymity: the hearing must involve an investigation for a serious crime as listed by the CCP[72] and there must be no alternative ways for discovering the truth.[73]

The decision to hold the interview in full anonymity can be taken during the investigative stage or for the first time during the trial phase. According to section 2 of Article 189*bis* CCP (and Article 294 CCP in the procedure before the assize court), the trial court can (*motu proprio* or upon request of the public prosecutor, the suspect, the civil party,[74] or of their counsels) decide to rehear a witness who has already been heard with the protection offered by Article 86*bis* and 86*ter* CCP[75] or to hear a new witness (*i.e.* a witness who was never heard before) with the measure of protection offered by Article 86*bis* and 86*ter* CCP. What is peculiar is that the trial court does not carry out the interview itself but it orders the investigating judge to do so.[76] The trial court can decide to be present at the hearing of the witness, but the preparatory works clarify that it cannot be made aware of the identity of the witness.

The rules for hearing the witness are set out in Article 86*ter* CCP. These rules provide that the other parties (the prosecutor, the suspect, whether or not formally charged, the civil party, and their counsels) be invited to the interview[77] and that they be allowed to submit the questions they want the investigating judge to pose.[78] The investigating judge takes all necessary precautions to ensure that the anonymity of

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[71] This conforms to ECtHR case law. See *Van Mechelen v. the Netherlands,* ECtHR 23 April 1997, nos 21363/93, 21364/93, 21427/93 en 22056/93, 56; Tom Decaigny, *Tegenspraak in het vooronderzoek* (Intersentia, 2013) 268–269.

[72] Art 86*bis* CCP states that the interview with full anonymity must concern an investigation into one of the crimes of Art 90*ter* §2–4 or an investigation into organized crime (Art 324*bis* CC). Art 90*ter* §2–4 CCP includes a list of offences for which certain investigatory measures regarding electronic communication (registration, recording, etc.) are allowed. The list of Art 90*ter* §2–4 CCP contains all Belgian terrorism offences.

[73] Art 86*bis,* §2 CCP; Chris Van Den Wyngaert and Bart De Smet, *Strafrecht en strafprocesrecht in hoofdlijnen* (book 2, Maklu, 2014) 1046; Raf Verstraeten, *Handboek Strafvordering* (5th edn, Maklu, 2012) 491.

[74] In Belgium it is possible for the (direct and indirect) victims of a crime to claim damages in front of the criminal courts. They then become a party in the criminal proceedings, called the civil party.

[75] Provided this witness consents to be heard.

[76] The choice was made following the Dutch example and it was mostly based on organizational reasons, as it was considered to be easier to shape the procedure around the investigating judge (*Parl. St.* Kamer 2000–2001, no 50-1185/001, 27–28).

[77] To this end they also receive a copy of the decision to hear the person in full anonymity. However, no appeal against this decision is possible.

[78] Art 86*ter*, sections 1 and 3 CCP; Tom Decaigny, *Tegenspraak in het vooronderzoek* (Intersentia, 2013) 272–274.

See as well Art 86*ter*, section 4 CCP. If they so desire, the parties can follow the investigation from a different room through means of telecommunication.

the witness is protected. Such measures can include the interview taking place in a separate room from where the parties sit, in which case an audio-visual communication link between the rooms must be established. The investigating judge can also refuse to ask some of the questions submitted by the parties if the answers would lead to a direct or indirect disclosure of the identity of the witness.[79] The investigating judge is required to note in the official records why some questions were not asked. The official records must also mention the circumstances in which the interview took place, the measures adopted to protect the witnesses, all questions posed and answers given.[80]

In any case, the investigating judge, who always has access to the witness's identity, should assess the reliability of the witness.[81] If the investigating judge decides to hear a witness anonymously, this judge has to include in his or her report that all the conditions were met and how he or she assessed the reliability of the witness.[82] This allows the parties to verify the necessity of full anonymity and, although only to an indirect and limited extent, the reliability of the witness.[83] When the decision is taken by the trial court, the investigating judge shall send a report to the trial court on his assessment of the reliability of the witness.

The CCP states that the conviction of a person cannot be exclusively or predominantly based on the deposition of an anonymous witness who has been heard according to Article 86*bis* and 86*ter* CCP.[84] Such testimony can only be used to convict if it is sufficiently corroborated by other pieces of evidence.[85] The rule is a plain

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[79] Art 86*ter,* section 3 CCP; Tom Decaigny, *Tegenspraak in het vooronderzoek* (Intersentia, 2013) 272–274; Chris Van Den Wyngaert and Bart De Smet, *Strafrecht en strafprocesrecht in hoofdlijnen* (book 2, Maklu, 2014) 1047; Raf Verstraeten, *Handboek Strafvordering* (5th edn, Maklu, 2012) 492–493.

[80] Art 86*ter*, *in fine* CCP; Raf Verstraeten, *Handboek Strafvordering* (5th edn, Maklu, 2012) 493.

[81] Art 86*bis,* §3 CCP; Tom Decaigny, *Tegenspraak in het vooronderzoek* (Intersentia, 2013) 271; Chris Van Den Wyngaert and Bart De Smet, *Strafrecht en strafprocesrecht in hoofdlijnen* (book 2, Maklu, 2014) 1046; Raf Verstraeten, *Handboek Strafvordering* (5th edn, Maklu, 2012) 492.

LS, KM, EMM et al, Cass 2 November 2011, P.11.0919.F, [2013] T Strafr 109: this assessment concerns the reliability of the witness and not the truthfulness of his statements.

[82] Art 86*bis* §4 CCP; LS, KM, EMM et al, Cass 2 November 2011, P.11.0919.F, [2013] T Strafr 109; Raf Verstraeten, *Handboek Strafvordering* (5th edn, Maklu, 2012) 491.

[83] LS, KM, EMM et al, Cass 2 November 2011, P.11.0919.F, [2013] T Strafr 109.

[84] Art 189*bis*, section 3 CCP. The rule was introduced in application of the ECtHR case law: *Doorson v the Netherlands*, ECtHR 26 maart 1996, no 20524/92, 76; *Krasniki v the Czech Republic*, ECtHR 28 February 2006, no 51277/99, 76; Tom Decaigny, *Tegenspraak in het vooronderzoek* (Intersentia, 2013) 275.

[85] Art 189*bis* section 3 CCP. Art 294 CCP does not contain an equivalent provision on the use of evidence coming from an anonymous witness. However, Art 294 CCP should be read in conjunction with Art 189*bis* and the rule should therefore also be applied to the procedure before the assize court.

consequence of the fact that the right of the defence to confront the witness is significantly limited and that it is more difficult to assess the reliability of a witness whose identity was not disclosed during the testimony. Furthermore, Article 86*quinquies* CCP establishes that witness statements obtained with the procedure of Article 86*bis* and 86*ter* can be used in evidence only for proving certain listed crimes of a major gravity. Nonetheless, the Article clarifies that the prosecutor can use the statements for starting the investigation into further offences.

If anonymous witness statements are collected outside of the procedure described in the CCP, they cannot be used in evidence *against the defendant*.[86] They are, however, added to the file and can be used *à décharge* (to exculpate the defendant) and also to assess the reliability and consistency of other evidence.[87]

4. Using codes in official reports

In 2016 a new feature was introduced to Belgian criminal law.[88] In cases of terrorism and organized crime, police officers can get an identifying code assigned to them, which will be used in all the official reports instead of their name or identifying information.[89] This is done for their safety and also to protect their privacy. The code

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[86] MR v DM, Cass 23 March 2005, P.04.1528.F, [2005] Arr Cass 688; BAM, Cass 13 April 2005, P.05.0263.F, [2005] Arr Cass 860; YY, TM, TM, and KK, Cass 14 January 2009, P.08.1350.F, [2009] Arr Cass 115; Joachim Meese, 'De motiveringsverplichting tijdens het vooronderzoek' [2012] Nullum Crimen 95; Steven Vandromme, 'Anonieme inlichtingen hebben geen bewijskracht in strafproces' [2005] 108 Juristenkrant 1 and 7. There is one case by the Dutch speaking chamber of the Court of Cassation that seems to say they can be used as evidence as long as they do not constitute the sole or main basis for conviction. However, the case law of the French speaking chamber of the Court of Cassation cited above contains a more recent case and is more consistent with the system. See KS, Cass 19 December 2006, P.06.1310.N, [2006] Arr Cass 2707.

[87] MR v DM, Cass 23 March 2005, P.04.1528.F, [2005] Arr Cass 688; BAM, Cass 13 April 2005, P.05.0263.F, [2005] Arr Cass 860; YY, TM, TM, and KK, Cass 14 January 2009, P.08.1350.F, [2009] Arr Cass 115; Joachim Meese, 'De motiveringsverplichting tijdens het vooronderzoek' [2012] Nullum Crimen 95; Steven Vandromme, 'Anonieme inlichtingen hebben geen bewijskracht in strafproces' [2005] 108 Juristenkrant 1 and 7; Raf Verstraeten, *Handboek Strafvordering* (5th edn, Maklu, 2012) 490.

[88] Arts 4–15 of the statute of 25 December 2016 (*Loi modifiant le statut juridique des détenus et la surveillance des prisons et portant des dispositions diverses en matière de justice; Wet tot wijziging van de rechtspositie van de gedetineerden en van het toezicht op de gevangenissen en houdende diverse bepalingen inzake justitie*).

[89] Art 112*quinquies* CCP. This also covers people in administrative or logistical positions who are not technically police officers. See Exposé des motifs de projet de loi de 15 juillet 2016 modifiant le statut juridique des détenus et la surveillance des prisons et portant des dispositions diverses en matière de justice/Memorie van toelichting bij het wetsontwerp van 15 juli 2016 tot wijziging van de rechtspositie van de gedetineerden en van het toezicht op de gevangenissen en houdende diverse bepalingen inzake justitie, *Parl.St.* Kamer 2015–2016, no 54 1986/001, 25–26; Eric Van Dooren and Caroline Van Deuren, 'Strafrechtelijke noviteiten in de potpourri IV-wet' [2017] Nullum Crimen 134.

is assigned to them by the police officer in charge of the investigation[90] if there are serious indications that the investigation concerns terrorism or certain forms of organized crime[91] and if partial anonymity (see *supra* Section II.A.3) will not suffice.[92] If a code is assigned, all necessary precautions are taken to ensure the anonymity of the police officer in question.[93] If they explicitly request this, the public prosecutor or the investigating judge are informed of the identity of the police officer, allowing them to check whether the conditions were met.[94] Once a code is assigned, this police officer will only be referred to by her or his code in every official report and even if the officer is questioned as a witness.[95] This is a form of anonymous witness testimony, and the rules set out above (see *supra* Section II.A.3) should be applied to the extent possible.[96] This means for example that the parties should be invited to attend the interrogation (probably from a different room) and should be allowed to ask questions (through the investigating judge).

Still, the procedure for the assignment of a code is much less stringent than the procedure for full anonymity. Furthermore, the code is not just relevant for witness testimony. For all other investigative techniques, it might be important for the

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[90] Members of the special services of the federal police are automatically given a code when executing the tasks the law imposes upon them (Art 112*quater* CCP).

[91] Being the offences in Arts 323, section 1 CC, 324*ter* CC if there is a reasonable suspicion that the organization uses intimidation, threat, or violence, or Art 323, section 2 CC if there is a reasonable suspicion that the organization uses intimidation, threat, or violence to commit the crimes listed in Art 90*ter* §2 CC (Art 112*quinquies* §2, second and third bullet point CCP).

[92] Art 112*quinquies* §1 CCP; Eric Van Dooren and Caroline Van Deuren, 'Strafrechtelijke noviteiten in de potpourri IV-wet' [2017] Nullum Crimen 134.

[93] Art 112*octies* CCP.

[94] Art 112*septies*, section 2 CCP; Exposé des motifs de projet de loi de 15 juillet 2016 modifiant le statut juridique des détenus et la surveillance des prisons et portant des dispositions diverses en matière de justice/Memorie van toelichting bij het wetsontwerp van 15 juli 2016 tot wijziging van de rechtspositie van de gedetineerden en van het toezicht op de gevangenissen en houdende diverse bepalingen inzake justitie, *Parl.St.* Kamer 2015–2016, no 54 1986/001, 30; Eric Van Dooren and Caroline Van Deuren, 'Strafrechtelijke noviteiten in de potpourri IV-wet' [2017] Nullum Crimen 134.

[95] Art 112*novies* CCP; Eric Van Dooren and Caroline Van Deuren, 'Strafrechtelijke noviteiten in de potpourri IV-wet' [2017] Nullum Crimen 134.

[96] As also noted by the Council of State (*Avis du Conseil d'État sur le projet de loi de 15 juillet 2016 modifiant le statut juridique des détenus et la surveillance des prisons et portant des dispositions diverses en matière de justice; Advies van de Raad van State bij het wetsontwerp van 15 juli 2016 tot wijziging van de rechtspositie van de gedetineerden en van het toezicht op de gevangenissen en houdende diverse bepalingen inzake justitie*, *Parl.St.* Kamer 2015–2016, no 54 1986/001, 164). See also Exposé des motifs de projet de loi de 15 juillet 2016 modifiant le statut juridique des détenus et la surveillance des prisons et portant des dispositions diverses en matière de justice/Memorie van toelichting bij het wetsontwerp van 15 juli 2016 tot wijziging van de rechtspositie van de gedetineerden en van het toezicht op de gevangenissen en houdende diverse bepalingen inzake justitie, *Parl.St.* Kamer 2015–2016, no 54 1986/001, 27, 29 and 31.

defence to know who executed the investigatory measures. The use of a code makes this impossible (this is the very point of using a code). This amounts to a double reduction in the rights of the defence when a code is employed.[97]

B. The problem of non-disclosure of evidence

In this part we will discuss the issue of non-disclosure of evidence. While section II.A focuses on information that can be used by criminal courts despite the fact that it was not entirely disclosed, this section deals with cases where the evidence remains concealed from the criminal justice authorities. The reasons for non-disclosure are either forms of professional secrecy or have to do with the protection of the security of the state.

Sometimes witnesses are prevented from disclosing state secrets when requested to provide information by criminal justice authorities. This is for instance the case where witnesses questioned by the criminal justice authorities (police, prosecutor, investigating judge) can remain silent or refuse to answer. Likewise, rules may be in place that prevent the authorities from having access to certain information (e.g. impossibility to seize or compel the production of certain sensitive documents). The impossibility to have access to the information inevitably entails the impossibility for the courts to use the information. This material unavailability can nonetheless alter the fairness of the judicial outcome. It brings about two opposite risks: (1) the risk that exculpatory evidence remains concealed to the detriment of the accused, and (2) the risk that (further) criminal activities remain concealed under the veil of secrecy. The first situation can be of particular concern. When exculpatory evidence is not disclosed to the parties and the court, defendants cannot organize their defence to the same degree as if the evidence were disclosed. Unlike in the cases of non-disclosure of the source, the criminal courts have no power (direct nor indirect) to gain access to the concealed information. The trial courts cannot compel another court or body to look into the undisclosed evidence either. This means that in these cases evidence remains unavailable to the criminal justice process and hence cannot be used for the decision.

1. Professional secrecy

Article 458 Criminal Code (CC) punishes the disclosure of confidential information by doctors, surgeons, health officers, pharmacists, midwives, and all other people who for reasons of their profession have an obligation of professional secrecy regarding information entrusted to them in the exercise of their profession. The provision makes exceptions for cases where the holder of a professional secret is called

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[97] Ward Yperman, 'De bestrijding van terrorisme en strafprocesrecht: vele kleintjes maken een grote' [2019] T Strafr 16–17.

to give testimony in front of a court, a judge, or a parliamentary committee, or whenever the law establishes an obligation or permission to reveal the confidential information.[98]

The provision of Article 458 CC is in itself insufficient to provide an exhaustive answer to the issue of whether holders of secrets should disclose information when questioned in court. Article 458 CC simply lifts the punishment for the holders of professional secrets who disclose confidential information before a court or a judge. The Article remains silent as to whether the holder of a secret should disclose information. The literature states that the provision of Article 458 CC does not entail an obligation to disclose the information before the court.[99] Following this interpretation, Article 458 CC confers upon the holder of a secret a right to choose whether to remain silent or not.[100] It remains therefore in the hands of the holder of the professional secret to decide whether or not to reveal the confidential information to the judge (or the court) in light of the circumstances of the case.[101] According to the Court of Cassation, the only limit to this is that the professional secrecy must not be abused or used to hide facts that do not fall within the privilege.[102] However, the Court did not clarify how judges should apply this limit in practice.[103]

Besides the express reference to a number of medical professionals, the provision of Article 458 CC includes in its scope a large array of categories of people '*who for reasons of their profession have an obligation of professional secrecy regarding information which is entrusted to them in the exercise of their profession*'. This includes, for example, attorneys. Police officers have an obligation to maintain the

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[98] The provision closely resembles the original provision of the French criminal code, with the sole addition of the obligation to speak in front of the judicial authority; see Luc Huybrechts, 'Beroepsgeheim(en) en discretieplicht van de politieambtenaar' [2014] Vigiles 175.

[99] D Lybaert, 'Het beroepsgeheim van de politieambtenaar t.o.v. de onderzoekserchter' [2000] Vigiles 100 and 103; Bart Vangeebergen, *Het gebruik van inlichtingen in het strafproces* (Intersentia 2017) 440.

[100] Luc Huybrechts, 'Beroepsgeheim(en) en discretieplicht van de politieambtenaar' [2014] Vigiles 185; J Leclerq, 'Secret professionnel' in *Les Novelles. Droit pénal* (Larcier, 1989) no 7670; Sofie Royer and Frank Verbruggen, '"Komt een terrorist met zijn advocaat bij de dokter …" Mogen of moeten beroepsgeheimhouders spreken?' [2017] Nullum Crimen 27.

[101] Antwerpen 22 October 2014, [2014–2015] T Gez 287; Sofie Royer and Frank Verbruggen, '"Komt een terrorist met zijn advocaat bij de dokter …" Mogen of moeten beroepsgeheimhouders spreken?' [2017] Nullum Crimen 27.

[102] Cass. 23 September 1986, [1986–1987] Arr Cass 96; D X M-L K and K V, Cass 9 December 2014, P.14.1039.N, [2015] Nullum Crimen 215; Lucien Nouwynck, 'La position des différents intervenants psycho-médico-sociaux face au secret professionnel dans un contexte judiciaire – Cadre modifié, principe conforté' [2012] RDPC 627; Sofie Royer and Frank Verbruggen, '"Komt een terrorist met zijn advocaat bij de dokter …" Mogen of moeten beroepsgeheimhouders spreken?' [2017] Nullum Crimen 27.

[103] Sofie Royer and Frank Verbruggen, '"Komt een terrorist met zijn advocaat bij de dokter …" Mogen of moeten beroepsgeheimhouders spreken?' [2017] Nullum Crimen 27.

secrecy of information as well. Such obligation is, however, considered to be partly different from that of holders of professional secrets.[104] The literature draws a distinction between the duty of confidentiality and the duty to maintain professional secrecy.[105] In the latter case the information is kept secret to protect the privileged relationship with a client, whereas in the former case the duty not to disclose certain information is imposed with a view to protecting the investigation regardless of any confidential relationship with a specific person. This means they are bound to an obligation of confidentiality only insofar as the proceedings remain secret. The secrecy of the investigation entails that police officers are not allowed to share any information regarding a criminal investigation with people outside the investigation. Officers who do so can be punished according to Article 458 CC.[106] On top of this, there are specific duties of secrecy, for example when a police officer is involved in BOM methods (see *supra* Section II.A.2).[107] So police officers can, and are even obliged to, protect the identity of their informants.[108]

2. Duty of confidentiality for state secrets?

It was already mentioned that the information gathered by intelligence services can, and sometimes must, be shared with the criminal justice authorities (see *supra* Section II.A.1). Incriminating information can thus find its way into criminal proceedings in order to be used therein. But there is nothing to ensure that all relevant information is shared. This can be particularly problematic in case of exonerating evidence. Intelligence services who uncover exculpatory information can decide not to include it in their unclassified reports or in the other information they share with the judicial authorities.

The question that arises is whether there are other ways to obtain the information held by the intelligence services and in particular whether it is possible to elicit the testimony of members of the intelligence services. The CCP does not contain any explicit rules preventing the judge from calling a person with direct access to security information, such as a member of the intelligence services, as a witness. However,

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[104] Sofie Royer and Frank Verbruggen, 'Geheimhoudingsplicht politie beperkter dan discretieplicht', note under Gent 8 November2017, [2018] P&R 135.

[105] Benoit Allemersch, 'Het toepassingsgebied van art. 458 Strafwetboek. over het succes van het beroepsgeheim en het geheim van dat succes' [2003–2004] Rechtskundig Weekblad, 1–2.

[106] Art 28*quinquies* §1 and 57 §1 CC; Sofie Royer and Frank Verbruggen, 'Geheimhoudingsplicht politie beperkter dan discretieplicht', note under Gent 8 November2017, [2018] P&R 135.

[107] Sofie Royer and Frank Verbruggen, 'Geheimhoudingsplicht politie beperkter dan discretieplicht', note under Gent 8 November2017, [2018] P&R 135.

[108] Cass 10 January 1978, [1978] Pasicrisie Belge 515; Cass 26 February 1986, [1986] Pasicrisie Belge 801; D X M-L K and K V, Cass 9 December 2014, P.14.1039.N, [2015] Nullum Crimen 215.

the Code does not state whether the members of the intelligence services (or other public servants who are aware of confidential information concerning the security of the state) can (or should) remain silent when called as witnesses in a court of law or, more generally, when requested to disclose the information they hold, either. The issue is to what extent they are bound to confidentiality with regard to information obtained in the exercise of their profession.

According to scholars, the rule concerning the protection of professional secrecy (Article 458 CC) is applicable to members of the intelligence services.[109] It was already noted, however, that the rule leaves it in the hands of the holder of the secret whether or not to reveal the information.

Beyond the provisions of the CCP and the CC, there are also a couple of special statutes that deserve to be considered in this matter. The first is the Royal Decision of 2 October 1937 (*Arrete Royal portant le statut des agents de l'etat; Koninklijk besluit houdende het statuut van het Rijkspersoneel*). Article 10 of this statute prohibits all the country's public office holders from revealing information concerning: (i) the security of the country, (ii) the protection of the public order, (iii) the financial interests of the State, (iv) the prevention and repression of offences, (v) the secrecy of the medical profession, (vi) the rights and liberties of citizens.

The second relevant statute is the aforementioned Security Act. According to Article 36 Security Act, every agent and, more generally, every person who for any reason contributes to the application and implementation of the Security Act, is compelled to maintain secrecy regarding the confidential information he or she is entrusted with in the exercise of his or her tasks. Such a duty of confidentiality remains in place even if the person leaves the position or ceases to fulfil tasks related to the intelligence services.[110] Articles 36 and 37 make it clear that the duty of confidentiality extends to all persons who are called to cooperate with the intelligence services, even if they are not formally employees of the services. But it remains unclear whether the obligation to keep state-sensitive information confidential should prevail over the testimonial duty in front of judges and courts. During the preparatory works for the statute, the government defended the view that the obligation to maintain confidentiality could give way to the testimonial duty to answer questions in judicial proceedings.[111] This interpretation, however, is

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[109] Bart Vangeebergen, *Het gebruik van inlichtingen in het strafproces* (Intersentia, 2017), 440.

[110] Art 36, section 2 Security Act.

[111] Rapport fait au nom des commissions reunies de la defense nationale et de la justice sur le projet de loi organique des services de renseignement et de sécurité de 8 octobre 1997/Verslag namens de verenigde commissies voor de landsverdediging en voor de justitie over het wetsontwerp van 8 oktober 1997 houdende regeling van de inlichting- en veiligheidsdiensten, *Parl.St.* Kamer 1995–96, no 49 638/14, 46 ('En outre, il est expressément prévu aux articles 23 et 25 qu'il n'est pas porté préjudice à l'article 458 du Code pénal, ce qui implique que les agents des services de renseignement et de sécurité sont autorisés à dévoiler

contested in the literature. Some authors contend that the secret should prevail over testimonial duties.[112]

Nor does Article 43 Security Act provide further clarity. The Article makes it an offence to disclose secret information or to reveal the identity of people or officers of the intelligence services when this information should remain concealed. But the provision is silent with regard to the situation where a court requests disclosure in the context of witness testimony. Furthermore, the Article contains an ambiguous opening proviso concerning the relation with Article 458 CC. It states that the application of Article 43 Security Act is 'without prejudice to' Article 458 CC (*'Sans préjudice'; 'Onverminderd'*). The clause could be read in two opposite ways. One way to interpret it is to consider Article 43 Security Act and Article 458 CC as completely independent clauses. This would mean that the application of Article 43 Security Act does not provide for the exclusion of personal liability as under Article 458 CC. The alternative is to read the clause as an explicit referral to the exclusion of liability cases of Article 458 CC. In this reading, punishment under Article 43 Security Act is excluded in the same cases as under Article 458 CC, that is if the disclosure takes place before a court, a judge, a parliamentary commission, or in consequence of a legal obligation to reveal the information.

A similar problem arises when reading the Act of 11 December 1998 concerning the classification of information related to state security (*Loi relative à la classification et aux habilitations, attestations et avis de sécurité; Wet betreffende de classificatie en de veiligheidsmachtigingen, veiligheidsattesten en veiligheidsadviezen*, hereafter 'Classified Information Act'). The Act establishes different levels of confidentiality (top secret, secret, confidential)[113] and clarifies with regard to all three of these categories that only individuals with the appropriate security clearance (*habilitation de sécurité correspondante; overeenstemmende veiligheidsmachtiging*) can access the information.[114] Article 23 Security Act further establishes that the intelligence services personnel are bound to the strictest secrecy with regard to the classified information they hold in the implementation of the Security Act. This Article punishes all those who reveal the secrets, 'without prejudice to' *('Sans préjudice'; 'Onverminderd'*) Article 458 CC. Just as we saw in the Security Act, the final clause concerning Article 458 CC lends itself to the same ambiguous interpretation.

A brief mention should also be made of the Act of 18 July 1991 (*Loi organique du contrôle des services de police et de renseignement et de l'Organe de coordination*

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ou non des secrets, même les secrets de l'Etat, lorsqu'ils sont appelés à témoigner en justice ou devant une commission d'enquête parlementaire').

[112] Bart Vangeebergen, *Het gebruik van inlichtingen in het strafproces* (Intersentia, 2017), 441. Filip Vanneste, 'De wet van 30 november 1998 houdende regeling van de inlichtigen- en veiligheidsdiensten' [1999–2000] Jura Falconis 363–364.

[113] Art 4 Classified Information Act.

[114] Art 8 Classified Information Act.

pour l'analyse de la menace; Wet tot regeling van het toezicht op politie- en inlichtingendiensten en op het Coördinatieorgaan voor de dreigingsanalyse). According to Article 48 of this Act, members of the intelligence services can share privileged information if this information is requested by the committee tasked with the oversight of intelligence activities (Permanent Committee I).[115] This latter provision could be interpreted in the sense that the intelligence services are only compelled to reveal the confidential information they hold in front of the Permanent Committee I. However, the provision could also be interpreted in combination with Article 458 CC, thus maintaining the possibility to reveal secret information in court.

The legal landscape is fraught with ambiguities, which makes it difficult to reach a fair and reasonable outcome. On the one hand, it appears disproportionate when balancing the conflicting interests at stake to force the intelligence services personnel to always disclose confidential information when questioned as witnesses by a court. There are proceedings for minor cases where a disclosure of confidential information is not warranted. Even in proceedings for more serious crimes, confidential information may only shed light on a minor or collateral aspect of the case or may constitute just a marginal or corroborative piece of evidence. Likewise, it seems too extreme to believe that the intelligence services should always refuse to answer questions related to state security, simply because they hold a special form of professional secret.[116] There might be cases where the confidential information sought by the courts is no longer sufficiently sensitive to require that it remain undisclosed. And there might be criminal proceedings of such importance that secrecy should give way, in a reasonable balancing exercise, to the disclosure of the information to the courts. A generalized duty to answer or a generalized duty to remain silent are both far too radical options. The most sensible option remains to balance the conflicting interests at stake (the need for secrecy of confidential information on the one hand, the need for disclosure and openness of the trial on the other) on a case-by-case basis. Based on the existing rules, it seems therefore preferable to let the witnesses or their superiors within the organization decide whether or not to disclose the information. The holders of the professional secret are in fact the only ones who are aware of the confidential information and who can assess its importance in light of the case. Nonetheless, one should be wary of the risks that such a solution entails. Leaving the intelligence services free to choose might lead to forms of arbitrariness, all the more so when their interest might be at stake. Imagine the case of the testimony of a member of the intelligence service who acted outside the scope of his or her legal authority or even committed (unauthorised) crimes: this person might be inclined not to

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[115] The same statute contains a similar provision (Art 24) for police personnel; they are obliged to reveal the secrets they hold in front of the supervisory committee for police services (*Comité permanent P, Vast Comité P*).

[116] Bart Vangeebergen, *Het gebruik van inlichtingen in het strafproces* (Intersentia, 2017), 441.

disclose in court the confidential information he or she holds so as to shield the wrongdoing under a veil of secrecy. The case of a rogue member of the intelligence services is not the only problem. It is sufficient to consider the case of the holder of a secret who decides whether or not to disclose information on the basis of reasons entirely alien to the balancing between the needs of criminal justice (to discover the truth) and needs of the State (to protect its security). In other words, if the choice is entirely left to the discretion of the holder of the professional (national) secret, the risk of arbitrariness remains. Furthermore, the principle of uniform treatment can be endangered. It would at least be appropriate to require that the government set some minimum general internal guidelines to establish when the members of the intelligence services (or other persons holding state-security-sensitive information) should disclose the confidential information so as to guide them in the balancing exercise (see *infra* Section V). Belgian legislation currently does not offer an appropriate solution to this problem and no case law has been published on this point.

3. Deposition of the intelligence services under anonymity

One further point concerns the question whether a witness who is the holder of confidential information can be questioned as an anonymous witness (see *supra* Section II.A.3). The issue could be particularly sensitive for members of the intelligence services. The special statutes completely ignore this possibility.

The rules on anonymous witness testimony are mostly meant for the protection of witnesses who could risk forms of retaliation due to their testimony. The rules explicitly take into account the position of police officers (see *supra* Section II.A.3) but not that of intelligence officers, and they do so by focusing on the risk for their personal integrity and not on the issue of protecting the information they hold or the work they perform.

These rules could well be applicable to members of the intelligence services or to other persons holding confidential information on issues concerning the security of the State but only to the extent the required legal conditions are met. Both situations (partial or full anonymity) should involve cases where the maker of a statement will suffer an adverse effect as a consequence of making the statement.[117] This could at times be the case when members of the intelligence services (or other people holding confidential information on state security) are heard but is not necessarily so. The disclosure of state secrets (or of confidential information in general) does not always result in a direct negative consequence for the individual witness him- or herself.

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[117] When it comes to partial anonymity, one could argue that intelligence officers can fall under Art 75*ter* CCP, which grants partial anonymity without the risk of adverse effects for the witness. However, it is doubtful that partial anonymity would be sufficient when it comes to intelligence officers.

It remains, however, very unlikely that members of the intelligence services would be called to give testimony in court (or even earlier, during the investigation). The literature rightly underscores that, in practice, the testimony of members of the intelligence services is of little importance given the rules that allow the reports of the intelligence services to be used in criminal proceedings (see *supra* Section II.A.1). However, such testimony could sometimes prove crucial to exonerate the innocent.

4. Seizure of intelligence documents

Secret information can also be gathered by means other than testimonial depositions, for instance by collecting documents during a search. The Security Act sets out special rules for searches conducted by the judicial authorities on the premises of the intelligence services. Article 38 Security Act allows searches and subsequent seizures in the offices of the intelligence services, but it establishes special safeguards. The search must be conducted in the presence of the head of the service. If the judicial authorities intend to seize classified documents, the disclosure of which could jeopardize the function of the intelligence services or put people in danger, the head immediately informs the chairman of the oversight committee (Permanent Committee I) and the competent minister. The head of the service can also file an appeal against the seizure of the documents before the indictments chamber. The indictments chamber must scrutinize whether the seizure of documents could in fact bring about one of the two aforementioned dangers. Only the indictments chamber, the prosecutor, and the investigating judge have access to the seized evidence. If the indictments chamber finds that the disclosure might in fact cause risks for the work of the intelligence services or the integrity of people, it quashes the seizure and returns the documents to the intelligence services. If the indictments chamber finds that the asserted dangers are not present, it upholds the seizure. In this case, the documents remain in the possession of the judicial authority until the end of the proceedings at which point they must be returned to the competent service. Article 40 Security Act contains a similar procedure for classified information or intelligence found during a search conducted in places other than the premises of the intelligence services.

These rules are the result of recent amendments to the Security Act, which were enacted by the Act of 30 March 2017 (*Loi modifiant la loi du 30 novembre 1998 organique des services de renseignement et de sécurité et l'article 259bis du Code penal; Wet tot wijziging van de wet van 30 november 1998 houdende regeling van de inlichtingen- en veiligheidsdienst en van artikel 259bis van het Strafwetboek*). For the first time, they introduce explicit limits to the possibility of collecting evidence consisting of classified (or more in general) secret information. This development reflects the growing tendency to protect the intelligence operations and the information sensitive for the security of the State. Even with these latest developments, Belgium remains a country where the conflict between the need to maintain secrecy and the needs of criminal justice is mostly solved in favour of the latter.

5. Exculpatory evidence uncovered using special investigative techniques

When evidence is collected during an observation, infiltration, or civilian infiltration, the police are under a duty to record all the activities and their results in a secret report, which is subsequently shared only with the public prosecutor.[118] A second official report is then drafted which contains only non-secret information (see *supra* Section II.A.2). At this point the police officers and the public prosecutor can decide to label some information confidential, thus keeping it out of the official report. In principle, only some specific categories of information should be kept confidential (identity of the people involved, techniques used, etc.), but still some discretion exists. This is obviously a problematic situation, particularly if the confidential information could have an exonerating function. Even if the indictments chamber believes that the information is not confidential, it does not enjoy the power to order the prosecutor to add this information to the official report.[119] It can only note this omission in its ruling (though without making explicit what the information is), but it cannot force the public prosecution service to disclose it.[120] Of course part of the duty of a public prosecutor entails including all relevant evidence (both exculpatory and inculpatory) in the file.[121]

In front of the trial court a similar situation arises. If the suspect believes the public prosecutor has exculpatory information in the confidential file that he or she is refusing to make public, the trial court cannot force the prosecutor to disclose it.[122] It can only decide to take the suspect's accusations against the public prosecutor into account when judging the case (although it does not have access to the confidential file).[123]

For informants the situation is even more problematic.[124] The possibility is real that informants will simply abstain from sharing with the police the exculpatory

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[118] Art 47*septies* §1 and 47*novies* §1 CCP.

[119] K, Cass 30 October 2001, P.01.1239.N, [2001] Arr Cass 1815.

[120] Luiz De Baets, 'Het vertrouwelijk dossier: een noodzakelijk kwaad in strafzaken?' [2016] Nullum Crimen special edition April 2016, 59; Steven Vandromme and Chris De Roy, 'Het vertrouwelijk dossier: Quo vadit?', note under GwH 21 December 2004, [2004–2005] RW 1297.

[121] Henri Berkmoes, 'De B.O.M.-reparatiewet: over de inhoud en over de lichtheid van sommige kritiek' [2006] Vigiles 9; Luiz De Baets, 'Het vertrouwelijk dossier: een noodzakelijk kwaad in strafzaken?' [2016] Nullum Crimen special edition April 2016, 37; Raoul Hayoit de Termicourt, Alfred Bernard, Raymond Charles, Lucien Simont and Etienne Gutt, *Répertroie Pratique du Droit Belge Complément* (part III, Établissements Émile Bruylant, 1969), 765.

[122] B, Cass 15 February 2000, P.98.0471.N, [2000] Arr Cass 422; K, Cass 30 October 2001, P.01.1239.N, [2001] Arr Cass 1815.

[123] K, Cass 30 October 2001, P.01.1239.N, [2001] Arr Cass 1815; Luiz De Baets, 'Het vertrouwelijk dossier: een noodzakelijk kwaad in strafzaken?' [2016] Nullum Crimen special edition April 2016, 25–26.

[124] Luiz De Baets, 'Het vertrouwelijk dossier: een noodzakelijk kwaad in strafzaken?' [2016] Nullum Crimen special edition April 2016, 36–37.

information they know. Even if they do so, the prosecutor has no obligation to record it. If the prosecutor decides not to, there is no possibility of judicial oversight, and the suspect might be deprived of a relevant piece of information to prove his or her innocence.[125]

III. Evidence in criminal pre-trial proceedings

The analysis of the use of undisclosed evidence in terrorist cases during the pre-trial stage of criminal proceedings requires us to take a brief look at the general rules on the disclosure of evidentiary material during investigations.

The presumption of innocence forbids the imposition of pre-trial measures which simply constitute an anticipation of punishment. However, it is possible to impose restrictive measures with a view to preserving evidence, protecting society or individuals, or preventing further offences. Two measures come particularly to the fore: pre-trial detention (which can be executed in jail or by house arrest) and the seizure of assets. Both measures do not amount to criminal penalties under Belgian law.[126] We will refer to these two measures when using the term 'restrictive measures' in this part of the text.

A. The principle of secrecy of the investigation

1. Secret investigation

There are two main types of criminal investigations in Belgium: the preliminary investigation and the judicial investigation. The first is led by the public prosecution service (the federal prosecutor's office for most organized crime and terrorism cases), while the second is led by the investigating judge. A judicial investigation is

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[125] vzw Ligue des droits de l'homme ea, Constitutional Court 21 December 2004, 202/2004, [2005] NjW 340; GFD, TRH and PJAD, Cass 25 May 2010, P.10.0200.N , [2010] Arr Cass 1512; KI Antwerpen 9 February 2007, [2007] RABG 833; Luiz De Baets, 'Het vertrouwelijk dossier: een noodzakelijk kwaad in strafzaken?' [2016] Nullum Crimen special edition April 2016, 61; Lawrence Verhelst, 'Enkele bijzondere machten van de KI' [2011–2012] Jura Falconis 571; Raf Verstraeten, *Handboek Strafvordering* (5th edn, Maklu, 2012) 372.

[126] With regard to pre-trial detention, see Art 16 §1 part 3 Statute on pre-trial detention (*Loi de 20 juliet 1990 relative à la détention préventive; Wet van 20 juli 1990 betreffende de voorlopige hechtenis*), which explicitly states that pre-trial detention cannot amount to a preemptive form of punishment and the motivation requirements of the arrest warrant are intended to ensure the respect of this principle. With regard to seizure, see MD, Cass 22 June 2005, P.05.0664.F, [2005] Arr Cass 1406; Frédéric Lugentz and Damien Vandermeersch, *Saisie et confiscation en matière pénale* (Larcier, 2015) 99–100; Raf Verstraeten, *Handboek Strafvordering* (5th edn, Maklu, 2012) 339.

only required where the most coercive/intrusive measures are taken (pre-trial detention, interceptions, house searches, and a series of other listed acts, which has dwindled over time). Today, a judicial investigation is the exception.[127]

During a preliminary investigation, the prosecutors are responsible for gathering the evidence and when they believe to have sufficient proof, they can directly summon the suspect to trial.[128] In a judicial investigation, direct committal to court is not possible: at the end of the investigation, an independent judge (the council chamber and sometimes the indictments chamber as well) must review the case before it can be referred to the trial court.

One of the governing principles in both the preliminary and the judicial investigation is the secrecy of the investigation, which means that access to the file is in principle impermissible.[129] This secrecy serves to ensure an efficient investigation and to protect it against the pressures of public opinion while at the same time preserving the reputation of the people under investigation.[130] Nonetheless, the principle may damage the interest of an effective and timely defence and, in some cases, can be detrimental to a fair and proper course of the investigations. In consequence, the principle is not absolute and is subject to exceptions. One such exception is the case of pre-trial detention (see *infra* Section III.A.2). Another possibility is that the competent investigative authority permits the disclosure of the file.

During the preliminary investigation, anybody can request the public prosecutor for access to the file.[131] During the judicial investigation, direct stakeholders (*i.e.* the victim who has formally declared to have been harmed by the crime or who has formally entered the proceedings as a civil party, the suspect, the civilly liable party,[132] and their representatives) can request access from the investigating judge,

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[127] It is employed in no more than 5% of all cases; see Constitutional Court 25 January 2017, 6/2017, [2017] NjW 354; Frank Schuermans, 'Verdachte moet beroep krijgen tegen inzageweigering bij opsporingsonderzoek', [2017] 343 Juristenkrant 3.

[128] Except for the cases that have to appear before the assize court, in which case a direct summons is impossible.

[129] Arts 28*quinquies* and 57 CCP; Constitutional Court 25 January 2017, 6/2017, [2017] NjW 354; DMG et al/JT et al, Cass 26 March 2003, P.03.0208.F, [2003] Arr Cass 782; VDM, Cass 14 May 2008, P.08.0188.F, [2008] Arr Cass 1187; Gunter Maes, 'Inzage in het strafdossier tijdens het gerechtelijk onderzoek' [2002] 39 OSS 189; Frank Schuermans, 'Verdachte moet beroep krijgen tegen inzageweigering bij opsporingsonderzoek' (2017) 343 Juristenkrant 1; Raf Verstraeten, *Handboek Strafvordering* (5th edn, Maklu, 2012) 394 and 430–431.

[130] Constitutional Court 25 January 2017, 6/2017, [2017] NjW 354; RvSt 10 January 1992, no 38.476, [1992] JLMB 1049; Raf Verstraeten, *Handboek Strafvordering* (5th edn, Maklu, 2012) 394 and 430–431.

[131] Art 21*bis* and *61ter* CCP.

[132] This is a (natural or legal) person who is civilly liable for the damages caused by the crime, e.g. the teacher of a student who committed a crime while in class or the parents of a

while others have to request access from the public prosecutor.[133] In both cases, there is no right to obtain the disclosure of the file, and the investigating judge or the prosecutor can turn down the request. The law sets out the exhaustive list of grounds upon which the prosecutor and the investigating judge can deny disclosure. However, these reasons are quite broadly drafted and allow the requested authorities much room for manoeuvre.[134] The rejection can be further appealed in front of the indictments chamber but only by direct stakeholders (being the ones listed above).[135]

2. Discovery in pre-trial detention

Only the investigating judge can take the decision to remand a suspect in custody. Pre-trial detention must then be periodically reviewed by a judicial authority (the council chamber) until the case is referred to the trial court (or the suspect is released). The first review takes place within five days of the investigating judge's decision. Further controls take place within a month and from the third intervention onwards every two months.[136]

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minor who committed a crime. In Belgium they can be involved in the criminal proceedings as a party.

133 Art 21*bis* §1, section 3 and Art 61*ter*, §1 *juncto* Art. 21*bis*, section 2 CCP; Henri Berkmoes and Franky Goossens, 'De inzage, kopiename en voeging van (stukken van) strafdossiers: een nog steeds actueel vraagstuk van strafprocesrecht', note under Cass 15 September 2015, [2016] Nullum Crimen 429; Gunter Maes, 'Inzage in het strafdossier tijdens het gerechtelijk onderzoek' [2002] 39 OSS 192.

134 The prosecutor can turn down the request if the needs of the investigation require that secrecy be kept or if lifting the secrecy might be dangerous for people or could undermine people's privacy. The prosecutor can also reject the request if the person does not offer a good reason to inspect the file. This ground is often interpreted as only limited to the position of persons other than the suspect (e.g. the civil party). The request can also be turned down if the file contains only the complaint or if the counsel already had access to the file. Moreover, the request will be rejected if meanwhile a judicial investigation has been opened, or the case has been referred to the trial court (Art 21*bis* § 5 CCP). The list of reasons for which the investigating judge can refuse are similar, only slightly more limited. Like the prosecutor, the investigating judge can reject the request if the needs of the investigation so demand or disclosure would endanger individual privacy and, in any case, whenever the claimant (more specifically, the civil party) does not offer a good reason to lift the veil of secrecy. See Luc Huybrechts, 'Twee jaar Wet Franchimont', in CBR-Jaarboek 2000–2001 (Maklu, 2001) 117–119; Gunter Maes, 'Inzage in het strafdossier tijdens het gerechtelijk onderzoek' [2002] 39 OSS 205–208; Raf Verstraeten, *Handboek Strafvordering* (5th edn, Maklu, 2012) 437–438.

135 The possibility to appeal the rejection of the prosecutor was only recently introduced (by the Act of 18 March 2018 (*Loi de 18 mars 2018 modifiant diverses dispositions du droit pénal, de la procédure pénale et du droit judiciaire; wet van 18 maart 2018 houdende wijzigingen van diverse bepalingen van het strafrecht, de strafvordering en het gerechtelijk recht*)). People other than direct stakeholders do not have a right to appeal when their request is denied or even ignored (Art 21*bis* CCP).

136 Arts 21–23 WVH. Against every one of these decisions by the council chamber, appeal to the indictments chamber and a second appeal to the Court of Cassation are possible (Art 30 WVH); see Raf Verstraeten, *Handboek Strafvordering* (5th edn, Maklu, 2012) 625.

In conformity with the case law of the European Court of Human Rights (ECtHR),[137] Articles 21 and 22 of the law on pre-trial detention (WVH) grant every suspect in pre-trial detention the right to access the file in the days leading up to the review of his or her case by the council chamber.[138] This right is interpreted strictly, to the point that the Court of Cassation ruled it an infringement of the right of defence that only the counsel, and not the suspect, had been given access to the file.[139] According to the current case law of the Court of Cassation, the suspect has the right to have access to all the pieces of evidence that the investigating judge has at his or her disposal and that are relevant for imposing and maintaining the detention.[140] If the suspect is not granted access to the file, his or her right of defence is infringed upon, and he or she must be released from pre-trial detention.[141]

B. The use of incriminating 'indirect evidence'

Since the secrecy of the investigation is the general rule, evidence usually remains undisclosed during the investigation. The two exceptions are discussed above (*supra* Sections III.A.1 and 2). However, even in the two situations where the file is accessible to the defence, the file itself may still contain indirect evidence.

The main forms of indirect evidence are the same in the pre-trial phase as in the trial phase, being the use of special intelligence methods, the use of special investigative methods (BOM), anonymous witness testimony, and the use of codes in official reports. A lot of what has been said about these measures in the trial is relevant in the pre-trial phase as well. A major difference in the use of special investigative methods, anonymous witness testimony, and codes in official reports in the pre-trial phase as compared to the trial phase is that in the pre-trial phase the individuals imposing the restrictive measures (*i.e.* for pre-trial detention or asset freezing the

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[137] *Mooren v Germany*, ECtHR 9 July 2009, no 11364/03; *Lamy v Belgium,* ECtHR 30 March 1989, no 10444/83.

[138] Art 21 WVH; Gunter Maes, 'Inzage in het strafdossier tijdens het gerechtelijk onderzoek' [2002] 39 OSS 189.

[139] D v OM, Cass 30 December 1997, P.97.1690.N, [1998–1999] RW 364; Raf Verstraeten, *Handboek Strafvordering* (5th edn, Maklu, 2012) 610.

[140] H, Cass 13 August 1987, [1987–1988] RW 989, note A Vandeplas; Raf Verstraeten, *Handboek Strafvordering* (5th edn, Maklu, 2012) 610–611. This means that the suspect has to be informed that the file (or part of it) is accessible to him or her, but not that new documents have been added to it (Kemani, Cass 13 July 1999, P.99.0954.N, [1999] Arr Cass 1001; OO, Cass 21 March 2007, P.07.0310.F, [2007] RDCP 861).

[141] Rk Namen 16 June 1992, [1993] JLMB 25; Rk Namen 23 September 1999, [2000] Rev dr pén 1092. However, if access was not granted when appearing before the council chamber, the infringement of the right of defence can be remedied by granting access before appearing in front of the indictments chamber; see BN, Cass 5 April 2006, P.06.0466.F, [2006] T Strafr 265; RF and RF, Cass 28 May 2008, P.08.0751.F, [2008] RDPC 1248; Raf Verstraeten, *Handboek Strafvordering* (5th edn, Maklu, 2012) 611.

investigating judge or for asset freezing the public prosecutor) have access to the confidential file or the identity of the witness/person who wrote the report. However, they can never use this knowledge to the disadvantage of the suspect when making their decision. Because of this, these are forms of indirect evidence and not of undisclosed evidence.

1. Intelligence gathering

As explained above, non-classified reports can be added to the file (see *supra* Section II.A.1). These reports can then be used as a basis for pre-trial detention, the freezing of assets, or any other coercive investigative measures. The investigation supervision courts can, using the same procedure as the trial courts (see *supra* Section II.A.1), ask for advice from the Permanent Committee I on the legality of the methods used in gathering the intelligence.[142]

When the intelligence services pass on information to the public prosecution service outside of a non-classified report (see *supra* Section II.A.1), this information can be used in the pre-trial phase as well. In the *GICM* case (see *supra* Section II.A.1), the court stated that, by analogy with the rules for anonymous witness testimony, even when 'the source or origin of the information is not revealed with complete accuracy', this information can serve as the basis for opening or guiding an investigation and for gathering evidence (which includes asset freezing, while doubts remain on the possibility to use it for pre-trial detention).[143] In any case, it is necessary to verify whether this intelligence information is serious and reliable (the same as for anonymous witness testimony) and, if the test is negative or impossible (because insufficient information is available), whether the intelligence should not be used.[144]

2. Special investigative (policing) techniques

BOM measures are always executed under the supervision of the public prosecutor, even during the judicial investigation (when investigative measures have to be

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[142] Arts 131*bis*, 189*quater* and 279*bis* CCP; Hugo Vandenberghe and Thomas Van Ongeval, 'Genese en krachtlijnen van de Wet van 4 februari 2010 op de bijzondere inlichtingenmethoden' in Wauter Van Laethem, Dirk Van Daele and Bart Vangeebergen (eds), *De wet op de bijzondere inlichtingenmethoden* (Intersentia, 2010) 22.

[143] OM v EHL, OH, BK et al, Brussels 19 January 2007, [2008] T Strafr 281–316; Frank Schuermans, 'Het gebruik van gegevens afkomstig van de inlichtingendiensten in de strafprocedure: is er nood aan een "BIM-Wet"?' [2008] T Strafr 320; Bart Vangeebergen, *Het gebruik van inlichtingen in het strafproces* (Intersentia, 2017), 397; Bart Vangeebergen and Dirk Van Daele, 'De verhouding tussen de inlichtingen- en veiligheidsdiensten en de gerechtelijke overheden', in Wauter Van Laethem, Dirk Van Daele and Bart Vangeebergen (eds), *De wet op de bijzondere inlichtingenmethoden* (Intersentia, 2010) 222.

[144] Bart Vangeebergen, *Het gebruik van inlichtingen in het strafproces* (Intersentia, 2017), 398.

authorized by the investigating judge).[145] A confidential file is kept of every observation, infiltration, and civilian infiltration (to which only the investigating judge and the public prosecutor have access), and official reports are made which do not contain any confidential information and are added to the general file (see *supra* Section II.A.2). The official reports in the general file can serve as the basis for restrictive pre-trial measures, just like any other piece of evidence. Since the information in the confidential file can never be used against the suspect, restrictive measures cannot be based on it. However, it could shed light on the circumstances surrounding the procurement of the evidence, which could be vital to the defence.

The official report is added to the general file at the latest after termination of the measure. According to a decision of the Court of Cassation, the official reports of the special policing techniques employed need not be added to the file at an earlier stage, not even if the suspect is placed in pre-trial detention.[146] Based on this case law it therefore appears that there is a window during the investigation in which the suspect could be subject to restrictive measures based on BOM evidence (which could have been illegally obtained) without having any access to the relevant information (and maybe even any knowledge of the measure). The official reports can be added only at a later stage (where the problem remains of the suspect being unable to access the confidential file so as to establish the illegality of said evidence). Furthermore, the suspect has no right to bring the case before the indictments chamber for a review of the BOM measure. He or she can request a review by the indictments chamber, but the indictments chamber is not required to provide it.[147] During this period, the suspect is therefore at a disadvantage and may suffer the consequences of inappropriate prosecutorial decisions.[148]

There are several possibilities for review by the indictments chamber. Supervision automatically takes place before the case is sent to the trial court (after a judicial or a preliminary investigation). Furthermore, during the judicial investigation the public

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[145] Art 56*bis* CCP; Luiz De Baets, 'Het vertrouwelijk dossier: een noodzakelijk kwaad in strafzaken?' [2016] Nullum Crimen special edition April 2016, 20.

[146] AVC, Cass 23 March 2010, P.10.0446.N, [2010] Arr Cass 874.

[147] Art 235*ter* and 235*quater* CCP; FF, Cass 24 January 2006, P.06.0082.N, [2006] Arr Cass 209; TB, Cass 25 September 2007, P.07.0677.N, [2007] Arr Cass 1769; Luiz De Baets, 'Het vertrouwelijk dossier: een noodzakelijk kwaad in strafzaken?' [2016] Nullum Crimen special edition April 2016, 44; Raf Verstraeten, *Handboek Strafvordering* (5th edn, Maklu, 2012) 771.

[148] *Edwards v UK*, ECtHR 16 December 1992, no 13071/87, A247-B; Henri Berkmoes, 'De B.O.M.-reparatiewet: over de inhoud en over de lichtheid van sommige kritiek' [2006] Vigiles 9; Luiz De Baets, 'Het vertrouwelijk dossier: een noodzakelijk kwaad in strafzaken?' [2016] Nullum Crimen special edition April 2016, 37; Hans De Doelder, *Het O.M. in positie* (Gouda Quint, 1988) 15–16; Bart De Smet, 'Voeging van strafdossiers op verzoek van de verdediging', note under Antwerpen 13 March 2002, [2002–2003] RW 1023; Frank Schuermans, 'Verdachte moet beroep krijgen tegen inzageweigering bij opsporingsonderzoek' [2017] 343 Juristenkrant 1.

prosecutor or investigating judge can trigger a review and the suspect can request it (see *supra* this Section). During the preliminary investigation, however, the suspect cannot request a review. This means that when the public prosecutor decides to take no further action after the preliminary investigation, the indictments chamber will not get involved in checking the BOM measures, even though they may have served as the basis for the freezing of assets. In this case the only remaining option is an internal review of the BOM measures within the prosecution service, which, according to the Constitutional Court, satisfies the requirements of the ECHR.[149]

Reports of information gathered by informants can be used to 'start or re-orient the investigation' or as the basis for further investigation measures.[150] The public prosecutor and investigating judge who order the restrictive measures such as pre-trial detention or asset freezing have access to the confidential file while the defence does not. However, the prosecutor and investigating judge are not allowed to use the information from the confidential file as grounds for restrictive measures. As mentioned before, judicial supervision is not possible here.

3. Anonymous witness testimony

During the investigation phase, the investigating judge can decide to hear a witness anonymously. The anonymous character of the evidence does not, in itself, create a problem for its use in the investigation phase.[151] Anonymous witness testimony gathered according to the procedure of the CCP can be the basis for opening a preliminary or even judicial investigation.[152] It can also be used as the basis for restrictive measures, as was clarified by the courts.[153] This includes an arrest warrant, although in this case there needs to be corroborating evidence.[154] The testimony naturally has to have a certain degree of seriousness and reliability, and these requirements may be more stringent the more coercive or intrusive the measure the authorities want to

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[149] Art 47*undecies* CCP; LL et al, Constitutional Court 19 July 2007, 105/2007, [2007] NjW 695–700; Raf Verstraeten, *Handboek Strafvordering* (5th edn, Maklu, 2012) 369–370.

[150] DMG et al/JT et al, Cass 26 maart 2003, P.03.0208.F, [2003] Arr Cass 782; MR v DM, Cass 23 March 2005, P.04.1528.F, [2005] Arr Cass 688.

[151] Bart Vangeebergen and Dirk Van Daele, 'De verhouding tussen de inlichtingen- en veiligheidsdiensten en de gerechtelijke overheden' in Wauter Van Laethem, Dirk Van Daele and Bart Vangeebergen (eds), *De wet op de bijzondere inlichtingenmethoden* (Intersentia, 2010) 222.

[152] DP, Cass 21 January 2003, P.01.1121.N, [2003] Arr Cass 178; MR v DM, Cass 23 March 2005, P.04.1528.F, [2005] Arr Cass 688; Bart Vangeebergen, *Het gebruik van inlichtingen in het strafproces* (Intersentia, 2017), 396.

[153] A, Cass 4 April, 2001, P.01.0041.F, [2001] Arr Cass 616; ZG, OV and OB, Cass 4 January 2006, P.05.1417.F, [2006] Arr Cass 13; Bart Vangeebergen, *Het gebruik van inlichtingen in het strafproces* (Intersentia, 2017), 396.

[154] Taxquet, Cass 1 April 1997, P.97.0414.F, [1997] Arr Cass 414; Bart Vangeebergen, *Het gebruik van inlichtingen in het strafproces* (Intersentia, 2017), 397.

adopt.[155] Thus, the suspect has access to the information in the testimony but no way of knowing where the information came from and no way of verifying its reliability.

Besides the case of anonymous witness testimony, the investigating authorities can also make use of other information coming from anonymous sources in order to open or steer the investigation or to gather further evidence.[156]

4. Using codes in official reports

Reports referring to police officers by codes rather than names have the exact same value in the investigation as other official reports. If a police officer identified with a code is questioned, the above-mentioned rules on full anonymity apply (see *supra* Sections II.A.3 and III.B.3).

C. The use of undisclosed incriminating evidence

As was explained in Section II.1.a, when the suspect is not in pre-trial detention, he or she can be refused access to the file. However, the investigating authorities can take measures like the seizure of goods (which can take the form of asset freezing) without disclosing the underlying evidence.

The seizure of goods can be ordered by the public prosecutor (in the preliminary investigation) or by the investigating judge (in the judicial investigation).[157] The police can autonomously seize goods when a suspect hands them over voluntarily.[158] The same is true for objects discovered during a lawful frisk or search.[159] The seizure

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[155] VDBL, L and H, Cass 12 February 2002, P.01.1534.N, [2002] T Strafr 321; ZG, OV and OB, Cass 4 January 2006, P.05.1417.F, [2006] Arr Cass 13; Bart Vangeebergen, *Het gebruik van inlichtingen in het strafproces* (Intersentia, 2017), 397; Bart Vangeebergen and Dirk Van Daele, 'De verhouding tussen de inlichtingen- en veiligheidsdiensten en de gerechtelijke overheden' in Wauter Van Laethem, Dirk Van Daele and Bart Vangeebergen (eds), *De wet op de bijzondere inlichtingenmethoden* (Intersentia, 2010) 222–223.

[156] MR v DM, Cass 23 March 2005, P.04.1528.F, [2005] Arr Cass 688; BAM, Cass 13 April 2005, P.05.0263.F, [2005] Arr Cass 860; Joachim Meese, 'De motiveringsverplichting tijdens het vooronderzoek' [2012] Nullum Crimen 95; Steven Vandromme, 'Anonieme inlichtingen hebben geen bewijskracht in strafproces' [2005] 108 Juristenkrant 1 and 7.

[157] Arts 28*bis* §3 and 89 CCP.

[158] Francis Desterbeck and Jan Van Droogbroek, *De inbeslagneming en verbeurdverklaring in strafzaken in België* (Wolters Kluwer, 2017) 24–30.

[159] Francis Desterbeck and Jan Van Droogbroek, *De inbeslagneming en verbeurdverklaring in strafzaken in België* (Wolters Kluwer, 2017) 30–31; Erwin Francis, 'Algemene principes van de bijzondere verbeurdverklaring en het beslag in strafzaken' [2011] T Strafr 323; Frédéric Lugentz and Damien Vandermeersch, *Saisie et confiscation en matière pénale* (Larcier, 2015) 101. This hypothesis does not apply to assets in a bank account, which will have to be frozen by notifying the bank: Art 37 §2 CCP; Francis Desterbeck and Jan Van Droogbroek, *De inbeslagneming en verbeurdverklaring in strafzaken in België* (Wolters Kluwer, 2017) 50–51.

can have different goals: to preserve the evidence for the further steps of the proceedings; to preserve the items for a potential later confiscation; to prevent the commission of further crimes; to protect the rights of the victims.[160]

All assets that appear to be liable for confiscation (*i.e.* assets that are the object of an offence, that were used in or intended for committing an offence, that originated from an offence, that are the proceeds of an offence, or that are assumed (until proven otherwise) to be the proceeds of similar offences as the one for which the suspect is being prosecuted, which were committed within the previous five years) can be seized (as well as every object that might be useful in revealing the truth about a case, so it can be used as evidence).[161] This means that the assets have to be linked to the offence committed (or to similar offences committed within the previous five years) and that a general seizure of all the funds of a suspect is not allowed.[162]

Article 46*quater* CCP introduces a special kind of seizure, in the form of freezing a suspect's bank accounts. This Article allows the public prosecutor (or the investigating judge) to demand from financial institutions information on all of a suspect's bank accounts, the transactions from those accounts during a certain period, and the names of other people who have access to those accounts.[163] The second paragraph further allows the prosecutor (or the investigating judge) to freeze those accounts for a maximum period of five days after receiving the aforementioned information.[164] In order to be able to do so, there have to be serious and exceptional circumstances justifying the measure and the investigation has to involve offences included on the list of most serious crimes (see *supra* Section II.A.3).[165] This Article was introduced to prevent suspects from concealing assets pending the decision of the authorities on the seizure (a decision that requires information received from the bank).[166] Because of the very limited temporal scope of this measure, the public prosecutor or investigating judge who wishes to freeze

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[160] Sofie Royer, *Strafrechtelijk beslag: digitaal en (multi)functioneel?,* (Die Keure, 2020); Raf Verstraeten, *Handboek Strafvordering* (5th edn, Maklu, 2012) 338 and 499; Raf Verstraeten and Luk Delbrouck, 'Beslag in strafzaken' [2014] 79 OSS 132.

[161] Art 35 CCP; Art 42 and 42*quater* Sw; Hof Ter Poorterwalle NV, Cass 15 February 2000, P.99.1664.N, [2000] Arr Cass 430; Francis Desterbeck and Jan Van Droogbroek, *De inbeslagneming en verbeurdverklaring in strafzaken in België* (Wolters Kluwer, 2017) 16–22; Sofie Royer, *Strafrechtelijk beslag: digitaal en (multi)functioneel?,* (Die Keure, 2020); Raf Verstraeten, *Handboek Strafvordering* (5th edn, Maklu, 2012) 339 and 449.

[162] KI Antwerpen 14 January 1999, [1998–1999] RW 1421; Hans Van Bavel, 'Het strafrechtelijk kort geding: een jaar toepassing' [2000] P&B/RDJP 69.

[163] Art 46*quater* §1 CCP.

[164] Art 46*quater* §2 CCP.

[165] Art 46*quater* §2 CCP.

[166] Henri Berkmoes, 'De B.O.M.-reparatiewet: over de inhoud en over de lichtheid van sommige kritiek' [2006] Vigiles 4; Erwin Francis, 'Algemene principes van de bijzondere verbeurdverklaring en het beslag in strafzaken' [2011] T Strafr 327.

a suspect's assets for a longer period of time has to use the general regime for seizures, as described in this Section.[167]

If there are serious indications of the existence of proceeds of an offence or assumed proceeds of similar offences in the previous five years that can no longer be found in Belgium, seizure of an equivalent sum is possible as well.[168] However, the sum seized needs to be proportionate to the offences under investigation (this is true for all seizures but especially for seizures of an equivalent sum).[169] When the prosecutor or investigating judge wishes to seize an equivalent sum, he or she has to include an estimate of the sum in the official report and must explain the 'serious and concrete circumstances' that justify the seizure.[170] This official report must be presented to the owner of the goods, who also has the right to a copy of it.[171] So, in this scenario, the use of undisclosed evidence is somewhat tempered. If the suspect is the owner of the goods, he or she has the possibility to find out the basis for the seizure. But he or she does not have access to the actual evidence itself, if this is still covered by the secrecy of the investigation. Furthermore, the absence of the required explanation of circumstances only leads to the invalidity of the seizure if the seizure violates the rights of the defence.[172] It is also important to note that if the assets that appear to be liable for confiscation (object of the offence, proceeds of the offence,

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[167] For the seizure of sums from bank accounts see in particular: Art 37 §2–4 CCP; Erwin Francis, 'Algemene principes van de bijzondere verbeurdverklaring en het beslag in strafzaken' [2011] T Strafr 327; Frédéric Lugentz and Damien Vandermeersch, *Saisie et confiscation en matière pénale* (Larcier, 2015) 140.

[168] Art 35*ter* CCP.

[169] Erwin Francis, 'Algemene principes van de bijzondere verbeurdverklaring en het beslag in strafzaken' [2011] T Strafr 325; Frédéric Lugentz and Damien Vandermeersch, *Saisie et confiscation en matière pénale* (Larcier, 2015) 100; Leon Viaene, *Huiszoeking en beslag in strafzaken* (Larcier, 1962), nr 85.

[170] Art 35*ter* CCP; Francis Desterbeck and Jan Van Droogbroek, *De inbeslagneming en verbeurdverklaring in strafzaken in België* (Wolters Kluwer, 2017) 23; Frédéric Lugentz and Damien Vandermeersch, *Saisie et confiscation en matière pénale* (Larcier, 2015) 147–149; Sofie Royer, *Strafrechtelijk beslag: digitaal en (multi)functioneel?,* PhD at KU Leuven, expected in 2019; Raf Verstraeten, *Handboek Strafvordering* (5th edn, Maklu, 2012) 340; Raf Verstraeten and Luk Delbrouck, 'Beslag in strafzaken' [2014] 79 OSS 136. An estimate is only required when seizing an equivalent sum and not when seizing the goods themselves: VDM, Cass 14 May 2008, P.08.0188.F, [2008] Arr Cass 1187.

[171] Raf Verstraeten, *Handboek Strafvordering* (5th edn, Maklu, 2012) 341.

[172] G, Cass 7 February 2001, P.01.0168.F, [2001] Arr Cass 243; Fruytier ea v Auditeur du travail de Marche-en-Famenne, Cass 10 March 2004, P.03.1233.F, [2004] Arr Cass 428; Never 2 Limited BP, Cass 17 October 2006, P.06.0846.N, [2006] Arr Cass 2028; WVC and MS, Cass 20 March 2012, P.11.1952.N, [2012] Arr Cass 723; Francis Desterbeck and Jan Van Droogbroek, *De inbeslagneming en verbeurdverklaring in strafzaken in België* (Wolters Kluwer, 2017) 23; Erwin Francis, 'Algemene principes van de bijzondere verbeurdverklaring en het beslag in strafzaken' [2011] T Strafr 325; Sofie Royer, *Strafrechtelijk beslag: digitaal en (multi)functioneel?* (Die Keure, 2020); Raf Verstraeten, *Handboek Strafvordering* (5th edn, Maklu, 2012) 340 and 500; Raf Verstraeten and Luk Delbrouck, 'Beslag in strafzaken' [2014] 79 OSS 136–137 and 149.

etc.) are a sum of money, then any sum of money in the assets of the suspect can be assumed to be that sum of money.[173] No link between that exact sum of money and the money seized has to exist, and this is not a form of seizure of the equivalent. Even evidence of the legal origin of the sum of money that was seized is irrelevant, as long as there is no evidence that the proceeds of the offence left the assets of the suspect.[174]

Judicial remedies are available against the decisions affecting the right to property, thus particularly the decisions to freeze and seize assets. The suspect can file a request to lift the measure with the public prosecutor (during the preliminary investigation) or the investigating judge (during the judicial investigation).[175] The prosecutor or investigating judge can only deny the request for four reasons exhaustively listed in the legislation.[176] Furthermore it must be ensured that the refusal (and its reasons) does not infringe upon the suspect's presumption of innocence.[177] In case of a breach of procedural rules, the measure is quashed only if the breach involves a procedural rule sanctioned by nullity or if the right to a fair trial was violated.[178]

Importantly, the filing of a request does not give the suspect a right of access to the file.[179] If the request is denied (or if no decision is made within a certain period),

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[173] BC, also going by BH, Cass 6 June 2006, P.06.0274.N, [2006] Arr Cass 1314; Erwin Francis, 'Algemene principes van de bijzondere verbeurdverklaring en het beslag in strafzaken' [2011] T Strafr 324; Raf Verstraeten and Luk Delbrouck, 'Beslag in strafzaken' [2014] 79 OSS 134.

[174] KI Antwerpen, 29 januari 2007, quoted in Erwin Francis, 'Algemene principes van de bijzondere verbeurdverklaring en het beslag in strafzaken' [2011] T Strafr 324.

[175] Arts 28*sexies* §1–2 and 61*quater* §1–2 CCP. Art 28*sexies* CCP, applicable to the preliminary investigation includes an exception for measures taken under special criminal legislation; such an exception is not included in Art 61*quater* CCP, which is applicable to the judicial investigation.

[176] The reasons for maintaining the seizure are different and wider than the reasons for seizing goods in the first place (Illusion, Cass 5 October 2004, P.04.1122.N, [2004] Arr Cass 1525). They are: when the refusal is necessary to be able to investigate further, when granting it would infringe the rights of the other parties or third parties, when granting it would endanger people or goods, or when the law provides for forfeiture of the goods or their return to the rightful claimant (Arts 28*sexies* §3 and 61*quater* §3 CCP). See Francis Desterbeck and Jan Van Droogbroek, *De inbeslagneming en verbeurdverklaring in strafzaken in België* (Wolters Kluwer, 2017) 5; Erwin Francis, 'Algemene principes van de bijzondere verbeurdverklaring en het beslag in strafzaken' [2011] T Strafr 329; Luc Huybrechts, 'Twee jaar Wet Franchimont', in CBR-Jaarboek 2000–2001 (Maklu, 2001) 126–128; Frédéric Lugentz and Damien Vandermeersch, *Saisie et confiscation en matière pénale* (Larcier, 2015) 178; Raf Verstraeten, *Handboek Strafvordering* (5th edn, Maklu, 2012) 399–400 and 451; Raf Verstraeten and Luk Delbrouck, 'Beslag in strafzaken' [2014] 79 OSS 164 and 167.

[177] PZ, Cass 18 June 2003, P.03.0542.F, [2003] Arr Cass 1425.

[178] Francis Desterbeck and Jan Van Droogbroek, *De inbeslagneming en verbeurdverklaring in strafzaken in België* (Wolters Kluwer, 2017) 5.

[179] VDM, Cass 14 May 2008, P.08.0188.F, [2008] Arr Cass 1187; Erwin Francis, 'Algemene principes van de bijzondere verbeurdverklaring en het beslag in strafzaken' [2011]

an appeal to the indictments chamber is possible.[180] This appeal does not grant the suspect a right of access to the whole file either.[181] However, the complainant has a right to access the evidence that directly relates to the seizure in order to allow for a meaningful debate before the indictments chamber.[182] The extent of disclosure depends on the circumstances of the case and the court presiding over it.[183] It is still unclear whether or not the complainant needs to get access to all parts of the file on which the indictments chamber based its decision.[184] Once the investigation phase is formally concluded, every suspect has a right to access the entire file or copy it, and no parts of the file can be excluded from this right.[185]

The Court of Cassation has ruled that the current seizure procedure (as described in Articles 35, 35*ter*, and 37 CCP) and the appeals procedure do not violate Article 1 of the first protocol to the ECHR (protection of property) and that the State does not have to notify the person undergoing the seizure in advance.[186]

T Strafr 329; Raf Verstraeten, *Handboek Strafvordering* (5th edn, Maklu, 2012) 399 and 451; Raf Verstraeten and Luk Delbrouck, 'Beslag in strafzaken' [2014] 79 OSS 168.

[180] Arts 28*sexies* §4 and 61*quater* §5 CCP; Francis Desterbeck and Jan Van Droogbroek, *De inbeslagneming en verbeurdverklaring in strafzaken in België* (Wolters Kluwer, 2017) 6; Luc Huybrechts, 'Twee jaar Wet Franchimont', in CBR-Jaarboek 2000–2001 (Maklu, 2001) 130; Frédéric Lugentz and Damien Vandermeersch, *Saisie et confiscation en matière pénale* (Larcier, 2015) 181; Hans Van Bavel, 'Het strafrechtelijk kort geding: een jaar toepassing' [2000] P&B/RDJP 64; Raf Verstraeten, *Handboek Strafvordering* (5th edn, Maklu, 2012) 401–402 and 453; Raf Verstraeten and Luk Delbrouck, 'Beslag in strafzaken' [2014] 79 OSS 164 and 167.

[181] VDM, Cass 14 May 2008, P.08.0188.F, [2008] Arr Cass 1187; Frédéric Lugentz and Damien Vandermeersch, *Saisie et confiscation en matière pénale* (Larcier, 2015) 182; Raf Verstraeten and Luk Delbrouck, 'Beslag in strafzaken' [2014] 79 OSS 168.

[182] Arts 28*sexies* §4 and 61*quater* §5 CCP.

[183] Erwin Francis, 'Algemene principes van de bijzondere verbeurdverklaring en het beslag in strafzaken' [2011] T Strafr 329; Luc Huybrechts, 'Twee jaar Wet Franchimont', in CBR-Jaarboek 2000–2001 (Maklu, 2001) 131; Hans Van Bavel, 'Het strafrechtelijk kort geding: een jaar toepassing' [2000] P&B/RDJP 66–67; Steven Vandromme, 'De inzage in het strafdossier met het oog op het indienen van een verzoek tot opheffing van een onderzoekshandeling', note under KI 24 December 1999, [2001–2002] RW 1505; Raf Verstraeten, *Handboek Strafvordering* (5th edn, Maklu, 2012) 402.

[184] For the contrast in the case law between the positions of the Brussels indictments chamber and that of the Antwerp indictments chamber see Hans Van Bavel, 'Het strafrechtelijk kort geding: een jaar toepassing' [2000] P&B/RDJP 66; Damien Vandermeersch and O Klees, 'Chronique de jurisprudence: un an d'application de la loi du 12 mars 1998 relative à l'amélioration de la procécure pénale au stade de l'inormation et de l'instruction' [1999] JLMB 1600. The Court of Cassation has not been able to provide guidance since in principle no direct appeal against these decisions of the indictments chambers is possible.

[185] Chris Van den Wyngaert and Bart De Smet, *Strafrecht en Strafprocesrecht in hoofdlijnen* (book 2, Maklu, 2014) 585.

[186] CV, Cass 21 May 2003, P.03.0439.F, [2003] Arr Cass 1226; Illusion, Cass 5 October 2004, P.04.1122.N, [2004] Arr Cass 1525; MD, Cass 22 June 2005, P.05.0664.F, [2005] Arr Cass 1406; Never 2 Limited BP, Cass 17 October 2006, P.06.0846.N, [2006] Arr Cass 2028;

IV. Evidence in non-criminal proceedings against individuals: the use of undisclosed incriminating evidence

Detention or house arrest outside of criminal proceedings for people suspected of organized crime or terrorism is not possible in Belgium. The government proposed house arrest (enforced by electronic tagging) for terrorism suspects in 2016, but the proposal did not make it through parliament.[187] Thus, this short Section IV focuses on the freezing of assets which, in this scenario, is not a penalty but a security measure.[188]

Asset freezing is done at the instigation of the UN and the EU. In fact, Belgium was criticized for being too passive, as it waited until the EU had implemented the UN resolutions to enforce them itself. As a reaction to the criticism, the right to freeze assets of suspects on the UN list has been conferred on the secretary of finances.[189] However, this book chapter on Belgium is not the place to address these mechanisms extensively. Therefore, we will focus on asset freezing measures taken by the Belgian government independently of UN or EU measures.

The possibility to freeze assets was introduced in 2006.[190] A Royal Decree made it possible to freeze the assets of people who were identified by the European Council but also to freeze assets of other suspected terrorists and thereby create a national Belgian list, independent of the EU or UN lists.[191] The assets of people or entities

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Raf Verstraeten, *Handboek Strafvordering* (5th edn, Maklu, 2012) 339 and 400; Raf Verstraeten and Luk Delbrouck, 'Beslag in strafzaken' [2014] 79 OSS 133.

[187] List of counter-terrorism measures, plenary session of the chamber of representatives, 19 November 2015, http://www.premier.belgium.be/sites/default/files/articles/lijst%20van%20maatregelen%20-%20veiligheid%20Plenaire%20zitting%2019%2011%202015.pdf (last accessed on 26 September 2019).

[188] Frederic Vanneste, 'Het recht op toegang tot de rechter en de financiële strijd tegen het terrorisme' in Bernard Tilleman and Alain Laurent Verbeke, *Actualia vermogensrecht,* Liber Alumnorum KULAK (die Keure, 2005), 756.

[189] Francis Desterbeck and Jan Van Droogbroek, *De inbeslagneming en verbeurdverklaring in strafzaken in België* (Wolters Kluwer, 2017) 13.

[190] Royal Decree of 28 December 2006 on specific restrictive measures against certain persons and entities with the goal of combatting the financing of terrorism (*Arrêté royal de 28 decembre 2006 relatif aux mesures restrictives spécifiques à l'encontre de certaines personnes et entités dans le cadre de la lutte contre le financement du terrorisme; KB 28 december 2006 inzake specifieke beperkende maatregelen tegen bepaalde personen en entiteiten met het oog op de strijd tegen de financiering van het terrorisme*), confirmed by Art 115 of the Act of 25 April 2007 containing diverse provisions (*Loi de 27 avril 2007 portant des dispositions diverses (IV); Wet van 25 april 2007 houdende diverse bepalingen (IV)*); Sofie Lavaux, 'Recente overhreidsmaatregelen i.v.m. de "foreign fighters"' [2016] Panopticon 355.

[191] Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism; Arts 2 and 3 Royal Decree on specific restrictive measures against certain persons and entities with the goal of combatting the financing of terrorism (Arrêté royal de 28 decembre 2006 relatif aux mesures restrictives spécifiques à l'encontre de certaines personnes et entités dans le cadre de la lutte contre le financement du

who, it is suspected, 'commit or attempt to commit terrorist offences, who facilitate the committal or cooperate with the committal of those offences' and who appear on a list, drafted by the National Security Council, have to be frozen.[192] This piece of legislation lay dormant for almost ten years, but a list was eventually drafted in 2016 and has since been updated several times.[193] It was created and is updated based on evaluations made by the Coordination Unit for Threat Analysis (*OCAM; OCAD*) after recommendations from the federal prosecution service and approval by the council of ministers. At least every six months the list is re-evaluated by the National Security Council; the person subject to the asset freezing can at any time request reconsideration of his or her inclusion on the list by this Council.[194] This is a form of organized administrative review, but the legislation does not provide for any judicial review.[195] This lack of judicial review, among other things, could be a violation of existing European case law. Because of the recent nature of this measure, there appears to be no national case law yet. A potential option for a person subject to the freezing of assets would be to appeal the decision to the Council of State (Belgium's highest administrative judicial body), since it is the standard court of appeal for

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terrorisme; KB 28 december 2006 inzake specifieke beperkende maatregelen tegen bepaalde personen en entiteiten met het oog op de strijd tegen de financiering van het terrorisme).

[192] Art 3 Royal Decree on specific restrictive measures against certain persons and entities with the goal of combatting the financing of terrorism; Sofie Lavaux, 'Recente overheidsmaatregelen i.v.m. de "foreign fighters"' [2016] Panopticon 355; Frank Verbruggen, 'Terrorristenlijsten: oorsprong, functie en spanning met mensenrechten' in Jan Wouters and Cedric Ryngaert (eds), *Mensenrechten: actuele brandpunten* (Acco, 2008), 98.

[193] Royal Decree of 30 May 2016 on the establishment of a list of persons and entities as intended in Arts 3 and 5 of the Royal Decree of 28 December 2006 *(Arrêté royal de 30 mai 2019 établissant la liste des personnes et entités visée aux articles 3 et 5 de l'arrêté royal du 28 décembre 2006 relatif aux mesures restrictives spécifiques à l'encontre de certaines personnes et entités dans le cadre de la lutte contre le financement du terrorisme; KB 30 mei 2016 tot vaststelling van de lijst van personen en entiteiten bedoeld in artikelen 3 en 5 van het koninklijk besluit van 28 december 2006 inzake specifieke beperkende maatregelen tegen bepaalde personen en entiteiten met het oog op de strijd tegen de financiering van het terrorisme*). The most recent update was in November 2020, when one name was deleted from the list and twenty one names were added to it (*Arrêté royal de 8 novembre 2020 modifiant la liste des personnes et entités visée aux articles 3 et 5 de l'arrêté royal du 28 décembre 2006 relatif aux mesures restrictives spécifiques à l'encontre de certaines personnes et entités dans le cadre de la lutte contre le financement du terrorisme; KB van 8 november 2020 Koninklijk besluit tot wijziging van de lijst van personen en entiteiten bedoeld in artikelen 3 en 5 van het koninklijk besluit van 28 december 2006 inzake specifieke beperkende maatregelen tegen bepaalde personen en entiteiten met het oog op de strijd tegen de financiering van het terrorisme*). For an up to date version of this list, see https://finance.belgium.be/en/about_fps/structure_and_services/general_administrations/treasury/financial-sanctions/national (last accessed on 10 February 2021).

[194] Art 5 Royal Decree on specific restrictive measures against certain persons and entities with the goal of combatting the financing of terrorism.

[195] J Vande Lanotte, J Dujardin and M Van Damme, 'De administratieve en jurisdictionele beroepen', in J Dujardin, M Van Damme, J Vande Lanotte and A Mast, *Overzicht van het Belgisch Administratief Recht* (Wolters Kluwer, 2014) 855 and 860.

administrative decisions.[196] A person subject to such a measure who wanted damages could turn to the civil courts and make a claim based on Article 1382 Civil Code, which is the general provision for civil tort liability in Belgium.[197] This would require them to prove an error made by the state, damages, and a causal link between the two.

It appears unclear on what evidence these decisions are based, and the person subject to the asset freezing measure does not seem to have any form of access to the evidence against him or her. The entire procedure is based on undisclosed evidence.

Belgium also executes asset freezing measures imposed abroad. However, this is only done if the asset freezing abroad was ordered by judicial decision.[198] The procedures of Articles 28*sexies* and 61*quater* CCP described above are not applicable in this scenario.[199]

V. Assessment

When restrictive measures are applied (whether post- or pre-trial), the rights of the defence deserve adequate protection. Nevertheless, these rights of the defence are not absolute. As said, there may be competing interests that have to be balanced against the rights of the defence.[200] This balancing exercise is always tricky,

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[196] Art 14 RvS statute; Sabien Lust, 'Volle rechtsmacht, substitutie, injunctie en herstel' in Sabien Lust, Peter Schollen, and Stijn Verbist, *Actualia rechtsbescherming tegen de overheid* (Intersentia, 2014), 10; Frederic Vanneste, 'Het recht op toegang tot de rechter en de financiële strijd tegen het terrorisme' in Bernard Tilleman and Alain Laurent Verbeke, *Actualia vermogensrecht,* Liber Alumnorum KULAK (die Keure, 2005), 758.

[197] Frederic Vanneste, 'Het recht op toegang tot de rechter en de financiële strijd tegen het terrorisme' in Bernard Tilleman and Alain Laurent Verbeke, *Actualia vermogensrecht,* Liber Alumnorum KULAK (die Keure, 2005), 763.

[198] Francis Desterbeck and Jan Van Droogbroek, *De inbeslagneming en verbeurdverklaring in strafzaken in België* (Wolters Kluwer, 2017) 58 and 60.

[199] H v OM, KI Antwerpen, 23 November 1999, [2001–2002] RW 1178; VB, SA EBG, SA C, SA 3 I, KI Brussel 26 June 2000, [2001] RDPC, 589; Inge Gabriëls, 'Verhouding tussen de rechtspleging van de wet van 12 maart 1998 tot die bepaald voor de tenuitvoerlegging van rogatoire opdrachten op verzoek van buitenlandse gerechtelijke overheden', note under KI Antwerpen, 23 November 1999, [2001–2002] RW 1179–1180; Raf Verstraeten, *Handboek Strafvordering* (5th edn, Maklu, 2012) 450.

[200] *Fitt v UK*, ECtHR 16 February 2000, no 29777/96; vzw Ligue des droits de l'homme ea, Constitutional Court 21 December 2004, 202/2004, [2005] NjW 340; Orde van Vlaamse balies, Jo Stevens and vzw Liga voor Mensenrechten, Constitutional Court 22 September 2011, 145/2011, [2011] A GrwH 2433; ME, PP, ME, KY, Cass 23 August 2005, P.05.0805.N, [2005] Arr Cass 1520; TB, Cass 25 September 2007, P.07.0677.N, [2007] Arr Cass 1769; Jan Theunis, 'De toetsing aan grondrechten door het Grondwettelijk Hof – Overzicht van rechtspraak 2011' [2012] TBP 624; Steven Vandromme and Chris De Roy, 'Het vertrouwelijk dossier: Quo vadit?', note under GwH 21 December 2004, [2004–2005] RW 1296.

particularly when people's fundamental rights are at stake.[201] When talking about balancing, we seem to imply a certain degree of precision, that everything can be measured and compared.[202] This is obviously not the case. What exactly is the 'public interest', how far do a suspect's rights of defence go, how certain is it that an informant's safety is at stake, etc.? Risk is by definition an uncertainty.[203] The more serious the possible consequences (the death of an informant or the leaking of state secrets for example), the more we tend to overestimate the risk. As a final *caveat*, it is important to be aware of the danger of balancing the rights of the few (the defendants and suspects in this case) with the rights of the many (society). If we are not mindful of the presumption of innocence and the right to a fair trial, the balance might always tip in the same direction because of the sheer force of numbers of the latter.[204] While terrorism and organized crime are important issues to tackle, it is imperative to remember that there is a price to be paid for the extended powers given to the government, and it may indeed be a steep one. To put it in the words of the European Court of Human Rights:

> The Court, being aware of the danger such a law poses of undermining or even destroying democracy on the ground of defending it, affirms that the Contracting States may not, in the name of the struggle against espionage and terrorism, adopt whatever measures they deem appropriate.[205]

With these warnings in mind, it still remains necessary to carry out this balancing exercise when confidential information is at stake. Strong judicial oversight and adherence to due process rights wherever possible are good ways to avoid an

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[201] For example Andrew Ashworth, 'Security, Terrorism and the Value of Human Rights' in B Goold and L Lazarus (eds), *Security and Human Rights* (Hart Publishing, 2007) 203–226; Jeremy Waldron, 'Security and Liberty: The Image of Balance' [2003] 11 Journal of Political Philosophy 191–210; Lucia Zedner, *Security* (London, 2009), 134–137.

[202] Andrew Ashworth, 'Security, Terrorism and the Value of Human Rights' in B Goold and L Lazarus (eds), *Security and Human Rights* (Hart Publishing, 2007), 209–210; Lucia Zedner, 'Securing liberty in the face of terror: reflections from criminal justice' [2005] 32(4) Journal of Law and Society 512; Lucia Zedner, *Security* (London, 2009), 126–128.

[203] Jessica Wolfendale, 'Terrorism, Security, and the Threat of Counterterrorism' [2007] 30 Studies in Conflict & Terrorism 77–80; Lucia Zedner, 'Too much security?' [2003] 31 International Journal of the Sociology of Law 166; Lucia Zedner, 'Securing liberty in the face of terror: reflections from criminal justice' [2005] 32(4) Journal of Law and Society 512.

[204] Andrew Ashworth, 'Security, Terrorism and the Value of Human Rights' in B Goold and L Lazarus (eds), *Security and Human Rights* (Hart Publishing, 2007), 209; Jeremy Waldron, 'Security and Liberty: The Image of Balance' [2003] 11 Journal of Political Philosophy 201; Lucia Zedner, 'Securing liberty in the face of terror: reflections from criminal justice' [2005] 32(4) Journal of Law and Society 513–514; Lucia Zedner, *Security* (London, 2009), 135–136.

[205] *Klass v Germany*, ECtHR 6 September 1978, no 5029/71, A28, 49; Paul Van Santvliet, 'De commissie BIM uit de startblokken' [2011] 56 De orde van de dag 57.

unbalanced outcome.[206] As are the limitations of the evidentiary value of indirect evidence. So, how does the Belgian system fare?

As said, forms of undisclosed evidence exist only to a very limited extent in Belgian criminal procedure. When a suspect is in pre-trial detention, the rules are clear and the suspect has access to the file, besides the mentioned exceptions.[207] When he or she is subject to asset freezing measures, the situation is far less clear, but by and large the suspect will (after a few procedural stages) get access to the relevant evidence against him or her. At trial, the defence has full access to the file as well.

There are a few situations in which indirect evidence is used, but all in all the Belgian system seems to succeed rather well in balancing the rights of the defence with the competing interests of society (national security, safety of witnesses, the usefulness of investigatory measures for the future, etc.). However, there are definitely certain aspects of the system that should be cause for concern.

First, the task of reviewing the undisclosed evidence is handed to a body or court other than the trial courts deciding on the merits. The lawmaker wants to ensure a centralization of the supervision in the hands of the fewest people possible (also with a view to avoiding improper leaks). This choice could be defended on the ground that if every trial court had the right to access the secret evidence, the circle of those who could pierce the veil of secrecy would be very large. Furthermore, the legislature reasoned that if trial courts could have access to information undisclosed to the parties – which they could not use in their decision-making process – they might be unduly influenced by such knowledge.[208] Nevertheless, the current system has a considerable downside as well. It makes it very difficult for the trial court to properly assess the legality and even the credibility and veracity of the information contained

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[206] *Fitt v UK*, ECtHR 16 February 2000, no 29777/96; vzw Ligue des droits de l'homme ea, Arbitragehof 21 December 2004, 202/2004, [2005] NjW 340; Lucia Zedner, 'Securing liberty in the face of terror: reflections from criminal justice' [2005] 32(4) Journal of Law and Society 525–531.

[207] As explained above, it is possible that information gathered through special investigative techniques is not in the general file yet at the time a decision concerning pre-trial detention is made.

[208] This argument was explicitly made when introducing the system for the exclusion of illegally obtained evidence and the legislature explicitly referred to this system when introducing the review of undisclosed evidence. See: Expose des motifs de projet de loi de 19 décembre 1996 relatif à l'amélioration de la procédure pénale au stade de l'information et de l'instruction/Memorie van toelichting bij wetsontwerp van 19 december 1996 tot verbetering van de strafrechtspleging in het stadium van het opsporingsonderzoek en het gerechtelijk onderzoek, *Parl.St.* Kamer 1996–1997, no 49-857/1, 63 and Expose des motifs de projet de loi de 28 octobre 2005 apportant des modifications diverses au Code d'instruction criminelle et au Code judiciaire en vue d'améliorer les modes d'investigation dans la lutte contre le terrorisme et la criminalité grave et organisée/ Memorie van toelichting bij wetsontwerp van 28 oktober 2005 houdende diverse wijzigingen van het Wetboek van Strafvordering en van het Gerechtelijk Wetboek met het oog op de verbetering van onderzoeksmethoden naar het terrorisme en de zware en georganiseerde criminaliteit, *Parl.St.* Kamer 2005–2006, no 51-2055/001, 48.

in the file. It is only by knowing the source, the origin, or the way in which a certain piece of information was collected that a court can properly weigh the evidence available. In the case of anonymous witness testimony this problem is partly remedied by the assessment of the reliability made by the investigating judge, but no equivalent assessment is made in the other cases of indirect evidence.

Secondly, when information uncovered by the intelligence services is used as indirect evidence, the effective oversight on the legality of its collection remains dubious. The special administrative committee (BIM Committee) is responsible for supervision during the execution of special and extraordinary methods. Nonetheless some doubts are voiced that this Committee can exercise an independent and effective oversight.[209] A formal control on the legality can be requested to the Permanent Committee I, but only if the information is passed on by means of an unclassified report. The Constitutional Court endorsed the existing rules on the use of a non-classified report coming from the intelligence services, mostly because the evidence could only be used for corroboration.[210] For the Court, this entailed no breach of the adversarial principle. But the point of whether such procedure grants sufficient oversight remains open. Furthermore, if the information is passed on by the intelligence services in an informal way, outside of an unclassified official report, there is no possibility of oversight, which is highly problematic and would possibly not withstand a thorough test by the Constitutional Court.

Thirdly, the BOM procedure still contains several flaws. Throughout the years, a large number of constitutional implications have come to the attention of the Constitutional Court.[211] The Court quashed some of the provisions of the original statute because the lack of adequate judicial review breached the right to a fair trial and the right of defence. In a subsequent decision the Constitutional Court upheld the new legal construction which introduced the judicial review of the indictments chamber but without giving the parties the possibilities to access the confidential file.[212] The Court found that the limitation to the right of defence was justified in light of the need to provide for adequate means to counter the most serious forms of criminality. The Court pointed to two elements which were important in ensuring the adequate balancing of conflicting interests: the fact that confidential elements had to be

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[209] Johan Vanderborght and Bart Vangeebergen, 'De wet op de bijzondere inlichtingenmethoden: "la clé de voute" van de wettelijke omkadering voor de inlichtingendiensten?' [2011] 56 de orde van de dag 15; Bart Vangeebergen, *Het gebruik van inlichtingen in het strafproces* (Intersentia, 2017), 293–295; Paul Van Santvliet, 'De commissie BIM uit de startblokken' [2011] 56 De orde van de dag 51.

[210] Grondwettelijk Hof no 145/2011. Orde van Vlaamse balies, Jo Stevens and vzw Liga voor Mensenrechten, Constitutional Court 22 September 2011, 145/2011, § B.17.

[211] The Constitutional Court has delivered more than ten judgments over the rules on special policing techniques (Constitutional Court, nos 202/2004, 105/2007, 107/2007, 22/2008, 98/2008, 111/2008, 25/2009, 45/2009, 98/2009, 101/20009, 150/2009, 196/2009).

[212] LL et al, Constitutional Court 19 July 2007, 105/2007, [2007] NjW 695–700.

confined to what is strictly necessary for preserving the efficiency of the investigations and the integrity of the investigators and the fact that secret (undisclosed) elements could not be put to any judicial use. The Court has, however, given less attention to the parts related to the compatibility with the presumption of innocence of information that remains completely undisclosed. Despite the approval of the Constitutional Court, several issues remain. The indictments chamber only has to intervene at the very end of the investigation,[213] which means that restrictive measures taken during the investigations and based on illegally obtained information could protract for years without intervention. The indictments chamber is allowed to intervene earlier, but it does not have to do so simply because the suspect requests it.[214] If it does intervene earlier, this might pose a problem for its subsequent interventions in the same case. The indictments chamber still has to intervene on other occasions during the investigation and during these interventions it will have knowledge of the contents of the confidential file, while the suspect does not.[215] This means the suspect is unable to defend him- or herself on every single point which the court deciding the case has knowledge of.[216] The indictments chamber should not base its decision on information that was not disclosed to the suspect. However, it is very difficult to verify to what extent information from the confidential file was taken into account when making a decision.[217] Since the suspect never has access to the confidential file, he or she is to a large extent dependent on the indictments chamber to defend his or her rights.[218] Though problematic, this scenario might still be acceptable in light of the balancing exercise that the fight against the most egregious forms of criminality might require. Nonetheless, it should be clear that the balancing can be acceptable only in a restricted number of criminal cases.

Furthermore, it must be pointed out that the decision of the indictments chamber is *de facto* the only judicial decision concerning the respect of legality and of defence rights in the secret collection of evidence. An appeal to the Court of Cassation

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213 It is allowed to intervene earlier, but it does not have to do so simply because the suspect requests it; see Raf Verstraeten, *Handboek Strafvordering* (5th edn, Maklu, 2012) 771.

214 Raf Verstraeten, *Handboek Strafvordering* (5th edn, Maklu, 2012) 771.

215 Steven Vandromme and Chris De Roy, 'Het vertrouwelijk dossier: Quo vadit?', note under GwH 21 December 2004, [2004–2005] RW 1297.

216 A similar problem arises when the indictments chamber later has to refer the suspect to trial court. De Baets argues that there is no real problem here because the trial court (which does not have access to the confidential file either) still has to judge the case (Luiz De Baets, 'Het vertrouwelijk dossier: een noodzakelijk kwaad in strafzaken?' [2016] Nullum Crimen special edition April 2016, 39). This is true for that specific situation but does not apply to the situation mentioned in the text.

217 The indictments chamber has to motivate its decision. However, it is not excluded that judges might in fact decide on the basis of the undisclosed information, which is not included in the motivation.

218 Luiz De Baets, 'Het vertrouwelijk dossier: een noodzakelijk kwaad in strafzaken?' [2016] Nullum Crimen special edition April 2016, 58–59.

(a court that is not a trier of fact)[219] is possible but only after the court of appeal has ruled on the merits of the case at trial.[220] The suspect could be subject to pre-trial restrictive measures (which could even be extended until the end of the trial phase) for quite some time before the Court of Cassation has the opportunity to review the case.[221] In addition, the Court of Cassation does not have access to the confidential file either, which makes the scrutiny much less powerful.[222]

This problem is lifted to a whole other level for informants, where no judicial oversight is possible at all. This is highly problematic.[223] A voiced solution is that to make all informants and undercover agents wear a recording device.[224] This may not always be desirable from a safety perspective though, besides the problem of enforcing and verifying compliance with the rule.

In addition to all of this, there is no limitation of the evidentiary value of information gathered through special investigative methods. Only for civilian infiltration the code provides that the results can be used only to corroborate other evidence. It begs the question whether it is constitutionally appropriate to base a conviction solely on elements stemming from activities of secret policing. With regard to these activities the Constitutional Court found that the judicial oversight was sufficient to ensure a fair balance with defence and fair trial rights. Nonetheless the asymmetry with other cases of not fully disclosed evidence is remarkable and it appears strange that these elements can be put to full judicial use while the same is not true for anonymous witnesses or unclassified intelligence reports.

The non-disclosure of exculpatory evidence remains a weak point in the system. If informants uncover exculpatory evidence there is no way of making sure they actually pass it on to the prosecutor and no way of making sure the prosecutor in turn includes it in an official report. A similar problem presents itself when exculpatory evidence is uncovered by the intelligence services. In the case of observations, infiltrations, or civilian infiltrations, the indictments chamber could spot any unnecessary discrepancy between the confidential file and the general file, but it does not have a

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219 JM, FS, IB, Cass 27 April 2010, P.10.0578.N, [2010] Arr Cass 1211; AS, SS and NM, Cass 17 February 2016, P.16.0084.F, http://www.cass.be/.

220 Joost Huysmans, *Legitieme verdediging* (Intersentia, 2017) 426–429.

221 Jos Decocker et al, 'De wet van 5 februari 2016 tot wijziging van het strafrecht en de strafvordering en houdende diverse bepalingen inzake justitie (Potpourri II), gewikt en gewogen' [2016] T Straf 45–47; Joost Huysmans, *Legitieme verdediging* (Intersentia, 2017) 426–429.

222 Luiz De Baets, 'Het vertrouwelijk dossier: een noodzakelijk kwaad in strafzaken?' [2016] Nullum Crimen special edition April 2016, 44.

223 Tom Decaigny, *Tegenspraak in het vooronderzoek* (Intersentia, 2013) 252–253.

224 Luiz De Baets, 'Het vertrouwelijk dossier: een noodzakelijk kwaad in strafzaken?' [2016] Nullum Crimen special edition April 2016, 62. In a recent case, the Court of Cassation confirmed that it is not required that all contacts with an undercover agent are recorded. This would even make the execution undercover operations impossible in practice. See BLRA, RA and BS, Cass 2 February 2021, P.20.1054.N.

positive injunction right and thus cannot force the prosecutor to include that information in the file.[225] Even though the public prosecutor and the police are supposed to faithfully gather both inculpatory and exculpatory evidence, they sometimes get stuck in a too adversarial mind set.[226] Unlike other countries (e.g. Italy, where the accused can be acquitted if the evidence remains undisclosed), the current Belgian system offers no protection against the withholding of exculpatory evidence. Thus, new rules could be devised here, which make it possible to acquit the defendant whenever there is a significant probability that essential elements have remained concealed from the parties and the trial courts.

Finally, the procedure to get access to the file in cases of asset freezing is long and cumbersome. Suspects need to appeal before they get a right of access and even then it is unclear how far this right extends. More clarity and simplicity would definitely be a big step forward.

Regarding administrative measures, the fact that Belgium has, until now, not implemented any measures that would impose detention (in jail or house arrest) on terrorism and organized crime suspects is to be approved. Because of the severe impact on the rights of the defence, such measures are not to be taken lightly.

Belgium has, however, created the system of a national terrorism list (in addition to the UN and EU systems). The assets of people featured on this list are frozen. The evidence against them remains undisclosed and their only form of appeal explicitly included in the law is to request their removal from the very authorities that included them on the list in the first place. This is highly problematic. A step in the right direction would be to provide clarity regarding the possibility of an appeal to the Council of State. Even then, this use of undisclosed evidence in support of such an intrusive measure is an alarming development. Because this measure is relatively recent, it remains to be seen whether or not the Belgian constitutional legal order will find it acceptable and what amendments will be agreed on.

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[225] K, Cass 30 October 2001, P.01.1239.N, [2001] Arr Cass 1815; Steven Vandromme and Chris De Roy, 'Het vertrouwelijk dossier: Quo vadit?', note under GwH 21 December 2004, [2004–2005] RW 1297.

[226] De Baets conducted interviews with a public prosecutor, the president of an indictments chamber, and an attorney, and there is a sense that police officers sometimes do keep information from the public prosecutor on purpose: Luiz De Baets, 'Het vertrouwelijk dossier: een noodzakelijk kwaad in strafzaken?' [2016] Nullum Crimen special edition April 2016, 18, and 58. Although the author does not elaborate much on the research method, these interviews contain undoubtedly some very interesting points on possible dangers lurking in the daily practice.

Secret Evidence in Criminal Proceedings in England & Wales

Paul Jarvis

I. Evidence in the criminal trial

The system of criminal justice in England and Wales is adversarial and accusatorial.[1] In most cases, the police investigate an allegation of criminal wrongdoing and, once evidence has been gathered, the prosecutor will decide whether the person under suspicion should be charged with any criminal offence. These decisions are generally made by lawyers from the Crown Prosecution Service (CPS) applying the Code for Crown Prosecutors, which is updated periodically. The Code requires prosecutors to focus on the sufficiency of the evidence (Is there a realistic prospect that on the evidence a court would convict the suspect of a criminal offence?) and on the public interest in bringing a criminal prosecution against that suspect. Even where the evidence is sufficient, if the public interest comes down against a prosecution, then the suspect should not be charged with a criminal offence. If the person under suspicion is charged, they become a defendant and the prosecutor will take over conduct of the case against them. Their case will progress first to the magistrates' court and then, depending on the seriousness of the allegation, to the Crown Court, where any trial will take place before a judge and a jury.

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[1] See generally, A Ashworth and M Redmayne, *The Criminal Process* (4th ed. Oxford University Press 2010); and LH Leigh, 'English Criminal Procedure' in *English Public Law* (2nd ed. Oxford University Press 2009).

All criminal courts are required to act in accordance with the Criminal Procedure Rules as supplemented by the Criminal Practice Directions. The Criminal Procedure Rule Committee is responsible for updating the Rules, whereas the Lord Chief Justice updates the Practice Directions. Together, the Rules and the Practice Directions operate as a *de facto* criminal procedural code in England and Wales. The overriding objective of the Rules[2] is that criminal cases should be dealt with justly, and this includes dealing with cases 'efficiently and expeditiously', dealing with the prosecution and defence fairly, respecting the interests of victims and witnesses, and recognising the rights of defendants and, in particular, those rights contained in Article 6 of the European Convention on Human Rights (ECHR). The Practice Directions make it clear that in England and Wales a criminal trial is 'a search for truth in accordance with the twin principles that the prosecution must prove its case and that a defendant is not obliged to inculpate himself, the object being to convict the guilty and acquit the innocent'.[3]

The requirement for the prosecution to prove its cases means that it is incumbent on the prosecution to adduce evidence at a criminal trial that is probative of the defendant's guilt in relation to the offence with which he is charged. The defendant is required to assist the court to identify the issues in the case against him, but he cannot be required in a criminal trial to inculpate himself and so he is not under an obligation to assist the prosecution to prove its case against him. In order for evidence to be adduced against a defendant, it must be both relevant and admissible, and those requirements are different. Evidence may be relevant in the sense that it is probative of the defendant's guilt, but there may be some reason why that evidence is not admissible at trial at the behest of the prosecution, perhaps because the evidence is of a type where prior approval by the court is needed before it be can be adduced.[4] In such a situation, the Rules and the Practice Directions set out the procedure that will need to be followed by the party that seeks the court's approval for the admission of that evidence. The court may exclude prosecution evidence that is both relevant and admissible if it appears to the court that the admission of that evidence would unfairly prejudice the accused person.[5] There is no similar jurisdiction available to the court where the prosecution complains that the admission of evidence called by the defence would be prejudicial to its interests.

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[2] See Rule 1.1.

[3] See Practice Directions 1, §1A.1.

[4] As would be the case if the prosecution proposed to introduce hearsay evidence (governed by Chapter 2 of Part 11 of the Criminal Justice Act 2003) or evidence of the defendant's bad character (governed by Chapter 1 of Part 11 of the Criminal Justice Act 2003).

[5] Section 78 of the Police and Criminal Evidence Act 1984.

A. The use of incriminating 'indirect evidence'

1. Grounds for non-disclosure and competent authority

In addition to bearing the responsibility for proving its case against the accused person, the prosecution is also subject to an obligation to disclose to the defendant any material in its possession which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused himself.[6] The origin of the duty of disclosure lies in the principle of fairness.[7] This duty of disclosure was first formulated by the common law of England and Wales in the second half of the twentieth century, but it was not until the latter part of the last century that it found statutory form following recommendations made by the Royal Commission on Criminal Justice that reported in 1993.[8] For trials on indictment in the Crown Court, the statutory duty of disclosure arises when the defendant's case first arrives in the Crown Court and ends once the proceedings in the Crown Court have reached their conclusion, whatever that conclusion may be. After that point, a more limited common law duty of disclosure persists, which will govern disclosure in relation to appeals, for example.[9]

However, the duty of disclosure is not absolute. Where an important public interest would be prejudiced in the event of disclosure being made, the prosecution can petition the court to permit it to refuse to disclose the material to the defendant. The sort of material that is likely to attract this type of public interest immunity includes material relating to national security or material relating to the identities or activities of police informants.[10]

The duty of disclosure attaches to material in the possession of the prosecution and which does not form part of the prosecution's case against the defendant. This is often known as unused material. If the prosecution is in possession of material that it wishes to adduce against the defendant, then that material must be served on the defendant. This is often known as used material. Unlike unused material, there is no *general* mechanism by which the prosecution can seek to withhold used material from the defendant, whether in whole or in part. The defendant is entitled to know what that used material is except in the circumstances considered below. If the admission of the used material at the defendant's trial could prejudice an important public interest, then the usual way to protect that interest is for the prosecution to

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[6] See section 3 of the Criminal Procedure and Investigations Act 1996, as amended and Chapter 7 of D Corker and S Parkinson, *Disclosure in Criminal Proceedings* (Oxford University Press 2008).

[7] *R v H* [2004] 2 AC 134, at para 14, per Lord Bingham of Cornhill.

[8] Known as the Runciman Commission.

[9] *R (Nunn) v Chief Constable of Suffolk Police* [2014] UKSC 37; [2015] AC 225.

[10] For a non-exhaustive list see para 6.12 of the Code of Practice to the Criminal Procedure and Investigations Act 1996.

decline to adduce that material, in which case it would become unused material and its disclosure to the defence would be subject to the public interest immunity jurisdiction.

There may be instances where the prosecution is in possession of a piece of evidence only some of which it wishes to deploy against the defendant at his trial. That could be the case, for example, where the prosecution has extensive mobile telephone records pertaining to the defendant but only intends to adduce some of those records as part of its case, or where the prosecution has covert recordings of conversations between the defendant and someone else and only seeks to adduce in evidence those parts of the conversation where the defendant implicates himself. In such a situation, the prosecution would be perfectly entitled to serve as used material the parts of those records that it wishes to adduce at the trial and then retain as unused material the remainder. Whether that remainder falls to be disclosed to the defence and, if so, in what form, would be a matter to be determined by reference to the usual rules on disclosure.

There are certain *specific* statutory exceptions that permit the prosecution to shield parts of the used material from the defence. The most obvious example of this is where the witness who is to give evidence for the prosecution is fearful for her safety should she incriminate the defendant in her testimony. There are a number of mechanisms in English law to facilitate the giving of evidence by witnesses, and these include the provision of screens so the witness can be shielded from the defendant or the provision of a live link so the witness can give evidence over a video link from another part of the court building or from another building altogether,[11] but special measures such as these do not involve withholding important information from the defence about the witness. Even where the witness is screened from the defendant so the defendant cannot see her, she will be visible to the defendant's lawyers, and if her appearance may be significant for the defence case, then it may be possible for the defendant to see a photograph of her so he can decide whether she is someone whom he recognises or not. However, where the witness is fearful of repercussions should the defendant be able to identify her, then these measures will not go far enough and the courts will be called upon to take steps to withhold from the defendant and his lawyers information about the witness that they would otherwise be entitled to know, such as her name and other personal details that could lead to her identification.

It is a long-established principle of the English common law that the defendant in any criminal trial should be confronted by his accuser so that he can effectively challenge that person's evidence.[12] That principle originated in ancient Rome,[13] but in

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[11] See Chapter 1 of Part 2 of the Youth Justice and Criminal Evidence Act 1999.

[12] *R v Davis* [2008] 1 AC 1128.

[13] D Lusty, "Anonymous Accusers: An Historical and Comparative Analysis of Secret Witnesses in Criminal Trials" (2002) 24 Sydney Law Review, 361, 363–364.

medieval times the Court of Star Chamber in England was not averse to ignoring the principle where national security interests were at stake. In such cases, it was not uncommon for the court to hear evidence from anonymous witnesses and even to take evidence in secret away from open court. The Court of Star Chamber was abolished by the Long Parliament in 1641 whereupon the aforementioned principle was reaffirmed even in cases where matters of national security were at stake. Thereafter, the principle came to be recognised as an inviolable feature of the English common law.[14]

Little by little though the courts of England and Wales made inroads into this principle during the course of the twentieth century to the point that in one well-known case, where several witnesses to a murder were in fear for their lives should their names become known to the defendant, the trial judge permitted their personal details (including their names and addresses) to be withheld from the defence. The trial judge also allowed the witnesses to give evidence under pseudonyms and from behind screens so that the jury but not the defendants could see them, and, in circumstances where their voices would be subject to mechanical distortion, to prevent anyone from recognising them. Upon conviction, the defendant appealed to the Court of Appeal (Criminal Division) on the ground that the proceedings had been unfair because he had been denied the opportunity to confront these witnesses. That court dismissed his appeal, but on appeal to the House of Lords, his appeal was allowed. The House of Lords unanimously concluded that measures imposed by the trial judge 'hampered the conduct of the defence in a manner and to an extent which was unlawful and rendered the trial unfair'.[15]

That decision prompted an immediate review of the use of so-called anonymous witness evidence in the criminal courts. Within one month of the judgment being handed down, the UK Parliament had enacted the Criminal Evidence (Witness Anonymity) Act 2008 to govern the admissibility of anonymous witness evidence. That statute was replaced by the Coroners and Justice Act 2009 as of 1 January 2010 and so now a statutory framework exists in England and Wales for the court to sanction the withholding of important information from the defence where specific criteria are met. Those criteria are, first, that a witness anonymity order is necessary to protect the safety of the witness or in order 'to prevent real harm to the public interest',[16] secondly, that the proposed order would be consistent with the defendant receiving a fair trial[17] and, thirdly, the importance of the witness's testimony is such that they

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[14] In his *Rationale of Judicial Evidence* (1827), vol 2, bk III, Jeremy Bentham criticised the practice in continental Europe, as he saw it, of taking evidence in secret because this left the door "wide open to mendacity, falsehood and partiality" (at p. 423).

[15] Para 35, per Lord Bingham of Cornhill in *Davis*.

[16] Section 88(3). This could cover, for example, the operational or strategic interests of law enforcement agencies or cases that concern diplomatic relations or delicate foreign affairs.

[17] Section 88(4).

ought to testify and either the witness would not testify if the proposed order were not made or there would be real harm to the public interest if the witness were to testify without the order being made.[18] Thus, the UK Parliament has put in place a number of safeguards, the most significant of which is that a witness cannot be permitted to give evidence anonymously if to do so would be inconsistent with the defendant's right to a fair trial.

2. Forms of indirect evidence

The evolution of the approach of English law to the admissibility of the evidence of anonymous witnesses provides a useful illustration of how the domestic courts have dealt with certain forms of indirect evidence more generally. First, a form of indirect evidence comes to be used in the courts without any apparent concern being expressed by the parties to the criminal proceedings or even by the judge. Secondly, the use of that indirect evidence increases to the point where it becomes an accepted form of evidence, normally shorn of the sort of safeguards that should be in place to protect the defendant's right to a fair trial. Thirdly, a convicted defendant takes a point on appeal to the higher courts complaining that the introduction of that indirect evidence in his case infringed his rights and resulted in an unsafe conviction. Fourthly, and finally, the higher courts either (i) declare that that form of indirect evidence should not be admissible in domestic criminal proceedings (as happened with anonymous witness evidence) subject to legislation by the UK Parliament or (ii) declare that the form of indirect evidence is admissible provided the lower courts follow a particular framework of admissibility set out by the higher courts to ensure that the defendant's rights are properly protected.

One example of the latter approach can be seen in relation to evidence of a defendant's association with criminal gangs, or what is sometimes referred to as 'gang evidence'. In some cases the defendant's membership of a particular gang could be an important piece of evidence against him. In seeking to establish that the defendant is a member of a gang, the prosecution will often rely on the evidence of a police officer with particular knowledge of the gang in question and who can speak as to the defendant's membership of one of that gang. However, there are obvious dangers in the prosecution simply inviting a police officer to express an opinion in court about whether the defendant is a member of a gang not least because the basis for that opinion may not be entirely clear to the defence. Indeed, it may be that the police officer's opinion is the product of her own observations of the defendant and comments made to the officer by others, including comments made by police informers (CHISs),[19] whose identity the police officer would obviously not wish to reveal to the defence. An opinion of this sort may also be based on material that could not be

[18] Section 88(5).

[19] Covert human intelligence sources.

admitted in evidence against the defendant without the leave of the court. That would include evidence of the defendant's bad character and hearsay, neither of which are admissible in a criminal trial in England and Wales unless the requirements in the relevant statutes are met.[20]

The general rule in English law is that only experts can express opinions and, to qualify as an expert, the person who it is proposed will give that evidence must cross a threshold of expertise. There is no reason in principle why a police officer cannot qualify as an expert provided they cross that threshold. A police officer who has special training in the investigation and reconstruction of road traffic accidents is capable of giving expert opinion evidence about the cause of a vehicular collision[21] and, equally, a police officer who is familiar with the customs and practices of drug users is capable of expressing an opinion about the street value of certain types of drugs.[22]

In the case of *Myers v The Queen,*[23] Lord Hughes, delivering the judgment of the Privy Council, said that by extension there is no reason why a police officer should not be permitted to give evidence about gang affiliation provided the officer has 'made a sufficient study, whether by formal training or through practical experience, to assemble what can properly be regarded as a balanced body of specialised knowledge which would not be available to the tribunal of fact'.[24] Lord Hughes emphasised that once a police officer qualifies as an expert witness in this way, she will have to assume all of the responsibilities of an expert witness, which means that the officer will have to give unbiased opinion evidence uninfluenced as to the form or content of that evidence by her association with the prosecution.[25] It follows that a police officer in such a position will be required to reveal to the defence 'any material which weighs against any proposition which he is advancing, as well as all the evidence on which he has based his proposition'[26] that the defendant is a member of a particular gang.

It is well-established in English law that an expert is entitled to rely on theories, concepts, and data produced by the expert's peers and colleagues in forming her own opinion, which she then presents in court.[27] That approach has drawn some criticism

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[20] See fn. 4.

[21] *R v Oakley* [1979] RTR 417.

[22] *R v Hodges* [2003] 2 Cr App R 15.

[23] [2015] UKPC 40; [2016] AC 314.

[24] [58].

[25] See *National Justice Cia Naviera SA v Prudential Assurance Co Ltd (The Ikarian Reefer)* [1993] 2 Lloyds Rep 68 at 81, and *R v Harris* [2006] 1 Cr App R 5, paras 271–272. See also Part V of the Criminal Practice Directions and Part 19 of the Criminal Procedure Rules.

[26] *Myers* [60].

[27] *R v Abadom* [1983] 1 WLR 126.

on the basis that it could allow an expert to give all sorts of what would otherwise be inadmissible hearsay evidence at trial without the leave of the court.[28] The English courts are alive to these concerns, which is why Lord Hughes in *Myers* made it plain that just because a witness is an expert it does not follow that she is 'immune from all inhibition on hearsay'.[29] In the context of gang evidence, it would not be permissible for the police officer simply to report that according to one of her colleagues the defendant had been seen wearing gang colours where that colleague was available to give evidence about what he had seen with his own eyes. Lord Hughes drew a distinction between opinion evidence properly informed by hearsay information (in which case that hearsay evidence was admissible in support of the opinion expressed by the expert) and 'specific evidence of observable fact, which has to be proved in a manner which satisfies the ordinary rules of evidence'.[30] In this sense, the police expert giving evidence about the defendant's association with a particular gang is more likely to be able to base her opinion on information coming to her from other people where that information is the product of 'general study'[31] than where it amounts to simple factual observations about what the defendant has or has not done in the past. Where the opinion is based on the observations of others, then the prosecution will either need to call the observing witness to give evidence about what they saw or seek the court's permission to adduce that evidence in written form as a hearsay statement.

In criminal proceedings in England and Wales, a statement not made in oral evidence in those proceedings is admissible as evidence of the matter stated, but only if either (i) all the parties to the proceedings are in agreement that it should be admissible or (ii) any provision of Chapter 2 of Part 11 of the Criminal Justice Act 2003 (ss 114–136) makes it admissible. For these purposes a statement is any representation of fact or opinion made by a person by whatever means and a matter stated is one where the purpose or one of the purposes of the person making the statement appears to the court to have been to cause another person to believe the matter or to cause another person to act or a machine to operate on the basis that the matter is as stated.[32] To illustrate this with an example, suppose a third party made a note that the defendant to criminal proceedings had a particular mobile telephone number. If that note was solely for the benefit of the third party himself (because he was worried he would otherwise forget what the defendant's mobile telephone number was), the note would *not* be hearsay evidence because it was not one of the third party's purposes in writing the note that anyone else would see it or act upon it. In such a

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[28] See, for example, P Roberts and A Zuckerman, Criminal Evidence (2nd ed. Oxford University Press 2010), at p. 417–418.

[29] [64].

[30] [65]. See also *English Exporters (London) Ltd v Eldonwall Ltd* [1973] Ch 415 and *R v Cluse* [2014] 120 SASR 268 at [2], per Kourakis CJ.

[31] *Myers* [66].

[32] Section 115(1) and (2) of the 2003 Act.

situation the note would be admissible at the defendant's trial to prove that the number written on the note was his mobile telephone number, subject to the court's jurisdiction to exclude that evidence. However, if someone asked the third party for the defendant's mobile telephone and the third party wrote it on a note and handed it to that other person, the note would be hearsay because it was the purpose of the third party that that other person should believe that the number written on the note was the defendant's mobile telephone number. In that situation, the matter stated in the note would be hearsay, and if the prosecution wished to adduce it as evidence against the defendant, then, in the absence of agreement, they would have to look to the provisions of the 2003 Act for a route to admissibility. Those provisions are not without their complexities, but in short form the hearsay evidence will be admissible where the maker of the statement has died or is unavailable to give evidence for other good reason, where the statement is contained within a business document, where some special rule of common law deems the statement to be admissible (such as *res gestae*), or where it would be in the interests of justice to admit the evidence. There is no requirement in English law that the hearsay evidence has to be reliable before it can be admitted,[33] but the legislation does create a number of counter-balancing safeguards that are designed to ensure that the defendant's trial is a fair one notwithstanding the admission of hearsay evidence against him. In the context of 'gang evidence', where the officer's opinion as to the defendant's membership of a gang is based on the observations of others, the first issue will be whether the fruits of those observations qualify as hearsay evidence or not. Where the observer relays their observations to someone else intending that person to believe what the observer is telling them, then the observer's comments clearly will be hearsay and so the prosecutor at trial who wishes to ask the officer in evidence about those observations will either need agreement from the defence or the leave of the court before doing so. Whether the court grants leave or not may well turn on why the observer himself cannot give that evidence.

Importantly, the Privy Council in *Myers* set out guidelines for how gang evidence should be presented in future cases. First, the police officer must set out in writing her qualifications for being able to give gang evidence. Secondly, the police officer must state not only her conclusion (that the defendant is a member of a particular gang) but how she arrived at that conclusion, and in particular whether her conclusion is based on her own observations or on information provided to her by others. If that information has been provided to her by other police officers, then she must show how that information has been collected, recorded, and exchanged. If that information has been provided to her by informers, then she must acknowledge that fact, although Lord Hughes stressed that the police officer would not be required in such circumstances to identify the name of the informer. All of this information should be set out in a written statement signed by the police officer. If the information

[33] *R v Riat & Others* [2013] 1 Cr App R 2.

in the statement is deficient, then the trial judge can direct the prosecution to provide more information to the defence. Where the prosecution fails to remedy those deficiencies, then the trial judge could, on the application of the defence under section 78 of Police and Criminal Evidence Act 1984, exclude the police officer's evidence altogether.

Although *Myers* was not the first occasion on which the courts in England and Wales have had to consider the admissibility of gang evidence,[34] and it certainly will not be the last either,[35] it does mark the first time the courts grappled with the obvious unfairness that can be caused to the defence by the indiscriminate admission of such evidence and suggested a way of ameliorating the position so that in future the defence will know the basis upon which the conclusions of the expert police witness have been arrived at. Of course, *Myers* does not require the expert to reveal the precise source of every piece of information that informs her opinion. If some of that information comes from a CHIS, there is no requirement for the prosecution to give the name of that informer to the defence, but it is a rule in English law that the court cannot admit hearsay evidence from an anonymous source,[36] and so if the police officer who is to give evidence receives information from a CHIS that he, the CHIS, saw the defendant fraternising with members of a particular criminal gang, the observations of the CHIS cannot be admitted in evidence through the police officer unless the identity of the CHIS is made known. The situation may be different where the source of the observation is unknown rather than anonymous, in which case with the leave of the court the officer *could* give evidence about information received from such an unknown source, but it is highly unlikely the court would give leave in such circumstances, and even if the conditions for admissibility were met, the defence would no doubt seek to exclude that aspect of the police officer's evidence on the basis that it would be unfair to the defence to permit such evidence to be given where so little is known about who provided the information to the police and for what reason. In this way, the decision in *Myers* illustrates the willingness on the part of the English courts to regulate the use of indirect evidence by providing an appropriate framework for its admission, thereby preserving the defendant's right to a fair trial both at common law and under Article 6 of the ECHR.

3. Judge's access to an undisclosed source

There are likely to be a number of situations where the judge but not the jury will have access to the name or identifying details of a source of indirect evidence that is being withheld from the defendant and this can include such further information

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[34] See also *R v Lewis & Others* [2014] EWCA Crim 48.

[35] See *R v Awoyemi & Others* [2016] EWCA Crim 668; [2016] 4 WLR 114.

[36] *R v Ford* [2011] Crim LR 475.

about the source of the indirect evidence that the prosecution places before the judge in order to secure the order that permits it to adduce that evidence before the jury.

Where the prosecution is in possession of unused material that derives from a CHIS, for example, it may be that the information provided by the CHIS is disclosable to the defence but the identity of the CHIS is not. In such a case there is no difficulty because the prosecution can disclose to the defence that it is in receipt of certain information and then proceed to set out what that information is without revealing the source of that information.

In other cases, the identity of the CHIS himself may be disclosable to the defence because, for example, he may have first-hand knowledge of a matter that goes directly to the heart of the defence case in circumstances where the defence would ideally wish to call that witness as part of its case, or at the very least take advantage of an opportunity to speak to that witness in more detail about what he saw or heard. In the situation where the identity of the CHIS is disclosable to the defence, the prosecution would seek the permission of the court not to reveal the CHIS's name to the defence pursuant to the public interest immunity procedure. The courts have observed in the past 'an increasing tendency for defendants to seek disclosure of informants' names and roles, alleging that those details are essential to the defence. Defences that the accused has been set up and duress, which used at one time to be rare, have multiplied. We wish to alert judges to the need to scrutinise applications for disclosure of details about informants with very great care. They will need to be astute to see that assertions of a need to know such details, because they are essential to the running of the defence, are justified. If they are not justified, then the judge will need to adopt a robust approach in declining to order disclosure. […] Even where the informant has participated, the judge will need to consider whether his role so impinges on an issue of interest to the defence, present or potential, as to make disclosure necessary.'[37]

Non-disclosure of the names of CHISs is justified, according to Lawton LJ in *R v Hennessey (Timothy)*,[38] 'not only for their own safety but to ensure that the supply of information about criminal activities does not dry up', and in *D v National Society for the Prevention of Cruelty to Children,*[39] Lord Diplock said 'the rationale for the rule as it applies to police informers is plain. If their identity were liable to be disclosed in a court of law, those sources of information would dry up and the police would be hindered in their duty of preventing and detecting crime.' Whenever the disclosure of the identity of a CHIS falls to be considered by the court, then it is axiomatic the court will need to be made aware of who the CHIS is so it can decide whether to protect his identity from disclosure.

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[37] Lord Taylor LCJ said in *R v Turner* [1995] 2 Cr App R 94, at 97–98.

[38] (1978) 68 Cr App R 419, 426.

[39] [1978] AC 71.

Equally, where an application is made for a witness anonymity order pursuant to the provisions of the Coroners and Justice Act 2009, the court will be made aware of the identity of the witness to be called. Such an application can be made by either the prosecution or the defence, but there are two important differences depending on which party to the criminal proceedings is making the application. Where an application is made by the prosecution, the prosecutor must, unless the court directs otherwise, inform the court of the identity of the witness, but she is not required to disclose the identity of the witness to the defendant or to his legal representatives.[40] Where the defence makes the application, the defendant must inform both the court and the prosecutor of the identity of the witness, but he is not required to disclose that identity to any other defendant in the case.[41] It follows that whereas the prosecution can invite the court to direct that the prosecution does not have to disclose the identity of the witness to the court itself, where the anonymity application is made by the defence, the court cannot permit the defence to withhold the name of that witness from the court. It also follows that the prosecution can withhold the identity of their witness from the defence, but the defence must disclose the identity of their witness to the prosecution.

Where the prosecution makes the application, the hearing before the court will be in private in the sense that the public and the press will be excluded. The court even has the power to exclude the defendant and his representatives from the hearing if it appears appropriate to the court to do so.[42] In such a situation, it is incumbent on the prosecutor when presenting the application to 'put her defence hat on' in the sense that she must set out for the court the arguments the defence would have made if they had been in a position to make them.[43] A recording of the proceedings will be made in accordance with Part 5.5 of the Rules and kept in a secure place. The court is required to rigorously scrutinise the prosecution's application in order to determine whether the statutory criteria for the granting of a witness anonymity order are made out. In exceptional cases where the information provided to the court was served in confidence and there are good reasons why that information should not be placed before the defendant or his representatives, the court can invite the Attorney General to instruct a special advocate to assist. The special advocate acts like the defendant's representative save that she is not permitted to share the confidential information with the defendant in the course of her instruction.[44] The court must pronounce its decision in public and give reasons, although those reasons should not in any way reveal the identity of the witness. If a witness anonymity order is granted, the criteria under which the court permitted the application must be kept under review. If it

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40 Section 87(2).

41 Section 87(3).

42 Section 87(7).

43 *R v Donovan and Kafunda* [2013] 2 Archbold Review 3, Court of Appeal.

44 PD 18D.14.

subsequently appears that those criteria are no longer met, then the order can be varied or even discharged.

It is worth emphasising that the regime under the 2009 Act for the introduction into a criminal trial of anonymous witness evidence does not permit any party to adduce anonymous hearsay evidence and so neither the prosecution nor the defence can utilise those provisions in order to seek to read out to the jury the content of the statement of an anonymous witness. If an application for a witness anonymity order is successful, the party that wishes to adduce the evidence of that witness will have to call that witness to give evidence their account can be the subject of challenge.

4. Suspect's access to an undisclosed source

In witness anonymity proceedings the prosecutor is at liberty to disclose to the defence the identity of the witness, but in practice that would never happen. Neither the defendant nor his representatives have any right to be informed of the identity of a witness who has been made the subject of a witness anonymity order. If the court does not grant the order and the prosecution still wishes to rely on the evidence of that witness, then his or her identity will have to be disclosed to the defence. The only way the prosecution can avoid revealing the identity of that witness to the defence is by no longer relying on them as a witness in the case against the defendant.

5. Evidentiary value

It will be a matter for the tribunal of fact to decide what weight to attach to the evidence of a witness, whether the identity of that witness is known or unknown and whether the sources of information relied upon by that witness are known or unknown. In Crown Court cases the tribunal of fact is the jury, and the jurors will be assisted in their task by directions from the trial judge. Trial judges in England and Wales are aided in their task of directing juries by The Crown Court Compendium, which is issued by the Judicial College. The current version was published in December 2019. Since 1987, first the Judicial Studies Board and then the Judicial College have provided guidance for full and part-time judges summing up cases in the Crown Court. The current version of the Compendium contains a number of examples of directions that can be given to juries depending on the issues in any particular case.

As to anonymous witnesses, the Compendium stresses[45] that the trial judge will need to carefully direct the jury so as to ensure that no unfair prejudice to the

[45] At §3.40. Section 90(2) of the Coroners and Justice Act 2009 states that where a witness has given evidence anonymously, the 'judge must give the jury such warning as the

defendant is drawn from the use of such a witness and in doing so she should highlight the disadvantages faced by the defendant on account of his inability to know the identity of the witness who has given evidence against him.[46] In two cases from the Court of Appeal,[47] the trial judge's directions to the jury were expressly approved and the direction from the second of those cases is set out in the Compendium.[48] Once the jury has been provided with appropriate directions from the trial judge, it will be a matter for the members of the jury to decide what value they attach to evidence of this type.

6. Appeals proceedings

The structure of the appellate system in England and Wales is not without its complexities. Where a case is tried in the Crown Court in front of a judge and a jury, in the overwhelming majority of cases the defence will have no interlocutory rights of appeal against decisions of the trial judge. In those cases the only right of appeal afforded to the defence is following a conviction.[49] It follows that the defence cannot challenge a decision of the trial judge to permit a witness to give evidence anonymously, for example, unless the defendant is convicted and it is arguable that the trial judge's decision adversely affected the safety of that conviction. However, a judge of the Crown Court does have the power, in limited circumstances, to hold what is called a preparatory hearing in advance of trial[50] where the case concerns serious fraud or is complex in some other way. Any rulings made by the judge in the course of such a hearing can be taken on appeal by the defence to the Court of Appeal. It is very unlikely that the prosecution will make a witness anonymity application in a case that could qualify for a preparatory hearing because witness anonymity orders tend to be the preserve of cases of violence where the witness is in fear for their personal safety rather than in cases of fraud.

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judge considers appropriate to ensure that the fact that the order was made in relation to the witness does not prejudice the defendant'.

46 See also *Ellis v UK* [2012] ECHR 813.

47 *R v Mayers* [2008] EWCA Crim 2989 and *R v Nazir* [2009] EWCA Crim 213.

48 At §3.41. The direction states that the jury should not hold it against the defendant that the witness has given evidence anonymously and goes on to state – 'You must also bear in mind that [the defendant] is particularly disadvantaged by the conditions of the anonymity of the witness. It is a pretty fundamental principle that the person is entitled to know the identity of his or her accuser. If the identity is known, then the defendant may be able to say "Oh, well I am not surprised that X would want to incriminate me or because so and so that happened or that applies to us" i.e. because of some bad feeling or grudge between the witness and the defence'.

49 See section 1 of The Criminal Appeal Act 1968.

50 See sections 9(11)–9(14) of the Criminal Justice Act 1987 and section 35 of the Criminal Procedure and Investigations Act 1996.

B. The use of undisclosed incriminating evidence

Undisclosed incriminating evidence consists either of information that is used against a suspect without that information having been disclosed to the suspect and his lawyer or of information that is used against the suspect with that information having been disclosed to the suspect's lawyer but not to the suspect himself. As to the second of these meanings, there are very limited circumstances indeed where the suspect's lawyers are prohibited from sharing information with him that the lawyers have obtained from the police or prosecutors. Where such a prohibition exists, it tends to be for the purposes of protecting victims or witnesses. So, by way of example, in certain cases where a witness is vulnerable,[51] her account of events will be recorded by the police in a procedure known as 'Achieving Best Evidence'. A transcript of that recording will be prepared by the police, but the recording itself can be adduced in evidence by the prosecution as part of its case.[52] If the prosecution proposes to adduce that recording, then it will serve the recording on the suspect's lawyers provided the lawyers sign an undertaking that they will not share the recording with the suspect. The suspect is perfectly entitled to view the recording with his lawyers, but he will not be permitted to retain a copy of the recording himself so although the information provided to his lawyers (the recording) is not kept from him, his ability to access the information at his own leisure is strictly prohibited. That is an exception to the general rule that where documents are provided to the suspect's lawyers, they are free to provide copies of them to the suspect, although he will remain under a statutory restriction not to share those documents with others.[53]

As to the first type of undisclosed incriminating evidence, namely evidence that is not provided either to the suspect or to his lawyer, that has been dealt with in the preceding section. To reiterate, the prosecution will not be permitted to rely on evidence against the suspect which neither he nor his lawyers have seen. There may be circumstances where the identity of the person giving the evidence will be withheld from the suspect and his lawyers, and even more cases where the identity of the witness is known but the defendant (and possibly his lawyers) is precluded from seeing the witness because he or she will be shielded from the defence in court.

Equally, there are no circumstances where the court at trial will be permitted to rely on information that is unfavourable to the defendant when making decisions

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[51] Typically, where the witness is said by the prosecution to the victim of sexual abuse or where the witness is a child.

[52] See fn. 11.

[53] Where the information handed to the suspect by his lawyers consists of disclosure made by the prosecution in furtherance of its disclose obligations section 17 of the Criminal Procedure and Investigations Act 1996 prohibits the suspect from using that material for any purpose unconnected to the criminal proceedings themselves. The suspect would be in breach of this prohibition if, for example, he chose to share that material with his friends or to post it on social media.

about the defendant himself without the defendant and his legal representatives being made aware of that information. So when sentencing the defendant, the court cannot receive information prejudicial to the defence without making the defence aware of what that information is. There is no mechanism in English law whereby material harmful to the defence can be relied upon by the sentencing court without being disclosed to the defence first so that the defendant's lawyers can make submissions in relation to it.

The position may be different where the information is helpful to the defence. Where the defendant is a CHIS or where he has provided relevant information to the authorities in advance of the sentencing hearing, he can request what is called a 'text'. The 'text' sets out for the benefit of the sentencing court the information provided by the defendant and an assessment of its value to the police as determined by the defendant's handler. The 'text' may be provided to the court without a request from the defence and without the defendant's lawyers even knowing that he is a co-operating informer. The content of the 'text' will not be shared with the defendant or with his lawyers. It will be handed to the sentencing judge for her to read elsewhere than in open court, before being handed back to the authorities. In court no overt reference will be made to the content of the 'text', although the sentencing judge will reflect the assistance given by the defendant in the length of the sentence she imposes upon him.[54]

C. Remedies against non-disclosure

Where the prosecution seeks to rely on indirect evidence and the judge in the Crown Court permits that course then, as already stated, there is no mechanism in the majority of cases whereby the defence can seek to challenge the decision of the judge prior to conviction. If the defendant is convicted, then he can seek leave to appeal against his conviction to the Criminal Division of the Court of Appeal. That would not be an appeal against the decision made by the trial judge but an appeal against the safety of the defendant's conviction, his argument being that the erroneous decision of the trial judge had, in some way, compromised the proceedings against him to such an extent that his conviction cannot be regarded as safe. That was the argument advanced by the convicted defendant in the case of *Davis*,[55] who successfully submitted before the House of Lords that the trial judge's decision to permit the use of anonymous witness evidence against him had led to his trial being unfair and hence his conviction being unsafe. However, even if the appellate courts

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[54] In *R v Emsden* [2015] EWCA Crim 2092; [2016] Cr App R (S) 62 the Court of Appeal emphasised, at [21] that – "Of importance will be a consideration of the quality and value of the assistance given and a consideration of whether the assistance brought to justice persons who might not otherwise have been brought to justice."

[55] See fn. 12.

conclude that the decision reached by the trial judge was wrong, it does not necessarily follow that the ensuing conviction will be unsafe. The Court of Appeal will examine with care the relationship between the ruling impugned by the defendant and the safety of any conviction that followed it. Where the evidence against the defendant was strong the Court may conclude that notwithstanding the trial judge's error there is no reason to interfere with the conviction returned by the jury.

Where the prosecution does not seek to rely on indirect evidence against the defendant but refuses to disclose to the defence material which the defence has requested to see, then the defence can apply under the provisions of section 8 of the Criminal Procedure and Investigations Act 1996 for the court to order the prosecution to disclose that material to the defence. In some instances, where it is not obvious from the description of the material what it consists of, the judge may need to see the material itself in order to determine whether it should be disclosed to the defence.

D. Constitutional law framework and assessment

Irrespective of how evidence or information comes to be withheld from a defendant in the course of his trial, it is an important feature of the law in England and Wales that the trial judge should be in a position to scrutinise that process, either because she is responsible for making the decision that leads to the withholding of the information from the defendant (in the case of an application for witness anonymity) or because she is available at the request of the defence to consider, and potentially overturn, the decision of the prosecutor not to reveal information to the defence (in the case of an application by the defence for further disclosure from the prosecution). The court assumes this role because it bears the ultimate responsibility of ensuring that the defendant receives a fair trial, both under the common law and in furtherance of Article 6 of the ECHR, which is given force in the domestic law of England and Wales by virtue of the Human Rights Act 1998. The legislation that permits the court to allow a witness to give evidence anonymously stipulates that no such order can be made by the court unless, having regard to all the circumstances, the effect of the proposed order would be consistent with the defendant receiving a fair trial.[56] While the legislative regime that governs the prosecution's duty of disclosure to the defence does not contain an express reference to the fairness of the defendant's trial, the common law has recognised for a long time that fairness lies at the very heart of that duty.[57] That is probably the most important constitutional safeguard against the improper admission of secret evidence against the defendant and the improper withholding of important information from the defence.

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[56] Section 88(4) of the Coroners and Justice Act 2009.

[57] *R v H and C* [2004] UKHL 3; [2004] 2 AC 134.

II. Evidence in pre-trial proceedings

In England and Wales once a criminal investigation is underway, the police will gather evidence that is relevant to the allegation that has been made against the suspect with a view, in due course, to placing that evidence before a prosecutor so a decision can be made whether to charge the suspect with any crime. The Code of Practice[58] issued under Part II of the Criminal Procedure and Investigations Act 1996 sets out 'the manner in which police officers are to record, retain and reveal to the prosecutor material obtained in a criminal investigation and which may be relevant to the investigation, and related matters'.[59] The Code goes on to set out the general responsibilities of the police in the conduct of a criminal investigation and stresses that in conducting an investigation 'the investigator should pursue all reasonable lines of inquiry, whether these point towards or away from the suspect. What is reasonable in each case will depend on the particular circumstances.'[60] It follows that the responsibility of the police is not just to unearth evidence indicative of the suspect's guilt but to actively search for evidence that points towards his innocence.

As part of its investigation, the police have a wide range of powers at their disposal, but the exercise of those powers often requires authorisation from the court. That can be the case where the police wish to search premises where they believe important material may be held or where they wish a third party to hand over material to them. In addition, by virtue of Chapter 1 of Part 3 of the Coroners and Justice Act 2009, a magistrates' court can make an investigation anonymity order, which means that a witness can be suitably anonymised during the course of an investigation and in the expectation that a full witness anonymity order will be sought in due course if the decision is taken to call that witness to give evidence as part of the prosecution's case at trial. All of these applications will be conducted *ex parte*, that is to say, in the absence of the defence and without the defence having any forewarning that the applications are to be made. Clearly, then, any material handed to the court by the police either in advance of those applications being heard or during the hearing of the applications themselves will not have been seen by the defence and may never be seen by the defence. Like an application for a witness anonymity order in the Crown Court, any *ex parte* hearing in the Crown Court will be recorded and the recording kept in a secure location should an issue arise in the future as to what was said and by whom. In the magistrates' court the hearings are not recorded, but the clerk to the court will often make a handwritten note that will be retained instead. Where the defence is not present for such a hearing, the police or the prosecutor (whoever appears to make the application) is under a duty to place before the court any arguments the suspect and his lawyers would have advanced had they been in a position to do so.

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58 The current version was published in March 2015.

59 Preamble.

60 Para 3.5 of the Code.

The court will then consider the material before it and the submissions of the applicant before deciding whether to grant the order sought.

It is not uncommon in cases where the criminal courts grant such orders on an *ex parte* basis for the person affected to challenge the order usually by way of judicial review, which concerns the lawfulness of the order as made and so a claim for judicial review will not attack the merits of that decision, only its legality. In *R (on the application of Haralambous) v Crown Court at St Albans & another*,[61] the UK Supreme Court considered a number of significant issues regarding the procedures whereby magistrates may issue warrants to enter and search premises and seize property under section 8 of Police and Criminal Evidence Act 1984, and where Crown Court judges may order the retention by the police of unlawfully seized material under section 59 of the Criminal Justice and Police Act 2001, and how third parties affected by those decisions can challenge them. The Court held that on such applications magistrates and Crown Court judges can rely on material that is not, and cannot, be disclosed to those affected by the applications. Moreover, there is no rule of law that requires the 'gist' of the undisclosed material to be given to an affected person in every case. The Strasbourg authorities recognise that there may be circumstances where it is in the public interest to withhold even the gist of the material relied on. The relevant authorities were analysed by the UK Supreme Court in *Tariq v Home Office*.[62] Where a person who is affected by one of these decisions seeks to challenge that decision by way of judicial review, the principle in *Al Rawi v Security Service*[63] (that in the absence of express parliamentary authorisation to conduct a closed material procedure the court cannot have regard to information that, on public interest grounds, has been withheld from the person affected by the decision) is displaced and so the higher courts can consider that undisclosed material when determining the lawfulness of the impugned decision that was based, in part at least, on that material. A departure from the *Al Rawi* principle was justified because it would be 'self-evidently unsatisfactory, risk injustice and in some cases be absurd'[64] if the High Court on judicial review was bound to address the matter on a different basis from the magistrates' court and the Crown Court.

There is no general duty on the police or on the prosecution to reveal to the defendant or his lawyers the evidence that has been gathered against him until such time as charges are brought and the defendant is due to appear in court to answer those charges. This means that when the police come to interview a suspect pre-charge about his alleged involvement in the commission of a criminal offence, the police are not under an obligation to hand over to the suspect or his lawyer all of the

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61 [2018] 2 WLR 357.

62 [2012] 1 AC 452 at paras 27–37.

63 [2012] 1 AC 531.

64 At [57].

evidence in their possession. Code C[65] to the Police and Criminal Evidence Act 1984 provides that before a defendant is interviewed by the police, and if they are represented by a lawyer, that lawyer 'must be given sufficient information to enable to understand the nature of any offence',[66] but this does not require the disclosure of details that could hamper the ongoing investigation were the defendant to become aware of them. The police officer in charge of the investigation is responsible for deciding what information should be supplied to the defendant's lawyer in order to satisfy this obligation. The *Notes for Guidance* that relate to this particular provision of Code C[67] state that 'sufficient information' should generally include, 'as a minimum, a description of the facts relating to the suspected offence that are known to the officer, including the time and place in question. This aims to avoid suspects being confused or unclear about what they are supposed to have done and to help an innocent suspect to clear the matter up more quickly.' Where the defendant is unrepresented in his police interview, the Code does not place an obligation on the investigating officer to provide him with information to that extent.

Once a defendant has been charged with a criminal offence, for many years there was uncertainty as to how quickly, and in how much detail, the prosecution would have to reveal its case to him. In his 2001 Review of the Criminal Courts,[68] Sir Robin Auld made these observations about the provision to the defence of details of the prosecution's case: 'The law is somewhat muddled in its provision for advance notification of the prosecution case and/or evidence, but reasonably satisfactory in its operation […] in all cases there is a legal duty on or a practical requirement for a prosecutor to supply its proposed evidence in advance of the hearing.'[69]

The position is now governed by Part 8 of the Criminal Procedure Rules, which provides that following charge, if the defendant requests initial details of the prosecution case, then the prosecution must serve those details on him 'as soon as practicable' and in any event no later than the beginning of the day of his first hearing in the magistrates' court. Where no request is made for those details, they should be provided to the defendant not later than the day of that hearing. The initial details of the prosecution's case must include a summary of the circumstances of the offence and the defendant's criminal record, if any, in cases where the defendant was in police custody prior to being charged. Where the defendant was on police bail before charge, the initial details should additionally include any account given by the defendant in his police interview and any witness statement or exhibits that are

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[65] Code of Practice for the Detention, Treatment and Questioning of Persons by Police Officers. The current version came into force in August 2019.

[66] Para 11.1A, which was introduced as a result of the terms of EU Directive 2012/13/EU.

[67] Note 11ZA.

[68] http://webarchive.nationalarchives.gov.uk/+/http://www.criminal-courts-review.org.uk/ccr-00.htm

[69] Paras 117 and 119.

available to the prosecutor and which the prosecutor considers material to any decision the court may have to make at the first hearing or material to the plea the defendant may choose to indicate at that first hearing. The Rules further provide that where the prosecutor wishes to rely on any of the documents included within the initial details of her case, the court must not allow the prosecutor to do so unless the defendant has had sufficient time to consider those documents first. Where the defendant's case proceeds from the magistrates' court to the Crown Court, at the first hearing in the Crown Court, also known as the Plea and Trial Preparation Hearing, the judge will set down a timetable for the service by the prosecution of its case against the defendant, which will consist of all of the witness statements and exhibits the prosecution wishes to rely on in evidence against the defendant at trial.

In criminal pre-trial proceedings in the Crown Court there could be any number of occasions on which the judge is called upon to make a determination. That could be a straightforward case management decision as to when a particular piece of evidence should be served by the prosecution, or it could be a more fundamental decision, such as whether a defendant will be released on bail until his trial or whether he will have to remain on remand in custody. Section 4 of the Bail Act 1976 refers to an accused person's general right to bail subject to the exceptions in Schedule 1 of the 1976 Act. The exceptions include where there exist substantial grounds for the judge to believe that if granted bail, the defendant would fail to surrender to the court at the allotted time and place, commit an offence while on bail, or interfere with witnesses or otherwise obstruct the course of justice, whether in relation to himself or any other person. Where the defendant has a previous conviction for one of a number of offences referred to in section 25 of the Criminal Justice and Public Order 1994 and he is charged with an offence on the same list, then bail can only be granted in exceptional circumstances. When the court is required to consider whether to release a defendant on bail, the hearing can be held in secret without the public or press having access to the court. The defendant and his lawyers will be present at such a hearing. The reason to hold a hearing of this nature in secret would be to protect the defendant and any witnesses from the damaging consequences of personal or confidential information being disclosed about them in open court.

Occasionally there may be cases where, in support of objections to the granting of bail, the prosecution seeks to rely on information that is protected from disclosure to the defence by some important public interest. It may be, for example, that the prosecution seeks to put before the court information from a police informer without revealing to the defence either what that information is or who the informer is, for fear that revealing either would lead to his identification.[70] In such a case, the prosecution is not precluded from placing information before the court which has been withheld from the defendant and his lawyers, but where these circumstances arise, the judge should consider appointing a special advocate if the possibility exists that

[70] See *R (Malik) v Central Criminal Court* [2006] 4 All ER 1141.

bail could be refused based in part at least on this closed material.[71] Even where material is lawfully withheld from the defendant in this way, it does not follow that the defendant and his lawyer can be excluded from the hearing where his remand status is considered by the court. The better view is that the hearing of objections to bail cannot take place in the absence of the defence, even if some of the submissions made by the prosecution refer rather elliptically to information known to the court and to the prosecutor but not to the defence.[72] The same broad principles will apply to other pre-trial applications where the prosecutor wishes to make submissions based on material they submit should be withheld from the defence, although applications of that type are rare other than where objections to bail are being raised.

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[71] *R (KS) v Northampton Crown Court* [2010] 2 Cr App R 23.

[72] See *R (British Sky Broadcasting Ltd) v Central Criminal Court (B intervening)* [2014] AC 885; *Al Rawi v Security Service (JUSTICE intervening)* [2012] 1 AC 531.

Secrecy and Non-Criminal Proceedings in the European Union

Eva Nanopoulos

Questions of secrecy and security information traditionally appeared far off the routine business of the EU, let alone of its judicial branch. After all, law enforcement and national security remain primarily within the competence of the Member States. Such questions could have come to the EU courts indirectly—the archetypical example would be a preliminary reference on the compatibility of deportation proceedings against an EU citizen or their family on national security grounds[1] with EU law and particularly the EU Charter of Fundamental Rights (CFR). But a couple of decades ago, it would have been hard to envisage situations where the EU institutions themselves would seek to adopt measures on the basis of undisclosed evidence and where the permissibility and review of confidential information would be raised in cases challenging the actions of the relevant EU body directly before the EU courts.

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[1] E.g. Case C‑300/11 *ZZ v Secretary of State for the Home Department* ECLI:EU:C:2013:363.

The situation has changed dramatically as a result of the gradual individualization of the EU's common foreign and security policy (CFSP) and particularly its power to adopt economic and financial sanctions. Whilst the EU's power was originally confined to the interruption of economic and financial relations with third countries, in line with international practice in this area—the development of so-called 'smart sanctions'—the EU began instead to implement restrictive measures against natural and legal persons allegedly responsible for the conduct the sanctions seek to change or condemn. These typically involve the freezing of those people's funds and economic resources, often extending even to their basic means of survival, such as social or child care benefits. The 'list' of those to whom such measures are to apply are annexed to a decision based on the CFSP, and financial and economic restrictions are imposed by means of EU regulations adopted under Article 215 Treaty on the Functioning of the European Union (TFEU). Some of these measures are adopted in implementation of relevant UN Security Council (UNSC) Resolutions, whilst others are adopted on the EU's own initiative—so called 'autonomous' measures. The individualization of sanctions was also accompanied by an increased diversification—and indeed proliferation—of restrictive measures. Whilst sanctions were historically deployed to respond to military threats and inter-state conflicts, at the turn of the 21st century, internal conflicts but also activities traditionally belonging to the criminal realm, like terrorism and organized crime, were seen to constitute threats to international peace, in the case of the UN,[2] and to the Union's security, in the European context,[3] blurring traditional divides between criminal justice and foreign policy.

As part of these trends, the UN and the EU both impose restrictive measures on people suspected of terrorist activities. The 'UN terrorist list' targets individuals and entities associated with Al-Qaida and ISIL (Daesh).[4] It is compiled by a UN Sanctions Committee and then transposed at the EU level.[5] At the time of writing, the UN blacklist had been amended for the 267th time[6] and contained 254 individuals and 75 entities. Since 2016, the EU has also independently added to the names of people identified by the UN.[7] The EU's own autonomous terrorist list[8] was put together after 9/11 to give effect to UNSC Resolution 1373,[9] which requires members of the UN

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[2] E.g. 'A More Secure World: Our Shared Responsibility: Report of the High Level Panel on Threats, Challenges and Change', 29 November 2004, UN Doc a/59/565.

[3] E.g. 'A Secure Europe in a Better World', European Security Strategy, 12 December 2003, Brussels.

[4] UNSC Resolution 1390 (2002) and UNSC Resolution 2253 (2015).

[5] Common Position 2002/402/CFSP [2002] OJ L 169/4 and Council Regulation 881/2002 [2002] OJ L 139/9.

[6] Commission Implementing Regulation (EU) 2017/778 [2017] OJ L116/26.

[7] Council Decision (CFSP) 2016/1693 [2016] OJ L255/25 and Council Regulation (EU) 2016/1686 [2016] OJ L255/1.

[8] Common Position 2001/931/CFSP [2001] OJ L344/93 and Council Regulation 2580/2001 [2001] OJ L344/70.

[9] UN SC Resolution 1373 (2001).

to freeze the assets and economic resources of people involved in terrorist activities. Originally, the EU autonomous list included two types of persons: those based outside the EU (so-called 'external terrorists') and those operating within the territory of the EU (so-called 'internal terrorists'). Restrictive measures were only imposed on the former category of people; the latter were only subject to measures of enhanced police and judicial cooperation at the national level. The EU list of 'external' terrorists currently targets 13 individuals and 22 organizations.[10] In 2009, 30 individuals and 18 organizations were named as internal terrorists.[11]

Article 75 TFEU, which was introduced by the Treaty of Lisbon, now grants the EU the power to 'define a framework for administrative measures with regard to capital movements and payments, such as the freezing of funds… belonging to, or owned or held by, natural or legal persons, groups or non-State entities' when this is necessary to achieve the objectives pertaining to the area of freedom, security, and justice, particularly as regards the prevention and combatting of terrorism and other related activities. But this provision has never been used to date and non-criminal measures targeting individuals or entities based in the EU are still adopted by the Member States, if at all. The distinction between Articles 75 and 215 TFEU proved contentious from the outset, as the former provides for the involvement of the European Parliament who challenged the use of Article 215 TFEU as a basis for the UN list. The case was rejected,[12] but the Court of Justice was at pains to delimit any principled distinction between the two provisions.

These lists have resulted in considerable litigation. Initially, the focus was primarily on the availability of procedural safeguards, which were virtually non-existent, leading to criticisms that these measures were 'unworthy of international bodies such as the UN and the EU'.[13] But as blacklisting practices gradually became more formalized, or juridified, questions of confidentiality were increasingly brought to the fore. Whilst this chapter focuses on the terrorist lists, issues of secrecy have gained salience across the board of sanctions regimes the EU has in place, largely as a result of the EU courts' transposition of the principles first developed in the area of counter-terrorism to other types of restrictive measures, even though their exact application in each context varies. A wave of cases challenging inclusion on the list of individuals and entities allegedly supporting the Iranian government and its proliferation

[10] Council Decision (CFSP) 2017/154 of 27 January 2017 updating the list of persons, groups, and entities subject to Articles 2, 3, and 4 of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, and repealing Decision (CFSP) 2016/1136 Citation: OJ 2017 L23/21.

[11] The website of the European Council refers to Common Position 2009/468/CFSP as the instrument containing the EU list of internal terrorists, but this act has been formally repealed.

[12] Case C-130/10 *European Parliament v Council* ECLI:EU:C:2012:472.

[13] Resolution 1597 (2008) of the Parliamentary Assembly, Council of Europe, 23 January 2008, para 7.

activities, in particular, brought questions of secrecy to a head, as listing decisions were repeatedly annulled for want of sufficient information to back up the measures.[14] Moreover, such questions are likely to intensify as the blurring between law enforcement and foreign policy intensifies. In the aftermath of the Arab Spring and the situation in the Crimea, the EU adopted autonomous sanctions on individuals and entities allegedly responsible for the 'misappropriation of State funds' or for being associated with such persons in Tunisia,[15] Egypt,[16] and Ukraine.[17] The legal authority to adopt these measures was questioned, on the basis that judicial cooperation in criminal law matters—these restrictive measures were mostly adopted in response to requests for judicial assistance by domestic authorities—falls within the competence of the Member States. But their legality has now been upheld.[18] For want of space, this chapter will not examine such measures in a separate section, but the discussion will pick up on some of the differences between different types of restrictive measures.

I. Restrictive measures against individuals in non-criminal proceedings: the EU terrorist list

A. The use of incriminating 'indirect evidence'

1. Grounds for non-disclosure and competent authority

The EU list is compiled on the basis of Articles 1(4), (5), and (6) of Common Position 2001/931/CFSP. Together these provisions prescribe three requirements. First, an initial decision to freeze funds must be based on 'precise information and material in the file which shows that a decision has been taken by a competent authority', which is defined as a judicial authority or equivalent competent authority. Second, the decision of the competent authority must concern the 'instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in, or facilitate such an act' and it must be based 'on serious and credible evidence or clues, or condemnation for such deeds'. The evidentiary threshold is unclear. Reference to 'clues'—in French 'indices'—has been taken to suggest intelligence information may be sufficient.[19] But Advocate General (AG) Sharpston has insisted that

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[14] E.g. T-565/12 *National Iranian Tanker Company v Council* ECLI:EU:T:2014:608; T-157/13 *Sorinet Commercial Trust Bankers v Council* ECLI:EU:T:2014:606.

[15] Council Decision 2011/72/CFSP and Council Regulation (EU) No 101/2011.

[16] Council Decision 2011/172/CFSP and Council Regulation (EU) No 270/2011.

[17] Council Decision 2014/119/CFSP and Council Regulation (EU) No 208/2014.

[18] Case C-220/14 P *Ahmed Abdelaziz Ezz and Others v Council of the European Union* ECLI:EU:C:2015:147.

[19] I Cameron, 'European Union Anti-Terrorist Blacklisting' (2003) 3 *HRLRev* 225, 235.

it requires 'significantly more than mere suspicion or hypothesis'.[20] Finally, pursuant to Article 1(6), the Council must review whether there remain grounds for continuous inclusion. According to the Court of Justice, this entails ascertaining whether the factual situation has changed in a way which no longer makes is possible to 'draw the same conclusion in relation to the involvement of the person at issue in terrorist activities'.[21] For example, if too much time has passed since the adoption of the relevant national decision, the Council must justify maintaining someone on the list by an 'an up-to-date assessment of the situation'.[22] On the other hand, however, the repeal or withdrawal of the underlying decision of the competent authority is not an automatic ground for delisting.[23] Instead, in determining whether there is an ongoing risk that the person is involved in terrorist activities, the Council is merely required to consider 'the subsequent fate of the national decision that served as the basis for the original entry'.[24]

This composite procedure, as it is known, suggested that the EU restrictive measures could be based on indirect evidence, namely the decision of the competent domestic authority. But the extent to which access to the evidence underpinning that decision or any other information relied upon by the Council could be denied and by whom was left largely unregulated. In practice, the process was largely political. Designations were carried out by a 'clearing house'[25] composed of Ministers of Foreign Affairs and representatives of intelligence and security services entirely behind closed doors, with little to no information provided to the listed individual or entity. Many decisions were annulled for failure to provide the listed persons with the reasons for their listing.

Somewhat counter-intuitively perhaps,[26] more formal rules governing the use of indirect evidence and confidentiality appeared concomitantly with the introduction of procedural rules requiring disclosure of the evidence supporting a designation. In the first case to come before the EU courts in 2006, the General Court (GC) confirmed that the right to a fair hearing, the duty to state reasons, and the right to effective judicial protection all applied in the context of a decision to freeze funds.[27] This

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[20] Opinion of AG Sharpston in Case C-27/09P *French Republic v People's Mojahedin Organization of Iran* ('*PMOI II*') ECLI:EU:C:2011:482, para 136.

[21] C-550/10 P *Al Aqsa v Council* ECLI:EU:C:2012:711, para 82.

[22] Case C-79/15P *Hamas v Council* ECLI:EU:C:2017:584, para 32.

[23] *Ibid*, para 91. This overturns prior case law by the GC. See for example T-341/07 Sison v Council ('*Sison III*') ECLI:EU:T:2011:687, para 56.

[24] CoJ, *Hamas v Council,* above fn. 22, para 30.

[25] Council Document 11693/02, 3 September 2002, Annex I.

[26] Although we see this in other contexts, too. In the UK, the closed material procedure was introduced to respond to higher disclosure and review requirements imposed by the ECHR. See *Chahal v United Kingdom* (1997) 23 EHHR 413.

[27] Case T- 228/02 *Organisation des Modjahedines du peuple d'Iran v Council ('OMPI')* ECLI:EU:T:2006:384, paras 91–113.

meant the grounds and evidence relied upon by the competent EU authority had to be disclosed to the individual or entity concerned, concomitantly or as soon as possible after the decision had first been adopted if it is an 'initial decision' to freeze funds or before a decision to renew in the case of a 'subsequent decision' to freeze funds. On the flip side, however, the GC ruled that 'overriding considerations concerning the security of the [EU] and its Member States, or the conduct of their international relations, may preclude the communication to the parties concerned of certain evidence adduced against them.'[28]

The EU courts have only given sporadic indications of what these grounds mean. The 'conduct of international relations' presumably refers to intelligence and other information sharing arrangements, notably with the US. In this context, the 'control principle' makes any disclosure of confidential information subject to the consent of the State which provided the relevant evidence. According to AG Sharpton, secrecy would also be justified if disclosure would prejudice future investigations by revealing investigative or other techniques used by law enforcement bodies to combat terrorism or if it put those operating on the ground at risk of being tortured or killed by helping their identity or activities being uncovered.[29] Similar statements have been made by the Court of Justice in the context of national deportation proceedings, where it added that information whose disclosure would 'endanger life, health or freedom of persons'[30] could also compromise State security in a 'direct and specific manner'.[31] In terms of scope, the GC clarified that these considerations applied above all 'to the "serious and credible evidence or clues" on which the national decision to instigate an investigation or prosecution is based, in so far as they may have been brought to the attention of the Council'.[32]

The reference to the information actually 'brought to the attention of the Council', however, reflects the fact that the content of these disclosure—and hence confidentiality—rules are determined by the composite nature of the listing procedure, which, according to the GC, prescribes a specific allocation of tasks between the two levels of decision-making. Although the exact role of the Council in that process remains somewhat opaque, in the context of an initial decision to freeze funds, the relevant rules appear to depend on the identity and nature of the authority which adopted the relevant decision. Thus, the GC in *OMPI* explained that:

> Provided the decision in question was adopted by a competent national authority of a Member State, the observance of the right to a fair hearing at [EU] level does not usually require, at that stage, that the party concerned again be afforded the opportunity to express his views on the appropriateness and well-foundedness of that decision, as those questions may only be raised at national level, before the authority in question or, if the party

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[28] *Ibid*, para 133.

[29] Opinion of AG Sharpston *PMOI II*, above fn. 20, para 228.

[30] CoJ, *ZZ*, above fn. 1, para 66.

[31] *Ibid*.

[32] GC, *OMPI*, above fn. 27, para 136.

> concerned brings an action, before the competent national court. Likewise, in principle, it is not for the Council to decide whether the proceedings [...] was conducted correctly, or whether the fundamental rights of the party concerned were respected by the national authorities. That power belongs exclusively to the competent national courts or, as the case may be, to the [ECHR].[33]

This template has direct consequences for issues of confidentiality. Thus, the GC further clarified that the principle of loyal cooperation imposes an obligation on the Council:

> […] to defer as far as possible to the assessment conducted by the competent national authority, at least where it is a judicial authority, both in respect of the issue of whether there are 'serious and credible evidence or clues' on which its decision is based and in respect of recognition of potential restrictions on access to that evidence or those clues, legally justified under national law on grounds of overriding public policy, public security or the maintenance of international relations.[34]

As a result, when the decision is taken by an EU Member State, restrictive measures can be adopted on the basis of indirect evidence, as the underlying source of the information should in principle only be assessed and challenged at the domestic level. In that context, the Council is not to second-guess how much information was provided to the individual or entity concerned, as this remains a matter of national law, even if EU law appears to have some say over the matter. *OMPI* implied a more interventionist stance would be warranted if the decision was not taken by a judicial body, but in practice, so long as is it open to independent scrutiny, the role of the EU has remained limited.[35]

This allocation of tasks does not appear to have universal application. First, if the information underpinning the decision of the competent authority is actually provided to the Council, it is unclear whether disclosure is to be decided by the EU authority on the basis of EU law, or whether it can be validly opposed by the Member State, particularly on the basis of the so-called control principle.[36]

Second, *OMPI* suggested that when the Council bases its decision to impose or renew an asset freezing measure 'on information or evidence communicated to it by representatives of the Member States without it having been assessed by the competent national authority, that information must be considered as newly-adduced evidence which must, in principle, be the subject of notification and a hearing at [EU] level, not having already been so at national level.'[37] In those situations, decisions about disclosure would appear to rest exclusively with the Council. In that regard,

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[33] *Ibid*, para 121.

[34] Ibid, para 124.

[35] Eg T-256/07 *People's Mojahedin Organization of Iran v Council ('PMOI I')*, para 145.

[36] See discussion in C Eckes, 'Decision-Making in the Dark? Autonomous EU Sanctions and National Classification' in I Cameron (eds) *EU Sanctions: Law and Policy Issues Concerning Restrictive Measures* (Intersentia, 2013).

[37] GC, *OMPI*, above fn. 27, para 125.

the Court of Justice in *Hamas* recently overturned a finding of the GC that, even in the context of a subsequent decision to maintain a person on the list, the Council could only rely on information that had been previously assessed by a decision of a competent national authority.[38] According to the Court of Justice, this ran contrary to the Common Position 2001/931/CFSP, which drew a clear distinction between the original decision to place a name on the list and a subsequent decision to maintain the relevant name on the list, only the former requiring the material relied upon by the Council to have been the subject of a national decision.[39] In *Hamas* and the related case of *Liberation Tigers of Tamil Eelam (LTTE)*, the GC and AG Sharpston also rejected the possibility for the Council to use press and internet sources, but the issue was not decided on appeal. If the Court of Justice were to disagree, it is hard to see how the Council could necessarily in practice have access to, let alone disclose, the evidence corroborating such publicly available information.

Finally, different rules appear to apply to decisions taken by a third country,[40] which is not bound by the CRF—or the ECHR[41]—and in relation to which the duty of loyal cooperation does not apply. In this context, the EU courts have ruled that the Council must verify that the 'relevant legislation of that State ensures protection of the rights of the defence and a right to effective judicial protection equivalent to that guaranteed at EU level' and that these safeguards were applied to the case at hand.[42] This suggests the last word about whether the degree of disclosure at the national level was acceptable is with the Council. But provided that standard is equivalent to EU law—which as we saw allows for the source of the information to remain confidential—it does not appear to prevent the Council from relying on a decision that is based on indirect evidence. The further question is whether the Council is also itself to assess whether the evidence underpinning the relevant decision supports inclusion on the EU list.[43] If it is, this may imply the Council is not only to verify that domestic disclosure requirements are equivalent to those applicable under EU law but also to decide for itself how much disclosure is acceptable. In that scenario, it remains unclear what role, if any, the control principle is supposed to play and hence what input the relevant State would have on the level of disclosure.

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38 T-400/10 *Hamas v Council* ECLI:EU:T:2014:1095, para 127.

39 CoJ, *Hamas*, above fn. 22, paras 36–50.

40 The GC has confirmed that a decision of a third country could constitute a basis for listing. See T-208/11 *Liberation Tigers of Tamil Eelam v Council* ('*LTTE*') *v Council* ECLI:EU:T:2014:885.

41 That would depend on whether the country in question is a member of the Council of Europe.

42 GC, *LTEE* above fn. 40, para 139. No evidence of such inquiry was found in that case, and the decision to list LTTE was annulled. See also AG Sharpston in Case C-599/14 P *Council of the European Union v LTTE*, para 67.

43 The working methods of the working party established to assist with the implementation of the EU list outlined in Council document 10826/1/07 REV 1 suggest it does.

2. Court's access to an undisclosed source

In any event, the alleged confidentiality of the information cannot be validly relied upon to prevent disclosure to the EU courts, who must be provided with sufficient information to discharge their reviewing function. Thus, in *PMOI II* the GC held that 'the Council is not entitled to base its funds-freezing decision on information or material in the file communicated by a Member State, if the said Member State is not willing to authorize its communication to the [EU] judicature whose task is to review the lawfulness of that decision'.[44]

Although the principle of loyal cooperation was not held to impose any specific duties on the EU courts, the composite procedure in practice continues to play a role in defining the exact scope and intensity of review—and hence in determining the amount of information that needs to be provided to, and reviewed by, the EU courts. Early judgments suggested the EU courts will invariably assess 'the facts and circumstances relied on as justifying' the decision and the 'evidence and information on which that assessment is based'.[45] But the EU courts have since clarified that their task was to verify that the decision has been taken on a 'sufficiently solid factual basis', a test whose application largely depends on the facts of the case. If the decision has been taken by a third country, this would seem to require a more thorough review, and hence disclosure, of the underlying evidence. If the decision has been by an authority based in a Member State, it might be sufficient for the information forwarded to the EU courts to show that the decision meets the requirements set out in Article 1(4) Common Position. That is not to say that judicial review of the Council's decision is deferential. On the contrary, the EU courts have made clear that the Council enjoys virtually no discretion in deciding whether the information in the file demonstrates that a decision of a competent national authority has been adopted.[46] Rather it is to say that if such a national decision exists, the evidence that authority relied upon to reach its decision needs not necessarily to be forwarded to the EU courts or indeed the Council. This differs from the situation where the Council bases the measure on the decision of a third country or indeed, as we shall see in the second part of this chapter, on a decision of the UNSC, where at least one of the reasons for inclusion needs to be corroborated by evidence that is put before the EU courts. Thus, for example, the GC in *PMOI II* annulled the decision to maintain the People's Mojahedin Organization of Iran (PMOI),[47] an organization opposing the Iranian regime, on the terrorist list. But this was on the basis that there was no information in the file to suggest that the French prosecutorial decisions upon which the Council purported

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[44] Case T-284/08 *People's Mojahedin Organization of Iran v Council* ("*PMOI II*") ECLI:EU:T:2008:550, para 73.

[45] GC, *OMPI*, above fn. 27, para 154.

[46] GC, *Sison II*, above fn. 23, para 57.

[47] GC, *PMOI II*, above fn. 44.

to rely concerned individuals associated with the PMOI.[48] Had it been established that the individuals were members of the PMOI, it is not clear that the EU courts would have required the French authorities to provide it with the actual evidence upon which their decision to initiate an investigation was based.

In the context of the EU list, no case ever clarified how EU courts were to handle confidential information. In *PMOI II*, AG Sharpston referred to the well-known *Kadi I* formula according to which courts must apply 'techniques which accommodate, on the one hand, legitimate security concerns about the nature and sources of information taken into account in the adoption of the act concerned and, on the other, the need to accord the individual a sufficient measure of procedural justice',[49] although this gave little indication of what 'techniques' the Court of Justice had in mind.

EU courts have always had at their disposal some mechanisms to enable them to examine sensitive information, including the use of *in camera* proceedings.[50] But notwithstanding the EU courts' case law, until recently, Article 67 of the GC's rules of procedure (ROP) required the GC to take into account only 'those documents which have been made available to the lawyers and agents of the parties and on which they have been given an opportunity of expressing their views' and appeared therefore to prevent the use of indirect evidence.

Part of the result, in practice, was that Member States simply refused to provide the Courts with the information supporting inclusion on the EU list. In *PMOI II*, GC noted that at the request of the French authorities, the Council has refused to declassify point 3 a) of the last of the three documents referred to at paragraph 58 above, setting out a 'summary of the main points which justify the keeping of [the PMOI] on the EU list',[51] drawn up by the said authorities for the attention of certain Member States delegations. According to the above-mentioned letter from the French Ministry of Foreign and European Affairs, the passage in question 'contained information of a security nature with implications for national defence which is therefore, under Article 413–9 of the Penal Code, subject to protective measures to restrict its circulation', so that 'the Ministry is unable to authorize its communication to the [GC]'. As a result, many decisions, including the listing of the PMOI, were annulled because they were not backed up by sufficient evidence.

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[48] The issue arose after the UK decision originally relied upon by the Council was annulled by the Proscribed Organisations Appeals Commission.

[49] Joined Cases C-402/05P and C-415/05P *Kadi and Al Barakaat v Council and Commission ('Kadi I')* ECLI:EU:C:2008:461, para 344. See also Opinion of the AG in *PMOI II*, above fn. 20, para 180.

[50] Art 56 ROP of the ECJ; Article 109 of the GC's new ROPs. Under Article 348 TFEU *in camera* proceedings are obligatory for cases involving Articles 346 and 347 TFEU. The former concerns information that relates to States' security interests and the latter is a broader 'emergency' clause.

[51] GC, *PMOI II*, above fn. 44, para 71.

This eventually led[52] to the GC's rules of procedure being amended to enable the GC to take into account information that has not been disclosed to one of the parties. These changes were negotiated entirely behind closed doors, despite several calls for a wider consultation process. The new ROP were first published and approved by the Court of Justice in March 2014 and have been formally adopted by the Council on 10 February 2015.[53] To date, they have never been used.

Under Article 105 ROP,[54] if one of the parties considers that disclosure of certain information would undermine the 'security of the Union or that of one or more of its Member States or to the conduct of their international relations', that information can be produced before the GC by a separate document with an attached application for confidential treatment explaining 'the overriding reasons, which, to the extent strictly required by the exigencies of the situation, justify the confidentiality of that information'. If the material is relevant to the case but the application for confidentiality is unsuccessful, the information will either have to be disclosed to the other party or withdrawn from the file, in which case it cannot inform the GC's assessment about the legality of the measure. If the material is relevant to the case and the application for confidentiality is successful, the GC must weigh the requirements linked to the right to effective judicial protection and the adversarial principle against those flowing from security concerns. The GC is then to adopt a reasoned order laying out the procedure required to meet the requirements of that (largely unspecified) 'balancing exercise'. The details of that procedure are left to the discretion of the GC, but Article 105(5) ROP mentions the possibility of producing a non-confidential version of the information or a non-confidential summary of its essential elements. This suggests the listed person may be granted some form of access to the undisclosed source.

3. Appeals proceedings

In the event of an appeal, it remains unclear whether the Court of Justice could also examine the confidential information behind closed doors. Those aspects of the case law that mention the need for EU courts to use techniques to accommodate the confidentiality of the information refer to the 'Court of Justice of the EU' without singling out the GC. But Article 105 ROP only applies to the GC. In recent cases, the Court of Justice appears to be drawing a tighter line between questions of facts, which, save for instances where the appellant claims the evidence was distorted, remain within the exclusive competence of the GC, and questions of law, which can be revisited on appeal. But even if that suggests the Court of Justice will not be

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[52] Such amendments were expressly called for by AG Sharpston in her opinion in PMOI and also implicitly by the GC in *OMPI*.

[53] The latest draft can be found in Council document 16724/14 of 9 December 2014, http://data.consilium.europa.eu/doc/document/ST-16724-2014-INIT/en/pdf.

[54] But see also Article 103 ROP on confidential information more generally.

routinely involved with the examination of confidential material, the scenario remains possible in practice, particularly if the claimant challenges the decision to withhold information.

B. The use of undisclosed incriminating evidence

1. Conditions for use of undisclosed incriminating evidence

The question whether undisclosed incriminating information can be used by EU institutions remains somewhat unclear. In *OMPI*, the GC held that non-disclosure may cover not only the evidence and clues relied on by the competent authority and shared with the Council, but also 'the specific content or the particular grounds for that decision, or even the identity of the authority that took it'.[55] 'It is even possible', the GC continued, that 'in certain, very specific circumstances, the identification of the Member State or third country in which a competent authority has taken a decision in respect of a person may be liable to jeopardise public security, by providing the party concerned with sensitive information which it could misuse'.[56] This suggests the listed person could be validly left entirely in the dark about the underlying basis for the decision to freeze its funds. AG Sharpston, by contrast, and despite having openly advocated for a revision of the GC's ROP, regarded the 'availability of a non-confidential summary as an irreducible minimum guarantee in a Union governed by the rule of law'.[57] The view of the GC may therefore in retrospect prove far-stretched but thus far the case law has only been concerned with non-disclosure to the EU courts. It is unclear what exactly would happen if the Council purported to base its decision on undisclosed material, which it is, however, willing to share with the EU courts.

2. Court's access to undisclosed evidence

In fact, Article 105 ROP lends some support to the proposition that undisclosed evidence is admissible under EU law. Although the procedure to be used in each individual case is left for the GC to draw up, Article 105(8) deals expressly with the issue of non-disclosed incriminating evidence. Whilst Article 105(6) encourages—but crucially does not oblige—the GC to order the production of a summary of any undisclosed material, when this is impossible and the information is 'essential' for the GC to decide the case, Article 105(8) expressly enables the GC to depart from the adversarial principle and decide the case on the basis of the undisclosed evidence.

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[55] GC, *OMPI*, above fn. 27, para 136.

[56] *Ibid*.

[57] AG Sharpston opinion in *PMOI II*, above fn. 20, 216.

Article 105 ROP however presupposes that the GC is provided with the undisclosed incriminating evidence, an assumption that also underpins the case law on the EU list. If the EU authority does not itself submit an application for confidential treatment, the GC can order the production of the relevant document via a measure of inquiry.[58] However, the GC has limited means to enforce such a measure. Article 105(2) specifies that formal note should be made of any refusal to produce the relevant document, but that is basically it. At the same time, if the authority does not comply with the order, the GC will simply decide the case on the basis of the material available to it, which is likely to result in the annulment of the measure. As we saw, this has been rather common.

3. Suspect's representation in closed proceedings

Under Article 105(8) ROP, the GC is required to take into account the fact that one of the parties has not had an opportunity to comment on the undisclosed incriminating evidence. But neither Article 105 nor the case law make any provision for some kind of involvement of the listed individual and entity in the closed proceedings. Given the exact details of the procedure are for the GC to decide, it is not inconceivable that some form of representation could be catered for that does not involve the listed individual or entity being present. But this does not appear to have been given serious consideration thus far.

4. Suspect's access to undisclosed evidence

Article 105(8) is explicitly framed as an exception to Article 105(6), which mentions the possibility of providing a summary of the confidential information to the other party. It must therefore be assumed that Article 105(8) is precisely designed to cover those cases where any access to the information is denied. In any event, even under Article 105(6), there is no obligation on the GC to order the production of a summary or redacted version of the information.

5. Content of decision

Neither do the new ROP explain how Article 105 ROP, and particularly Article 105(8) ROP, are to be reconciled with the duty of the EU courts to state the reasons on which their judgment is based.[59] In the specific context of restrictive measures, the Court of Justice has held that the judgment of the GC must disclose 'clearly and unequivocally' that court's 'reasoning in such a way as to enable the persons concerned to ascertain the reasons for the decision taken and the Court of Justice to

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[58] Arts 91 and 105(2) new GC ROP.

[59] Arts 36 and 53, Statute of the CJEU, as well as Art 81 new GC ROP.

exercise its power of review'.[60] The Court of Justice has also in the past indicated that it will 'exclude a document from consideration altogether, if by giving the document confidential treatment the Court would be prevented from complying with its duty to give a reasoned judgment in open court'.[61] That statement may need revisiting in the context of Article 105 ROP, but the fact remains that the new ROP do not contain any rules regarding the content of judgments delivered on the basis of closed proceedings.

6. Appeals proceedings

This may cause particular difficulties if the decision is appealed. As was mentioned, Article 105 ROP has no equivalent in the ROP of the Court of Justice. But given the Court's emphasis on the importance of a reasoned open judgment for the effectiveness of the appeals process, this procedural discrepancy is likely to cause greater difficulties in cases involving undisclosed incriminating evidence. In the specific context of the EU list, moreover, if the undisclosed material covers the identity of the authority who took the relevant national decision, the issue is not solely a question of fact but also trades into questions of law, as the existence of a decision meeting the conditions set out in Common Position 2001/931 is a legal pre-requisite to the enactment of EU sanctions.

C. Remedies against non-disclosure

In line with the composite of the EU listing procedure, remedies against non-disclosure should be sought both at the national level and the EU level. Particular difficulties arise if the identity of the competent domestic authority is kept secret, as this prevents any use of domestic rights and remedies. At the EU level, the denial of disclosure can in principle be challenged in two ways.

First, via an ordinary action for annulment of the decision or an appeal before the Court of Justice on the basis that it breaches the rights of the defence and of effective judicial protection. *OMPI* indeed made clear that the Court must, where applicable, ensure that 'the overriding considerations relied on exceptionally by the Council in order to not to respect those rights are well founded'.[62] Even before the new ROP, the GC could examine the undisclosed evidence and determine whether non-disclosure was justified, although if it was, the document could not be relied upon by the relevant EU authority. Today, it would examine the claim using Article 105 ROP.

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[60] Case C-330/15 *Tomana v Council* ECLI:EU:C:2016:601, para 97.

[61] Case 236/81 *Celanese v Council and Commission* [1982] ECR-1183.

[62] GC, *OMPI*, above fn. 27, para 154.

Presumably, it would also now be possible for the applicant to challenge the GC's reasoned order under Article 105 ROP before the Court of Justice.

Second, although the Court of Justice has indicated this would not be the most appropriate course of action,[63] at least one listed person[64] challenged the denial of disclosure via an action for refusal of access to documents under Regulation 1049/2001.[65] Under Article 104 ROP, where, following a measure of inquiry, the 'document to which access has been denied by an institution has been produced before the General Court in proceedings relating to the legality of that denial, that document shall not be communicated to the other parties'. In that scenario, the GC would therefore examine the legality of the refusal behind closed doors. Like Article 105 ROP, there is no provision for the individual to be represented in the proceedings.

D. Constitutional law framework and assessment

1. Constitutional law

The 'paradox' as regards EU constitutional law is that the rules on the use of indirect or undisclosed evidence—although the two terms are not used at the EU level and do not map very well onto the distinction between the 'evidence' and the 'grounds' of the decision that is more commonly used in the case law—were developed by the EU courts largely on the basis of EU primary law and particularly EU fundamental rights. As we already saw, most of the relevant rules were derived from three main principles: the right to be heard, which is now enshrined in Article 41 CRF; the duty to state reasons, which is now also found in Article 41 but has a more general footing in Article 256 TFEU; and Article 47 CRF on the right to effective judicial protection. In that sense, there is a peculiar double movement, whereby the constitutional limits to secret evidence are being defined concomitantly with the articulation of rules enabling its use. The principles developed in *OMPI* and subsequent case law as regards the confidentiality of security information constitute authoritative interpretations of EU constitutional law, with which they necessarily comply, even if the said principles are often disregarded in practice. In that context, it is worth highlighting that Article 346 TFEU[66] expressly provides that no Member State shall be 'obliged to supply information the disclosure of which it considers

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[63] According to the Court, the purpose of Regulation 1049/2001 is 'to give the general public a right of access to documents of the institutions and not to lay down rules designed to protect the particular interest which a specific individual may have in gaining access to one of them'. See Case C-266/05 P *Sison v Council* ECLI:EU:C:2007:75, para 39.

[64] *Ibid*.

[65] Regulation of the European Parliament and of the Council 1049/2001 OJ [2001] L145/43.

[66] On this provision see among others S Trombetta, 'La Protection des Intérêts Nationaux de la Défense quand la Défense Devient Européenne: les Evolutions de l'Article 296 TCE' (2005) 490 *Revue du Marché Commun et de l'Union Européenne* 441.

contrary to the essential interests of its security' and that EU primary law therefore expressly protects the confidentiality of certain types of information.

There are nonetheless two issues. The first is whether the use of incriminating undisclosed evidence envisaged by Article 105 ROP is compatible with EU primary law. The position in the context of the EU list—and as we shall see, the UN list—is ambiguous. But in *ZZ*, a case concerning deportation proceedings on national security grounds, Article 47 CFR was read to require the individual to be provided with the 'essence' of the grounds on which the deportation order was based. This had to take place 'in a manner which takes due account of the necessary confidentiality of the evidence',[67] but the fact remains that it expressly requires a minimum level of disclosure. A different level of disclosure potentially could be explained by the nature and importance of the underlying substantive right: *ZZ* concerned rights of free movement and residence, whilst restrictive measures are only taken to affect the right to property and to carry out a business. Article 30(2) of the Citizenship Rights Directive, moreover, required *ZZ* to be 'informed precisely and in full of the public security grounds which are the basis of the decision'. At any rate, given the procedure that will be applied to the individual case will ultimately be defined in the reasoned order of the GC, the Court of Justice might not take issue with Article 105 as a whole. If *ZZ* applies, however, that order would need to make adequate provision for some information to be forwarded to the listed person.

The second issue is whether the principles that were developed by the EU courts to deal with confidentiality—and indeed the ROP—meet the requirements of the European Convention on Human Rights (ECHR). Whilst the EU is not a part of the ECHR and its measures cannot be challenged before the Strasbourg court, the CFR itself dictates that to the extent that a right corresponds to a right enshrined in the ECHR, its meaning and scope shall be the same as that laid down in the Convention. The European Court of Human Rights (ECtHR) accepts the recourse to secret evidence in non-criminal proceedings. In fact, it was Strasbourg that first pointed to the existence of techniques that could supposedly reconcile the competing demands of public security and human rights, after which the so-called closed material procedure and the system of special advocates were introduced in the UK, subsequently spreading to much of the common law world.[68]

The ECtHR has never directly examined the use of secret evidence in the context of asset freezing measures and much in practice will depend on the classification and effects of the measure. Indeed, Strasbourg tends to adopt a contextual approach to the content of procedural safeguards and assess compliance on a case by case basis having regard to the overall fairness of the proceedings. Nonetheless, the following

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[67] CoJ, *ZZ*, above fn. 1, para 68.

[68] J Jackson, 'The Role of Special Advocates: Advocacy, Due Process and the Adversarial Tradition' (2016) 20 *International Journal of Evidence & Proof* 343.

template usefully summarizes the ECtHR's approach to secrecy outside of the criminal law realm and can help us determine the likely response of the ECtHR.

At the one end of the spectrum, in cases involving deportation on security grounds, the ECtHR has recognized[69] that provided there is 'some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information',[70] some or all of the information can be kept secret. This was largely on the basis that there is no automatic right to disclosure under Article 8 ECHR. At the other end of the spectrum, in cases involving quasi-criminal measures, a minimum level of disclosure appears, in principle, to be required. In *A v UK*, the ECtHR ruled that preventative detention imported 'the same fair trial guarantees as art.6 (1) in its criminal aspect'[71] and hence a right to disclosure of relevant evidence. As a result, restrictions on disclosure had to be strictly necessary and any difficulty caused to the defendant 'sufficiently counterbalanced by the procedures followed by the judicial authorities'.[72] In that case, the ECtHR accepted that the UK closed material procedure could ensure the overall fairness of the proceedings, but only if the individual was 'provided with sufficient information about the allegations against him to enable him to give effective instructions to the special advocate'.[73] Compliance with what has come to be known as the 'A-disclosure' test is assessed on a case-by-case basis, but the ECtHR clarified that where 'the open material consisted purely of general assertions and [the decision of the tribunal] was based solely or to a decisive degree on closed material', the test would not be satisfied.[74]

Given this appears to limit the use of undisclosed incriminating evidence as contemplated, *inter alia*, by Article 105(8) of the ROPs, compatibility with the ECHR would depend on two factors. First, on whether asset freezing measures import the same procedural safeguards as a system of detention. There has been considerable debate regarding the exact legal nature of asset freezing measures.[75] The ground appeared set to shift when the GC held that 'in the scale of a human life, 10 years in fact represents a substantial period of time and the question of the classification of the measures […] as preventative or punitive, protective or confiscatory, civil or criminal seems now to be an open one'.[76] But they continue to be classified as

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[69] *IR v United Kingdom* (Admissibility) (2014) 58 EHRR SE14.

[70] *Ibid,* para 57.

[71] *A v UK* (2009) 49 EHRR 29, para 217.

[72] *Ibid,* para 205.

[73] *Ibid,* para 220.

[74] *Ibid*.

[75] See for example C Eckes, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions* (OUP, 2010), ch 3.

[76] Case T-85/09 *Kadi v European Commission* ('*Kadi II*') ECLI:EU:T:2010:418, para 150. But in all subsequent cases, the EU courts have insisted that these constitute temporary precautionary measures.

temporary preventative measures. At the same time, the judgment of the ECtHR in *A v UK* was not premised on the formal classification of preventative detention but on its effects. In domestic courts, there is some support for the applicability of the standard to asset freezing measures, which have been compared to control orders,[77] where the A-disclosure has been held to apply.[78] However, although AG Sharpston[79] and the GC[80] have both used *A v UK* in this context, the Court of Justice has never expressly relied on the case in the context of the terrorist lists, a point to which we shall return when we look at the UN list.

Second, even assuming A-disclosure does not apply, this would not necessarily mean that the ROP provide a sufficient counterbalance to the injustice caused to the appellant within the meaning of the ECHR. Contrary to the closed material procedure applicable in the UK, an application for confidentiality is subject to a balancing exercise where the competing demands of security and fairness are weighted against one another. On the other hand, however, there is no system of representation comparable to the system of special advocates, which was so central to the judgment of the ECtHR. In practice, much may depend on the specific reasoned order issued by the GC. But the compatibility of the new ROP with the ECHR, however watered down the requirements of human rights law have become in recent years, is by no means clear. In passing it is worth reiterating that if the decision of the competent domestic authority is taken by an EU Member State, it will have itself to comply with the principles articulated by Strasbourg.

2. Political and academic discourse

Terrorist blacklisting has attracted considerable scholarly and political attention. At the political level, secrecy is viewed as a necessity to ensure the effectiveness of the measures, which has only increased—not decreased—with the development of procedural safeguards. From that viewpoint, the new ROP are seen as the necessary counterpart of a certain juridification of restrictive measures. The US, in particular, was adamant that the EU must put in place mechanisms that ensure restrictive measures are not repeatedly annulled, although the pressure arose in the context of the sanctions against Iran, where several entities managed successfully to challenge their designation before the GC.

At the academic level, by contrast, the 'high level of secrecy'[81] is seen as one of the most important problems underpinning blacklisting regimes. Several authors, in

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[77] *A v HM Treasury* [2010] UKSC 2, [2010] 2 A.C. 534, para 192 (Lord Brown).

[78] S*ecretary of State for the Home Department v AF (No 3)* [2009] UKHL 28, para 65 (Lord Philips).

[79] Opinion of AG Sharpston in *PMOI II*, above fn. 20, para 245.

[80] GC, *Kadi II*, above fn. 76, paras 174–175.

[81] Eckes, above fn. 36, 177.

particular, have deplored the systemic failure to share the information on which the measures are based with the EU courts.[82] But responses to that problem differ. For some, the solution is not to challenge the use of undisclosed evidence but to require 'institutional adaptation'[83] to ensure better information sharing and cooperation, as well as meaningful review. In that context, academics have looked to mechanisms in place at the national level, such as the UK system of special advocates, even though they tend to admit these are only imperfect solutions.[84] Secrecy, in other words, is seen as a necessary evil. While their concern is with enabling the reviewability, rather than enhancing the effectiveness, of the measures, such approaches tend to reinforce the supposed necessity of secrecy and legitimize the continuous implementation of blacklisting.

For others, the use of undisclosed evidence is hardly the answer. These perspectives could be grouped in three camps—the 'pragmatic', the 'principled', and the 'radical'—although the classification is largely impressionistic. *Pragmatic perspectives* point to the difficulties of making a system of undisclosed evidence work in the EU. They express reservations about whether the ROP will overcome Member States' reluctance to share information with EU institutions[85]—the UK abstained from signing the new rules on the basis that they did not contain sufficient safeguards against leakages or enable Member States to withdraw the document from the file. Or they question whether EU courts, as international adjudicative bodies, have the necessary expertise to assess the probative value and reliability of intelligence information.[86] In the context of the EU list, these practical concerns were partly echoed by the Court of Justice itself, which pointed out that the composite procedure was designed to overcome the EU's lack of investigatory capacity.[87] As a result, pragmatic perspectives can also dovetail with broader objections to the competence of the EU in this area, which, it is argued, should have remained with the Member States.[88] Such perspectives do not necessarily object to the admissibility of undisclosed evidence in general, but they do object to its use in the EU. *Principled perspectives* see a more fundamental incompatibility between human rights and

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[82] E.g. C Eckes, 'EU Restrictive Measures Against Natural and Legal Persons: From Counter-Terrorist to Third Country Sanctions' (2014) 51 *CMLRev* 869, 893–894.

[83] C Eckes, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions* (OUP, 2010), 384.

[84] *Ibid*.

[85] Editorial, 'Confidentiality in Luxembourg: "Something in Motion, Weary but Persisting"' (2015) *ELRev* 308, 3010.

[86] I Cameron, 'EU Sanctions and Defence Rights' (2015) 6 *New Journal of European Criminal Law* 335, 348–350.

[87] CoJ, *Al Aqsa*, above fn. 21, para 62.

[88] Before the entry into force of the Treaty of Lisbon, the power of the European Community to adopt these blacklisting mechanisms on the basis of Articles 301 EC, 60 EC and 308 EC was deeply contested. See for example Eckes, above fn. 82, 78–126.

undisclosed evidence and question the extent to which judicial techniques or security vetted councils can truly palliate the unfairness of secret procedures.[89] More *radical perspectives* could be divided in two camps. First, those that link the issue of undisclosed evidence to the problem of 'intelligence-as-evidence', meaning the use of risk-based assessments based on suspicion before courts that traditionally have been used to determine guilt based on proof of past conduct that constitutes violations of the law.[90] Undisclosed 'intelligence-as-evidence' thus reflects a deeper reconfiguration of executive power[91] and its admissibility risks undermining more fundamentally the judicial function. Second, those for whom the admissibility of undisclosed evidence triggered a slippery slope that not only normalizes secrecy but has entailed a broader redefinition of human rights standards, which have evolved to accommodate the new security paradigm.[92] Contra to the pragmatic perspective, principled and radical perspectives do not see the problem as unique to or aggravated by the EU but as a broader phenomenon linked to the increased preemptive and secretive practices that underpin counterterrorism in the context of the 'War on Terror'. Principled and radical perspectives, however, tend to differ in their exact diagnosis of the nature and extent of the problem.

The issue of secrecy also takes on a different dimension in the context of the composite procedure. As Cameron puts it, the decision to freeze funds 'may be greater than its parts, and the remedies which exist may only (at best) be capable of challenging the parts',[93] creating gaps in the system of legal protection. Much of the case law of the GC rests on the assumption that national standards of disclosure are adequate and that it will be possible for the individual to challenge non-disclosure before domestic courts. But theory and practice show that this 'coordination' between different levels of decision-making works to the disadvantage of the listed individual and entity, particularly when the Court of Justice has expressly held that the decision needs not to 'have been taken in a specific legal form or to have been published or notified'.[94]

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[89] E.g. JUSTICE, 'Secret Evidence', June 2009, http://www.justice.org.uk/resources.php/33/secret-evidence.

[90] K Roach, 'The Eroding Distinction between Intelligence and Evidence in Terrorism Investigations' in N McGarrity, A Lynch and G Williams (eds.) *Counter-Terrorism and Beyond* (Routledge, 2010).

[91] See also G Sullivan, 'Transnational Legal Assemblages and Global Security Law: Topologies and Temporalities of the List' (2014) 5 *Transnational Legal Theory* 81.

[92] E Nanopoulos, 'European Human Rights Law and the Normalisation of the Closed Material Procedure: Limit or Source?' (2015) 78 *MLR* 913.

[93] Cameron, above fn. 86, 345.

[94] CoJ, *Al Aqsa*, above fn. 21, para 69.

3. Limits on the use of secret evidence

From a doctrinal perspective, the ECHR suggests that there should be a limit to the use of both indirect and undisclosed evidence: the allegations against the person (indirect evidence) need to be sufficiently precise and if they are not, the undisclosed evidence cannot be decisive for the case. There are several voices in favour of a minimum disclosure standard in this context, too, but the position remains unclear.

From a normative perspective, viewpoints on the issue differ. It is, however, important to appreciate the crucial differences of the modern secrecy debate which takes place in the twin contexts of (a) the exercise of coercive powers by international bodies and (b) a war on terror that has redefined or moved away from traditional criminal justice models of coercion. The former creates both practical (most often the information is not even in the possession of the relevant institution) and normative problems (the legitimacy of the so-called individualization of international authority is not uncontested). The latter at the very least means that traditional rules on evidence may not be suitable to thinking through the problem of using intelligence information to establish risk or suspicion, particular when the definition of terrorism itself remains opaque. One obvious solution to the problem would be to restore terrorism squarely back to the criminal realm, a proposal that was recently been put forward in the UK by the newly appointed independent reviewer of terrorism legislation.[95] This would ensure that only evidence about past behaviour meeting criminal law standards is admissible in court and that any restriction on full disclosure is kept to a minimum, seeing that the relevant evidence could not be based on risk assessments derived from intelligence sources.

4. Procedural safeguards

Article 215 TFEU now specifically requires sanctions regimes to include 'necessary provisions on legal safeguards', which must thus be incorporated into secondary legislation. While this has been partly done in the context of the UN list, the rules developed in the context of the EU list are still primarily to be found in Council communications, best practice documents, and the working documents of the relevant EU working party—an equivalent of the UN Sanctions Committee. At the very least, more elaborate rules should be included in the relevant legislative framework, clarifying in particular how the interaction between the two levels of decision-making works and the exact role of the Council in the process. These should also include rules on confidentiality, including how much information can be kept secret and who ultimately is to decide upon disclosure. Eckes, for example, has proposed adapting the rules governing access to documents to the present context, where the EU has the

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[95] http://www.independent.co.uk/news/uk/home-news/terror-laws-uk-offences-abolish-max-hill-interview-independent-reviewer-legislation-isis-attack-a7883836.html.

final say over questions of disclosure.[96] There should also at the very least be guidelines about how the GC will exercise its discretion under Article 105 ROP, particularly as regards the fairness side of the equation. The requirements for a balancing exercise and the taking into account of the effect of non-disclosure on the probative value of the evidence may go further than corresponding arrangements, but they remain fundamentally insufficient. The individual remains entirely in the hands of the GC, with no means to foresee how his or her case will be treated in court and no means of representation.

Even if one were to introduce sufficient procedural safeguards into the process—and it is the distinct view of this author that undisclosed evidence should be prohibited—one of their main problems in the EU has been their application in practice. Some commentators already have pointed out that the EU courts' case law risks becoming little more than a 'drafting guide',[97] as it has done in other areas. Thus, Cameron concludes, by 'taking case in how the "accusation" is formulated, the Council should be able to avoid a situation where it (or rather a member state) is forced to reveal secret information to the CJEU' and indeed, one may add, where the EU courts will in turn avoid having to scrutinize the evidence underpinning a decision. This has been particularly pronounced in sanctions regimes outside the terrorist context, where, depending on how the criteria for listing are drafted, association with the regime would be enough to justify the imposition of sanctions and where the availability of procedural safeguards becomes little more than a formalistic box ticking exercise. But it also finds resonance in the context of the EU terrorist list, where, depending on the identity of the competent authority, EU institutions may be relieved from their duties to scrutinize the decision or provide meaningful procedural protection.

II. Restrictive measures against individuals in non-criminal proceedings: the UN terrorist list

A. The use of incriminating 'indirect evidence'

1. Grounds for non-disclosure and competent authority

The UN list, by contrast, is drawn on the basis of designations of the UN Sanctions Committee, although as we saw, such designations can now also be supplemented by the EU's own determinations.[98] As is well known, *Kadi I* confirmed that the

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[96] Eckes, above fn. 31.

[97] Cameron, above fn. 86, 349.

[98] For that purpose, the Working Party on the implementation of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism was renamed

UNSC Resolution did not have the effect of suspending the applicability of EU law, including EU fundamental rights, or indeed, judicial review.[99] But the Court of Justice effectively drew out two limitations to full disclosure.

First, although the UNSC Resolution does not displace EU law, it remains relevant to the nature of the duties incumbent upon EU institutions. Having recalled the requirements stemming from EU human rights law, in *Kadi II*[100] the Court of Justice clarified that any 'infringement must be examined in relation to the specific circumstances of each particular case, including, the nature of the act at issue, the context of its adoption *and the legal rules governing the matter in question*' (emphasis added).[101] The Court then mentioned various provisions in the EU Treaties which, in some shape or form, pledge a commitment to the principles of the UN Charter, namely Articles 3(1), 5(2), and 21(1) and (2)(a) and (c) TEU. It also recalled, as it had already done in *Kadi I*, the primary responsibility of the UNSC in maintaining peace and security.

During the administrative stage, this meant the relevant EU authority—in this instance the European Commission—could only be expected to provide the individual with the evidence *available to them and relied on* as a basis of decision, that is, 'at the very least the summary of the reasons of the Sanctions Committee'.[102] In the spirit of cooperation underpinning Article 220 TFEU, if the Commission considers it needs more information to enable it to make an impartial assessment, it is invited to reach out to the Sanctions Committee. But having observed that the UN is under no legal obligation to cooperate with the EU, the fact that the authority does not make 'accessible to the person concerned and, subsequently, to the Courts of the European Union information or evidence which is in the sole possession of the Sanctions Committee or the Member of the UN concerned and which relates to the summary of reasons underpinning the decision at issue, cannot, as such, justify a finding that [due process rights] have been infringed'.[103]

Second, to the extent that any information is made available to the EU authority, here too, its disclosure to the listed person can be limited:

> With regard to a [EU] measure intended to give effect to a resolution adopted by the Security Council in connection with the fight against terrorism, overriding considerations to do with safety or the conduct of the international relations of the [EU] and of its

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'Working Party on restrictive measures to combat terrorism'. See Council Document 14612/1/16 REV 1.

[99] Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat v Council and Commission* ('*Kadi I*') ECLI:EU:C:2008:461.

[100] Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Kadi v Commission and others* ('*Kadi II*') ECLI:EU:C:2013:518.

[101] *Ibid*, para 202.

[102] *Ibid*, para 111.

[103] *Ibid*, para 137.

> Member States may militate against the communication of certain matters to the persons concerned and, therefore, against their being heard on those matters.[104]

At other times, the Court of Justice has spoken of 'some of the information or evidence' (as opposed to 'certain matters') needing to be kept secret, whilst the protection of 'security' has later come to replace the term 'safety' as a ground for refusing disclosure. These suggest that terminological differences in different judgments are purely semantic, even though they tend to come at the cost of clarity as to the applicable principles.

Taken together, these have three implications. First, the Commission can base a decision on indirect evidence, namely the statement of reasons of the Sanctions Committee. Second, the extent to which disclosure can be denied will partly be informed by pragmatic considerations pertaining to the amount of information actually provided to the Commission by the UN, although the Commission must state the 'individual, specific and concrete' reasons which led it to confirm the implementation of the measures.[105] Finally, access to any evidence provided to the Commission by the UN or the designated State can be denied. In those instances, it is again unclear whether the decision to forward the information is exclusively for the EU, or whether the relevant State or organization can oppose disclosure.

2. Court's access to an undisclosed source

The international dimension of the UN list has implications for the extent to which the information underpinning a listing must be forwarded to the EU Courts. In *Kadi II*, the Court of Justice reiterated that its role is to ensure that the measures have been adopted on a 'sufficiently solid factual basis',[106] which has essentially become the scope of review across all restrictive measures. But the Court of Justice disagreed with the GC at first instance that this required a full review of all the reasons for a designation. In this context, the Court of Justice explained that, for compliance with the right to effective judicial protection to be ensured, it was instead sufficient for one of the reasons on which the measures were based to be (a) sufficiently detailed and specific, (b) substantiated by evidence, and (c) sufficient in itself to support the decision to freeze funds.[107] The corollary is that only the evidence underpinning one of the reasons relied upon against the listed person must by law be disclosed to the EU courts.

As regards the evidence upon which that reason is based, however, the Court reiterated that security concerns cannot be validly raised as grounds to limit disclosure to the EU courts. In *Kadi II*, the Court in particular developed a little further the

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[104] CoJ, *Kadi I*, above fn. 99, para 342.

[105] CoJ, *Kadi II*, above fn. 100, para 116.

[106] *Ibid*, para 119.

[107] *Ibid*, para 130.

'procedural techniques' that the EU courts would have to deploy to ensure the confidentiality of the information, along the lines now codified in Article 105 ROP. It clarified that procedural justice required the EU courts to check the necessity of non-disclosure and the probative value of the evidence[108] and to consider the production of a summary of the secret evidence.[109] But it did not elaborate on what an 'appropriate balance between the requirements attached to the right to effective judicial protection […] and those flowing from the security of the European Union or its Member States'[110] would entail, such as to give more concrete guidance on how the GC would be called upon to exercise its powers under Article 105 ROP. If the competent EU authority finds itself unable to comply with the request for disclosure to the Courts, whether because of confidentiality reasons or because the Sanctions Committee has not made sufficient supplementary information available to enable the EU courts to exercise their review function, the latter will base its decision solely on the material before it.[111] Such was the case in *Kadi I* and *II,* where the decision was on both occasions annulled.

Similar to the position of EU listings based on decisions of a third country, the Court of Justice indicated that it would be prepared to limit the scope of its review[112] if the UN was to develop an equivalent system of fundamental rights protection.[113] In that scenario, the EU courts would not necessarily be required to review the substance of the designation and hence examine the confidential information. But this is unlikely to materialize anytime soon. Although the Court of Justice recognized the improvements introduced at the level of the UN in the aftermath of *Kadi I*, it concurred with the judgment of the ECtHR in *Nada*[114] that the UN delisting procedure did not constitute an effective remedy.[115] In *Kadi II*, the Court in particular clarified that the notion of effective judicial protection not only has a *functional* element (i.e. concerned with the delivery of procedural justice) but also an *institutional* element pursuant to which it should be possible 'for the person concerned to obtain a declaration *from a court*, by means of a judgment ordering *annulment* whereby the contested measure is retroactively *erased from the legal order* and is deemed never to have existed, that the listing of his name, or the continued listing of his name, on the

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[108] *Ibid*, paras 124–126.

[109] *Ibid*, para 129.

[110] *Ibid*, para 128.

[111] *Ibid*, para 123.

[112] CoJ *Kadi I*, above fn. 99, paras 322–325.

[113] Both Advocate Generals in *Kadi I* and *II* expressly held that the doctrine of equivalence should be applied to the UN. AG Bot even thought that its requirements were fulfilled following the creation of the office of the Ombudsperson.

[114] And specifically paragraph 211 of the judgment in which the ECtHR found that the re-examination procedure did not comply with Article 13 ECHR on the right to an effective remedy. See *Nada v Switzerland* (2013) 56 EHRR 18.

[115] CoJ, *Kadi II*, above fn. 100, para 133.

list concerned was vitiated by illegality, the recognition of which may re-establish the reputation of that person or constitute for him a form of reparation for the non-material harm he has suffered (emphasis added)'.[116] Under this approach, any development falling short of a more fundamental restructuring of the UN along the lines of a world government with a proper global judiciary resembling the EU's own supranational model appears unlikely to meet with the approval of the Court of Justice.

4. Suspect's access to an undisclosed source

There is no mention of techniques to ensure the suspect's access to and scrutiny of an undisclosed source. The EU authority is only required to invite them to submit observations on the statement of reasons of the Sanctions Committee during the administrative phase of the proceedings and neither the ROP nor the case law mention any additional disclosure requirement during the judicial phase of the proceedings.

5. Evidentiary value

The Court of Justice has only held that the reason relied on by the EU authority must constitute *in itself* a sufficient basis to support the imposition of restrictive measures.[117] However, whilst it will check the probative value of the underlying evidence, there is no requirement attached to how decisive the secret evidence should be in supporting continuous inclusion similar to the 'sole and decisive rule' applied by the ECtHR.

B. The use of undisclosed incriminating evidence

1. Conditions for use of undisclosed incriminating evidence

Matters are further complicated when it comes to the use of undisclosed information. Two different stages could be distinguished, at least in the context of an initial decision to freeze funds: before and after the Commission has heard the person's views. Regulation 1286/2009,[118] which was adopted after the judgment of the Court of Justice in *Kadi I,* provides that the Commission shall make a provision decision to freeze funds once provided with the statement of case by the Sanctions Committee. This makes clear the Commission cannot adopt restrictive measures lacking that statement of reasons, but it says nothing about how clear or specific the reasons included therein need to be. In that context, the pragmatic approach now

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116 *Ibid*, 134.

117 *Ibid,* para 130.

118 Council Regulation 1286/2009 [2009] OJ L346/42.

adopted by the Court of Justice in *Kadi II*, which essentially links the requirements of EU procedural law to how much information is actually made available to the EU authority, suggests it would not be impermissible for the Commission to rely on undisclosed material, if the UN statement of case does not actually give any concrete details about the actual reasons for listing.

Under Article 7(3) of the Regulation, however, the Commission must then review and possibly finalize its decisions after hearing the person's view.[119] If the decision to freeze funds is confirmed, the Commission is required to provide the 'individual, specific and concrete' reasons which led it to confirm the implementation of the measures.[120] This also dovetails with the duty of the CJEU to verify that the measure is based on a 'sufficiently solid factual basis', which, as we saw, requires one of the reasons relied upon by the competent EU authority to be sufficiently detailed and specific. At this stage, therefore, it would appear that the Commission cannot confirm the decision to freeze the person's funds if the statement of reasons is vague and no further clarification has been provided to it by the Sanctions Committee.

But there are two further issues. First, there is the question of whether the possibility to limit disclosure on security grounds applies to the reasons on which the designation is based or only to the underlying information or evidence. On the one hand, the relevant passages of the case law mention that only '*some* information or *some* of the evidence' (emphasis added) can be kept confidential, which suggests this does not affect the requirement that the individual be provided with sufficiently detailed reasons about his or her designation. On the other hand, however, the judgment in *Kadi II* falls short of the more robust language used in *ZZ*, which requires disclosure of the 'essence' of the grounds, even if *Kadi II* otherwise quoted extensively from that judgment. Neither did the Court of Justice refer to the similarly worded judgment of the ECtHR in *A v UK*, which was by contrast cited by the GC at first instance.

Second, even if a minimum level of disclosure is required under EU law, there is an issue about the degree of precision and detail which it prescribes. Thus, in *Kadi II*, the very same allegations that were described by the GC as 'general, unsubstantiated, vague and unparticularised'[121] were found by the Court of Justice to meet the test of being sufficiently 'detailed and specific' on appeal. Kadi may have been successful because the EU institutions did not provide any evidence to counter his objections about the veracity of the allegations. But if sufficient incriminating evidence

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[119] A similar procedure also applies to the review of names included in the UN list prior to the introduction of Regulation 1286/2009. See Art 1 Regulation 1286/2009 adding Art 7c to Regulation 881/2001.

[120] CoJ, *Kadi II*, above fn. 100, para 116.

[121] GC, *Kadi II*, above fn. 76, para 157.

had been provided to the Court of Justice in confidence, it is not clear that the vagueness of the allegations would have bared the measure being upheld.

2. Court's access to undisclosed evidence

As the previous sections made clear, the Court of Justice does not require an independent assessment of *all* the facts and evidence upon which a UN listing is based, and there is therefore no requirement that the EU institutions provide the Courts with all the undisclosed incriminating evidence. Some of the reasons behind a designation can be kept entirely secret, and it is ultimately for the competent EU authority to decide how much information to share with the EU courts. However, assuming it is open to the Commission to base its decision exclusively on undisclosed material, at least one reason and its supporting evidence will need to be disclosed to the EU courts. In that scenario, Article 105 ROP would apply and, as we saw, this provision appears to contemplate cases where any form of disclosure to the listed person is denied. If the case is decided entirely behind closed doors, it remains unclear what the impact would be on the content of the Court's decision or the conduct of any appeal.

C. Remedies against non-disclosure

Similar to the principles applying to the EU list, EU courts can review whether the confidentiality of the information is justified, a ground which the listed person can put forward in proceedings before the Courts. However, if the failure to provide the individual or entity with sufficient information about their designation is due to the fact that such information has simply not been forwarded to the EU institutions by the Sanctions Committee, *Kadi II* suggests that this cannot meaningfully be challenged at the EU level. The appropriate recourse in that case is before the Office of the Ombudsperson that was established after the decision of the Court of Justice in *Kadi I*.

D. Constitutional law framework and assessment

1. Constitutional law

Relevant constitutional issues have already been discussed in section I, but two further points arise in the specific context of the UN list. First, assuming *Kadi II* requires a minimum level of disclosure, which is by no means clear, there is, here too, a question of whether the standard of disclosure complies with the requirements of the ECHR in *A v UK* or, for that matter, with the judgment in *ZZ*. Second, there is the question of whether reviewing only one reason is sufficient to meet fairness standards. In deportation proceedings, both the Court of Justice and the ECtHR

appear to carry out an independent assessment of *all* the evidence,[122] even though the standard of review appears to be lower in the ECHR context. Moreover, leaving EU authorities to decide what information it will forward to the EU courts does not guard against them withholding exculpatory evidence or information that would affect the probative value of the evidence, such as evidence obtained in violation of the prohibition on torture and inhuman and degrading treatment,[123] which is normally inadmissible in court.

As a matter of EU constitutional law, the Court of Justice appears to suggest these lower standards of disclosure are justified by the fact that the measures imposed against Kadi—as opposed to those imposed against the PMOI or ZZ—are based on designations of the UN and that EU constitutional law itself makes various references to the EU's commitment to the UN enterprise. Whether vaguely formulated principles can be used to derive concrete limitations on the scope and content of judicial review is debatable, but it is certainly not unique to the UN list. In the context of the EU list too, the EU courts have used the principle of cooperation rather impressionistically to develop rules on disclosure and confidentiality.

The ECtHR, for its part, held in *Al-Dulimi* that verifying that inclusion on a UN list is not arbitrary[124]—a standard that does not seem to require an independent scrutiny or disclosure of all the evidence—is sufficient to ensure compliance with Article 6 ECHR. The ECtHR accepted that the inability of domestic courts to examine 'sufficiently precise information in order to exercise the requisite scrutiny in respect of any substantiated and tenable allegation' was 'capable of constituting a strong indication that the impugned measure is arbitrary, especially if the lack of access is prolonged'.[125] On the facts of the case, the applicant succeeded, because he should have been 'afforded at least a genuine opportunity to submit appropriate evidence to a court for examination on the merits'.[126] But on closer analysis this says little about how much information ought to be disclosed to the domestic courts or indeed the individual. References to the 'merits' of the decision, moreover, obscure more than they reveal, seeing that they sit rather unwell with the language of arbitrariness. For all the ECtHR's attempts to avoid ruling on the normative relationship between the ECHR and the UN Charter under Article 103 UN Charter,[127] the existence of a UNSC Resolution and the 'imperatives' of international peace and security still appear to play a crucial role in the delineation of disclosure obligations in judicial proceedings.

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[122] CoJ, *ZZ*, above fn. 1, para 59.

[123] A Cuyvers, 'Give me One Good Reason: The Unified Standard of Review for Sanctions after *Kadi II*' (2014) 51 *CMLRev* 1759, 1775.

[124] *Al-Dulimi v Switzerland* 36 BHRC 58, paras 147–151.

[125] Ibid, para 147.

[126] Ibid, para 151.

[127] See also ECtHR, Nada, above fn. 114; *Al Jedda v United Kingdom* (2011) 53 EHRR 23; and *Behrami v France, Saramati v France, Germany and Norway* (2007) 45 EHRR SE10.

It is therefore not inconceivable that the threshold developed by the Court of Justice in *Kadi II* would be unproblematic from Strasbourg's point of view. At the same time, it is worth recalling that *Al-Dulimi* concerned the implementation of UN sanctions imposed against Saddam Hussein and people associated with him, rather than sanctions intended to fight international terrorism.

2. Political and academic discourse

Most debates on the UN list have centred on the EU's relationship to the UN, not least because of the primacy enjoyed by UNSC Resolutions on the international plane. But these debates also have implications for secrecy and disclosure. Again, the scholarship can be divided in several 'camps'. The 'necessary evil' camp would accept the use of indirect and undisclosed evidence at the EU level as an alternative to deferential review of measures implementing UNSC Resolutions and a mechanism that might enable greater cooperation between the EU and the UN. Among those that are more skeptical or openly critical of secrecy, there are again multiple perspectives. 'Pragmatic' voices tend to question the feasibility or desirability of substantive review—even the watered-down version articulated in *Kadi II*—and secret procedures on the basis that the UN is unlikely to share the relevant information with the EU executive, let alone its judicial branch (if the UN even has the relevant information in its possession to begin with) anyway. 'Principled' approaches would reject any adaptation of EU fundamental rights law to reflect the UN origin of a designation in the absence of a clear requirement to do so in the Treaties. Some more 'radical' accounts emphasize that intelligence-as-evidence is inherent to the UN list and that the introduction of secret procedures at EU level must be seen as part of the development of an emerging global security law, whose effect is to create 'empty' legal spaces where executive bodies are freed from any genuine accountability.[128] In that sense, the new ROP render any attempt, *Kadi I* included, to ensure legal accountability rather meaningless.

III. Conclusion

This chapter has focused on the use of secret evidence in non-criminal court proceedings in the EU in the context of the EU and UN terrorist blacklists. These practices have generated considerable debate, and the chapter illustrates only a fragment of the criticisms that have been voiced against these mechanisms, even though many such critiques speak directly to the problem of secrecy. By now, several studies and commentators have highlighted that terrorist blacklisting involves a more pervasive reconfiguration of power that cannot be palliated by discrete reforms, be these at the

[128] Sullivan, above fn. 91.

international, regional, or national level, and that the practice should therefore altogether be abolished.[129] In that sense, the admissibility and review of secret evidence cannot be treated merely as a problem of legal accountability and fairness in judicial proceedings. Despite challenges to their legitimacy, however, these lists are alive and well and the story from the EU shows that whilst early reforms seemingly worked towards ensuring some semblance of fairness to those included in these lists, the new ROP are a paradigmatic example of the EU's institutions structures adapting to the new paradigm. These rules considerable disrupt the EU's constitutional ordering and their compatibility with human rights norms remains deeply contested. Secrecy is also likely to facilitate the capacity of executive bodies to escape accountability and aggravate the difficulties created by the fragmented decision-making structures of the lists.

[129] G Sullivan and B Hayes, 'Blacklisted: Targeted Sanctions, Preemptive Security and Fundamental Right' European Center for Constitutional and Human Rights, December 2010, available at: <http://www.ecchr.eu/publications/articles/blacklisted-targeted-sanctions-preemptive-security-and-fundamental-rights.864.html>.

Secret Evidence in France

Marc Touillier

In a famous essay entitled *The Rebel* (1951), Albert Camus criticized the rise to power of police states, which often try to legitimate their action with the proverb whereby 'the end justifies the means'. The author countered this assertion by asking 'but who will justify [then] the end?' (before answering himself somewhat acerbically 'the means').[1]

This subtle reaction is still up-to-date in times when French society is suffering from many terrorism attacks and is divided on the methods for fighting this threat. For example, some people believe that the detention conditions of the main surviving suspect of the attacks of 13 November 2015, Salah Abdeslam, are 'too humane'.

Let us leave the question of the humane treatment of terrorists aside and focus on another question directly linked to our subject: can we allow this person to be accused, detained, and judged based on evidence kept secret by 'reason of state'?

This question leads us to approach another question about French criminal proceedings: what do we mean by the ends and means in criminal proceedings? It is essential to identify the ends a criminal procedure system is pursuing and the

[1] Albert Camus, *The Rebel*, Gallimard, 1951, 351.

means used to getting to these ends if you wish to have a good idea about the degree of liberalism of the State in which you are living.

What people in France, like people abroad, mean by the ends is to establish material truth based on a court decision that establishes legal truth. These two types of truth must correspond as much as possible by balancing the protection of procedural guarantees and the effectiveness of repressive action.

And these are the means: protection of procedural guarantees on the one hand, effectiveness of repressive action on the other hand. Both of these considerations imply, respectively, that everyone charged with a criminal offense has sufficient rights to defend him- or herself and that the public authorities have sufficient powers to carry out the essential investigations to search for evidence of innocence as well as evidence of guilt.

Because of their contradictory nature, these two means are in permanent tension in the choices of criminal policy. That is why they are generally not considered in an equitable manner, depending on whether or not the need for preserving innocence and the rights of defence are emphasized or the need of arresting and convicting criminals. The second objective will clearly be privileged whenever public authorities are able to use secret evidence to arrest and convict criminals.

The example of the fight against terrorism and organized crime offers a tragic opportunity for taking a look at the subject of secret evidence in criminal proceedings, even though this subject exceeds the framework of these 'exceptional' forms of crime. These most serious threats allow us to grasp the full gravity of the subject. Can we legitimately use the most extreme methods of investigation, such as torture or the lie detector, under the pretext of a more effective fight against these forms of crime?

We only need to say 'secret' in criminal proceedings to remind us of the inquisitorial system which dominated in France during the period of the *Ancien Regime*. In this system, the procedure was secret and evidence was strictly defined by the law (*preuves légales*). Everyone knows that judicial confession was the 'queen of evidence', which is why torture was practiced to obtain a confession of guilt.

Between the Revolution and the end of the nineteenth century, the inquisitorial system began to change by abolishing torture; still, during investigations the investigating judge (*juge d'instruction*) kept the procedure secret. After the investigations, however, the criminal trial was public and adversarial and the judges were free to give as much weight to the evidence as they thought appropriate. They were not tied by the rules of 'legal evidence'. Since the middle of the twentieth century, the French system has progressively admitted accusatorial elements into the criminal procedure. It has become a 'mixed' system, because it is neither exclusively accusatorial nor inquisitorial.

The rules for French criminal proceedings are currently provided in the Code of Criminal Procedure (*Code de procédure pénale,* CPP), which has been in force since

1959. Many reforms changed the rules in order to strengthen the right of defence and the adversarial principle; they also significantly mitigated the value and weight of secret evidence. In fact, the value of secret evidence cannot be equal to the other evidence and cannot be used under the same conditions, even if it was obtained according to the rules. In the following, the concept of secret evidence will be used in a broad sense that goes beyond state secrets, including various forms of secrecy in criminal trial and pre-trial proceedings as well as in non-criminal proceedings targeting individuals suspected of involvment in organized crime or terrorism.

I. Restrictive measures imposed following a criminal trial

A. The use of incriminating 'indirect evidence'

First, it should be noted that the French CPP does not consider a distinction between direct and indirect evidence. Article (Art.) 427 CPP—which is the most important criminal rule of evidence—provides in its first paragraph: 'except where the law otherwise provides, offences may be proved by any mode of evidence and the judge decides according to his innermost conviction'.[2] This Article is widely seen as expressing the liberty principle in the production of evidence.[3] For legal doctrine it means that the judge is 'free to form his opinion as well in a negative, conjectural and imperfect evidence, as in an affirmative, direct and complete evidence'.[4]

Nevertheless, in light of the specific rules provided by the CPP it is possible to consider the anonymous testimonies originating from protected witnesses, repentant criminals, intelligence officers, or undercover agents as indirect evidence.

1. Grounds for non-disclosure and competent authority

During the criminal trial, the district prosecutor (*procureur de la République*) and the private parties (the accused or the victim) have the obligation to disclose their pieces of evidence regardless of their origin[5] or form[6] in order to respect the

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[2] English translation provided under www.legal-tools.org/doc/912f4d/pdf.

[3] See esp. Jean Pradel, *Procédure pénale* (18th edn Cujas, 2015) 365.

[4] Faustin Hélie, *Traité de l'instruction criminelle* (H. Plon, first published 1866), vol 4, para 1780.

[5] Evidence can be produced by an individual such as by an agent of the state (police officer, investigating judge), on the basis of material elements (seized or found documents, electronic data, or other objects) or human findings (report of a police interrogation, hearing of witness, etc.).

[6] Evidence can be written or not (oral confession or testimony, audio, and/or video recording, etc.).

adversarial principle protected under Art. 6 European Convention on Human Rights (ECHR).[7] Art. 427 paragraph (para.) 2 CPP in fact provides that the judge 'may only base his decision on evidence which was submitted in the process of the hearing and adversarially discussed before him'. This explains why the court must be involved in the disclosure of evidence between the parties.

However, the CPP provides a number of instances where disclosing the source of incriminating 'indirect evidence'—but not the information originating from it—can be denied in order to protect certain witnesses or to safeguard secrecy interests of the state *lato sensu*.

a) Anonymous testimonies of protected witnesses or repentant criminals.

Since 2001,[8] Arts 706–57 to 706–73 CPP have provided a special procedure for testimonies of protected witnesses. In proceedings brought for a felony or a misdemeanour carrying at least three years' imprisonment—giving this procedure significant scope—, where the hearing of a privileged witness[9] is liable to put his or her life or health or that of his or her family members or close relatives in serious danger, the liberty and custody judge (*juge des libertés et de la détention*),[10] seized of the case during the criminal investigation by the district prosecutor or the investigating judge, may authorize recording this person's statements without his or her identity appearing in the case file of the proceedings. The witness's hearing is held by a judicial police officer (*officier de police judiciaire*), except if the liberty and custody judge decides to carry out this hearing him- or herself.[11]

If the witness is granted anonymity, his or her identity or address cannot be revealed under any circumstances, subject to five years' imprisonment and a €75,000 fine.[12] Such protection does not apply if, taking the circumstances in which the

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[7] As the European Court of Human Rights (ECtHR) says, 'It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. In addition, Article 6 § 1 requires, as indeed does English law, that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused.' (*Jasper v UK*, 16 February 2000, App. no. 27052/95, para 51).

[8] Act no. 2001–1062 of 15 November 2001, art 57.

[9] This special protection can only benefit persons against whom there is no plausible reason to suspect that they committed or attempted to commit an offence and who are in a position to bring useful pieces of evidence to the proceedings (Art 706–57 CPP).

[10] The liberty and custody judge was created in 2000 specifically to decide on detentions during judicial investigations in place of the investigating judge.

[11] Art 706–58 para 1 CPP.

[12] Art 706–59 CPP.

offence was committed or the witness's personality into account, knowing the person's identity is essential to the case for the defence.[13]

This special procedure must be distinguished from another measure recently created by the legislator[14] in order to protect all witnesses—not only privileged witnesses—exposed to serious danger of retaliation in proceedings brought in respect of a felony or a misdemeanour punished by at least three years' imprisonment.[15] The investigating judge or the president of the trial court may order either *ex officio* or at the request of the district prosecutor or the private parties that the identity of these witnesses will not be mentioned during the public hearings and will not appear in the orders or judgments of the investigating or trial court liable to be made public. A number in place of the identity will be used to designate the witness, but it does not prevent the court and the parties from knowing his or her identity because it still appears in the case file of the proceedings to which they have access. Thus, evidence gathered in this way is not secret.

Further, repentant criminals[16] also have access to special protection of their identity where their appearance is liable to put their life or health or that of their family members or close relatives in serious danger. In such a case, the decision is taken in secret by the trial court, *ex officio* or at the request of the repentant criminals.[17]

b) Anonymous testimonies of intelligence officers or undercover agents

The CPP provides two comparable procedures for the protection of intelligence officers[18] and judicial police officers or agents carrying out infiltration operations under an assumed identity,[19] if their testimony is required during criminal proceedings. On the one hand, the true identity of these 'special agents' must not be revealed at any stage of the proceedings. On the other hand, the questions asked of these agents during a hearing—we must point out here that, unlike intelligence officers, undercover agents cannot be heard directly[20]—or a confrontation with the accused[21] may not be designed to reveal, whether directly or indirectly, their true identity.

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[13] Art 706–60 para 1 CPP.

[14] Act no. 2016–731 of 3 June 2016, art 22.

[15] Art 706–62–1 CPP.

[16] According to Art 132–78 Penal Code (CP), a repentant criminal is a person who attempted to commit a felony or a misdemeanour and who either enabled the offence to be prevented or ended, prevented it from causing damage, or facilitated the identification of the other perpetrators or accomplices by alerting the legal or administrative authorities.

[17] Art 706–63–2 CPP (introduced by Act no. 2017–1510 of 30 October 2017).

[18] Art 656–1 CPP (introduced by Act no. 2011–267 of 14 March 2011).

[19] Arts 706–81 to 706–87 CPP (introduced by Act no. 2004–204 of 9 March 2004).

[20] According to Art 706–86 CPP para 1, only the judicial police officer under whose authority the infiltration operation is carried out may be heard as a witness.

[21] See *infra*, I. A. 4.

2. Forms of indirect evidence and the court's access to an undisclosed source

Before the court, indirect evidence can take a written and an oral form. All the statements shall be recorded to be used as evidence, but the court may decide, *ex officio* or at the request of the parties, to hear and ask questions of the undisclosed source of incriminating indirect evidence.

For an anonymous testimony of a *protected witness*, the hearing is transcribed without identifying him or her in the case file of the proceedings. Thus, the court and the parties may have access to the witness's testimony under conditions guaranteeing anonymity. The person's identity and address are entered into another official record signed by the person and this record is put in a case file separate from the case file of the proceedings.[22] The public prosecutor must keep this specific case file, which can only be accessed by the investigating judge, the liberty and custody judge, and the president of the investigating chamber (especially if the recourse to the proceedings is challenged before him or her).

During the criminal trial, the protected witness can also be heard on the court's decision if the latter orders an additional investigation. In that case, the witness is heard either by an investigating judge nominated to carry out the additional investigation or, if one of the members of the court has been nominated to carry out this hearing, by means of a technical device allowing the witness to be heard from a distance.[23]

When the court needs the testimony of an *intelligence officer*, it may carry out the hearing under conditions guaranteeing the officer's anonymity. Otherwise, the hearing is conducted at another place chosen by the chief of the intelligence service, such as the agent's duty station. The questions asked of the agent may not be designed to reveal, whether directly or indirectly, his or her true identity.[24]

Similar rules apply to *undercover agents*. However, the court cannot hear the agent directly. Only the judicial police officer under whose authority the undercover operation is carried out may be heard in the capacity of a witness.[25]

For a long time there was no specific rule about testimony by *repentant criminals*, but since passage of Act no. 2017-1510 on 30 October 2017, the CPP has provided that the court may decide to hear them directly *in camera* or at a distance by means of voice and face distortion techniques.[26]

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22 Art 706–58 para 2 CPP.

23 Art 706–61 para 2 CPP.

24 Art 656–1 CPP.

25 Art 706–86 CPP.

26 Art 706–63–2 CPP.

3. Accused's access to an undisclosed source

Except if the source of incriminating indirect evidence is a *repentant criminal*,[27] the accused has one or more possibilities of access to an undisclosed source.

If the indirect evidence is testimony of a *protected witness*, the CPP gives first the accused the right to challenge the recourse to this special procedure before the president of the investigating chamber, within ten days of being informed of the content of a hearing conducted by the judicial police officer or the liberty and custody judge. After considering the evidence of the proceedings and the evidence in the specific case file, the president of the investigating chamber rules in a reasoned decision not open to appeal. If he or she finds the challenge justified, he or she may either order to have the hearing nullified or rule that the witness's identity be disclosed, on condition that the witness make it expressly known that he or she agrees to waive anonymity protection.[28] In that case, the accused can immediately lift the anonymity of the witness, however, he or she can only use this right during judicial investigations. Furthermore, this means not only that the judge [must] consider the protection of the witness unnecessary in view of the knowledge of the person's identity for the exercise of the rights of the defence but also that the witness [must] give his or her consent. This is why this first possibility seems to be a difficult approach.

The second approach provided by the CPP is easier for the accused, because he or she may request to be confronted with a protected witness, during the judicial investigations or before the trial court, by using a technical device allowing the witness to be heard from a distance. The acc used may also get his or her legal counsel to interrogate this witness in the same way. The witness's voice is then rendered un-identifiable using appropriate technical means.[29] This possibility is considered 'as of right'.

In case of testimony by an *intelligence officer or an undercover agent*, the accused has the option to request a confrontation with the agent, but this possibility is not considered 'as of right'. If the accused is implicated by reports personally made by this agent, the accused may request to be confronted with the agent under the conditions provided above for protected witnesses. The questions asked of the agent at this confrontation may not be designed to reveal, whether directly or indirectly, his or her true identity.[30]

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[27] In the absence of specific legal provisions, the accused has no access to this undisclosed source. The only possibility for a confrontation of the accused with the repentant criminal is the court's decision to conduct an *in camera* hearing of this witness.

[28] Art 706–60 para 2 CPP.

[29] Art 706–61 para 1 CPP.

[30] Arts 656–1 and 706–86, para 2 CPP.

4. Evidentiary value

As we have seen above, incriminating indirect evidence is provided based on special rules of the CPP because they depart from the ordinary rules of evidence. The legislator limited the evidentiary value of secret evidence essentially in order to respect the jurisprudence of the ECtHR. The latter ruled, particularly in a judgment concerning France, that 'where a conviction is based solely or to a decisive degree on depositions that have been made by a person whom the accused has had no opportunity to examine or to have examined, whether during the investigation or at the trial, the rights of the defence are restricted to an extent that is incompatible with the guarantees provided by Article 6'.[31]

The legal provisions transpose this ECtHR case law insofar as they specify that 'no conviction may be returned on the sole basis of statements made by' a protected witness, a repentant criminal, an intelligence officer or an undercover agent.[32] Unlike the ECtHR, the French CPP does not prohibit convictions based to a decisive degree on depositions of these persons. It literally prohibits convictions based solely on statements of an undisclosed source.[33] Therefore, if there is one other piece of evidence—regardless of its value—corroborating the indirect evidence introduced in this way, a valid conviction may be pronounced in the presence of anonymous testimony even though this testimony was decisive in carrying the judge's conviction.

B. The use of undisclosed incriminating evidence

French criminal law leaves no room for the use of undisclosed incriminating evidence, regardless of the gravity of the charges against the accused. According to the adversarial principle, no conviction may be returned based on information undisclosed to the defendant and his or her legal counsel.

The only situation that comes to mind concerns evidence obtained based on classified documents,[34] but in that case the trial court is obliged to take recourse to

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[31] *Rachdad v France*, 13 November 2003, App. no. 71846/01, para 23.

[32] See Arts 706–62, 656–1, and 706–87 CPP and Art 132–78 PC.

[33] Art 706–87 CPP provides an exception in case of statements made by undercover agents, where they agree to testify under their true identity.

[34] According to Art 413–9 PC:
'The quality of national defence secrets, for the purposes of this section, attaches to information, processes, articles, documents, and computerized data or files which are of importance to national defence and which are subject to protective orders intended to restrict their circulation.
The object of such orders may be information, processes, articles, documents, computerized data or files the disclosure of which is liable to prejudice national defence or could lead to the disclosure of a national defence secret.
A Decree of the Conseil d'Etat shall provide for the levels of classification of information, processes, articles, documents, and computerized data or files which are in the nature of

a specific 'declassification' procedure provided by another Code, the Defence Code (*Code de la défense*).[35] To access a classified document, the court must ask, upon a reasoned request, the administrative authority at the origin of the classification (in practice, a minister) to declassify and communicate the requested information. The latter then submits this request to the opinion of the Commission on National Defence Secrets.[36] In the event of a favourable opinion for all or part of the classified documents, the administrative authority may decide in favour of the 'declassification' of these documents and their communication to the court.[37] Therefore, evidence gathered in this manner is entered into the case file of the proceedings. This means that the evidence is no longer secret and the parties can adversarially discuss it before the court.

We may conclude that the French system totally excludes the use of undisclosed incriminating evidence.

C. Remedies against non-disclosure

1. Remedy

As stated above, the accused may challenge the recourse taken to the special procedure relating to the protection of witnesses before the president of the investigating chamber. If the president of the investigating chamber finds the challenge justified, he or she orders the nullification of the hearing. He or she may also rule that the witness's identity be disclosed, on condition that the witness expressly make it known that he or she agrees to waive anonymity protection. However, if the president of the investigating chamber refuses an order nullifying the hearing, the accused cannot appeal this decision to the investigating chamber (which is in principle the court of appeals for the measures taken by a judge during the judicial investigations).[38] The accused may only lodge an appeal on points of law to the Court of Cassation on grounds of abuse of authority.[39]

Regarding testimony by an intelligence officer or an undercover agent, the only right the accused has is to request a confrontation under conditions guaranteeing the anonymity of the officer or agent. The accused cannot challenge the court's decision

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national defence secrets and the authorities in charge for the specification of the means to ensure their protection.'

[35] Art L. 2312–4 Defence Code.

[36] See Art L. 2312–2 et seq Defence Code for the composition and powers of the Commission on National Defence Secrets.

[37] The administrative authority may also deny the 'declassification' request without giving the reasons on which this refusal is based.

[38] Art 706–60 para 2 CPP.

[39] For example, see Court of Cassation, Criminal Chamber, Judgment of 8 July 2015, no. 15–82.383.

in the event of refusal.[40] This absence of a remedy is justified but open to critism because it impedes the discussion of evidence by the parties and casts doubt on the impartiality of the court.

2. Access to an undisclosed source

Access to an undisclosed source varies according to the type of evidence. For example, there is no possibility for the court to access an intelligence officer or an undercover agent directly. By contrast, the court is allowed to carry out the hearing of a repentant criminal *in camera*. In the presence of a protected witness, the only way provided by the CPP is for the custody and liberty judge to hear the witness first. After this hearing, there is no possibility for the court to hear the protected witness directly. The court can only decide to order an additional investigation to hear the witness. In that case, the latter is heard either by an investigating judge nominated to carry out this additional investigation or, if one of the members of the court has been nominated to carry out this hearing, by means of a technical device allowing the witness to be heard from a distance. This demonstrates that access to undisclosed information is limited, including for the court.

3. Accused's representation in closed proceedings

The only specific rule that applies to the suspect's representation in closed proceedings is the intervention of his or her legal counsel before the court in the event of a confrontation with an undisclosed source. In that case, the legal counsel for the accused—who is not a 'special advocate'—is allowed to interrogate the protected witness or special agent, but the questions asked of them during the confrontation may not be designed to reveal, directly or indirectly, their true identity. If the undisclosed source is a repentant criminal, we can deduce from the legal provisions that legal counsel of the accused may also ask questions of the witness either *in camera* or by means of a technical device allowing the witness to be heard from a distance. Needless to say, legal counsel may always request further evidence from the trial court.

4. Content of decision

The legal framework does not provide any specific rule on the content of a court's decision to ensure the protection of secrecy interests when the court hands down the reasons for its decision on access to an undisclosed source or its judgment of conviction.

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[40] We must remember that the court's decision cannot, under any circumstances, allow to lift the anonymity of the agent concerned.

D. Constitutional law framework and assessment

1. Constitutional law

The French Constitution does not touch on evidence or, more generally, on reconciling the fundamental rights and the repressive purpose pursued by the restrictive measures imposed following a criminal trial. However, the Constitutional Council (*Conseil constitutionnel*) already claimed that the adversarial principle and the respect for the rights of defence imply, in particular, that an accused must be put in a position, by him- or herself or his or her legal counsel, to challenge the conditions under which the evidence on which the accusation is based was gathered.[41] In light of the case law of the Constitutional Council, we may assume that indirect evidence is admitted insofar as the parties retain the possibility to discuss it and the judge cannot return a conviction based solely on statements made by the undisclosed source. In the aforementioned decision, the Constitutional Council declared unconstitutional a legal provision (Art. 230–40 CPP) which allowed the judge to return his conviction based on secret information originating from a geolocation measure,[42] whereas the accused was not put in a position to challenge the conditions under which this evidence was taken. The Council considered such a provision unconstitutional even if the judge could not return his conviction solely based on this evidence.[43]

In a different case, the Court of Cassation refused to transmit to the Constitutional Council an application for a priority preliminary ruling on the issue of constitutionality (*question prioritaire de constitutionnalité*) about the legal provisions allowing the hearing of a protected witness under conditions guaranteeing his or her anonymity. The Court of Cassation held that this special procedure was strictly framed by the law and placed under the control of a judge in order to guarantee respect for the adversarial principle and the rights of defence.[44]

Under these circumstances, it is reasonable to assume that undisclosed incriminating evidence cannot be admitted under the Constitution, because such evidence

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[41] Constitutional Council, decision no. 2014–693 DC of 25 March 2014, para 25.

[42] In proceedings brought in respect of a felony or a misdemeanor committed by an organized gang, the investigating judge may withdraw the following information from the case file for the proceedings when knowledge of this information is liable to put at risk the life or health of an individual or that of his or her family members or close relatives and when this information is not essential to the discovery of the truth and to the case for the defence:
1. the date, time, and place where the geolocation device has been installed or removed;
2. the recording of the location data and the elements allowing to identify a person who participated in the installation or the withdrawal of the geolocation device.

[43] Constitutional Council, decision no. 2014–693 DC, para 26.

[44] Court of Cassation, Criminal Chamber, Judgment of 29 June 2016, no. 15–87.290, Bull. crim. no. 211. The Court of Cassation also ruled these legal provisions compliant with the ECHR, particularly Articles 6 and 13 (Court of Cassation, Criminal Chamber, Judgment of 7 December 2016, no. 15–87.290).

affects these fundamental rights even more. However, it is difficult to anticipate the constitutionality of such evidence as it depends on the legal framework (grounds and conditions for using undisclosed incriminating evidence, court access to such evidence, guarantees given to the accused).

2. Political and academic discourse

As we have seen, the French system admits secret evidence only subject to restrictions. Thus, there are more arguments against than for the admissibility of 'indirect' and 'undisclosed' evidence.

The main arguments advanced in domestic political and academic discourse against the use of secret evidence are based on the necessity to respect fundamental rights such as the adversarial principle and the rights of defence, but also on the loyalty principle in evidence gathering—recently held inviolable by the Constitutional Council and the Court of Cassation—and the right of the accused to be presumed innocent until proven guilty according to the law. In other words, the right to a fair trial is definitely the most powerful argument in favour of limiting indirect evidence and prohibiting undisclosed evidence in the French system.

This does not preclude the temptation to encourage the admissibility of such evidence, especially in view of the French and European terrorism situation. It is obvious that an improvement in the effectiveness of the fight against terrorism and organized crime could be used as an argument to legitimize introducing some other indirect evidence or even undisclosed evidence. However, we are not aware of an actual political proposal or academic discourse to that effect.

3. Limitations on the use of secret evidence

In light of constitutional law and arguments advanced in academic discourse, the main limitations on the use of 'indirect' and 'undisclosed' evidence are, of course, the respect for fundamental rights in criminal proceedings. Even if these rights are not necessarily 'non-derogable', the French legislator cannot ignore their importance when introducing incriminating secret evidence and extending grounds for using such evidence.

4. Procedural safeguards

As we have seen, the French CPP admits indirect evidence under certain conditions and with defence guarantees. The two main procedural safeguards are, on the one hand, the possibility for the parties to discuss adversarially the indirect evidence before the court, if necessary by requesting a confrontation with the undisclosed source or by challenging the hearing, and, on the other hand, the impossibility for the court to return a conviction based solely on statements made by an undisclosed source.

In our opinion, these procedural safeguards must always be designed to allow for a proportionate balancing between the public interest and the rights of defence when using secret evidence in court.

II. Restrictive measures imposed in criminal pre-trial proceedings

The aforementioned incriminating 'indirect evidence' originating from different forms of *anonymous testimonies* is liable to justify restrictive measures in criminal pre-trial proceedings like detention or house arrest.[45] Such evidence can only apply to persons under judicial examination, that is, persons against whom there is strong and consistent evidence indicating the likelihood that they participated, as perpetrator or as accomplice, in the commission of the offence.[46] To the extent that the applicable rules are no different from the rules applicable to the criminal trial, we refer to the remarks in Part I concerning special procedures relating to protected witnesses and special agents.

We would like to mention another specific rule relating to the *geolocation measure* whenever the investigating judge intends to take a restrictive measure against a person under judicial examination. A restrictive measure may be imposed at the request of the investigating judge to search or track a person suspected of having committed an offence or assisted in its commission. If geolocation provides precise and detailed evidence indicating a likelihood that the person did participate in the commission of the offence as perpetrator or accomplice, the liberty and custody judge may use this evidence to issue an order of detention or house arrest against that person.[47] As mentioned above, in proceedings brought in respect of a felony or a misdemeanor committed by an organized gang, the investigating judge may withhold some information from the case file for the proceedings if he or she believes that knowledge of this information is liable to put the life or health of an individual or that of his or her family members or close relatives at risk and if this information is not essential for the discovery of the truth and for the case of the defence.[48]

In that case, the accused may challenge the conditions under which the geolocation occurred, including the withholding of certain information from the case file, before the president of the investigating chamber. After considering the legality of the measure and the importance of such information in view of the case for the defence, the president of the investigating chamber rules in a reasoned decision not open to

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[45] See Art 137 et seq CPP.

[46] Art 80–1 CPP.

[47] The investigating judge him- or herself may also decide to issue a house arrest.

[48] Art 230–40 CPP. For the content, cf *supra*, I.D.1.

appeal. If he or she finds the challenge justified, he or she orders to nullify the geolocation. He or she may also rule to disclose the secret information, provided this information does not endanger the agents who participated in the installation or withdrawal of the geolocation device.[49]

In the event of a refusal decision, the evidence originating from the geolocation is then partially concealed from the suspect and his or her legal counsel but may justify or contribute to justifying imposing a restrictive measure during the judicial investigations phase.

III. Restrictive measures imposed in non-criminal proceedings against individuals

Finally, we can draw on the news related to the fight against terrorism to illustrate the existence of restrictive measures imposed in non-criminal proceedings against individuals. Initially, the legislator had provided these measures for preventive purposes in an exceptional context, the state of emergency. However, when this exceptional regime ended, the legislator decided to transpose some of the exceptional measures provided during the state of emergency into a new, 'ordinary' regime.

A. Restrictive measures provided by the Law on the State of Emergency

Following the terrorist attacks committed in Paris on 13 November 2015, a state of emergency was declared and then extended six times until 1 November 2017. During this period, the administrative authorities exercised different exceptional powers in order to prevent related public order offences. One of the restrictive measures taken by these authorities against individuals was *house arrest*.

Art. 6 of the Law of 3 April 1955 on the state of emergency[50] allows the Minister of the Interior to keep persons residing in the area under state of emergency under house arrest in relation to whom 'there are serious grounds to consider that the behaviour of these individuals constitutes a threat for public security and order'. The decision to put an individual under house arrest is valid for a timeframe of twelve months, renewable for a period of three months. The Minister of the Interior may also impose on the person under house arrest the obligation to report to the police service or gendarmerie units up to three times a day, to surrender his or her passport

[49] Art 706–60 para 2 CPP.

[50] Law no. 55–385 of 3 April 1955 on the state of emergency.

or any other identity document to these authorities, and to prevent him or her from associating directly or indirectly with certain suspected persons.

Such preventive measure derogates significantly from the ordinary rules of preventive policy, which cannot allow the administrative authorities to take individual privative measures on the basis of serious, but potentially unclear or distant reasons to think that the behaviour of some persons constitutes a threat to security and the public order. In this context, hundreds of people were held under house arrest because they were suspected to be prone to terrorist activities, but not only for these reasons. Other people were put under house arrest to prevent disorders relating to certain events, such as some climate activists during the 'COP 21' climate change summit in Paris.

Even though the legal provisions applied to house arrest during the state of emergency do not deprive the individuals placed under house arrest of the right to dispute this measure before the administrative courts, including by referral, they do not give them or the court access to the undisclosed source of the 'indirect evidence'. These are secret reports from the intelligence services, called '*notes blanches*', which obviously do not specify the identity of the source and often also do not provide details of information liable to be used against the individuals. However, the Constitutional Council argued that 'it falls to the administrative courts to assess, having regard to the matters debated by the parties before it, whether there are serious reasons enabling it to be concluded that the conduct of the person placed under house arrest constitutes a threat for public security and order'.[51]

B. Restrictive measures provided by the Law following the State of Emergency

After several extensions of the Law on the State of Emergency, essentially under the pretext of a permanent terrorist threat, parliament's decision to put a stop to the state of emergency was conditioned on the integration of some of the exceptional powers provided by this Law into the ordinary legal rules. Act no. 2017–1510 of 30 October 2017, which is the Law following the State of Emergency, came into force when the state of emergency expired. The Act gives authorities permanent powers to search homes, shut places of worship, and restrict the movements of suspected extremists. This latter measure aims to extend the house arrest in a different, less restrictive form because it is no longer justified by the exceptional circumstances of the state of emergency.

Since then, the Code of National Security (*Code de la sécurité intérieure*) has enabled the Minister of the Interior to decide on individual measures of administrative control and surveillance to prevent terrorist acts. Such measures are applied to any person where 'there are

[51] Constitutional Council, decision no. 2015–527 QPC of 22 December 2015, para 16.

serious grounds to believe that her behaviour constitutes a particularly serious threat to public security and order'.[52] According to the new legal rules, the Minister of Interior cannot order the detention under house arrest but can only order the suspected person not to move outside a specific geographical area, which can not be less than the territory of his or her place of residence. The demarcation of this area allows the person affected to lead a family and professional life and extends, if necessary, to the territories of other cities or departments than those of his usual place of residence. Under certain conditions this restrictive measure may apply for a timeframe of twelve months, renewable for a period of three months. It may be completed by the obligation to report to the police services or gendarmerie units once a day.

The interested party may challenge this measure before the administrative courts, including by referral, in order to get it nullified. However, similar to the house arrest provided by the Law on the State of Emergency, neither the person affected nor the judge has access to the source of indirect evidence. This is more open to criticism as secret evidence can be imprecise in the absence of a legal obligation for the intelligence services to provide precise and detailed information. Furthermore, we must emphasize the fact that these restrictive measures are applied in non-criminal proceedings and outside a state of emergency. This is the reason why the Act providing these measures has been very controversial.

[52] Art L. 228–1 et seq Code of National Security.

Intelligence Information in Criminal Proceedings in Germany

Marc Engelhart and *Mehmet Arslan*

I. Securitization of criminal proceedings

When the German Code of Criminal Procedure was introduced in 1879, the open collection of evidence was the rule. Secret measures (e.g. secret observations by the police) were rare exceptions. This situation changed dramatically in the 20th and 21th century, especially with the ongoing development of new technological (surveillance and information gathering) measures and the growing use of informants or undercover agents in certain areas of serious crime.[1] Today, the use of secret

[1] For more see *Hefendehl*, Goltdammers Archiv für Strafrecht (GA) 2011, 209 ff.; *Schünemann*, Zeitschrift für die gesamte Strafrechtswissenschaft (ZStW) 119/2007, 945–958; *Soiné*, Aufklärung der Organisierten Kriminalität durch den Bundesnachrichtendienst, in: Zwischen Globalisierung und Staatenzerfall – Perspektiven Organisierter Kriminalität, available at https://www.thueringen.de/de/publikationen/pic/pubdownload1095.pdf , 12 ff.

measures in criminal investigations is more often the rule than the exception, at least in some areas. Moreover, as mentioned above, not just the police and prosecution play a major role in gathering secret evidence in certain areas of serious crime but the intelligence services do so as well.[2] Particularly the fact that the intelligence services were tasked with combating major crime, especially transnational crime, resulted in a cooperation with and increased intelligence transfer from the foreign intelligence services.[3] In addition, the German foreign intelligence service (Bundesnachrichtendienst; BND) is the main supplier of evidence with regard to crimes committed abroad and subject to jurisdiction of German courts. More recently, the BND collected evidence for criminal investigations against those foreign fighters who joined ISIS or other terrorist organizations in Syria but subsequently returned to Germany.

Both the growing use of secret investigative techniques by criminal prosecution authorities and the growing interaction between intelligence services, police, and prosecution give rise to conflicts with established principles of criminal procedure, rights of defence, and the constitutionally guaranteed protection of informational self-determination.[4] From the perspective of criminal procedure law the conflict is most obvious where police and intelligence authorities do not allow the unrestricted use of their investigative results in criminal trial, inter alia with reference to the protection of state secrets.[5] Similarly, the sharing of information between different branches of the security apparatus raises the question whether or to what extent a transfer of intelligence information to the criminal prosecution agencies can be justified, as the original information gathering was conducted for other purposes.[6]

Legal systems generally provide strategies, on the one hand, to protect the public interest by restricting the disclosure of evidence in criminal proceedings and, on the other hand, to comply with procedural guarantees. First, German law also offers the possibility to withhold evidence classified as a state secret and to prevent its

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[2] *Engelhart*, The Secret Service's Influence on Criminal Proceedings, in: A War on Terror? The European Stance on a New Threat, Changing Laws and Human Rights Implications, 2010, 505; for more see *Hefendehl*, GA 2011, 212 ff.; *Gusy*, Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft (KritV) 1994, 242–251; *Denninger*, KritV 1994, 232–241.

[3] *Vogel*, Zeitschrift für Internationale Strafrechtsdogmatik (ZIS) 1/2017, 28; for more see *Gercke*, Computer und Recht (CR) 11/2013, 750; *Gnüchtel*, Neue Zeitschrift für Verwaltungsrecht (NVwZ) 2016, 1113.

[4] See also *Engelhart*, The Secret Service's Influence on Criminal Proceedings (note 2), 506.

[5] See below II.C. Suspending a Transfer and III.B.1. General Framework.

[6] *Engelhart*, The Secret Service's Influence on Criminal Proceedings (note 2), 527; for more see below II.B. Intelligence Information as Evidence at the Criminal Investigation Stage.

consideration by the trial court in the first place. This may be called 'non-disclosure'.[7] Second, some evidence may only be used at the investigation stage by the public prosecutor's office or the police and may never make it into the official case file. Certain intelligence information in particular may only serve as a tip or lead and be used as an indicator for further investigations or the criminal prosecution authorities may keep it entirely concealed from the court or the defendant. The latter is especially the case if the intelligence services only consent to a transfer of information provided it is not used as evidence in trial.[8] Third, and most importantly, intelligence information can be introduced into criminal proceedings as 'indirect evidence'.[9] Fourth, there are some other secondary protection techniques to ensure the protection of state secrets in criminal proceedings, notably restrictions on the right of access to the case file,[10] on the publicity of the main hearing,[11] and on the publicity of the verdict.[12] These secondary protection techniques will not be covered here for reasons of space.

To consider the above-mentioned strategies normatively, we shall first address the transfer and use of intelligence information at the investigation stage (II.) This includes not only the constitutional requirements for the protection of the right to informational self-determination and provisions of intelligence law but also the framework for the criminal prosecution authorities on how to use the transferred information. Particularly the above-mentioned strategy of using intelligence information as an 'investigative tip' will be explained in detail. Second, the use of intelligence information and the protection of state secrets at the trial stage will be explored (III.). More specifically, we will provide a general overview of the main principles of a court trial in order to illustrate the tension between the use of intelligence and the protection of state secrets on the one hand and the interests of justice and the rights of defence on the other. We will also detail the solutions provided under German law.

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[7] For more see below II.C. Suspending a Transfer and III.B.1. General Framework.

[8] For more see *Lang*, Geheimdienstinformationen im deutschen und amerikanischen Strafprozess, 2013, 130.

[9] See below III.B. Protection of State Secrets during Trial.

[10] For the constitutional requirements in this regard, see Bundesverfassungsgericht (BVerfG) Rechtsprechungsreport Strafrecht (NStZ-RR) 2013, 379–380; BVerfG NJW (Neue Juristische Wochenschrift) 1983, 1043–1046; see also BVerfG NJW 1984, 1451–1452; *Frisch*, Schutz staatlicher Geheimnisse im Strafverfahren, in: Dünyada ve Türkiye'de Ceza Hukuku Reformları Kongresi, 2013, 204.

[11] For more see BverfG Multimedia und Recht 2017, 742; BVerfG Gewerblicher Rechtsschutz und Urheberrecht (GRUR) 2016, 314; NJW 2012, 1865; BGH NJW 2006, 1221; see also *Franke*, NJW 2016, 2619; see also *Fromm*, Neue Juristische Online-Zeitschrift (NJOZ) 2015, 1193.

[12] For the constitutional requirements in this regard, see BVerfG GRUR 2016, 313–315.

II. Transfer and use of intelligence information at the investigation stage

The Basic Law has considerable influence on German criminal procedure law. This is manifested not only in the constitutional principles that apply to the criminal investigation and court trial but also in the strong protection of the defendant's basic rights at both stages of criminal proceedings.[13] However, as the jurisprudence of the Federal Constitutional Court emphasizes, there are many cases where the legislature has the duty and a certain discretion to specify the constitutionally based principles of criminal proceedings and rights of defence.[14] The European Convention of Human Rights (ECHR) also contributes to a broad interpretation of defence rights. *German criminal procedure law is further influenced by the case law of the European Court of Human Rights (ECtHR), particularly regarding the examination of witnesses.*[15] *This also applies where witness evidence is withheld on grounds of protection of state secrets.*[16]

A. Main principles of criminal investigation

According to the conventional concept of law enforcement responsibilities, the police serve either preventive or repressive functions.[17] Police authorities and police officers tasked with the prevention of danger are at the same time obligated under the Federal Code of Criminal Procedure (CCP; in German: Strafprozssordnung, StPO) to investigate on grounds of criminal suspicion on their own initiative.[18] The police also assist in the criminal prosecution, under the supervision of the public prosecutor's office. As long as they carry out criminal investigation responsibilities, the police are subordinate to the public prosecutor and must follow and carry out his or her instructions.[19] However, in practice, it is typically the police who initiate the

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[13] For more see below III.A. Trial Procedures and Main Principles and III.A.2. Rights of Defence.

[14] See for instance BVerfG NJW 1981, 1722; BVerfG NJW 1992, 2811.

[15] For the influences by the ECtHR in general, see, *Vogel*, The Core Legal Concepts and Principles Defining Criminal Law in Germany, in: Dyson/Vogel (eds.), The Limits of Criminal Law, 2018, 42; see also BVerfG NJW 2007, 205; BGH Neue Zeitschrift für Strafrecht (NStZ) 2017, 602 ff.; BGH NJW 2010, 2451; BGH, Decision of Jan. 27, 2015, Case no: 1 StR 396/04, Beck online Rechtsprechung (BeckRS) 2005, 02845.

[16] See below III.B.2. Witness Protection Measures.

[17] *Graulich*, NVwZ 2014, 685; doubting that such a distinction in police practice is even possible, *Rzepka*, KritV 1999, 313.

[18] § 163 para 1; *Gusy*, Polizei- und Ordnungsrecht, 10th edn., 2017, 76.

[19] § 152 para 1 GVG (Gerichtsverfassungsgesetz; Courts Constitution Act); Meyer-Goßner/*Schmitt*, § 153 (GVG) 1; *Roxin*/*Schünemann*, Strafverfahrensrecht, 29th edn., 2017, 60; *Vogel*, The Core Legal Concepts and Principles Defining Criminal Law in Germany (note 15), 55.

investigation, collect evidence, and present the results of the investigation to the public prosecutor in charge. Although it is officially the latter who leads the investigation, he or she determines the course of investigation and intervenes only in the more important cases.[20]

As mentioned, the police are obligated to 'take action in relation to all prosecutable criminal offences, provided there are sufficient factual indications'.[21] This requirement is the very foundation for the justification and obligation to investigate (the so-called initial suspicion) and must be based on specific circumstances.[22] The police may obtain said indication from reports by the victim, witnesses, other public institutions, from public or open sources (news or social media), and may come across respective circumstances in the course of their own actions unrelated to the specific suspicion.[23] The category of other public institutions also includes the intelligence services as they may voluntarily transfer information to the public prosecutor's offices or the police (for more explanations, see below).[24]

The German CCP provides a broad spectrum of investigative measures the police can utilize to verify the truthfulness of the suspicion against an individual.[25] It also provides a general clause that entitles the police 'to request information from all authorities and to make investigations of any kind, […] provided there are no other statutory provisions specifically regulating their powers'.[26] This includes the intelligence services, which the criminal prosecution authorities might call on for information by formal request (for more explanations, see also below).[27]

According to the principle of objectivity and the search for the material truth, public prosecutors are obligated to 'ascertain not only incriminating but also exonerating circumstances'.[28] Thus, the intelligence information might be relevant for the criminal investigation authorities on both counts. Unlike in the main trial, the principle of

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[20] *Roxin*/*Schünemann*, Strafverfahrensrecht, 61; *Graulich*, NVwZ 2014, 687; *Vogel*, The Core Legal Concepts and Principles Defining Criminal Law in Germany (note 15), 56.

[21] § 152 para 1; *Vogel*, The Core Legal Concepts and Principles Defining Criminal Law in Germany (note 15), 55; BVerfG NJW 1984, 1451; *Engelhart*, The Secret Service's Influence on Criminal Proceedings (note 2), 525; *Greßmann*, Nachrichtendienste und Strafverfolgung, in: Handbuch des Rechts der Nachrichtendienste, 2017, 403.

[22] Meyer-Goßner/*Schmitt*, supra note 401, § 152 (StPO) 4; *Gleß*, Predictive policing und operative Verbrechensbekämpfung, in: Rechtsstaatlicher Strafprozess und Bürgerrecht, 2016, 173 f.; *Kröpil*, Juristische Schulung (JuS) 2015, 213.

[23] See § 160 para 1 StPO; *Gusy,* Polizei- und Ordnungsrecht (note 18), 76; *Kröpil*, JuS 2015, 213.

[24] See below II.B.2. Unsolicited Information Transfer.

[25] §§ 48 ff. StPO.

[26] § 160 para 1 StPO; see also BVerfG NJW 1981, 1973.

[27] See below II.B.3. Transfer on Request.

[28] § 160 para 2 StPO; BVerfG NJW 1983, 1043; for more see *Kröpil*, JuS 2015, 241.

publicity does not apply at the investigation stage.[29] This stage is confidential as a matter of principle.[30] Although defendants have the right to access investigation files[31] already at the investigation stage, which ensures the constitutionally mandated respect for the defendant's dignity, i.e. not to be treated as a mere object of investigation,[32] this right is not absolute and can be restricted, *inter alia* to ensure an effective investigation or to protect state secrets.[33] As a result, most defendants will only be informed that there is some inculpatory evidence against them but not that the evidence originates in an intelligence investigation. In this way, intelligence information will be used as 'indirect evidence' against the defendant as early as the investigation stage.

Finally, the criminal prosecution is guided *inter alia* by the principle of mandatory prosecution.[34] This means not only that the police and the public prosecutor are compelled to investigate given 'sufficient factual indications', but also that the prosecutor must bring a public charge as a matter of principle if the outcome of preliminary investigations provides 'sufficient reason' for it.[35] The prosecution authority must be in a position to name and disclose all evidentiary material on which its allegations against the defendant are based.[36] This includes intelligence information used by the public prosecutor's office to support the indictment.[37]

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[29] Compare § 169 GVG.

[30] BVerfG NJW 1984, 1451–1452, 1451 f.; *Franke*, NJW 2016, 2618.

[31] § 147 para 2 StPO; BVerfG NJW 1984, 1451–1452.

[32] BVerfG NJW 1984, 1452.

[33] § 147 para 2 StPO; BVerfG NStZ-RR 2013, 379–380 (search warrant based on undisclosed evidence); BVerfG NJW 1984, 1451–1452.

[34] *Arslan*, Aussagefreiheit des Beschuldigten in der polizeilichen Befragung. Ein Vergleich zwischen EMRK, deutschem und türkischem Recht, 2015, 196.

[35] §§ 152 para 2, 170 para 1 StPO; see also *Roxin*/*Schünemann*, Strafverfahrensrecht, (note 19), 79; *Brandt*, Das Bundesamt für Verfassungsschutz und das strafprozessuale Ermittlungsverfahren. Die Mitwirkung des Bundesamtes für Verfassungsschutz in strafprozessualen Ermittlungsverfahren vor dem Hintergrund des sog. Trennungsgebots, 2015, 67 ff.; arguing that in police *practice* the principle of facultative investigation applies because prosecutorial oversight is quite limited, *Rzepka*, KritV 1999, 315; moreover, the principle of mandatory prosecution does not apply strictly. It is generally accepted that, given certain circumstances, the principle of proportionality might require dropping a criminal prosecution, conditionally or unconditionally; for more see *Vogel*, The Core Legal Concepts and Principles Defining Criminal Law in Germany (note 15), 56.

[36] See §§ 199 para 2 and 200 para 1 StPO; see for more BVerfG NJW 1983, 1043–1046; Landgericht (LG) Hannover FD-StrafR 2015, 369880; Münchner Kommentar zur StPO (MüKO/StPO)-*Hauschild*, § 96 StPO, 11.

[37] Compare BVerfG NJW 1983, 1044.

B. Intelligence information as evidence at the criminal investigation stage

1. General framework

Intelligence information as evidence at the investigation stage is not only a matter of criminal procedure law but is also regulated by intelligence law. Thus, both laws apply simultaneously if the information is to be transmitted from the intelligence services to the criminal prosecution authorities. Problems arise if secretly gathered evidence, in whole or in part, is not to be used for criminal investigation purposes or at trial, as will be shown in more detail below; further, the transfer of or request for information as such also requires a legal basis and, most importantly, a case-specific justification. The Federal Constitutional Court considers the transfer, request, or use of personal data and information to or by other authorities, especially for purposes other than the one the data or information were collected for, as an infringement on the right to informational self-determination. Hence there must be a parliamentary provision allowing the transfer, request, or use in due consideration of the principle of proportionality. These are the basic requirements of the data protection law with regard to the transfer, request, and use of intelligence information for criminal investigations.[38] Further, as mentioned above, the German Federal Constitutional Court emphasizes that information sharing between the intelligence services and the police authorities is not permitted as a matter of principle. Departures from this principle are only permitted by exception and will generally constitute a serious infringement.[39]

The statutory framework of German foreign and domestic intelligence services regulating the sharing of intelligence information with other public authorities including the police and criminal prosecution authorities is quite fragmented. Not all services have specific regulations for the transfer of information in their own codes; furthermore, the transfer of some information, such as information gathered by telecommunication surveillance, is regulated separately. In view of the detailed and diverse regulatory framework, we will explain in the following the key features of the legislation relating to information transfer and will attempt to avoid further confusion by withholding specific references to the rather complicated regulation technique in

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[38] BVerfGE (Sammlung der Entscheidungen des Bundesverfassungsgerichts) 65, 1 ff.; see also *Engelhart*, The Secret Service's Influence on Criminal Proceedings (note 2), 517; *Sieber*, NJW 2008, 882; *Greßmann*, Nachrichtendienste und Strafverfolgung (note 21), 405; *Lang*, Geheimdienstinformationen (note 8), 104 f.; for further internal regulations between the intelligence services which cannot override statutory law, see *Gazeas*, Übermittlung nachrichtendienstlicher Erkenntnisse an Strafverfolgungsbehörden, 2014, 290; for the legal situation in the past, see ibid., 292 f.; for the requirements of the principle of proportionality, see *Arslan*, Intelligence and Crime Control in the Security Law of Germany, in: Dyson/Vogel (eds.), The Limits of Criminal Law, 2018, 510 f.

[39] BVerfG NJW 2013, 1505.

this area. Moreover, information transfer provisions distinguish primarily between information sharing for purposes of prevention of crime and prosecution of crime.[40] As in most cases the same police authority is in charge both for prevention and prosecution, it is worth noting that the police authorities may receive relevant intelligence information at a fairly early stage where the preventive nature of the work by the authorities in charge is quite general (as often only risk indicators exist and no specific threat can be identified) or where a certain crime is only in the planning stage and has not necessarily been attempted or committed. Our focus, however, will be on information sharing for repressive purposes; information transfer for preventive purposes (in a broad sense) will not be addressed.

In general terms, the relevant statutory framework contains two models of communicating intelligence information to the criminal prosecution authorities: the spontaneous or autonomous transfer by the intelligence services themselves[41] and the transfer on request by the criminal prosecution authorities.[42] The law further distinguishes between cases where the intelligence services are obligated to transfer relevant information and others where information sharing is at their discretion and where they are entitled to withhold relevant or requested information.[43]

The following explanations on the transfer of intelligence information to the police and criminal prosecution authorities do not claim to be exclusive; first, because this publication aims at providing a general overview of the respective frameworks and second, because some questions have still not been settled in the jurisprudence and are quite controversial among scholars. Further, the transfer of information by the German Financial Intelligence Unit to the criminal prosecution authorities will not be addressed either, as the Unit has a *sui generis* position in the German landscape of intelligence services and is based on a framework quite independent of conventional intelligence law.[44] Nor will the Act on Joint Databases regarding the security authorities, including the intelligence services and the criminal prosecution agency, be explored.[45] Finally, this contribution will also limit itself in that only the law of

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[40] See for instance §§ 19 para 2 nos 1–4, 20 para 1 Gesetz über die Zusammenarbeit des Bundes und der Länder in Angelegenheiten des Verfassungsschutzes und über das Bundesamt für Verfassungsschutz (BVerfSch-Gesetz); §§ 4 para 4 nos 1 and 2, 7 para 4 nos 1 and 2 G10-Gesetz; for more see *Greßmann*, Nachrichtendienste und Strafverfolgung (note 21), 402; *Gazeas*, Übermittlung nachrichtendienstlicher Erkenntnisse (note 38), 286 ff.

[41] §§ 19, 20 BVerfSch-Gesetz; § 24 BND-Gesetz; § 11 MAD-Gesetz; for more see *Greßmann*, Nachrichtendienste und Strafverfolgung (note 21), 406 ff.

[42] § 20 para 2 BVerfSch-Gesetz.

[43] §§ 23, 24 BVerfSch-Gesetz; § 31 BND-Gesetz; § 12 MAD-Gesetz; for more see *Greßmann*, Nachrichtendienste und Strafverfolgung (note 21), 408.

[44] See in general *Hütwohl*, ZIS 11/2017, 680–687.

[45] For the joint databases of the intelligence services, criminal prosecution authorities, and police see *Engelhart*, The Secret Service's Influence on Criminal Proceedings (note 2), 521 ff.; for the scope of the so-called counterterrorism database, see *Roggan*, Die

the federal intelligence services will be explored.[46] The federal intelligence services consist of the Federal Intelligence Service (*Bundesnachrichtendienst:* BND),[47] the Federal Office for the Protection of the Constitution (*Bundesamt für Verfassungsschutz:* BfV),[48] and the Military Counterintelligence Service (*Bundesamt für den Militärischen Abschirmdienst:* MAD).[49] We will restrict ourselves to the services of the federation, primarily the BND and the BfV, as they are the main suppliers of intelligence information for criminal investigations. In the field of domestic security, the *Länder* set up 16 State Offices or Departments for the Protection of the Constitution (*Länderverfassungsschutzämter* or *-abteilungen*). As for the intelligence services at the *Länder* level, there are some far-reaching transfer powers in force, but there is no unified concept for the transfer of intelligence information.[50] If intelligence information is transferred from the domestic intelligence service of one *Land* to the criminal prosecution authorities of another *Land*, the federal provisions apply.[51] However, the federal provisions do not apply if information is transferred from a domestic intelligence service to the criminal prosecution authorities of the same *Land*.[52] This is why it is argued that the above-mentioned informational separation between the intelligence services and the police applies only at the federal level but not between the security authorities of one *Land*.[53] Yet, the German Federal Constitutional Court

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unmittelbare Nutzung geheimdienstlicher Informationen im Strafverfahren nach dem Antiterrordateigesetzt. Über die Gefahr der Kontamination der Wahrheitssuche mit Unverwertbarem, in: Rechtsstaatlicher Strafprozess und Bürgerrecht, 2016, 269–291; for the question of its constitutionality, see *Arzt*, NVwZ 2013, 1328–1332; for more see also *Töpfer*, Informationsaustausch zwischen Polizei und Nachrichtendiensten strikt begrenzen. Konsequenzen aus dem Urteil des Bundesverfassungsgerichts zur Antiterrordatei, 2013, passim.

[46] For the general structure of the intelligence services, see also *Engelhart*, The Secret Service's Influence on Criminal Proceedings (note 2), 506 ff.; *Rose-Stahl*, Recht der Nachrichtendienste, 2nd edn., 2006, 15.

[47] *Engelhart*, The Secret Service's Influence on Criminal Proceedings (note 2), 511; *Sieber*, NJW 2008, 882; *Arslan*, Intelligence and Crime Control in the Security Law of Germany (note 38), 514; *Zöller*, JuristenZeitung (JZ) 15/16/2007, 765.

[48] *Arslan*, Intelligence and Crime Control in the Security Law of Germany, in: The Limits of Criminal Law, 2018, 515; *Zöller*, JZ 15/16/2007, 765; *Engelhart*, The Secret Service's Influence on Criminal Proceedings (note 2), 510.

[49] For more see *Engelhart*, The Secret Service's Influence on Criminal Proceedings (note 2), 511; *Daun*, Die deutschen Nachrichtendienste, 2009, 59 and 63.

[50] *Gazeas*, Übermittlung nachrichtendienstlicher Erkenntnisse (note 38), 480; see also *Greßmann*, Nachrichtendienste und Strafverfolgung (note 21), 407.

[51] § 21 para 1 BVerfSch-Gesetz.

[52] Ibid.

[53] *Singer*, Das Trennungsgebot – Teil 1. Politisches Schlagwort oder verfassungsrechtliche Vorgabe? Die Kriminalpolizei 2006, 114; compare *Graulich*, Sicherheitsrecht des Bundes – Recht der Nachrichtendienste in Deutschland, 9, who argues that the principle of separation does not apply to the organization of the security agencies at the Länder level, whereas these agencies must in fact adhere to the same principle in the event of an information transfer.

does not distinguish between the intelligence services at the federal and at the *Länder* level when it emphasizes that information sharing between the intelligence services and the police authorities is principally not permitted.[54]

2. Unsolicited information transfer

Intelligence services are obligated to communicate their information, including personal data,[55] to the responsible public prosecutor's office and to the police if there are factual indications that such sharing is necessary to (prevent or) prosecute a crime against national security.[56] The required threshold is similar but lower than the so-called initial suspicion in criminal proceedings. Still, mere assumptions are not sufficient grounds for a transfer.[57] The information in question must enable the criminal prosecution authorities to seriously consider the possibility of criminal investigations against the person concerned for an offence against national security.[58] The relevant suspicion will be determined by the intelligence service and must pertain to one of the statutorily enumerated offences against national security.[59] In addition to offences against national security, the intelligence law stipulates a mandatory transfer of information if the crime in question is politically motivated. This requirement is met if there are factual indications that, based on the offender's objectives and motivation or his or her connection with an organization, the offence that was committed was directed against the free democratic basic order, the existence and security of the Federal State and the *Länder*, or against Germany's external interests.[60] Thus, the scope of unsolicited transfer is de facto expanded to almost all types of crime, including petty theft, provided there is a link to the protection of the aforementioned values.[61]

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[54] BVerfG NJW 2013, 1505.

[55] For a definition of 'information' and 'personal data', see *Gazeas*, Übermittlung nachrichtendienstlicher Erkenntnisse (note 38), 298 ff.

[56] § 20 para 1 BVerfSch-Gesetz; for these crimes see *Gazeas*, Übermittlung nachrichtendienstlicher Erkenntnisse (note 38), 318 ff.; *Nehm*, NJW 2004, 3294; for the necessity of information sharing with the criminal prosecution authorities in the area of what is called state protection, see *Greßmann*, Nachrichtendienste und Strafverfolgung (note 21), 402 and 407; *Gazeas*, Übermittlung nachrichtendienstlicher Erkenntnisse (note 38), 291 complains about the lack of jurisprudence on the unsolicited transfer of information in case of crimes against national security; see also *Engelhart*, The Secret Service's Influence on Criminal Proceedings (note 2), 520.

[57] *Lang*, Geheimdienstinformationen (note 8), 94 f.; *Gazeas*, Übermittlung nachrichtendienstlicher Erkenntnisse (note 38), 308 ff.

[58] Ibid.

[59] In §§ 74a and 120 GVG.

[60] § 20 para 1 BVerfSch-Gesetz; *Greßmann*, Nachrichtendienste und Strafverfolgung (note 21), 408.

[61] *Lang*, Geheimdienstinformationen (note 8), 95; considering, inter alia, the unspecified catalogue of crimes against national security in a broad sense, *Gazeas*, Übermittlung

The intelligence services are obligated to transmit, unsolicited, available intelligence information on crimes against the security of the state to the public prosecutor's office and to the police but not to the criminal courts. However, after the public prosecutor has filed the indictment, he or she is required to forward any intelligence information received from the services to the trial court.[62]

Besides the information transfer related to national security offences, including politically motivated crimes in a broad sense, intelligence services are also authorized to forward information including personal data to the police and the public prosecutor's office if the communication in question is 'necessary to prevent or otherwise avert or prosecute crimes of significant importance'.[63] The exercise of this statutory power is at the discretion of the intelligence services as the law reads 'may … submit'.[64] However, the law stipulates an important exception and restricts the discretion of the federal domestic intelligence service (BfV) if there are sufficient indications to suggest that a covert agent of the service itself unlawfully committed an offence of 'significant importance'. In this case, the public prosecutor's office must be immediately informed about the suspicion. However, the president of the agency is allowed to depart from this obligation.[65] As a result, the services retain some discretion in such cases.[66]

In fact, at least under the last-mentioned statutory power, the intelligence services gained considerable influence in the criminal prosecution of certain serious crimes as they are now not only in the position to provide the criminal prosecution authorities with information on a broad spectrum of offences, but they can also decide whether or not to trigger criminal prosecution.[67] It is worth noting that, in terms of the discretionary power of the intelligence services, the law provides no threshold, namely, whether the information at issue gives rise to a certain type of suspicion.

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nachrichtendienstlicher Erkenntnisse (note 38), 357, concludes that § 20 para 1 BVerfSch-Gesetz is unconstitutional.

62 For more see *Engelhart*, The Secret Service's Influence on Criminal Proceedings (note 2), 527; *Gazeas*, Übermittlung nachrichtendienstlicher Erkenntnisse (note 38), 348 ff.

63 § 19 para 1 nos 3 and 4 BVerfSch-Gesetz.

64 For further details, see *Greßmann*, Nachrichtendienste und Strafverfolgung (note 21), 408; see also *Gazeas*, Übermittlung nachrichtendienstlicher Erkenntnisse (note 38), 353.

65 § 9a para 2 BVerfSch-Gesetz.

66 See also *Greßmann*, Nachrichtendienste und Strafverfolgung (note 21), 409; for the scope of the duty of intelligence services to report crimes, see *Engelhart*, The Secret Service's Influence on Criminal Proceedings (note 2), 525.

67 Compare *Engelhart*, The Secret Service's Influence on Criminal Proceedings (note 2), 514, who points out that particularly the BND 'can be seen as secret criminal police agency'; see also *Arslan*, Intelligence and Crime Control in the Security Law of Germany (note 38), 527 ff.; *Gazeas*, Übermittlung nachrichtendienstlicher Erkenntnisse (note 38), 337 and 439 ff.; *Lang*, Geheimdienstinformationen (note 8), 101; *Gleß*, Predictive policing und operative Verbrechensbekämpfung (note 22), 175.

Furthermore, the law, in the G10 Act, contains separate provisions for the unsolicited transfer of intelligence information the services collected by means of telecommunication interception, residential surveillance, and the so-called IMSI-catcher (International Mobile Subscriber Identity), as these measures constitute a serious interference with the basic rights of the persons concerned.[68] Information so gathered for intelligence purposes may be transferred to the police authorities for purposes of prevention or prosecution if there are factual indications to suspect that someone is planning, committing, or has committed an enumerated crime.[69] Despite the complicated reference technique the G10 Act uses for the enumeration it is evident that the crimes in question involve not only acts against national security, acts of international terrorism, and serious crimes against the individual such as homicide, but also organized theft and other serious variations of robbery, fraud, or money laundering. As a result, the unsolicited transfer in accordance with the G10 Act is ultimately based on the principle that intelligence gathered using the means described may be transferred if the information involves 'crimes of significant importance', even though the G10 Act requires meeting a certain threshold of suspicion, unlike the corresponding provision in general intelligence law. An unsolicited transfer of intelligence in keeping with the G10 Act is also at the discretion of the intelligence services.[70]

Finally, the issue of whether or to what extent the intelligence services have the obligation or the power to transfer information to the criminal prosecution authorities in parallel to the above-mentioned provisions based on so-called 'administrative assistance' is controversial.[71] This question arose in 2008 in the context of the Liechtenstein scandal, where the German foreign intelligence service assisted a local tax investigation department in buying stolen bank account information from a former employee of a foreign bank for purposes of investigating tax evasion.[72] Although a general obligation of the BND to support domestic authorities in investigations

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[68] §§ 4 para 4 nos 2, 7 para 4, 8 para 6 G10-Gesetz; § 9 paras 2 and 4 BVerfSch-Gesetz; for more see *Greßmann*, Nachrichtendienste und Strafverfolgung (note 21), 407; *Gazeas*, Übermittlung nachrichtendienstlicher Erkenntnisse (note 38), 484; *Engelhart*, The Secret Service's Influence on Criminal Proceedings (note 2), 520; for the surveillance of telecommunication by the services see *Huber*, NJW 2013, 2572 ff.

[69] §§ 4 para 4 no 2, 7 para 4, 8 para 6 G10-Gesetz; see also *Engelhart*, The Secret Service's Influence on Criminal Proceedings (note 2), 520; *Gazeas*, Übermittlung nachrichtendienstlicher Erkenntnisse (note 38), 426 ff.

[70] *Engelhart*, The Secret Service's Influence on Criminal Proceedings (note 2), 525; *Gazeas*, Übermittlung nachrichtendienstlicher Erkenntnisse (note 38), 425.

[71] For more see *Engelhart*, The Secret Service's Influence on Criminal Proceedings (note 2), 519 f.; compare *Soiné*, Aufklärung der Organisierten Kriminalität durch den Bundesnachrichtendienst (note 1), 13.

[72] See for more *Sieber*, NJW 2008, 881; *Engelhart*, The Secret Service's Influence on Criminal Proceedings (note 2), 525 f.

abroad is accepted,[73] it is not considered to be within the competence of the BND to actively collect information on tax evasion and to communicate it to the tax investigation authorities of its own accord and on its own responsibility.[74] Otherwise the above-mentioned limits on information transfer would become obsolete.[75] The use of illegally obtained intelligence information in criminal proceedings will be explored below.[76]

3. Transfer on request

The police or the criminal prosecution authorities may also ask the intelligence services for a transfer of information the requested agency already has at its disposal or which they can infer from open sources.[77] By restricting the request to information already acquired or publicly available, the law's objective is to avoid situations where the police or the criminal prosecution authorities request the intelligence services to conduct investigative measures and search for (new) information on their behalf. In fact, this is one of the consequences of the constitutionally mandated principle of separation.[78]

If a request by the police or the criminal prosecution authorities involves the transfer of personal data, German law requires what is called a double authorization: not only the authority in possession of the information must be allowed to transmit but the authority requesting the transfer must also be permitted to request, as both actions (transfer and corresponding request) constitute, each by itself, an interference with the constitutionally guaranteed right to informational self-determination.[79] As mentioned above, § 161 para 1 CCP entitles 'the public prosecution office … to request information from all authorities', including the intelligence services.[80] However, this does not mean that the services are obligated or allowed to transfer all requested information to the criminal prosecution authorities pursuant to the above provision

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[73] *Gazeas*, Übermittlung nachrichtendienstlicher Erkenntnisse (note 38), 557.

[74] *Sieber*, NJW 2008, 886; *Gazeas*, Übermittlung nachrichtendienstlicher Erkenntnisse (note 38), 558; *Engelhart*, The Secret Service's Influence on Criminal Proceedings (note 2), 526.

[75] *Gazeas*, Übermittlung nachrichtendienstlicher Erkenntnisse (note 38), 558 f.

[76] See below III.D.1. Illegally Collected Evidence.

[77] § 17 para 1 BVerfSch-Gesetz.

[78] Compare § 8 para 3 BVerfSch-Gesetz; for the scope and limits of the principle of separation in German law, see *Engelhart*, The Secret Service's Influence on Criminal Proceedings (note 2), 509; *Arslan*, Intelligence and Crime Control in the Security Law of Germany (note 38), 510 f.; *Lang*, Geheimdienstinformationen (note 8), 105; *Gusy*, KritV 1994, 242–251; against a broad interpretation of the principle of separation *Nehm*, NJW 2004, 3290 f.

[79] BVerfGE 65, 1 ff.; *Greßmann*, Nachrichtendienste und Strafverfolgung (note 21), 406.

[80] *Engelhart*, The Secret Service's Influence on Criminal Proceedings (note 2), 524.

of the CCP.[81] As said, the latter merely enables the public prosecutor's office to ask for intelligence information. The transfer itself is still subject to the above-mentioned requirements under intelligence law.[82] At this point it is important to mention that the trial court can also seek information from the intelligence services.[83]

C. Suspending a transfer

A transfer of intelligence information to the police, the public prosecutor's office, or the courts, whether unsolicited or on request, must not be executed in the following cases:

– if the legitimate interests of the person concerned outweigh the public interests in communicating the information in question (i.), or
– if other public interests, notably security interests, require the withholding of the information in question (ii.), and
– if a specific law prohibits a transfer (iii.).[84]

Decisions to suspend an information transfer despite its relevance for criminal prosecution purposes are made by the services themselves. The law does not stipulate a prior judicial review.[85] A 'non-disclosure' decision at the stage of criminal proceedings may restrict not only the obligation and power of the criminal prosecution authorities to 'make investigations of any kind'[86] and to 'ascertain not only incriminating but also exonerating circumstances'[87] but also, particularly in the latter case, the rights of defence. If it is informed of the non-disclosure decision in the first place, all the defence can do is to challenge the legality of the decision by the services before the administrative court; however, the practicability of this remedy remains in doubt.[88]

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[81] *Greßmann*, Nachrichtendienste und Strafverfolgung (note 21), 409; *Gazeas*, Übermittlung nachrichtendienstlicher Erkenntnisse (note 38), 504 f.

[82] In particular to §§ 19 para 2 nos 1–4, 20 para 1 BVerfSch-Gesetz and §§ 4 para 4 no 2, 7 para 4, 8 para 6 G10-Gesetz; see also *Engelhart*, The Secret Service's Influence on Criminal Proceedings (note 2), 520.

[83] §§ 202, 244 para2 StPO; see also *Engelhart*, The Secret Service's Influence on Criminal Proceedings (note 2), 527; *Greßmann*, Nachrichtendienste und Strafverfolgung (note 21), 410.

[84] § 23 para 1 BVerfSch-Gesetz; for more see *Lang*, Geheimdienstinformationen (note 8), 95; *Greßmann*, Nachrichtendienste und Strafverfolgung (note 21), 410.

[85] *Gazeas*, Übermittlung nachrichtendienstlicher Erkenntnisse (note 38), 363.

[86] § 160 para 1 StPO.

[87] § 160 para 2 StPO; for more see *Kröpil*, JuS 2015, 241.

[88] *Engelhart*, The Secret Service's Influence on Criminal Proceedings (note 2), 527; see also *Marsch*, Country Fiche Germany, in: European Parliament Study on 'National Security and Secret Evidence in Legislation and Before the Courts: Exploring the Challenges',

The protection of personal interests will lead to the suspension of a transfer of information if the personal data relate to the so-called core area of privacy. Such data must not be transmitted.[89] The transfer of information is also restricted in case of minors.[90]

The second reason for withholding intelligence information from the public prosecutor's office or the police, namely security interests, is particularly relevant.[91] Security interests are, *inter alia*, the interests of the services in using their 'sources' in pending or future investigations and in protecting their methods and techniques.[92] In this regard, the notion of security interests, which may lead to suspend a transfer of intelligence information by the services to the public prosecutor or the police, is quite similar to the notion of state secrets within the meaning of §§ 54 and 96 CCP (more explanations on that below),[93] although the protection of state secrets is grounds for rejecting a trial court's request for disclosure of evidence.[94] However, the different nature of relations between the intelligence services and the public prosecutor's office or police and the trial courts should not be overlooked.[95] In fact, a closer look reveals that when the services share information with the public prosecutor's office or the police they employ practices that exist in parallel with the suspension provisions of intelligence law and the aforementioned provisions of the CCP. The most prominent practice is to communicate relevant information in return for a promise by the public prosecutor's office or the police that the information will not be added to the official case file. In practice, such information is labelled 'not for use by the court' (*nicht gerichtsverwertbar*). In this way, the services save themselves from having to make a formal decision on grounds of the aforementioned provisions, and they also meet their objective of keeping their sources protected by trusting the integrity of the public prosecutor's office or the police.[96] Aside from questions whether

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available at http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509991/IPOL_STU(2014)509991_EN.pdf,108.

89 BVerfG NJW 2016, 1786; *Gazeas*, Übermittlung nachrichtendienstlicher Erkenntnisse (note 38), 361.

90 § 24 BVerfSch-Gesetz.

91 *Gazeas*, Übermittlung nachrichtendienstlicher Erkenntnisse (note 38), 362.

92 *Greßmann*, Nachrichtendienste und Strafverfolgung (note 21), 410; *Gazeas*, Übermittlung nachrichtendienstlicher Erkenntnisse (note 38), 364 f.; *Engelhart*, The Secret Service's Influence on Criminal Proceedings (note 2), 520; see also *Frisch*, Schutz staatlicher Geheimnisse im Strafverfahren (note 10), 205; *Kudlich*, JuS 2004, 929.

93 See below III.B.1. General Framework.

94 *Gazeas*, Übermittlung nachrichtendienstlicher Erkenntnisse (note 38), 366.

95 See also *Engelhart*, The Secret Service's Influence on Criminal Proceedings (note 2), 519.

96 For more see *Gazeas*, Übermittlung nachrichtendienstlicher Erkenntnisse (note 38), 384 ff.

this practice is covered by intelligence law[97] and, for the public prosecutor's office, by criminal procedure law, the impact on the defendant's defence rights is considerable. As a result of the promise, the defence (and the trial court) will not be routinely notified about the existence of relevant intelligence information, and the decision not to disclose the information will routinely be taken unilaterally.[98] This practice of non-disclosure by the services and the criminal prosecution authorities not only creates 'undisclosed incriminating evidence'[99] in criminal proceedings but also risks violating the right to a fair trial as interpreted by the European Court of Human Rights.[100]

D. Use of intelligence information

Having explained the relevant provisions of criminal procedure law with regard to requests for intelligence information for evidentiary purposes and the respective provisions of intelligence law regarding the information transfer, the use of intelligence information for criminal investigation purposes should be explored as well. The last-named concern may seem redundant because any restriction on the use of transferred information goes against the common perception that there is no doubt that the criminal prosecution authorities will use any intelligence information, once it is transmitted and received. However, as mentioned above, the use of intelligence information by the criminal prosecution authorities requires a special legal basis, because such use constitutes an interference with the constitutionally protected right to informational self-determination.[101]

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[97] At least for intelligence information transmitted on grounds of § 19 para 1 BVerfSch-Gesetz, one can argue that the receiver of the information, namely the public prosecutor's offices and the police, are obligated to comply with the purpose of the transmission in accordance with § 19 para 1 BVerfSch-Gesetz. This provision expressly stipulates the receiver's obligation to use the transmitted intelligence information only for the purpose underlying the transmission itself. Thus, the provision entitles the intelligence services to define the purpose to which the public prosecutor's offices or the police may use the information received.

[98] *Gazeas*, Übermittlung nachrichtendienstlicher Erkenntnisse (note 38), 389 f.; compare the requirements the public prosecutor must meet in order to withhold the so-called 'files of indicators' (Spurenakte) resulting from investigations against third persons, see BVerfG NJW 1983, 1043–1046; BVerfG NStZ-RR 2013, 379–380 (search warrant based on undisclosed evidence).

[99] Compare *Marsch*, Country Fiche Germany (note 88), 107.

[100] ECtHR, Judgment of 16 Feb. 2000 – 28901/95 (Rowe and Davis v. The United Kingdom), § 65 ('the prosecution's failure to lay the evidence in question before the trial judge and to permit him to rule on the question of disclosure deprived the applicants of a fair trial'); ECtHR, Judgment of 24 June 2003 – 39482/98 (Dowsett v. The United Kingdom), § 44.

[101] See above II.B.1. General Framework.

The framework for using personal data collected according to a different law than the Code of Criminal Procedure is provided in § 160 paras 2 and 3 CCP, which are regulations for use by the public prosecutor and the trial court.[102] Insofar as the court is not permitted to use a specific type of information, this amounts to a restriction of the court's duty to conduct *ex officio* searches for the truth (§ 244 para 2 CCP).[103] The restriction refers to intelligence information gathered not only in pursuit and for purposes of intelligence law but in most cases also without the prior presence of any suspicion of crime.[104] Allowing the use of intelligence information in criminal proceedings that were collected for different purposes and employing comparatively lower suspicion thresholds in applying intelligence techniques in criminal proceedings create the risk of undermining not only the constitutionally mandated protection of personal data but also of the guarantees for individuals in the CCP. In particular, the CCP limits the powers of the criminal prosecution authorities to interfere with the basic rights and freedoms, *inter alia* by subjecting the application of secret investigation measures to some degree of suspicion and to investigations of serious crimes.[105] The question arises how to maintain this level of protection under the CCP in cases where the intelligence services have already collected personal information relevant to the criminal prosecution. In other words, what can the legislature do to prevent that the intelligence services bypass the constitutional guarantees by dominating criminal proceedings or by escaping from the CCP to intelligence law? To this effect, § 160 para 2 CCP restricts the use of information not gathered under the Code but under a different law, *inter alia*, intelligence law, to two cases:

– first, if the person concerned consents to the use of intelligence information
– second, if the measure that led to the collection of the intelligence information at issue could hypothetically also have been ordered under the CCP.

The first alternative will predominantly apply if the information exonerates the defendant and the latter consents as expected. In the second case, the use of intelligence information can be justified by applying the so-called hypothetical order. Although details still need to be clarified and are controversial,[106] this order mandates that the requirements of the CCP be met as far as possible and in analogy with it at the very time when the criminal prosecution authorities make use of the intelligence information in question. The important factors for an analogous application of the

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[102] *Lang*, Geheimdienstinformationen (note 8), 114.

[103] For more see below III.A.1. Principles of Evidence Taking by the Court.

[104] *Engelhart*, The Secret Service's Influence on Criminal Proceedings (note 2), 513; *Gazeas*, Übermittlung nachrichtendienstlicher Erkenntnisse (note 38), 521.

[105] On the main features of the intelligence investigations and distinctions between intelligence and repressive police investigations, see *Arslan*, Intelligence and Crime Control in the Security Law of Germany (note 38), 515.

[106] For more see *Gazeas*, Übermittlung nachrichtendienstlicher Erkenntnisse (note 38), 524 ff.

CCP to the intelligence gathering process in question are, in particular, the type of measures applied, the threshold of suspicion, and the type of crime at stake.

The first condition is that the measure used by the intelligence services to collect the information at issue is also allowed under the CCP, i.e. dragnet investigation, interception of telecommunication, use of technical means, photography, other surveillance devices, IMSI-catcher, and undercover investigators.[107] In this way, the law prohibits the use of intelligence information collected by measures which only the services can use and which are unavailable to the criminal prosecution authorities.[108] This enables the legislature to prevent situations where certain highly intrusive secret measures employed by the services also have implications for criminal proceedings (this would challenge the proportionality of these measures) but also the notion that the criminal prosecution authorities can count on the privileges of the intelligence services. For instance, investigation measures such as the so-called visual residential surveillance or strategic surveillance are not available to the criminal prosecution authorities in Germany as the CCP lacks corresponding provisions. Under § 160 para 2 CCP, intelligence information gathered by these measures must not be used in criminal proceedings, at least not directly.[109]

Moreover, the analogous application of other criteria, namely the threshold of suspicion and the type of crime in question, can only be undertaken retrospectively and thus hypothetically, because neither did the collection of intelligence information occur for purposes of a criminal investigation nor did the services, at the time, act on the assumption of a certain suspicion of a crime within the meaning of the CCP. As a result, a subsequent use of said information requires a hypothetical assumption about whether the measure in question could have been ordered under the CCP at the time the information was subsequently used. Therefore, a certain degree of suspicion must have been reached so that the measure could, even if hypothetically, have been ordered at the time of the use of intelligence information in question. However, this does not mean that the suspicion must exist independent of the intelligence information transferred. Provided this information was transmitted voluntarily and according to intelligence law, it may also form the basis for the suspicion.[110] Due to the fact that unsolicited transmitted intelligence information can substantiate a certain degree of suspicion in most cases, the proof whether its use is allowed pursuant to § 160 para 2 CCP will largely depend on the presence of a relevant crime and a relevant measure as mentioned above.

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[107] §§ 98a, 100b, 100f, 100h, 100i, and 110a StPO; for more see *Gazeas*, Übermittlung nachrichtendienstlicher Erkenntnisse (note 38), 534 f.

[108] *Gazeas*, Übermittlung nachrichtendienstlicher Erkenntnisse (note 38), 522.

[109] *Lang*, Geheimdienstinformationen (note 8), 127 f.

[110] For more see *Lang*, Geheimdienstinformationen (note 8), 113.

The information may only be used for the prosecution and adjudication of a crime that is subject to both the transfer regulations and the evidence rule of § 160 para 2 CCP.[111] However, it must be noted that § 160 para 2 CCP governs and restricts only the direct use of intelligence information in criminal proceedings. The indirect use in the form of tips or leads by the criminal investigation authorities to collect further evidence or to locate a suspect's whereabouts is allowed without recourse to this provision.[112] As long as the criminal prosecution authorities limit themselves to this indirect use of intelligence information, they will use 'undisclosed incriminating evidence' at the investigation stage because, in most cases, the defendant will not be informed of the use or the existence of the information. The European Court of Human Rights seems to consider this practice compatible with the right to a fair trial, provided the defendant subsequently has the possibility to challenge the legality of the measures conducted against him or her.[113] However, this practice means in terms of national law that intelligence information gathered by secret investigative measures not allowed under the CCP, such as strategic surveillance, can also be introduced to criminal investigations.[114] Furthermore, § 160 para 2 CCP governs only the use of personal data collected by certain intrusive secret investigative measures. Intelligence information that does not consist of personal data or is collected by less intrusive investigation measures can be used based on § 160 para 1 CCP.[115]

E. Interim results

The transfer and use of intelligence information in criminal proceedings in Germany are subject to extensive regulations. This is a result of the jurisprudence of the German Constitutional Court on the right to informational self-determination starting in the early 1980s. Not just the intelligence service that transfers the information requires a specific statutory basis justifying the transfer of personal data to the criminal prosecution authorities, but the latter, as the requesting or receiving authority,

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111 See § 19 para 1 BVerfSch-Gesetz; *Lang*, Geheimdienstinformationen (note 8), 115.

112 *Greßmann*, Nachrichtendienste und Strafverfolgung (note 21), 2017, 416; *Gazeas*, Übermittlung nachrichtendienstlicher Erkenntnisse (note 38), 532; *Lang*, Geheimdienstinformationen (note 8), 115; *Arslan*, Intelligence and Crime Control in the Security Law of Germany (note 38), 523; critical, *Hefendehl*, GA 2011, 225.

113 ECtHR, Judgment of 20 Nov. 1989 – 11454/85 (Kostovski v. The Netherlands), § 44; on the use of intelligence information to arrest suspects, see ECtHR, Judgment of 28 Oct. 1994 – 14310/88 (Murray v. The United Kingdom), § 58 (the use of confidential information is essential in combating terrorist violence and the threat that organized terrorism poses to the lives of citizens and to democratic society as a whole).

114 But see *Gercke*, CR 11/2013, 752.

115 *Lang*, Geheimdienstinformationen (note 8), 116.

must have corresponding powers as well to use such data. The informational separation between the intelligence services and the police authorities allows, at least according to the Court, departures from the main principle only by exception. The intelligence services are allowed to render a 'non-disclosure' decision, inter alia for reasons of security interests or for the protection of state secrets. The defendant can challenge this decision before the administrative court, provided he or she has become aware of the decision. Moreover, in order to use the intelligence information received, the public prosecutor's office must pass a certain test. If it is passed, the public prosecutor's office may restrict access to the investigation files for the defence, and the use and existence of intelligence information may remain unknown to the defence ('indirect evidence' at investigation stage).[116] However, the public prosecutor's office must disclose all evidence in support of the indictment, at the latest after charges against the defendant have been filed in trial court. If the public prosecutor seeks further protection for the intelligence information or other evidence related to state secrets, he or she may apply measures provided in the CCP, which will be explored below ('indirect evidence' at trial stage).

These are the basic structural outlines of the information transfer and the criminal procedure law regarding the transfer, receipt, and use of intelligence information in criminal proceedings. However, the fact that questions are waiting to be clarified and that long-standing and established informal practices exist for the transfer and use of intelligence information should not be overlooked. The scope of administrative cooperation between the intelligence services and the criminal prosecution authorities, the prevalence of 'not for use in court as evidence' information sharing, and the indirect use of intelligence as investigative tips (both 'undisclosed incriminating evidence' at the investigation stage) are implicated in blurring the boundaries of the basic structure, thereby creating a space where the authorities can enjoy a high degree of flexibility. At the same time it must be noted that the non-disclosure of intelligence information by the criminal prosecution authorities in particular violates the defendant's right to a fair trial.

In the final analysis, the strict separation of intelligence from criminal prosecution based on the constitutionally mandated principle of separation appears not to exist, at least in some areas of crime. In practice, the power of this principle is not imperative, at least with regard to separation in terms of information, in obvious contrast to the above-mentioned jurisprudence of the Constitutional Court.[117] Only the organizational separation continues to carry much weight.[118]

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[116] *Engelhart*, The Secret Service's Influence on Criminal Proceedings (note 2), 528.

[117] *Arzt*, NVwZ 2013, 1332.

[118] *Engelhart*, The Secret Service's Influence on Criminal Proceedings (note 2), 509 and 515; see also BVerfG NJW 2013, 1502.

III. Use of intelligence iInformation and protection of state secrets at the trial stage

A. Trial procedures and main principles

1. Principles of evidence taking by the court

a) Constitutional framework

The objective of criminal proceedings is to facilitate the application of the state's monopoly on punishment by the judiciary for the sake of protecting the legal interests of the public and of individuals.[119] In other words, criminal proceedings must meet the objectives of substantive criminal law, in particular to protect society's most valuable legal interests and to punish perpetrators who significantly harm or endanger them in a blameworthy manner (culpability principle).[120]

Most importantly, the requirements of substantive criminal law compel criminal courts to search ex officio for the material truth.[121] This means that the court hearing must be conducted in order to establish the so-called material truth about the defendant's guilt and the facts relevant to sentencing (the so-called principle of ex officio inquiry). Accordingly, § 244 para 2 CCP requires the court to search for the truth and, consequently, to 'proprio motu, extend the taking of evidence to all facts and means of proof relevant to the decision'.[122] The determination of material truth will enable the trial court to apply the standards of criminal liability and sentencing. In other words, if there is no material truth, the trial court cannot establish guilt or innocence or issue the corresponding sentence.[123] According to this concept of criminal proceedings, the public prosecutor and the defendant have no authority to decide on

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[119] BVerfG NJW 2010, 593.

[120] BVerfG NJW 2016, 1153; BGH NStZ 2015, 170; *Vogel*, The Core Legal Concepts and Principles Defining Criminal Law in Germany (note 15), 54.

[121] BVerfG NJW 1983, 1043; for a critical perspective on the notion of material truth, see *Schünemann*, Reflexionen über die Zukunft des deutschen Strafverfahrens, in: Strafrecht, Unternehmensrecht, Anwaltsrecht, 1988, 474 ff.; on a comparison between the notions of material truth and consensual truth as mutual alternatives, see *Weßlau*, ZIS 1/2014, 561 ff.; on the notion of the so-called procedural truth, see *Link*, Wahrheit und Gerechtigkeit als Axiome des Strafverfahrensrechts?, in: Axiome des nationalen und internationalen Strafverfahrensrechts, 2016, 103 f.

[122] Emphasis added; translation by Brian Duffett and Monika Ebinger, available at https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p1647; for more see BVerfG NJW 1981, 1719–1726, 1723; BVerfG NJW 2003, 2444–2447, 2445; *Fezer*, Strafverteidiger (StV) 1995, 263.

[123] BVerfG NJW 1981, 1722; BVerfG NJW 2013, 1060, 1067; BVerfG NStZ 2016, 424; BVerfG NJW 2016, 1153; *Weigend*, German Law Journal (GLJ) 15/2014, 84 f.; *Weßlau*, ZIS 1/2014, 558.

the findings of fact and the legal merits of the case.[124] However, the CCP recognizes some exceptions to the court's duty and power to take and use all relevant evidence. In particular, there are other public institutions vested with the power to withhold from the court, in part or in whole, information or documents qualified as state secrets. This is not only true for the above-explored provisions of intelligence law on the suspension of a transfer of intelligence information to the criminal justice authorities including the trial court; rather, §§ 54 and 96 CCP also explicitly stipulate limits on the court's possibilities to obtain evidence (more on that below).[125] Moreover, German criminal procedure law recognizes several exclusionary rules of evidence that preclude obtaining or admitting certain types of evidence. These rules apply inter alia where intelligence information was collected illegally, such as by torture abroad,[126] or where personal data about the so-called core area of privacy are involved. Such information must be excluded from criminal proceedings.[127]

In terms of the constitutional requirements for criminal proceedings in Germany, Art. 92 Basic Law specifically stipulates that only a judge can impose criminal sanctions.[128] Only very few guidelines can be inferred from this constitutional requirement with regard to the question of how a criminal court should proceed in order to comply with the principles of culpability and material truth. At a minimum, the judge must independently establish all factual circumstances necessary for his or her judgment on guilt or innocence and for sentencing. The factual and legal assessments of other institutions, particularly of the investigation authorities, must not be adopted without further inquiry. A blind adoption of evidence collected by the prosecution authorities into a judge's decision-making process is prohibited under the constitution.[129] The same applies mutatis mutandis to the evaluation of information by the intelligence services and to their decisions on the conditions for withholding or introducing information.[130]

b) Statutory framework

The CCP has provisions that compel the judge to adhere to the principle of immediacy in taking evidence and reaching a judgment. The Code requires the judge to conduct an independent and comprehensive inquiry into the facts and to base his or

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[124] See § 264 para 2 StPO; BVerfG NJW 1981, 1723; BVerfG NJW 2013, 1062; BVerfG NStZ 2016, 424.

[125] BVerfG NJW 1981, 1723; see below III.B.1. General Framework.

[126] For more see below III.D.1. Illegally Collected Evidence.

[127] BVerfG NJW 2016, 1787; *Lang*, Geheimdienstinformationen (note 8), 117 f.

[128] See also BVerfG NJW 1967, 1219, 1221; *Bürger*, ZStW 128(2)/2016, 518.

[129] *Bürger*, ZStW 128(2)/2016, 519 f.; *Dumitrescu*, 130(1)/2018 ZStW, 107; see also BGH NJW 1998, 1164; BGH NStZ 2015, 170.

[130] See also below III.B.2.c) Written Statements and Hearsay Witnesses.

her judgment on the evidentiary results of his or her own hearing.[131] The principle of formal immediacy is supposed to enhance the separation of the evidentiary results of the investigation and those at the trial stage and emphasizes the value of personal evidence-taking by the judge in order to make a decision.[132] This is not only in the public interest as the public nature of the main hearing allows the public to understand the validity of a criminal judgment, but it serves to control the judiciary and to protect the defendant from misuse of power.[133] In its substantive function the principle of immediacy requires the judge who is seeking to prove both facts in favour and against the indictment to select the evidence closest to the facts.[134] This is best illustrated in § 250 para 1 CCP, which stipulates the primacy of the examination of a person by the judge over the introduction of documents relating to his or her previous statements.[135] The rationale behind this is that in the court's search for material truth an examination of witnesses or experts in person is deemed to produce a more qualified assessment of their reliability and credibility.[136] However, the CCP permits, to the detriment of the defendant, important exceptions to this primacy of orality and immediacy, based not only on the mutual consensus of the judge, the public prosecutor, and the defence[137] but also in the interest of the public and other individual interests (e.g. inter alia for the protection of state secrets).[138] Thus, it allows the use of so-called hearsay evidence introduced by surrogates, i.e. the reading of previous statements, other official reports, or the hearing of secondary witnesses who interrogated the original witnesses.[139] Allowing the use of 'indirect evidence' in a criminal trial is very important for the public authorities, particularly for the intelligence services and police authorities, both to protect their secrets and to introduce evidence into trial (more on that below).[140] The legal problem that arises in evidence taking is that the German criminal procedure system is based on the principle of examination

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[131] See §§ 244 paras 2 and 261 StPO; *Dumitrescu*, 130(1)/2018 ZStW, 110; *Theile*, ZIS 1/2013, 128; *Jahn*, StV 2015, 779; compare, however, *Pollähne*, StV 2015, 788.

[132] BGH Decision 22 May 2013 – 4 StR 106/13, BeckRS 2013, 10079; for more see *Pollähne*, StV 2015, 787.

[133] *Bürger*, ZStW 128(2)/2016, 525.

[134] *Bürger*, ZStW 128(2)/2016, 520; *Dumitrescu*, 130(1)/2018 ZStW, 107 f.; *Theile*, ZIS 1/2013, 128; *Pollähne*, StV 2015, 788; *Jahn*, StV 2015, 779.

[135] BVerfG NJW 1981, 1722; *Vogel*, The Core Legal Concepts and Principles Defining Criminal Law in Germany (note 15), 65; *Engelhart*, The Secret Service's Influence on Criminal Proceedings (note 2), 530; *Dumitrescu*, 130(1)/2018 ZStW, 111.

[136] *Bürger*, ZStW 128(2)/2016, 525; see also BVerfG NJW 1981, 1722.

[137] § 251 para 2 StPO; see also *Theile*, ZIS 1/2013, 131.

[138] See below III.B.1. General Framework.

[139] See §§ 251 ff. StPO; BVerfG NJW 1981, 1719–1726, 1721; *Dumitrescu*, 130(1)/2018 ZStW, 113 ff.; *Vogel*, The Core Legal Concepts and Principles Defining Criminal Law in Germany (note 15), 65.

[140] See below III.B.1. General Framework.

in person (§ 250 para 1 CCP). To that extent there is a conflict between the law of evidence and the interests in secrecy.[141] The German Constitutional Court recognizes that the use of hearsay evidence in accordance with § 250 f. CCP does not violate the constitutional principles of procedure or the defence rights, in particular the right to be heard.[142] The defendant's constitutionally guaranteed right to be heard by the court in accordance with the law[143] does not establish a right to immediacy of evidence taking or the prohibition of hearsay evidence.[144]

Furthermore, the CCP typically requires that the court's decision on guilt or innocence and the sentence must be based on evidence taken in line with the principles of immediacy and orality.[145] Whereas the court is compelled to follow strict principles of evidence-taking during the main hearing,[146] it is not bound by certain rules of evidence in arriving at its decision (principle of freely formed conviction).[147] In case of intelligence information or other evidence which the court could only consider subject to limitations on the principles of material truth, immediacy, or on the defence rights, the courts should routinely consider such circumstances as diminishing the value of the evidence in question.[148] In addition, it is generally accepted that the court should pay due attention to the fact that intelligence information is mostly one-sided or may even present events in a distorted manner. These factors will therefore regularly lead the trial court to assume a lower evidentiary value for intelligence information.[149] A similar problem, i.e. the diminished value of intelligence information as evidence in criminal proceedings, arises if the information consists only of analyses carried out by the services and lacks the 'raw facts' underlying these

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[141] For more on this see *Frisch*, Schutz staatlicher Geheimnisse im Strafverfahren (note 10), 205.

[142] BVerfG NJW 1981, 1722; BVerfG NStZ-RR 2013, 115; BVerfG NJW 1996, 449; BVerfG NJW 1992, 168.

[143] Art. 103 para 1 Basic Law.

[144] BVerfG NJW 1953 177–178, 178; see also *Marsch*, Country Fiche Germany (note 88), 108 f.; *Kudlich*, JuS 2004, 930.

[145] For more see §§ 260, 264 StPO; see also BGH Judgment, 20 Dec. 1977, Case no: 5 StR 676/77; OLG Hamm NJW 1973, 1427 ff.; see also *Dumitrescu*, 130(1)/2018 ZStW, 112; *Jahn*, JuS 2007, 193; *Pollähne*, StV 2015, 789; *Klesczewski*, HRRS (HöchstRichterliche Rechtsprechung im Strafrecht) 1/2004, 14.

[146] *Alsberg*/*Dallmeyer*, Der Beweisantrag im Strafprozess, 2013, 237; *Klesczewski*, HRRS 1/2004, 14.

[147] On the scope and limits of the principle of freely formed conviction in criminal proceedings, see BVerfG NJW 2003, 2445 f.; see also *Fezer*, StV 1995, 95–101; *Vogel*, The Core Legal Concepts and Principles Defining Criminal Law in Germany (note 15), 64.

[148] See below III.B.2.c) Written Statements and Hearsay Witnesses.

[149] *Lang*, Geheimdienstinformationen (note 8), 119; see also *Gazeas*, Übermittlung nachrichtendienstlicher Erkenntnisse (note 38), 298; for more see below III.B.2.c) Written Statements and Hearsay Witnesses.

analyses. Such situations require the due attention of the court in applying the strict criteria of evidence evaluation in keeping with § 261 CCP.[150]

2. Rights of defence

a) Constitutional framework

The constitution provides the foundation and many guarantees for the rights of the defence in criminal proceedings.[151] Especially the provisions on freedom of the person (Art. 2 para 2 Basic Law) and on human dignity (Art. 1 para 1 Basic Law) provide certain minimum standards for an effective participation by the defendant in criminal proceedings, considering that the outcome of the proceedings might considerably restrict the defendant's personal freedom and that a potential moral condemnation associated with a conviction would also impair his or her dignity.[152]

The respect for the defendant's dignity requires that he or she not be degraded to a mere object of criminal proceedings.[153] In addition, the rule of law requires a fair trial[154] for the defendant, and the constitution explicitly enshrines the defendant's right to be heard (Art. 103 para 1 Basic Law).[155]

More specifically, in conjunction with the respect for the defendant's dignity, the constitutionally guaranteed right to be heard requires to 'give him the opportunity to safeguard his interests and to have influence on the course and the outcome of the proceedings'. In other words, the defendant must be given the 'opportunity to comment on the facts relevant for the decisions by the court in principle before they are made and thereby to influence the court in its decision-making'.[156] Thus, the defendant has the constitutionally guaranteed right to be present in person during the evidence taking by the court and to defend himself.[157] This constitutionally guaranteed

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[150] BGH Decision 26 March 2009, Case no: StB 20/08, HRRS 2009 no 550, 31; *Lang*, Geheimdienstinformationen (note 8), 119; see also *Gazeas*, Übermittlung nachrichtendienstlicher Erkenntnisse (note 38), 304; on the constitutional limits of § 261 StPO, see BVerfG NJW 1981, 1722.

[151] See generally BVerfG NJW 2007, 205.

[152] BVerfG NJW 1981, 1722; see also BVerfG NJW 2003, 2445; BVerfG NStZ-RR 2013, 115.

[153] BVerfG NJW 1981, 1722; see also BVerfG NStZ-RR 2013, 115.

[154] BVerfG NJW 2013, 1060; BVerfG NJW 1981, 1722.

[155] For more see BVerfG NJW 1981, 1721; BVerfG NJW 1983, 1043.

[156] BVerfG Decision of 16 March 2006, Case no: 2 BvR 168/04, BeckRS 2002, 161311; BVerfG NJW 2016, 1149, 1154; BGH NJW 2010, 2450, 2451; see also *Vogel*, The Core Legal Concepts and Principles Defining Criminal Law in Germany (note 15), 57; *Stein*, ZStW 97(2)/1985, 314.

[157] BVerfG Decision of 16 March 2006, Case no: 2 BvR 168/04, BeckRS 2002, 161311; BVerfG NJW 2016, 1149, 1154; BGH NJW 2010, 2450, 2451; see also *Vogel*, The Core

position protects the defendant inter alia against so-called in camera hearings where the trial court could take inculpatory evidence in the defendant's absence (more on that below).[158] At the same time, the presence of the defendant at trial is an essential prerequisite for the search of material truth and the culpability principle.[159] The exclusion of the defendant for the protection of state secrets constitutes therefore a serious interference with corresponding defence rights (more on that below).[160]

Moreover, the constitutionally guaranteed right to be heard compels the court to take note of and contemplate the defendant's explanations.[161] This, however, does not preclude ignoring the defendant's request and explanations if there are legitimate formal or substantive reasons for doing so.[162] Furthermore the right to be heard (Art. 103 para 1 Basic Law) requires the court to base its judgment only on facts which the defendant had a chance to comment on. This also includes the possibility to apply for the procurement of evidence closer to the criminal act. However, this does not mean that the right to be heard guarantees the use of only certain evidence or specific types of evidence in criminal proceedings.[163]

Finally, the right to a fair trial is the foundation for the defendant's entitlement to take part in the evidence taking in criminal proceedings. Accordingly, the defendant must be given access to the sources of the established facts. The main standards in this regard are provided by Art. 6 paras 1 and 3 ECHR.[164] The defendant's right to request evidence during trial is another right that ensures his or her status as participant in the criminal trial with his or her own rights (in compliance with the notion of human dignity).[165] The defendant's right to effectively take part in the inquiry into the material truth by applying for evidence taking corresponds to the requirement of

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Legal Concepts and Principles Defining Criminal Law in Germany (note 15), 57; *Stein*, ZStW 97(2)/1985, 314.

158 See below III.B.1. General Framework.

159 For more see BVerfG NJW 2016, 1154; BVerfG NJW 2005, 1641; BGH NJW 2010, 2451; Entscheidungen des Bundesgerichtshofes in Strafsachen (BGHSt) 44, 316; BGH NJW 2010, 2451; OLG Hamm Decision of 17 March 2009, Case no: 2 Ss 94/09, BeckRS 2009, 10736; critical on the aspect of duty as not compatible with the right against self-incrimination, *Volk,* Die Anwesenheitspflicht des Angeklagten – ein Anachronismus, in: Festschrift für Reinhard Böttcher zum 70. Geburtstag, 2007, 213–221; see generally *Stein*, ZStW 97(2)/1985, 303 ff.

160 See below III.B.2.b) Questioning of the Witness outside the Main Hearing.

161 BVerfG NJW 1979, 414.

162 BVerfG NJW 1979, 414; BVerfG NJW 1983, 1045; BVerfG Decison 14 Sept. 2010 Case no: 2 BvR 2638/09, BeckRS 2010, 54630; BVerfG NJW 1992, 2811.

163 BVerfG NJW 1981, 1721.

164 BVerfG NJW 2007, 205.

165 On the constitutional foundations of this right, see *Perron*, ZStW 108(1)/1996, 131; *Klesczewski*, HRRS 1/2004, 14; *Basdorf*, StV 1995, 310.

substantive justice, which requires not only to adhere to the culpability principle but also to search for material truth and the court's duty to do so ex officio.[166]

Even though the above-outlined principles safeguard the defendant's position in the criminal trial to a certain degree, these principles must still be specified. In fact, the Federal Constitutional Court leaves this duty to the legislature, notably to further specify the requirements of the procedural rights to be heard and to a fair trial. The courts are also entitled to operationalize this right in specific situations.[167] One such example is the jurisprudence of the Federal Court of Justice holding that a trial court can drop a case if the defendant's access to evidence was excessively restricted for reasons of protection of state secrets.[168]

b) Statutory framework

The German CCP enshrines the defendant's right to request to adduce or procure evidence that can serve as proof of facts relevant for guilt or innocence and for sentencing and that enables the defendant to influence the court's decision-making processes.[169] As long as there are no statutorily enumerated reasons on which the court can deny the request, the defendant's request for evidence compels the court to implement it.[170] The defendant's right to apply for the procurement of evidence is further restricted by the Federal Supreme Court's jurisprudence holding that a request for evidence must be sufficiently specific with regard to the evidence in question and the circumstances the evidence in question is expected to mirror; in case of witness evidence, how the witness gained his or her knowledge, and a declaration of what his or her statements should prove.[171] If a motion fails to meet these requirements, the court is not compelled to comply with it. Instead, it is merely a suggestion for the court to focus its inquiry in a given direction and it is in its discretion to refrain from doing so.[172] Even if the defendant's application is in order, the right to request evidence is not absolute.[173] The court may reject the defendant's request, inter alia to procure what is called non-present evidence

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166 BVerfG NJW 2010, 593.

167 BVerfG NJW 2013, 1060; BVerfG NJW 1992, 2811; BVerfG NJW 1981, 1722.

168 For more see below III.C. Dropping Cases over Withheld Evidence.

169 *Perron*, ZStW 108(1)/1996, 133; *Gössel*, ZIS 14/2007, 558.

170 See §§ 244 paras 3 ff. StPO; see also BVerfG NJW 1983, 1054; BVerfG NJW 2010, 593; *Huber*, JuS 2017, 634; *Ventzke*, StV 2009, 655; *Becker*, NStZ 2006, 495; *Klesczewski*, HRRS 1/2004, 10.

171 BGH NStZ 2006, 586; BGH NJW 2008, 3447; on the constitutionality of this jurisprudence, see BVerfG NJW 1997, 999–1000; for more see *Beulke*/*Satzger*, JZ 20/1993, 1014; *Jahn*, StV 2009, 663 f.; compare, however, *Perron*, ZStW 108(1)/1996, 135 f.

172 BGH Decision 11 Apr. 2013, Case no: 2 StR 504/12, HRRS 2013 no 611; for more see *Fezer*, HRRS 11/2008, 457–459; *Basdorf*, StV 1995, 315 ff.

173 *Gössel*, ZIS 14/2007, 560 f.

– if the taking of evidence is not practicable for legal or factual reasons (i.e. inadmissible or unobtainable),
– if the taking of evidence is not relevant to the court's decision because the evidence aims to prove
  - a fact of common knowledge,
  - a fact that has already been proved,
  - a fact that is wholly inappropriate for a proof, or
  - an exonerating fact that the court can treat as if it were true, or
– if the submission of an evidence request constitutes a misuse of power, namely to protract the proceedings (§ 244 para 3 CCP).[174]

Inadmissibility and unobtainability as grounds for refusal are particularly significant when it comes to defence requests to procure intelligence information or other evidence the authorities are not willing to disclose (more on that below).[175] Furthermore, the court may reject the application to examine a witness who must be summoned from abroad if it, 'in the exercise of its duty-bound discretion, deems the inspection not to be necessary for establishing the truth' (§ 244 para 5 CCP).[176] However, the scope of this restriction requires further clarification, because, as regards the examination of witnesses, criminal courts in Germany must take Art. 6 para 3(d) ECHR in account, which has become considerably influential in legal practice.[177] In affording this right, the courts follow the so-called three step-test of the ECtHR. They consider whether (1) there is good reason for the witness not to appear (at trial) and thus for the admission of his or her testimony in evidence, whether (2) the statements of the absent witness are expected to be the sole or decisive basis for the defendant's conviction, and whether there are (3) counterbalancing factors sufficient to overcome the difficulties of the defence resulting from the admission of such evidence and to safeguard the fairness of the proceedings as a whole.[178]

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[174] *Frister*, ZStW 105(2)/1993, 352; *Gössel*, ZIS 14/2007, 561 f.; on the criterion of non-relevance, see BVerfG Decison 14 Sept. 2010 Case no: 2 BvR 2638/09, BeckRS 2010, 54630; on the misuse of the right to apply for procurement of evidence, see BVerfG NJW 2010, 593.

[175] See below III.B.1. General Framework.

[176] On the constitutionality of this provision, see BVerfG NJW 1997, 999–1000; on the rejection of an application to examine a witness from abroad, see BGH Decision 2 May 2018, Case no: 3 StR 355/17, HRRS 2018 no 476; on expert evidence, see also BVerfG NJW 1992, 2811–2812; on other reasons for rejection by the court, particularly regarding experts and adducement of so-called present evidence, see §§ 244 para 3, 245 StPO; *Klesczewski*, HRRS 1/2004, 11.

[177] *Esser*, NStZ 2017, 605.

[178] BGH NStZ 2017, 603; for more see *Arslan*, ZIS 6/2018, 218–228.

B. Protection of state secrets during trial

As indicated above, the principles of evidence taking by the court and the rights of defence can be restricted in many ways, including by referring to the protection of state secrets. More specifically, the German CCP entitles the authorities to deny the submission or surrendering of documents[179] and to deny certain witnesses the authority to testify in criminal proceedings,[180] in both cases to prevent the publication of state secrets through criminal proceedings.

1. General framework

Information in a file or other written information in possession of a public authority that may be used as evidence in criminal proceedings (and thus in a public hearing) must be submitted to the public prosecutor's office or the court.[181] Similarly, the public prosecutor's office must disclose to the trial court the entire evidentiary basis of its allegations against the defendant.[182] The CCP provides in § 96 an exception to these general rules:

> Submission or surrender of files or other documents officially impounded by authorities or public officials may not be requested if their highest superior authority declares that publication of the content of these files or documents would be detrimental to the welfare of the Federation or of a German Land.[183] [Emphasis added].

Thus, the public authorities or prosecutors may deny a court's request for submission or delivery of documents (§ 244 para 2 CCP) or a request by the defence (§ 244 para 3 CCP) where the publication of these files or documents is declared detrimental to the welfare of the federation or one of the German *Länder* ('non-disclosure at trial stage').[184] The law considers information of that nature generally as state secrets or secrets of the public authorities.[185] As indicated above, the fact that the authority is allowed to deny information is not only a restriction permitted pursuant to statute on the court's duty to search, *ex officio*, for the truth by all means but is also a legal reason

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179 § 96 StPO.

180 § 54 StPO.

181 § 161 StPO states the general obligation of all public authorities to cooperate with the prosecution; this obligation is extended to the cooperation with the courts; for more see MüKO/StPO-*Hauschild*, § 96 StPO, 2.

182 § 199 para 2 StPO; for more see BVerfG NJW 1983, 1043–1046; LG Hannover FD-StrafR 2015, 369880; MüKO/StPO-*Hauschild*, § 96 StPO, 11.

183 Translation by Brian Duffett and Monika Ebinger, available at https://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html#p1647.

184 MüKO/StPO-*Hauschild*, § 96 StPO, 11.

185 On the definition of these terms, see *Frisch*, Schutz staatlicher Geheimnisse im Strafverfahren (note 10), 201 ff.

to restrict the defendant's right to apply for the procurement of evidence as the evidence would be unobtainable within the meaning of § 244 para 3 CCP.[186]

In most of the cases where the police or the intelligence services conduct secret observations on persons, either by using their own personnel or by asking individuals to work for them,[187] these authorities are reluctant to let these individuals testify in court. Making the observation public might reveal the agent's identity or the involvement of the intelligence services, thus providing insights into their tactics. Likewise, informants frequently do not wish to reveal their identity (and publicize the fact that they work for the police/intelligence services). In fact, the promise to keep their identity secret is frequently a precondition for their work for the intelligence services.[188]

In order to keep an identity concealed, the intelligence services can declare this person withheld as a witness. This can lead to a situation where material witnesses cannot testify in court and the court may not be able to reconstruct the crime. The declaration to withhold a witness is considered possible by applying the aforementioned § 96 CCP to persons and not only to documents.[189] A special regulation governing undercover investigators is provided in § 110b para 3 CCP. The superior authority must declare that making this person's identity public would be detrimental to the welfare of the state.[190] Another possibility available to the intelligence services is not to withhold the witness completely but not to give this person the authorization to testify.[191] This is only possible where the person is an agency employee or

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[186] BVerfG NJW 1981, 1722 ff.; *Beulke*/*Satzger*, JZ 20/1993, 1014.

[187] Intelligence service personnel may work as undercover agents, conducting long-term observations of persons. They can also work on a single case only; in that case they are called undercover investigators (Verdeckte Ermittler, see § 110a StPO). Intelligence service employees may also have no special cover and only conduct secret observations. Informants are individuals who work for the agencies and merely provide information (Informant, see no 2.1 RiStBV (Richtlinien für das Strafverfahren und das Bußgeldverfahren) annex D). Individuals who work for the agencies on a long-term basis in order to investigate crimes are called confidants (Vertrauensperson, V-Person, see no 2.2 RiStBV annex D); for more see *Beulke*/*Satzger*, JZ 20/1993, 1014.

[188] *Soiné*, NStZ 2007, 247; *Beulke*/*Satzger*, JZ 20/1993, 1013.

[189] MüKO/StPO-*Hauschild*, § 96 StPO, 8; *Eisenberg*, Beweisrecht der StPO, 298; *Ellbogen*, Die verdeckte Ermittlungstätigkeit der Strafverfolgungsbehörden durch die Zusammenarbeit mit V-Personen und Informanten, 2004, 140; *Kühne*, Strafprozessrecht, 7th edn., 2007, 528; *Beulke*/*Satzger*, JZ 20/1993, 1014.

[190] The statement of any other authority, such as the public prosecutor's office, which wants to keep the name of an informant confidential, is not relevant to the court (BGH NStZ 2001, 333).

[191] In this regard and for civil servants, § 54 para 1 StPO refers to the civil service law of the federation or the federal states (Länder). The corresponding provisions of this law generally entitle the public authorities to deny their servants the authorization to provide witness testimony in a court trial if testifying would be detrimental to the welfare of the federation or of a federal state (Land) or seriously endanger or substantially hamper the performance public duties; for more see BVerfG NJW 1981, 1973; see also *Frisch*, Schutz staatlicher Geheimnisse im Strafverfahren (note 10), 203; MüKO/StPO-*Percic*, § 54 StPO, 4 ff.;

formally committed to keep his or her work for the agency secret. Before accepting the refusal, the criminal court must investigate whether there is no other way to protect the witness. But again, the court's options are limited if the intelligence services provide a plausible explanation for their refusal. In this case, as in cases of withholding documents and witnesses, the superior authority can influence the court's selection of evidence.

The German Federal Constitutional Court has accepted that an endangerment of the health, life, and liberty of the potential witness is grounds to justify not revealing the witness's identity.[192] It is equally accepted that the promise to keep an individual's identity secret or the need to use the person for further secret observations are grounds for withholding the person as a witness.[193]

The declaration must be given by the highest superior authority. The fact that the authority in possession of the document declares to withhold it is not sufficient. To that extent there is some internal control by involving higher ranking officials.[194]

Under § 96 CCP the authorities can withhold documents (including names or statements of witnesses, records of conversations, or images from observations) by claiming that their publication would be detrimental to the welfare of the state,[195] in other words that they are state secrets. Yet, German courts have clarified that it is not enough for the intelligence services to simply claim that the publication of documents might endanger their work and public security. The authority must state facts sufficiently concrete to enable the court to understand the authority's decision.[196] The fact that documents are relevant to the work of the intelligence services in general does not suffice to deny their production.[197] Similarly, the constitutional court has made it clear that it is not enough for the authority to claim the existence of a threat to the welfare of the state.[198] The criminal court must investigate the grounds for withholding the witness and must evaluate whether other means are available to protect the witness.[199] But as long as the intelligence services provide plausible arguments, the court has no possibility to challenge their decision.[200] In the end it is

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Systematischer Kommentar zur Strafprozessordnung mit GVG und EMRK (SK/StPO)-*Rogall*, § 54 StPO, 18 ff.

192 BVerfGE 57, 250; see also *Frisch*, Schutz staatlicher Geheimnisse im Strafverfahren (note 10), 217; *Kudlich*, JuS 2004, 929; *Beulke*/*Satzger*, JZ 20/1993, 1015.

193 *Eisenberg*, Beweisrecht der StPO, 299; *Ellbogen*, Die verdeckte Ermittlungstätigkeit der Strafverfolgungsbehörden (note 189), 146.

194 MüKO/StPO-*Hauschild*, § 96 StPO, 12.

195 More on the notion of 'welfare of the state' see SK/StPO-*Rogall*, § 54 StPO, 59 ff.

196 BVerwGE 75, 1 and BVerfGE 57, 250 = NJW 1981, 1719.

197 BVerwGE 75, 1.

198 BVerfGE 57, 250; for more see *Frisch*, Schutz staatlicher Geheimnisse im Strafverfahren (note 10), 210 ff.

199 BGH StV 1989, 284; BGH NStZ 2005, 43.

200 BVerfG NJW 1981, 1973.

the intelligence services (and not the criminal court) who decide whether a witness is allowed to testify.[201]

If the authority does not wish to withdraw its decision, the court cannot use the document(s) in the criminal proceeding. Also, the court must ascertain whether other options than withholding the document are available, such as redacting names or accepting a report by the intelligence services. In fact, in case of a report the services enjoy a great deal of flexibility to conceal the sources of their information as the reports are mostly made up of assertions, presumptions, and publicly available information.[202] But the alternatives are limited, in particular in terms of documentary evidence, as '*in camera*' proceedings, for example, are not allowed in criminal trials.[203] An *in camera* hearing would not only allow the trial court to review whether the non-disclosure decision by an administrative body is justified but would also enable the court to avoid losing evidence relevant to the search for the truth. However, at the same time, the *in camera* hearing would violate the constitutionally guaranteed right of the defendant to be heard, because he or she would not be in a position to defend him- or herself with regard to evidence only disclosed to the trial court.[204] More importantly, with regard to the undisclosed evidence in criminal proceedings, the principle of *in dubio pro reo* applies in favour of the defendant. If the undisclosed evidence is inculpatory, the absence of an '*in camera*' hearing benefits the defendant.[205] In case of witness evidence, witness protection can be afforded by a broad spectrum of measures, which will be explained below.

The court cannot take legal measures against an authority's refusal.[206] The only exception is where the refusal to produce documents is obviously illegal. In that case a court can order the seizure of the documents.[207] The defendant is entitled to challenge the legality of the refusal before the administrative court.[208]

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[201] On this, see also SK/StPO-*Rogall*, § 54 StPO, 34 f.

[202] On the use of intelligence reports (Behördenzeugnisse) see BGH Decision 26 March 2009 Case no: StB 20/08, HRRS 2009 no 550, 31.

[203] BGH NStZ 2000, 265; BVerfG NJW 2000, 1178; BVerfG NStZ-RR 2013, 379–380 (search warrant based on undisclosed evidence); MüKO/StPO-*Hauschild*, § 96 StPO, 16; SK/StPO-*Rogall*, § 54 StPO, 70 ff.; on the use of the so-called *in camera* hearing in administrative court proceedings in Germany, see *Vogel*, ZIS 1/2017, 31 f.; see also BVerfG NJW 2000, 1175–1179; BVerfG NVwZ 2006, 1041–1049; critical, SK/StPO-*Wohlers*/*Greco*, § 96 StPO, 33.

[204] BVerfG NJW 1981, 1974; see also *Frisch*, Schutz staatlicher Geheimnisse im Strafverfahren (note 10), 213; *Vogel*, ZIS 1/2017, 31.

[205] BVerfG NJW 2000, 1178; see also BVerfG NStZ-RR 2008, 17.

[206] BGHSt 32, 115; MüKO/StPO-*Hauschild*, § 96 StPO, 19.

[207] BGHSt 38, 237.

[208] For more see *Frisch*, Schutz staatlicher Geheimnisse im Strafverfahren (note 10), 213 f.; MüKO/StPO-*Hauschild*, § 96 StPO, 19; *Marsch*, Country Fiche Germany (note 88), 109.

Yet, neither the court asking the authority to reconsider its decision nor the accused questioning the decision in an administrative proceeding are very likely to be successful. The intelligence services have discretion in deciding what shall prevail: the interest to keep information secret or to conduct criminal proceedings.[209] As long as the intelligence services provide some plausible arguments for their decision, the documents will not be submitted to the courts. Thus, the intelligence services (and not the court or the defence) exercise considerable influence on a criminal trial as they can decide what type of evidence cannot be used.

2. Witness protection measures

As indicated above, a court can take various measures to protect a witness and thus enable the witness to testify in court.[210] Several levels of protection are possible. At the first level the court must examine whether the witness can be protected in the courtroom during the public main hearing. If this is not possible, the court must attempt to question the witness outside the main proceedings by a judge. As a last option the court has to examine whether a written statement by the witness can be accepted as evidence or whether the officer questioning the witness can be heard as a hearsay witness.

These protection measures are in conflict not only with the court's duty to extend the search for the truth to all available facts but specifically also with the defendant's right to examine a witness according to Art. 6 para 3(d) ECHR, which requires that the following conditions be met:

(1) the defendant must be informed about the identity of any prosecution witness;
(2) the personal appearance of the witness for examination in trial must be secured;
(3) the defendant must be enabled to follow the examination of the witness acoustically and visually, and
(4) the defendant needs to obtain the opportunity to question the witness and to challenge his or her testimony.[211]

a) Protection during the main hearing

During the main hearing the court can apply different measures to protect a witness. The possibility not to reveal the place of residence provides the least protection

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[209] See BVerfGE 57, 250; BGHSt 44, 107; for the practice of administrative courts, see OVG Münster NJW 2015, 1977–1978; VGH Hessen StV 1986, 52–54.

[210] *Ellbogen*, Die verdeckte Ermittlungstätigkeit der Strafverfolgungsbehörden (note 189), 190; *Kühne*, Strafprozessrecht, 7th edn., 2007, 529; *Frisch*, Schutz staatlicher Geheimnisse im Strafverfahren (note 10), 207 ff.; *Soiné*, NStZ 2007, 247.

[211] For more see *Arslan*, ZIS 6/2018, 219; see also BVerfG NJW 1981, 1973; *Vogel*, ZIS 1/2017, 28 ff.

in the main hearing.[212] Not revealing the identity or just giving an old or fake identity provides more protection.[213] But the person is still visible in the courtroom, and the accused or a member of the audience could subsequently identify him or her. The CCP, however, allows to remove the accused from the courtroom if there is a concrete threat to the health of a witness.[214] In this case the accused still gets to know the identity of the witness, which means that this measure only makes sense where the witness is intimidated by the accused. One more step is to exclude the public, which requires a threat for the life, liberty, or freedom of the witness.[215] In this case the accused also gets to know the identity of the witness. Similar problems arise where the witness is interviewed outside the courtroom by video conferencing[216] or where the video of an earlier questioning is shown.[217]

In sum, all these possibilities are no guarantee that the identity of a person is kept secret enough not to be recognized outside the courtroom.[218] In fact, this is the reason why the intelligence services are not likely to accept such low levels of protection.

A higher level of protection is reached if the identity of the witness is kept secret and his or her outer appearance is changed, such as by wearing a wig. The modern version of this camouflage is the visual and acoustical shielding of the witness. The Federal Court of Justice (BGH) allowed this possibility in 2003.[219] In that case the witnesses were placed in a separate room and their testimony was transmitted to the courtroom. A special lens made it impossible to recognize the face; a sound equalizer made it impossible to recognize the voice. These precautions enabled the court to hear the witnesses; otherwise, the ministry as the superior authority would have withheld them on grounds of protection of state secrets in keeping with §§ 54, 96 CCP. The disadvantages of this measure are that the defendant is not only not informed about the real identity of his or her accuser but is also unable to observe the witness's demeanour during the examination.[220] The advantage is that the person can be partially seen and heard in action and can be directly questioned by the prosecution, the court, and the defence.[221] Moreover, the defence has the same level of knowledge

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212 § 68 para 2 StPO; BVerfG NJW 1981, 1974.

213 § 68 para 3 StPO; BVerfG NJW 1981, 1974.

214 § 247 StPO, see BGHSt 32, 32.

215 § 172 GVG; BVerfG NJW 1981, 1974; see also *Frisch*, Schutz staatlicher Geheimnisse im Strafverfahren (note 10), 207; MüKO/StPO-*Percic*, § 54 StPO, 24.

216 § 247a StPO.

217 § 58a StPO.

218 *Soiné*, NStZ 2007, 247.

219 For more see BGH NJW 2003, 74; see also BGH NStZ 2005, 43.

220 ECtHR, Judgment of 20 Nov. 1989 – 11454/85 (Kostovski v. The Netherlands), § 42; ECtHR, Judgment of 10 Apr. 2012 – 46099/06, 46699/06 (Ellis, Rodrigo and Martin v. The United Kingdom), § 74.

221 *Safferling*, NStZ 2006, 75.

with regard to witness testimonies as the court. This type of protection seems to be suited to all cases except those where the mere statement by the witness would reveal his or her identity. Nevertheless, it also leads to the use of 'indirect evidence' in criminal proceedings.

b) Questioning of the witness outside the main hearing

If the protection of the witness during the main hearing is not possible, the court must attempt to question the witness outside the public proceedings and then introduce the written record of the questioning in the main hearing.[222] The court can only proceed in this way if it has procured a statement by the superior authority to the effect that, in any other case, the witness will be withheld, as the protection of state secrets according to §§ 54, 96 CCP could not be afforded otherwise.[223] The witness may be examined by a commissioned judge (a judge of the court conducting the main proceedings) or a requested judge (a judge of another court asked to do the questioning by judicial assistance). The examination is not public. If the witness will only give evidence if neither the accused nor the defence is present, the court can refrain from notifying the defence and the accused.[224]

The Federal Court of Justice as well as the Federal Constitutional Court have also accepted that the defence can even be excluded from questioning if the authorities would otherwise withhold the witness.[225] On the one hand this enables the court to question the witness at least through a commissioned or requested judge, but on the other hand it restricts the influence of the defence, as the defendant neither knows who the witness is, has no the chance to see and hear the witness during the examination, nor ask questions directly. Furthermore, there is no guarantee that the defendant will later have the same level of knowledge with regard to the witness testimonies as, say, the commissioned judge, who will take part in forming the judgment. Therefore, this measure not only appears to simply lead to the use of 'indirect evidence' in criminal proceedings but also to a quasi *in camera*-hearing and to the potential to produce 'undisclosed incriminating evidence'.[226] The jurisprudence of both federal

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222 So-called Kommissarische Vernehmung, § 223 StPO.

223 BGH NJW 1984, 65.

224 § 224 StPO.

225 BVerfGE 57, 250; BGH NJW 1980, 2088; in a later decision the BGH ruled that if the defence nonetheless gets to know the date and place of the examination and shows up, the defence does have the right to participate in the questioning (BGHSt 32, 115). Insofar not all details have been clarified yet.

226 In fact, under certain conditions, the ECtHR also seems to accept witness hearings in camera, ECtHR, Judgment of 12 Dec. 2013 – 19165/08 (Donohoe v. Ireland), § 88; however, compare ECtHR, Judgment of 22 July 2003 – 9647/98 40461/98 (Edwards and Lewis v. The United Kingdom), § 58; ECtHR, Decision of 5 Feb. 2013 – 31777/05 (O'Farrell and others

courts seems to suggest that such a quasi *in camera*-hearing is not categorically denied, whereas both courts strictly oppose an *in camera*-hearing on documentary evidence entirely withheld by the other authorities as state secret, but would principally disclose it to the trial court, provided the defence is excluded from the hearing.[227] However, as a result of the new and accepted option to protect a witness by means of visual and acoustical shielding, there will be fewer questionings outside the main hearing in future.[228]

Witness questioning outside the main hearing not only contravenes the defendant's right to examine a witness under Art. 6 para 3(d) ECHR but also the defendant's right to attend and be present at the main hearing.[229] However, under current law, predominantly opposing interests, namely the interest in clarifying the facts, may exceptionally justify a restriction on the accused's right to attend the main trial.[230]

c) Written statements and hearsay witnesses

If the aforementioned measures do not guarantee enough secrecy for an individual, the intelligence services will either withhold the witness by a declaration according to § 96 CCP or by a denial of the authorization to testify according to § 54 CCP. In either case the court cannot hear the witness in person. But the court does have the possibility to introduce a witness statement indirectly.[231] As indicated above, both the constitutional requirements of criminal proceedings as well as the statutory framework allow the use of 'indirect evidence'. If a witness is prevented from appearing at the main hearing for an indefinite period of time, the testimony may be replaced by a written statement. Withholding the witness for reasons of secrecy has been accepted as a constellation covered by § 251 para 1 no 2 CCP, namely as unobtainable evidence.[232] In such a case written statements of the witness may be read out in the main hearing. If a written statement of the witness is not available, the courts have also allowed introducing summaries of witness statements compiled by

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v. The United Kingdom), §§ 54 and 61; ECtHR, Decision of 10 Jan. 2017 – 40/14 (Austin v. The United Kingdom), § 59; see also *Vogel*, ZIS 1/2017, 32.

227 Critical on that *Vogel*, ZIS 1/2017, 35; compare *Marsch*, Country Fiche Germany (note 88), 108.

228 *Safferling*, NStZ 2006, 75.

229 *Frisch*, Schutz staatlicher Geheimnisse im Strafverfahren (note 10), 206.

230 BVerfG Decision of 16 March 2006, Case no: 2 BvR 168/04, BeckRS 2002, 161311; for exceptions see BGH NJW 2010, 2451; see also OLG Hamm Decision of 7 March 2009, Case no: 2 Ss 94/09, BeckRS 2009, 10736.

231 SK/StPO-*Wohlers*/*Greco*, § 96 StPO, 43; *Ellbogen*, Die verdeckte Ermittlungstätigkeit der Strafverfolgungsbehörden (note 189), 216; *Kühne*, Strafprozessrecht, 7th edn., 2007, 530.

232 BGHSt 29, 109 = NJW 1980, 464; BVerfGE 57, 250; see also *Kudlich*, JuS 2004, 930.

the intelligence services.[233] It is obvious that the defendant's right to examine a witness under Art. 6 para 3(d) ECHR is significantly restricted in such cases. Not only the witness's identity and appearance remain hidden, but any further questioning of the witness is impossible. Still, even such an extensive restriction can be justified.[234]

Another possibility is to question the person who interrogated the witness. The interrogator is a witness him- or herself, so there is no direct conflict with § 250 CCP. However, the interrogator can only present hearsay evidence about the crime and can only provide 'indirect evidence'. A hearsay witness is allowed as long as the original witness (the preferred type of evidence) is not available.[235] Although the interrogator can be questioned in person it is not possible to elicit many details the original witness might have provided. Thus, this presents similar problems as those that occur by introducing written statements.

The courts allow the possibility of introducing 'indirect evidence' of a witness only if the authority's refusal to permit him or her to testify (§ 54 CCP) was not obviously illegal.[236] This can be the case if the publication would not be detrimental to the welfare of the state or if the superior authority fails to provide any reasons for the refusal, if the reasons are not sufficiently substantive, or if the authority provides an arbitrary reason. The Federal Court of Justice has not yet heard a case on point. Only some lower courts have refused 'indirect evidence' on these grounds.[237] Although there are a few examples, it should be noted that the threshold is so high that the non-admission of 'indirect evidence' will rarely happen as long as the intelligence services provide some reasonable grounds for withholding a witness.

The permission of 'indirect evidence' does not mean that the evidence is of the same value as the oral witness statement.[238] The court's duty to search *ex officio* for the material truth (§ 244 para 2 CCP) requires to be especially careful with hearsay evidence even though the court is not bound by any evidence rules as it is allowed to form its conviction freely (§ 261 CCP).[239] However, the court must be more critical than usual and analyze in detail the consistency of 'indirect evidence'. Most importantly, a conviction can never be based on 'indirect evidence' alone, especially if

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233 See BGH NJW 2007, 384; OLG Hamburg, NJW 2005, 2326.

234 ECtHR, Judgment of 28 Feb. 2016 – 51277/99 (Krasniki v. The Czech Republic), § 75 ('Article 6 does not grant the accused an unlimited right to secure the appearance of witnesses in court'); for more see *Arslan*, ZIS 6/2018, 214 f.

235 BVerfGE 57, 250; BGH NStZ 2000, 265; BGHSt 32, 115; see also *Droste*, Handbuch des Verfassungsschutzrechts, 5th edn., 2007597.

236 BGHSt 29, 109.

237 See *Eisenberg*, Beweisrecht der StPO, 301; *Ellbogen*, Die verdeckte Ermittlungstätigkeit der Strafverfolgungsbehörden (note 189), 237.

238 *Ellbogen*, Die verdeckte Ermittlungstätigkeit der Strafverfolgungsbehörden (note 189), 256; BVerfG NJW 1981, 1722.

239 BVerfG NJW 1981, 1722.

the court receives only summaries of witness statements compiled by the intelligence services. 'Indirect evidence' must always be backed by other, direct evidence.[240] According to § 261 CCP, the evaluation of evidence by the court must be described in detail in the judgment (§ 260 para 4 CCP). The judgment must highlight that the court was aware and did pay special attention to the uncertainties of the 'indirect evidence'. If there are doubts about facts for or against the accused, the court is compelled to strictly apply the principle of deciding in favour of the accused (*in dubio pro reo*). This is particularly so where withheld evidence could be in favour of the accused. The Federal Court of Justice has explicitly highlighted that the interest of the state to keep information secret may not lead to disadvantages for the rights of the accused.[241]

In the final analysis, German courts attempt to compensate for the reduced value of 'indirect evidence' by being particularly careful in assessing it. The rationale behind this approach is that some evidence is better than no evidence at all.[242] But in many cases the court will not really be in a position to assess the value of the evidence, because it lacks necessary information, such as the circumstances involved in gathering the evidence, the motivation of the witness at the time, and, especially, because of omissions in the statements. This is equally true for the defence, which makes it almost impossible to question or counter such evidence. To this extent 'indirect evidence' can only support the court's reasoning based on other evidence.

C. Dropping cases over withheld evidence

If material evidence is withheld by the authorities ('non-disclosure'), for instance by the intelligence service, the question arises whether the court may drop a case because a fair trial is not possible. The Federal Court of Justice has decided that this is a possibility.[243] In the case at issue the accused (*Mounir el Motassadeq*) was indicted for aiding one of the September 11 hijackers (*Mohamed Atta*). One witness (*Ramzi Binalshib*) who might have clarified the involvement of the accused in the crime was imprisoned in the U.S. and not allowed to be questioned by the court. An FBI officer interrogated in court was not allowed by the FBI to give evidence on statements made by *Binalshib*. Information on statements by *Binalshib* in the possession of the German intelligence services was withheld. The Federal Court of Justice ruled that the 'non-disclosure' of evidence of such importance violates the fair trial rights of the accused. The court stated that if, as a result of the evidence withheld,

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240 BGH NStZ 2000, 265; see also BGHSt 49, 112.

241 BGHSt 49, 112; see also BGH NStZ 2000, 265; BVerfGE 57, 250; *Kudlich*, JuS 2004, 930; *Beulke*/*Satzger*, JZ 20/1993, 1014 f.

242 See BVerfGE 57, 250.

243 BGHSt 49, 112.

the judge has only a minimum of facts as a basis for deciding the case, the case must be dropped. Yet, in the case of *el Motassadeq* the court saw other means to compensate for the violation of the fair trial right. It ordered a rehearing of the case at the first instance court. Concerning the evidence, the first instance court was ordered to be particularly careful in considering the evidence and to strictly decide *in dubio pro reo*. In the rehearing, U.S. authorities provided new evidence which facilitated (together with other evidence) proof of *el Motassadeq*'s involvement in the attacks of September 11.[244]

D. Inadmissible evidence

If evidence gathered by the intelligence services is introduced into a criminal proceeding, the evidence is not necessarily admissible for proving the guilt of the accused. German law recognizes that the search for the truth must not be pursued at any price and, accordingly, the court's duty and power to 'extend the taking of evidence to all facts and means of proof relevant to the decision' (§ 244 para 2 CCP) must be restricted.[245]

In terms of the question whether a piece of evidence can be used as a basis for a criminal conviction, the German criminal procedure system distinguishes between prohibitions to take evidence (*Beweiserhebungsverbote*) and inadmissibility of (improperly obtained) evidence (*Beweisverwertungsverbote*). Violations during evidence gathering may result in an inadmissibility of the evidence in court. Yet the courts have allowed many exceptions to this rule and unfortunately not succeeded in developing a coherent system governing the admissibility of evidence.[246] In the context of intelligence service information in criminal proceedings, two constellations are of special interest: (1) the gathering of evidence without the necessary legal basis, (2) the use of information collected abroad.

1. Illegally collected evidence

The collection of evidence by the intelligence services can be illegal for a number of reasons.[247] The intelligence services may lack the authority to investigate certain

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[244] See BGH NJW 2007, 384.

[245] For more see above III.A.1.a) Constitutional Framework.

[246] See for the developments in recent years, *Fezer*, JZ 2007, 665 ff. and 723 ff.; *Jahn*, Beweiserhebungs- und Beweisverwertungsverbote im Spannungsfeld zwischen den Garantien des Rechtstaates und der effektiven Bekämpfung von Kriminalität und Terrorismus, Gutachten C für den 67. Juristentag, in: Ständige Deputation des Deutsche Juristentags, 2008, C39.

[247] *Greßmann*, Nachrichtendienste und Strafverfolgung (note 21), 417 f.; *Lang*, Geheimdienstinformationen (note 8), 120 ff.

crimes, such as the investigation of tax crimes in the above-mentioned *Liechtenstein* case.[248] The services may also lack the authority for certain coercive measures such as computer searches via the internet. And the services may have disregarded the principle of proportionality and not turned to less far-reaching measures.

Violations do not necessarily prohibit the evidence from being admitted in court.[249] The Federal Court of Justice attempts to balance the public interest in prosecuting crimes with the interest of the individual not to be infringed in his or her rights. Major factors in judging admissibility are the seriousness of the crime and the seriousness of the violation of rights by the intelligence services.[250] The more serious the violation by the services, because they do not just violate a formal regulation of the CCP but infringe on important basic rights in the constitution, the more likely the courts will not admit the evidence in the main hearing.

A special problem arises if the intelligence services gather illegally collected evidence. This may occur when the intelligence services ask individuals to work for them, say as informants or confidants. Courts generally do allow evidence illegally collected by individuals.[251] An exception can be made where the conduct of the individual may be attributed to the intelligence services.[252] Therefore, admissibility depends very much on the question whether the individual acted on his or her own initiative or whether he or she was instructed by the intelligence services. However, even if the conduct of the individual is attributed to the intelligence services the courts tend to strike a balance between the interest of the prosecution and individual rights,[253] thus allowing the rules of evidence and procedure to be 'bypassed'.

As already indicated above, the measures of the intelligence services frequently do not produce the evidence later used in court but only provide leads for further investigations by the police or the prosecution ('indirect evidence' at investigation stage).[254] If the evidence gathering by the intelligence services was illegal, the question of what happens with the evidence subsequently legally produced by the police, prosecution, or court arises only if respective evidence is taken in the main hearing.

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[248] See *Schünemann*, NStZ 2008, 305; *Sieber*, NJW 2008, 881 f.; *Trüg*, NJW 2008, 887.

[249] See BVerfG NStZ 2006, 46; *Jahn*, Beweiserhebungs- und Beweisverwertungsverbote (note 246), C32; *Arslan*, Aussagefreiheit des Beschuldigten in der polizeilichen Befragung (note 34), 365.

[250] See BGHSt 31, 304; BGHSt 38, 14; BGHSt 47, 172; BGH NJW 1997, 1018; BGH NJW 2013, 2271; *Jahn*, Beweiserhebungs- und Beweisverwertungsverbote(note 246), C45.

[251] BGHSt 36, 172; *Eisenberg*, Beweisrecht der StPO, 116; Löwen-Rosenberg (LR)/StPO-*Gleß*, §136a para 10; *Jahn*, Beweiserhebungs- und Beweisverwertungsverbote (note 246), C100; *Sieber*, NJW 2008, 886.

[252] *Eisenberg*, Beweisrecht der StPO, 118; *Jahn*, Beweiserhebungs- und Beweisverwertungsverbote (note 246), C101.

[253] BGHSt 40, 211.

[254] See above II.D. Use of Intelligence Information.

This procedural question may never come up, especially if the prosecution authorities do not disclose the existence of corresponding evidence ('undisclosed incriminating evidence' at investigation stage) and if they obtain further evidence by using the illegally gathered evidence. In this regard, it must be noted that the German system, in principle,[255] does not recognize the 'fruit of the poisonous tree doctrine'.[256] As a result, the courts, again, balance the interests of the prosecution against individual rights. There are not many cases where such tainted evidence was not allowed in court. The most prominent example is the case where the court disallowed evidence collected by the prosecution based on illegal information gathered by the intelligence services.[257] Because the intelligence services violated the important right of privacy of correspondence, posts, and telecommunication (Art. 10 Basic Law), the court regarded the violation as sufficiently grave not to admit the evidence in question. But even in this case the prohibition was not total as the court allowed the use in cases of serious crime.

Thus, evidence illegally collected by the intelligence services will not automatically be banned from being used in a criminal proceeding. This will only be the case where the intelligence services gather evidence regarding minor crimes for which they are not responsible. If they collect information about serious crimes enumerated as falling within the scope of their duties, the evidence is likely to be allowed in the proceeding. In short, one can say that German jurisprudence insofar puts more emphasis on facilitating public prosecutions and less on protecting individual rights.

2. Evidence collected abroad

In recent years the intelligence services have been receiving more and more information from abroad. The intelligence services, the police, and the prosecution see no problem in using such information as a basis for further investigations in Germany. German authorities take this approach even if the information may have been collected by illegal means such as torture.[258] This scenario is rarely made public because, as already emphasized above, in many cases only the outcomes of additional investigations are used as evidence in court.[259]

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[255] On the exception with regard to information concerning the so-called core area of privacy, see BVerfG NJW 2016, 1787.

[256] *Sieber*, NJW 2008, 886; *Arslan*, Aussagefreiheit des Beschuldigten in der polizeilichen Befragung (note 34), 371; *Eisenberg*, Beweisrecht der StPO, 118; *Jäger*, Beweisverwertung und Beweisverwertungsverbote im Strafprozess, 2003, 111; *Jahn*, Beweiserhebungs- und Beweisverwertungsverbote (, C91.

[257] BGHSt 29, 244.

[258] See *Hetzer*, Kriminalistik 59, 148.

[259] See above II.C. Suspending a Transfer and D. Use of Intelligence Information.

In more and more cases the collection of evidence abroad itself is important when the crime is committed in a transnational setting. Examples are terrorist attacks where the planning and training of at least some members of a group take place outside the countries where the attacks are committed. Another example are the criminal acts of the so-called returnees from the war in Syria, who face criminal investigation in Germany. These cases raise the question whether evidence collected abroad can be used in court.[260] The main issue in such cases is what standards should apply for introducing evidence into a German criminal proceeding. The courts have clarified that, for purposes of evidence gathering, the relevant standards are the standards of the country in which the interrogation or the coercive measures take place.[261] Hence, German courts will examine in each case whether the evidence was collected in compliance with the foreign standards.[262]

Yet, the examination whether the collection of evidence was legal according to foreign standards is only a precondition to the question whether the evidence is admissible. The ultimate question of admissibility is answered according to German law.[263] Therefore, illegally collected evidence does not necessarily mean that the evidence is not allowed in court. This is only the case if the breach of foreign law is also relevant under German standards. Conversely, the legal collection of evidence abroad does not mean that the evidence is allowed if German standards do not allow such collection. This can be the case where German authorities initiate an interrogation abroad and the interrogation techniques used are not allowed in Germany.[264] Evidence can be disallowed without the involvement of German authorities if the German standards of rule of law (*rechtsstaatliche Anforderungen*) were not observed.[265]

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[260] The classical mechanisms to obtain evidence are international judicial assistance or mutual cooperation (internationale Rechtshilfe). These aspects will not be examined any further in this context. The assistance can vary greatly especially when EU-countries are asked for help, as there is already an extensive legal network for the exchange of information within the EU or parts of the EU.

[261] BGH NStZ 1994, 595; BGH NStZ 1992, 394; see also *Böse*, ZStW 114/2002, 148; *Schuster*, Verwertbarkeit im Ausland gewonnener Beweise, 2006, 84.

[262] BGH NStZ 1992, 394; BGH NStZ 1983, 181.

[263] BGH NStZ 1996, 609; *Böse*, ZStW 114/2002, 148.

[264] *Schuster*, Verwertbarkeit im Ausland gewonnener Beweise im deutschen Strafprozess, 2006, 84; the involvement of German authorities abroad is obviously hard to prove. Information is often kept secret. If information becomes public, it is predominantly too general in nature to be produced in a criminal proceeding. For example, it has become public that German intelligence service agents took part in interrogations in Guantanamo (see *Hetzer*, Kriminalistik 59, 148). Yet, as long as this participation cannot be linked to the interrogation of a specific person, the complaint that a statement was obtained by bypassing German law will be unsuccessful.

[265] BGH NStZ 1983, 181.

The question whether the rule of law standards had been observed was discussed in the proceedings against *Mounir el Motassadeq* on terrorism-related charges mentioned above.[266] In this case the United States provided summaries of statements of several witnesses imprisoned by the United States. There were doubts whether the statements were obtained without the use of torture, as there had been press coverage concerning these witnesses. From the point of view of the law, measures such as 'waterboarding' may be legal under U.S. law but unquestionably constitute torture under German law.[267] § 136a CCP is quite clear regarding such ill-treatment and completely prohibits any evidence based on this ill-treatment.[268] It is generally accepted that the standards of § 136a CCP must be met in any proceeding abroad.[269]

The problem in the case was that the court, the higher regional court of Hamburg (Oberlandesgericht; OLG Hamburg), did not have more than a vague suspicion that the witnesses had been tortured. Neither the U.S. authorities nor the German intelligence services provided any information on the circumstances under which the witnesses had been questioned. The court solved the problem by applying a high burden of proof. As long as there was no proof that the witnesses had been tortured, the court assumed that they were not, and their statements were admissible in court.[270] Thus, the assumption of '*in dubio pro reo*' does not apply where a witness may have been tortured. This ruling is in line with a long-standing point of view of the Federal Court of Justice and was not overruled in the appellate proceeding.[271] *De facto* this means that the defence must prove that the witnesses were tortured if their statements should not be used in court. This is an almost impossible task if the state authorities do not even disclose where the witnesses are held in custody. Thus, once again, German jurisprudence puts public prosecution first and the protection of individual rights second. By demanding high standards of proof for the defence, German jurisprudence is not consistent with the jurisprudence of the European Court of Human Rights.[272]

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266 See OLG Hamburg, NJW 2005, 2326.

267 For more see *Arslan*, Aussagefreiheit des Beschuldigten in der polizeilichen Befragung (note 34), 284.

268 Besides § 136a StPO, the court discussed the U.N. anti-torture treaty, to which Germany is a signatory and which is directly applicable in Germany (OLG Hamburg, NJW 2005, 2326). Any evidence based on torture is not admissible in a criminal proceeding (art. 15); more on that see *Arslan*, ZStW 127(4)/2015, 1133 f.

269 LR/StPO-*Gleß*, § 136a para 11, 72; *Schuster*, Verwertbarkeit im Ausland gewonnener Beweise im deutschen Strafprozess, 2006, 219.

270 OLG Hamburg, NJW 2005, 2326.

271 See BGH NJW 2007, 384.

272 For more see *Arslan*, Aussagefreiheit des Beschuldigten in der polizeilichen Befragung (note 34), 615.

IV. Summary

In Germany, security, the protection of the state and the constitutional order, the prevention of danger, and the prosecution of crimes are in many different ways closely linked areas of the law. The theoretical foundations of these elements of domestic security lead to different constitutional requirements for the frameworks of the intelligence services, the police, and the criminal prosecution authorities. Differences in the constitutional foundations for providing domestic security are exacerbating normative tensions, which the Federal Constitutional Court is attempting to resolve by compromise: the Court has accepted the existence of new security threats and the resulting need to reconfigure the security framework. At the same time, the Court has set limits on this transformation.

Most importantly, the Court continues to insist on a separation between the intelligence services, the preventive role of the police, and criminal prosecution, as the proportionality between the social control by the state and its powers of intervention requires a differentiated and balanced approach. However, the customary clear-cut separation between intelligence, the preventive role of the police, and criminal prosecution, which was based on differences in their responsibilities, objectives, and respective *modi operandi*, and especially on different investigation thresholds, has been abandoned in favour of an internal security policy focused on effectiveness. The result, in terms of criminal justice, is that evidence collection, especially by non-criminal authorities, is increasingly becoming a matter of security. As the boundary lines recently drawn by the Constitutional Court between the intelligence services, the preventive role of the police, and criminal prosecution are quite thin, it remains to be seen to what extent the new normative boundaries between these areas can be respected in practice. Particularly the laws on the transfer of intelligence information and their application in criminal proceedings are quite illustrative in the sense that the laws of intelligence and criminal procedure apply significant restrictions on the principle of informational separation.

Intelligence services in Germany are allowed to render a 'non-disclosure' decision, *inter alia* on grounds of protecting state secrets during criminal investigations. If they do not take such a decision and if the matter involves crimes against the security of the state or crimes of major importance, they may provide intelligence information to the criminal investigation authorities either unsolicited or on request. The issue of whether and to what extent intelligence services may also support the criminal investigation authorities in other areas of crime, *inter alia* by transmitting intelligence information in accordance with their general duty of providing so-called administrative cooperation, is controversially debated.

Even if intelligence is transferred, a direct use of intelligence information by the criminal investigation authorities (and the courts) is only authorized if the information could also have been gathered under the CCP (the so-called hypothetical

order). As the investigation is conducted in secret and the prosecutor is allowed to restrict access to the investigation files, the defence will in most cases only be informed about the existence of some inculpatory evidence but not about the fact that this evidence comes from the intelligence services. Thus, the intelligence information will be used against the defendant already at the investigation stage. The prosecutor, however, is compelled to disclose all the results of his or her investigations, including the origin of the evidence, when filing the indictment in court.

Whereas intelligence law explicitly stipulates the two types of transfer mentioned above (unsolicited or on request), in practice, intelligence information is also shared between the intelligence services and the investigation authorities based on mutual trust. Specifically, the investigation authorities promise not to use the shared information at court in trial (so-called '*nicht gerichtsverwertbare Informationen*'). Moreover, an indirect use of intelligence information as investigative tips and leads, which do not need to be disclosed to the defence, is permitted without complying with the so-called hypothetical order. In both cases intelligence information is used at the investigation stage as 'undisclosed incriminating evidence'.

As regards the trial stage, the CCP entitles public authorities including the intelligence services to render a 'non-disclosure' decision to a criminal court, if the requested evidence (documents or witnesses) must be withheld for the protection of state secrets (similar to the above-mentioned intelligence law). If the evidence withheld is material to the case, the German Federal Court of Justice considers it feasible to drop the case entirely in keeping with the right to a fair trial. According to the German Constitutional Court, evidence cannot be disclosed to a trial court in a so-called '*in-camera* hearing'. However, this does not mean that the intelligence services and the courts are unable to introduce state secret-related evidence into trial on the one hand and to protect state secrets on the other hand. They can achieve both by submitting an intelligence report. This is how the intelligence services produce 'indirect evidence' at trial. Further, for witness evidence, the German CCP provides a wide variety of witness protection techniques: 'indirect evidence' is used when an anonymous witness is heard at trial with visual and acoustical shielding, the interrogator of an earlier interview with an absent witness is heard as hearsay evidence, or the written statements of an absent witness are read out as documentary evidence. 'Undisclosed incriminating evidence' may be generated by hearing an anonymous witness in the presence of a commissioned judge of the trial court and by excluding the defence.

Undisclosed Evidence in Court Proceedings in Ireland

Liz Heffernan and *Eoin O'Connor*

I. Restrictive measures imposed following a trial

The Irish system of judicial adjudication is grounded in the Anglo-American common law tradition with its emphasis on party autonomy, the formal trial, jury verdicts, and exclusionary rules of evidence.[1] The criminal trial operates within the framework of the Irish Constitution and is influenced above all by the requirement that an accused be afforded a trial 'in due course of law'.[2] Piecemeal legislation and Ireland's international human rights obligations play an increasingly important role in the development of the law but the criminal trial remains essentially a common law creature and case law the dominant source of legal rules and principles.

The presentation of evidence in the form of live testimony in open court is a central feature of the Irish system of justice. Information is presumed to be most reliable

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[1] See generally L Heffernan, *Evidence in Criminal Trials* (2nd edn, Bloomsbury Professional 2020); D McGrath, *Evidence* (3rd edn Thomson Round Hall 2020); C Fennell, *The Law of Evidence in Ireland* (4th edn Bloomsbury Professional 2020). See also E O'Connor (with M Lynn) *National Security Law in Ireland* (Bloomsbury Professional 2019).

[2] Constitution, Art 38.1.

when delivered in person, under oath, and directly before the court.[3] The adversarial tradition places a premium on the testing of evidence in court principally through the mechanism of cross-examination.[4] Consequently, indirect evidence is generally inadmissible because it offends the constitutional guarantee of a trial in due course of law[5] and the common law rule against hearsay.[6] Neither of these legal rules is absolute, however, and some of the exceptional circumstances in which the courts admit indirect evidence may potentially apply in trials for terrorism or organized crime.

The trial of offences relating to terrorism or organized crime departs from the strict common law model insofar as it is partly regulated by the legislative foundation for the State's national security apparatus, notably, the Offences Against the State Acts 1939 to 1998. Although prosecutions for serious crimes are typically brought before juries in the Circuit Criminal Court or the Central Criminal Court, cases relating to terrorism or organized crime are invariably adjudicated by the non-jury Special Criminal Court (SCC).

The functional operation of the SCC is conditioned upon a government proclamation that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order.[7] The present SCC has been in existence since 1972 and is associated historically with the conflict in Northern Ireland. The continued existence of the Court over 20 years after the formal cessation of hostilities and, indeed, its extended role in recent times as a forum for the trial of organized crime, has been a source of controversy.

A. The use of incriminating 'indirect evidence'

1. Grounds for non-disclosure and competent authority

Disclosure is an area where the common law adversarial trial process has been adapted in order to redress the imbalance in power between the parties and to vindicate the constitutional rights of the defence.[8] The prosecution is obliged to disclose the details of the case that it intends to make at trial and the evidence on which it will

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[3] *Eastern Health Board v MK* [1999] 2 IR 99; *Cullen v Clarke* [1963] IR 368.

[4] *Donnelly v Ireland* [1998] 1 IR 321; *People (DPP) v Kelly* [2006] 3 IR 115.

[5] *State (Healy) v Donoghue* [1976] IR 325 at 335 (Mr Justice Gannon noting that Art 38.1 includes the right of an accused 'to hear and test by examination the evidence offered by or on behalf of his accuser').

[6] *Ratten v R* [1972] AC 378; *Teper v R* [1952] AC 480.

[7] Special Criminal Courts have operated from 1939 to 1946, from 1961 to 1962, and from 1972 to the present day.

[8] See generally L Heffernan, *op cit*, ch 11; L Heffernan, *Legal Professional Privilege* (Bloomsbury Professional 2011) ch 9; W Abrahamson, J B Dwyer and A Fitzpatrick, *Discovery and Disclosure* (3rd edn Thomson Round Hall, 2019).

rely.[9] Beyond this, the prosecution must also disclose any material in its possession or control that may assist the defence.[10] This obligation may extend to good faith efforts to secure relevant information that is in the hands of a foreign government or agency.[11] There is no reciprocal onus on the defence to disclose its intended case or evidence in general; the defence is obliged only to reveal particular kinds of information in specific instances prescribed by statute.[12] The more substantial duty resting on the prosecution is an essential ingredient in a fair trial[13] and an echo of the allocation of the burden of proof which itself derives from the presumption of innocence.[14] It also constitutes a tangible manifestation of the prosecutorial responsibility to assist the court in ensuring that justice is administered fairly and effectively.[15]

The rules relating to disclosure are relatively underdeveloped in so far as there is no general, overarching legislative framework nor any comprehensive code of court rules. Some aspects of disclosure are regulated by statute, but for the most part the subject is governed by common law rules and principles. In practice, the defence is heavily dependent on the prosecution in relation to all forms of evidence that form the basis of adjudication at trial. The prosecution has at its disposal information gathered by the Gardaí (the Irish police), Forensic Science Ireland, and other State agencies. For its part, the defence is constrained in its ability to gather independent evidence by the limits of legal aid and the accused's personal financial resources.

The principal legal mechanism through which the prosecution may surmount the common law obstacles to the admission of incriminating indirect evidence is the doctrine of evidentiary privilege. Exceptionally a trial court may permit a party or a witness to withhold relevant evidence because the public interest in confidentiality outweighs the general policy in favour of disclosure. Public interest privilege arises where the State or one of its agents refuses to surrender information sought in

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[9] Criminal Procedure Act 1967, ss 4B and 4C as amended. See also Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2013 on the right to information in criminal proceedings [2012] OJ L142/1.

[10] *Traynor v Judge Delahunt* [2009] 1 IR 605 at 610 (McMahon J). ('The prosecution has an obligation to disclose all material evidence within its possession, power or procurement, even where it does not propose to rely on it at trial'). See also *DPP v Conmey* [2010] IECCA 105 (22 November 2010) p 15; *DPP v Special Criminal Court* [1999] 1 IR 60, 76; *People (DPP) v Tuite* [2003] 2 Frewen 175, 180.

[11] *People (DPP) v McKevitt* [2009] 1 IR 525, 539–540.

[12] See e.g., Criminal Procedure Act 2010 s 34 (application to present expert evidence); Criminal Justice Act 1984, s 20 as amended (notice of intention to present alibi evidence); Offences Against the State (Amendment Act) 1998 s 3 (notice of intention to call any witness when defending a charge of membership of an unlawful organization).

[13] Irish Constitution 1937, Art 38.1; European Convention on Human Rights (ECHR), Art 6; EU Charter, Art 47.

[14] *People (DPP) v D O'T* [2003] 4 IR 286; *O'Leary v Attorney General* [1993] 1 IR 102 (HC); *Woolmington v DPP* [1935] AC 462.

[15] Director of Public Prosecutions, *Guidelines for Prosecutors* (5th edn 2019) ch 9.

litigation.[16] In each case where the claim of non-disclosure is made, the trial court engages in a balancing exercise, weighing the general interest in disclosure against the countervailing public interest in confidentiality. The court, and the court alone, has authority to approve the withholding of information that a party or a witness would otherwise be required to disclose. This was not always the case: historically privilege was absolute at common law and the courts would simply accept the determination of the executive branch that disclosure would be contrary to the public interest. In *Murphy v Dublin Corporation and the Minister for Local Government,*[17] the Supreme Court resiled from this deferential position and claimed for the courts the power to decide the issue of disclosure. Mr Justice Walsh emphasized that this did not mean that the courts would invariably rule in favour of disclosure and against the executive branch.[18]

In some circumstances, the defence may try to counter the State's bid to suppress information by invoking the principle that privilege may not be used to further crime, fraud, or conduct that is injurious to the administration of justice.[19] This is a well-known exception to evidentiary privileges in general but it has not featured in the reported Irish cases on public interest privilege. This may be due in part to the inherent difficulty that the defence would face in seeking to establish a *prima facie* case of crime, fraud, or injurious conduct in circumstances where the State is withholding the very information that might support the exception.

A separate basis on which a claim of privilege may be defeated is that the privilege-holder has lost or waived the privilege at some point in the proceedings. Waiver may be deliberate or it may come about inadvertently through conduct on the part of the privilege-holder that is inconsistent with the assertion of privilege.[20] For example, if the State had disclosed the information in question to a third party, the defence might legitimately argue that confidentiality had been lost and that it would not be fair to allow the prosecution to withhold the information at trial. A waiver of privilege may affect only some of the information in question; if so, the court may decide to order partial rather than full disclosure, thereby allowing some of the information to continue to be withheld.[21]

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[16] See generally W Abrahamson, J B Dwyer and A Fitzpatrick, *op cit,* ch 43; D McGrath, 'Public Interest Privilege' (2000) 22 DULJ 75.

[17] *Murphy v Dublin Corp* [1972] IR 215. See also *Ambiorix v Minister for the Environment (No 1)* [1992] 1 IR 277. The only acknowledged caveat is the confidentiality of the meetings of the government cabinet. *Attorney General v Hamilton (No 1)* [1993] 2 IR 250; *O'Brien v Ireland* [1995] 1 ILRM 22.

[18] [1972] IR 215, 234.

[19] *R v Cox & Railton* [1884] 14 QBD 153; *Murphy v Kirwan* [1993] 3 IR 501.

[20] *Shell E & P Ireland Ltd v McGrath (No 2)* [2007] 2 IR 574; *Fyffes plc v DCC* [2005] 1 IR 59; *Hannigan v DPP* [2001] 1 IR 378.

[21] *Fyffes plc v DCC* [2005] 1 IR 59; *Guinness Peat Properties Ltd v Fitzroy Robinson* [1987] 1 WLR 1027.

The reported cases illuminate a range of grounds on which the State has sought the entitlement of non-disclosure including national security,[22] foreign relations,[23] the prevention and detection of crime,[24] the proper functioning of the public service,[25] and the confidentiality of investigations of the Garda Síochána Complaints Board.[26]

At common law, the Gardaí and other law enforcement agencies enjoy a privilege from disclosing the identity of their informers.[27] In contrast to public interest privilege, the application of informer privilege has generated a substantial body of case law. The justification for the privilege is grounded in two public policies: the need to preserve the valued contribution of informers to the prevention and detection of crime[28] and the imperative of protecting the informers' lives and safety.[29] Although traditionally linked to police informers, the privilege has evolved to embrace the giving of information to statutory bodies and officeholders engaged in the enforcement of the law in a wider sense.[30] Over the years, the courts have afforded Garda witnesses considerable leeway when asserting informer privilege and have tended to take at face value prosecutorial claims that maintaining confidentiality is necessary.[31]

Notwithstanding firm judicial recognition of the existence of informer privilege, some uncertainty remains regarding its scope. The privilege clearly protects the identity of an informer but it is less clear whether it extends to the content of communications between the informer and law enforcement authorities. Although there is no definitive authority on point, the courts seem willing to interpret the privilege broadly and with a degree of flexibility.[32]

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[22] *Gormley v Ireland* [1993] 2 IR 75.

[23] *Walker v Ireland* [1997] 1 ILRM 363; *Egan v O'Toole* [2005] IECS 53 (29 July 2005).

[24] *Breathnach v Ireland (No 3)* [1993] 2 IR 458; *McDonald v RTE* [2001] 1 IR 355; *Traynor v Judge Delahunt* [2008] IEHC 272 (31 July 2008).

[25] *Cully v Northern Bank Finance Corp* [1984] ILRM 683; *Incorporated Law Society v Osborne* [1987] ILRM 42; *Fitzpatrick v Martin* [1988] IR 132.

[26] *Skeffington v Rooney* [1997] 1 IR 22.

[27] *People (DPP) v Kelly* [2006] 3 IR 115; *Ward v Special Criminal Court* [1999] 1 IR 60. See L Heffernan (2011) *op cit,* ch 10; P O'Connor, 'The Privilege of Non-Disclosure and Informers' (1980) Irish Jurist 111.

[28] *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)* [1974] AC 405, 434; *D v NSPCC* [1987] AC 171, 218.

[29] *R v Hennessy* (1978) 68 Cr App R 419, 426.

[30] See e.g., *Skeffington v Rooney* [1997] 1 IR 22 (ordering disclosure of information given to the Garda Siochana Complaints Board); *Director of Consumer Affairs v Sugar Distributors Ltd* [1991] 1 IR 225 (recognizing privilege over communications to the Director relating to alleged anti-competitive practices); *State (Comerford) v Governor of Mountjoy Prison* [1981] ILRM 86 (recognizing privilege in relation to prison informers).

[31] See e.g., *People (DPP) v Eccles, McPhillips and McShane* (1986) 3 Frewen 36; *People (DPP) v Reddan* [1995] 3 IR 560.

[32] *Ward v Special Criminal Court* [1999] 1 IR 60; *Director of Consumer Affairs v Sugar Distributors* [1991] 1 IR 225.

Further ambiguity surrounds the 'innocence-at-stake exception' to informer privilege, an important and controversial exception that is said to be as old as the privilege itself. The effect of this exception is to require the prosecution to disclose information that would exonerate the accused.[33] Traditionally, innocence-at-stake was fairly narrowly applied to circumstances where the information would point directly to the accused's innocence. However, the contemporary courts seem willing to countenance a broader interpretation that would allow the defence access to information even where its relevance and probative value are less clear-cut. For example, in *Ward v Special Criminal Court,* Mr Justice Carney spoke of a need to examine documents in order to determine 'whether any of them might help the defence case, help to disparage the prosecution case or give a lead to other evidence'.[34]

2. Forms of indirect evidence

Where indirect evidence is permitted under Irish law, it may be used in any form. Just as there are no particular kinds of evidence that are presumptively admissible, so too there are no rules that constrain the admission of indirect evidence purely on the basis of form. Whether non-disclosure of the source is justifiable is determined on a case-by-case basis.

The case law shows that evidence which parties have resisted disclosing in the past has included, for example, a written report of a public inquiry,[35] memoranda for the consideration of a Minister,[36] and documentation related to the activities of an alleged informer.[37] Most of the reported cases of public interest privilege concern information in documentary form. In contrast, the cases on informer privilege typically relate to the testimony of Garda officers.

Some discussion is required of one particular form of evidence that has been a focus of judicial and academic discourse on the trial of terrorist offences. Section 21 Offences Against the State Act 1939 creates the offence of membership of an unlawful organization, and this is the most commonly prosecuted charge brought before the SCC.[38] Section 3(2) Offences Against the State Amendment Act 1972 outlines the evidence that can be given in court in support of the charge:

> Where an officer of the Garda Síochána, not below the rank of Chief Superintendent, in giving evidence in proceedings relating to an offence under the said section 21, states that

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[33] *Ward v Special Criminal Court* [1999] 1 IR 60; *Attorney General v Simpson* [1959] IR 105; *Marks v Beyfus* (1890) 25 QBD 494.

[34] [1999] 1 IR 60 at 76.

[35] *Murphy v Dublin Corporation* [1972] IR 215.

[36] *Ambiorix Ltd. v Minister for the Environment (No 1)* [1992] 1 IR 277.

[37] *Keating v RTE* [2013] IESC 22.

[38] L Heffernan, 'Evidence and National Security: "Belief Evidence" in the Irish Special Criminal Court' (2009) 15 European Public Law 65, 67.

> he believes that the accused was at a material time a member of an unlawful organisation, the statement shall be evidence that he was then such a member.[39]

Section 3(2) encapsulates what is known as 'belief evidence' and it is one of the State's strongest props in its fight against terrorism. It is an exception to the common law rule against the admission of opinion evidence in Irish law.[40] By the same token, belief evidence poses many difficulties for the accused person and, arguably, skirts the boundaries of the accused's constitutional and international rights to a fair trial.

The nub of the problem is the interaction between belief evidence and the doctrine of informer privilege. Where a Chief Superintendent gives evidence pursuant to section 3(2), informer privilege is often invoked by the prosecution to conceal the identity of the source of the information grounding the belief. A successful assertion of privilege effectively deprives the accused of knowledge of the original source and consequently of an opportunity to confront the person who has made the accusation in open court. Furthermore, the ability of the accused to cross-examine the Chief Superintendent is compromised insofar as defence counsel is precluded from asking any question that would tend to reveal the identity of the original source. Whereas in theory this restriction has the veneer of proportionality, in practice witnesses have been afforded considerable latitude to resist answering questions in cross-examination.[41] Perhaps recognizing the implications for the accused's right to a fair trial, the Supreme Court has required the prosecution to adduce some form of corroboration such as evidence of participation in the activities of the unlawful organization obtained through police surveillance or evidence of possession of criminal, subversive material. Even so, it is possible for an accused to be convicted on the basis of belief evidence coupled with a slight form of corroboration such as an inference drawn from the accused's silence to a material question at a custodial interview.[42]

3. Court's access to an undisclosed source

There is no uniform procedure to which the trial courts must adhere when dealing with claims of public interest privilege. In *Murphy v Dublin Corporation,*[43] the Supreme Court indicated that just as the substantive question of disclosure is a matter for the particular court to decide, so too is the procedure whereby the decision is reached. Thus, for example, in one case a judge might be prepared to accept the

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[39] Offences Against the State (Amendment) Act 1972.

[40] C Fennell, *op cit,* 279 [7.91–7.107].

[41] On the right to cross-examine as an aspect of the right to a fair trial, see *In Re Haughey* [1971] 1 IR 271 l; *State (Healy) v Donoghue* [1976] IR 325, 335–336; *Donnelly v Ireland* [1998] 1 IR 321. See also L Heffernan (with U Ni Raifeartaigh), *op cit* [2.78–2.82].

[42] *Redmond v Ireland* [2015] 4 IR 84; *DPP v Donnelly, McGarrigle and Murphy* [2012] IECCA 78 (30 July 2012).

[43] *Murphy v Dublin Corporation* [1972] IR 215.

opinion of an appropriate government official but in another it might be necessary for the State to produce the information so that the judge can inspect it with a view to assessing the State's justification for non-disclosure.[44]

These broad principles were restated and amplified in *Ambiorix Ltd v Minister for the Environment (No 1)*.[45] Chief Justice Finlay reiterated the need for a particularized, contextual review and emphasized that '[t]here cannot … be a generally applicable class or category of documents exempted from production by reason of the rank in the public service of the person creating them, or the position of the individual or body intended to use them …'.[46] By their nature these principles provide no more than a general framework for deliberation. Although the fact-specific enquiry enables a trial court to adapt its approach to disclosure to fit the concerns of each particular case, it gives the State a practical advantage because the prosecution is far better placed to marshal facts in areas like terrorism and organized crime where secrecy is at a premium.

The law on informer privilege has developed in an *ad hoc* fashion and many aspects of the subject have yet to be resolved. The right of the accused to adversarial due process generally prevents a court from receiving contested evidence on an *ex parte* basis (i.e. in a procedure from which the defence is excluded). The dilemma is that the safety of an informer (and possibly that of associated persons) may be endangered if the information is revealed to the defence.

Ward v Special Criminal Court centred on the trial of Paul Ward before the SCC for the murder of journalist Veronica Guerin. In advance of the trial, the defence sought the disclosure of some 40 statements made to the Gardaí by various informers. The SCC proposed that if the accused waived his right to personal inspection, then the prosecution would turn the documents over to his lawyers on condition of strict confidentiality. If the lawyers decided that any particular document contained information that might be relevant to the defence (and consequently they required further instruction from their client), the court would consider an application for the document to be disclosed to the accused himself. If the accused was not prepared to waive his rights in this manner, the court alone would examine the documents and decide whether any of them should be disclosed.

The Director of Public Prosecutions (DPP) successfully challenged this ruling in the High Court. Mr Justice Carney held that the SCC had exceeded its jurisdiction in 'fundamentally altering the established relationship between defence lawyers and their client'.[47] In his view a solution whereby lawyers were obliged to keep secrets

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[44] [1972] IR 215, 234.

[45] *Ambiorix Ltd v Minister for the Environment (No 1)* [1992] 1 IR 277.

[46] [1992] 1 IR 277 at 284.

[47] *Ward v Special Criminal Court* [1999] 1 IR 60 at 75.

from their clients was unworkable and possibly unconstitutional.[48] Mr Justice Carney directed that the SCC should examine the documents independently of the defence and determine whether any of them might assist the defence case.[49] The Supreme Court unanimously dismissed a further appeal and affirmed Carney J's determination that allowing the accused's lawyers but not the accused himself to see the documents did not constitute a viable procedure. However, the Supreme Court varied the High Court's ruling in one significant respect; Mr Justice O'Flaherty clarified that the SCC was not obliged to examine the documents but could decide to do so at its discretion.[50]

The Supreme Court's ruling in *Ward* created a significant exception to the general principle that adversarial due process is predicated on unbridled party access to relevant evidence. The trial courts may engage in an *ex parte* examination of information relating to the source of indirect evidence in order to decide whether the information can be withheld and the evidence adduced at trial. In this scenario, the prosecution is obliged to disclose the information to the court for the purpose of the privilege application but may withhold it from the defence. The ability of the defence to contest claims of privilege is necessarily constrained where it does not have sight of the information on which the court bases its determination.

Ward also illuminates the special place that the relationship between lawyer and client occupies within the Irish legal system. A net holding in the case is that the courts cannot undermine the unity of the relationship through the procedural device of disclosing contested information to the lawyers alone. The rationale is that the accused's right to legal representation could be adversely affected and, by extension, his or her right to a fair trial, even though, ironically, disclosing contested information to lawyers might give the defence a greater say in proceedings where they currently have little or no voice.[51]

There is flexibility regarding the manner in which information could potentially be revealed to the court for purposes of resolving the disclosure issue. Original documents might be handed over to the court for inspection and, if necessary, some of the information contained in the documents might be redacted. Alternatively, a summary or *précis* of the documentation might be provided, although this is unlikely to suffice in most cases. The court might require the prosecution to call one or more witnesses to authenticate the documents. Where the information is not reduced to documentary form, the court might convene a *voir dire* or special hearing on the issue of disclosure. Legal proceedings are generally conducted in public but courts have an inherent power to order *in camera* hearings in exceptional circumstances

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[48] [1999] 1 IR 60, 76.

[49] [1999] 1 IR 60, 76.

[50] [1999] 1 IR 60, 84.

[51] The Supreme Court had reached a similar conclusion in the earlier civil case of *Burke v Central Independent Television plc* [1994] 2 IR 61.

and to exclude everyone other than essential personnel from the courtroom. As the SCC was established by statute, rules providing for the exclusion of members of the public save for *bona fide* members of the press have been enacted by statutory instrument.[52]

To date the Irish courts have not availed of other more radical mechanisms that might facilitate the giving of evidence while preserving the anonymity of the original source.[53] The appointment of a special advocate to act for the defence where the trial court determines a prosecutorial assertion of privilege was rejected by the SCC in *DPP v Binead and Donoghue*. The SCC's ruling that, being a statutory creation, it lacked the inherent jurisdiction to make such an appointment, was upheld by the Court of Criminal Appeal.[54]

4. Evidentiary value

In a criminal jury trial, the admissibility of evidence is a question of law for the judge whereas the weight of the evidence is a question of fact for the jury. Where a dispute arises over the admissibility of a particular item of evidence, the judge may conduct a hearing, known as a *voir dire,* outside the presence of the jury. At the close of the trial, the judge 'charges' or instructs the jury prior to the jury's deliberation on the verdict. Jury instructions include a summary of the evidence and, in some instances, cautionary warnings in relation to particular kinds of evidence. The non-jury SCC sits as a panel of three judges and, in the absence of a jury, decides both questions of law and questions of fact. When dealing with an item of evidence that would be the subject of a cautionary warning in a jury trial, the SCC must exercise a corresponding degree of caution.

The assessment of the weight of the evidence is a matter of human judgment. The finder of fact is entrusted with the responsibility of deciding the probative value of the entirety of the evidence, and the results of its deliberations are reported in the form of a verdict. According to the burden and standard of proof, the ultimate question for the finder of fact is whether the prosecution has proved all elements of the offence beyond a reasonable doubt. In addition, the verdict must not be perverse or completely unreasonable.[55] In a jury trial, the trial judge has the authority to direct a jury to acquit an accused where he or she finds that no reasonable jury could return a conviction.[56]

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[52] Offences Against the State Acts 1939 to 1998 Special Criminal Court No 1 Rules 2016, SI 2016/182.

[53] There may be occasional exceptions. For example, Gardaí were permitted to give evidence behind a screen during an inquest at the Dublin Coroner's Court, see 'Court decides gardai can give evidence behind screens' *Irish Times* (18 July 2000).

[54] [2007] 1 IR 374, 396.

[55] *People (DPP) v Egan* [1990] ILRM 780.

[56] See e.g., *People (DPP) v Murphy* [2005] 2 IR 125, 145.

In terms of special rules relating to the weight of evidence, there are a number of cautionary warnings (i.e. warnings that a trial judge might be required to deliver to a jury or that a non-jury court might be required to bear in mind) that might potentially apply in trials for terrorist or organized crime offences. Where the prosecution tenders a witness who is an accomplice in respect of one or more of the crimes at issue, then the trial judge must caution the jury about the dangers of relying on the testimony if it is not corroborated by an independent source.[57] A mandatory warning is also required if the witness has been admitted into the State's Witness Protection Programme and his or her evidence is uncorroborated. In *DPP v Gilligan*,[58] the Supreme Court compared the evidence of a protected witness to that of an accomplice and reasoned that there is a corresponding danger that the hope of receiving benefits might incentivize the witness to stray from the truth. Provided the warning is given, the finder of fact can rely in principle on the uncorroborated evidence of the protected witness.[59] If the witness is both an accomplice and a protected witness, then separate warnings are required, each tailored to the respective status.[60]

Because the bulk of terrorist and gang-related crime is prosecuted in the Special Criminal Court, the effect of these principles in practice is that the Court must be cautious when relying on the evidence of accomplices and protected witnesses. Beyond this, however, the Court is not fettered by rules prescribing the evidentiary value of sources including indirect sources such as police testimony that is based on anonymous informers or official documents where the content has been partially redacted or the author has been anonymized.

B. The use of undisclosed incriminating evidence

For purposes of the present discussion, the term 'undisclosed incriminating evidence' is used to denote one of two scenarios. The first is a situation where information is used against a suspect but is not disclosed to the suspect and his or her lawyer. The second is where information used against the suspect is disclosed to the lawyer but not the suspect, and the lawyer is not allowed to communicate this information to the suspect. In principle, both of these scenarios are prohibited under Irish law. In particular, the possibility of closed proceedings (in the sense in which the term is used in this project) does not arise in the Irish courts, because it would fundamentally alter the lawyer-client relationship.[61] However, the admissibility of

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[57] *AG v Linehan* [1929] IR 19; *Dental Board v O'Callaghan* [1969] IR 181; *DPP v Morgan* [2011] IECCA 36.

[58] [2006] 1 IR 107.

[59] *People (DPP) v Gilligan* [2006] 1 IR 107, [117]. The Court noted that exceptionally some form of corroboration may be required.

[60] *DPP v Bryan Ryan* [2011] IECCA 6.

[61] *Ward v The Special Criminal Court* [1999] 1 IR 60.

belief evidence might sometimes lead to situations where incriminating evidence is effectively used by the court against the defendant and the defence lawyers without being disclosed.

In Ireland, the fact-finding and penalty imposition stages of the criminal trial are kept completely separate. Sentencing is exclusively a matter for the judiciary, and the jury has no role in sentencing the convicted person. As the Court of Criminal Appeal (CCA) has stated in *DPP v Dermody*:

> The duty of judges is to decide individual cases impartially in accordance with the Constitution and the law and without regard to expressions of opinion from any source other than the Director of Public Prosecutions, as prosecutor, and from the accused, as the person on whom the sentence was imposed.[62]

During the fact-finding phase of the criminal trial, strict evidentiary rules are applied in order to determine whether the accused did commit the alleged crime. At the sentencing phase of the trial, different considerations apply. As a result, the rules of evidence at the sentencing phase are more relaxed. As the CCA has noted in *DPP v McDonnell*:

> It is an undeniable fact that a wider range of evidence has historically been regarded as being admissible for the purpose of sentencing than would be admissible at the pre-conviction stage of a trial.[63]

As sentencing involves the exercise of a public power which affects a person's rights, it is subject to the principles of constitutional and natural justice. As the commentator O'Malley has noted that whilst the precise ambit of the term 'constitutional justice' may not be clear, it certainly embraces the traditional maxims of natural justice: *nemo iduex in sua cause* and *audi alteram partem.*[64] Procedural fairness demands that the convicted person has the opportunity to adduce evidence and make submissions on mitigating and any other relevant factors. As O'Malley has stated:

> In criminal proceedings in particular, a judge is constitutionally obliged to ensure that every defendant receives a fair trial in accordance with law, and this obligation extends to all stages of a trial, including sentencing. Procedural fairness clearly demands that any factual material which a judge proposes to take account should first be shared with the parties or their legal representatives so that they can challenge it, accept it or comment upon it as they see fit.[65]

In addition, O'Malley has stated that reliance on extraneous material would offend against the common law and constitutional principle that justice be administered in public.[66]

On the specific question of 'belief evidence', the CCA has stated the purpose of the judges of the SCC in looking behind the opinion of the Chief Superintendent is to assess

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62 [2007] 2 IR 622, 626.

63 [2009] 4 IR 105, 114.

64 T O'Malley, *Sentencing Law and Practice* (3rd edn, Roundhall 2016) [31.05].

65 *Ibid.,* [31.12].

66 *Ibid.,* [31.13].

the sufficiency of the basis for the Chief Superintendent's belief. In the case of *DPP v Binead and Donohue,*[67] the CCA addressed the issue of the material underpinning the Chief Superintendent's belief. During the trial in the SCC, the court had reviewed the materials upon which the Chief Superintendent had relied. Having examined the documentation, the trial court stated that it was satisfied that the Chief Superintendent had adequate and reliable information to support the belief. What is interesting for present purposes is that the trial court went on to say that:

> [T]he court first of all weighed and considered the belief evidence of Chief Superintendent Kelly, and while doing so, specifically excluded consideration of any information to which the court had become privy as a result of perusing the files relating to the two accused which had been produced by the Chief Superintendent.[68]

Therefore, it would appear that the SCC generally does not rely on the material which underpins the belief of the Chief Superintendent. However, the SCC, being a non-jury court, must go through the somewhat artificial process of excluding information/evidence that supports the belief of a Chief Superintendent when deciding on the guilt or innocence of the accused. Notwithstanding that, it appears that in most cases the undisclosed evidence is not used for sentencing purposes.

Another difficulty directly linked to the question of whether a trial court relies on the material that forms the basis of the belief of the Chief Superintendent is that in most cases the accused will not know what the material comprises; whether for example it is a transcript of a phone conversation, surveillance photos of the accused meeting with other known criminals/terrorists, some form of electronic surveillance of the accused's email and text conversations, a report from an informer, or a combination of all of the above.

Recently, in *DPP v Connolly*,[69] the Court of Appeal explored the issue of the possible disclosure of the material which underpins the Chief Superintendent's opinion evidence. During his trial, Connolly sought to challenge the claim of privilege on the ground that in the context of belief evidence it amounted to a bland and general refusal to answer questions that unfairly restricted the right to cross-examine.[70]

The defence submitted that in circumstances where counsel for the prosecution had been refused access to or sight of the material underlying the Chief Superintendent's belief, the SCC should direct prosecution counsel to read and evaluate the material. If the Court did not direct prosecution counsel to act, then the Court should review the material itself.[71] The SCC refused to follow either of these suggestions. The reason that the Court gave for refusing to review the material itself were that the

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[67] [2007] 1 IR 374.

[68] [2007] 1 IR 374, 382 [emphasis added].

[69] [2018] IECA 201.

[70] [2018] IECA 201, [7]–[10].

[71] [2018] IECA 201, [15]–[19].

judges had little experience in evaluating and assessing such information. The Court considered itself far less equipped than a senior and experienced police officer to review the material on which the belief evidence was based so as to be able to measure and evaluate the opinion offered by the Chief Superintendent in his or her testimony.[72] The accused was convicted.

On appeal, the Court of Appeal noted that the defence is entitled to request the trial court to review documentation that supports belief evidence but that the trial court is not bound to review the material simply because it is asked to do so.[73] The Court of Appeal held that in the particular circumstances of the instant case the reasons the Special Criminal Court gave for declining to review the source material (*inter alia* that the trial judges were less experienced than a senior police officer to measure and evaluate the information) were insufficient to justify their refusal to do so. The Court of Appeal was particularly cognizant that the belief evidence given in the case had contributed significantly to the guilty verdict. Consequently, the Court allowed the appeal and set aside the conviction.

The decision in *Connolly* has not put to rest the question of the circumstances in which the Special Criminal Court can legitimately refuse to review a request by the defence that it review the material underpinning the Chief Superintendent's belief. Similarly, the Court of Appeal did not address the issue of the Gardaí's refusal to allow prosecution counsel to view the material which supported the belief evidence.

C. Remedies against non-disclosure

Generally speaking, parties may not appeal decisions while a trial is ongoing but instead must wait until the proceedings have concluded before seeking redress from a higher court. Where the decision constitutes a ruling by a trial court on a question of law, generally a party must object to the ruling at the time it is handed down in order to preserve the challenge for purposes of appeal. For example, the defence must have objected to the admissibility of indirect evidence at trial if it is to challenge the trial court's ruling on admissibility at a subsequent appeal.[74]

In the case of trials on indictment before the Circuit Criminal Court, the Central Criminal Court, or the SCC, the defence may bring an appeal against a conviction and/or sentence before the Court of Appeal.[75] In the event that the appeal is unsuccessful, it may be possible to bring a further appeal to the Supreme Court on a point

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[72] [2018] IECA 201, 18–21.

[73] [2018] IECA 201, 350. Emphasis added.

[74] A decision on a question of fact will not be known until the court delivers its verdict at the end of the trial.

[75] Exceptionally, an appellant may bring a leapfrog appeal directly to the Supreme Court. Constitution, Art 34.5.4°.

of law that involves a matter of general public importance or where the appeal is necessary in the interests of justice.[76] Aside from these regular appeals, the Court of Appeal has an exceptional statutory jurisdiction to review convictions and, if necessary, overturn them on the ground that there has been a miscarriage of justice. Under the Criminal Procedure Act 1993, one of the grounds on which a miscarriage of justice may be established is a 'newly discovered fact', i.e. a fact that has come to light sometime after the trial. The Court of Appeal has held that undisclosed evidence that was improperly withheld by the prosecution at trial may constitute a newly discovered fact.[77]

In very exceptional circumstances, an accused may step outside the criminal appellate structure and appeal to a civil court for relief from an evidentiary decision. The traditional view is that rulings in the course of trial are not susceptible to judicial review.[78] Exceptionally it is possible to seek review of disclosure rulings that are taken both at the trial and the pretrial phases[79] but the accused bears a substantial burden in persuading the civil courts to intervene.[80]

D. Constitutional law framework and assessment

1. Constitutional law

The Irish law of criminal evidence operates within the dynamic framework of the Irish Constitution and, in particular, its provisions relating to the administration of justice and the protection of fundamental rights.[81] Chief among them for present purposes is the guarantee to an accused of a trial in due course of law under Article 38.1.

The possible role of special criminal courts is envisioned in the Constitution subject to the proviso that the existence and operation of such courts must be prescribed by law.[82] The principal feature of the SCC is its deviation from the constitutional norm of trial by jury.[83] Trials are conducted by panels of three judges who adjudicate

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[76] Constitution, Art 34.5.3°.

[77] *People (DPP) v Meleady (No 3)* [2001] 4 IR 16; *People (DPP) v Pringle* [1995] 2 IR 547.

[78] *DPP v Special Criminal Court* [1999] 1 IR 60.

[79] *Traynor v Delahunt* [2009] 1 IR 605; *Ludlow v DPP* [2009] 1 IR 640.

[80] *Z v DPP* [1994] 2 IR 476; *Savage v DPP* [2009] 1 IR 185.

[81] See generally GW Hogan and GF Whyte, *JM Kelly: The Irish Constitution* (5th edn Bloomsbury Professional 2018).

[82] Constitution, Art 38. On the SCC see generally D Walsh, *Walsh on Criminal Procedure* (2nd edn Thomson Round Hall 2016) ch 23; T O'Malley, The Criminal Process (Thomson Round Hall 2009) paras 9.33–9.53; F F Davis, *The History and Development of the Special Criminal Court 1922–2005* (Four Courts Press 2007).

[83] Constitution, Art 38.5. See *DeBurca v AG* [1976] IR 38; *Eccles, McPhillips and McShane v Ireland* (1988) 59 D and R 212.

all questions of law and fact by majority decision.[84] The SCC has jurisdiction to hear a catalogue of so-called 'scheduled offences'[85] as well as any particular case that the DPP sends forward for trial in the Court.[86] The justification for the abrogation of the right to jury trial is that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order in relation to these offences.[87] The continued operation of the SCC following the cessation of hostilities in Northern Ireland in the 1990s is controversial. In fact, the Court not only continues to hear cases involving subversive crime but has also become the presumptive forum for the prosecution of offences relating to organised or gangland crime.[88] Such is the workload of the SCC that a second division of the Court was established in 2016.[89] Exceptional measures associated with trials for offences relating to terrorism and organized crime include procedural and evidentiary props that support the investigation and prosecution of offences coming before the Court.[90]

Given controversy surrounding the existence, composition, and jurisdiction of the SCC it is not surprising that its constitutionality has been challenged on several occasions.[91] Although the SCC's legitimacy has been upheld, its continued and, indeed, extended role in the conduct of criminal trials remains a subject of debate. The compatibility of non-jury trials with international human rights law has also been called into question. The United Nations Human Rights Committee found that the trial of an accused before the SCC breached the applicant's right to equality as guaranteed by Article 26 International Covenant on Civil and Political Rights.[92]

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[84] Like military tribunals, the SCC is exempt from the constitutional requirements relating to the appointment and independence of judges. Constitution, Art 38.6 (referring to Arts 34 and 35). Although the historical special criminal courts were composed of military officers, the long-standing practice has been to appoint serving judges, one drawn from the High Court, the Circuit Court, and the District Court, respectively.

[85] OAS Act 1939, as amended, Part V. The offences include statutory offences relating to firearms, explosive substances, and the activities of unlawful organizations.

[86] The decision to prosecute in the SCC is practically immune from judicial review, a circumstance that has attracted the criticism of the UN Human Rights Committee. *Kavanagh v Ireland,* CCPR/C/71/D/819/1998 (4 April 2001).

[87] Constitution, Art 38.1; OAS 1939, s 35(2).

[88] The Criminal Justice (Amendment) Act 2009, s 8, created a number of offences that are deemed to be scheduled offences for purposes of the OAS Acts. These offences include directing the activities of a criminal organization, participating in or contributing to a criminal organization, and committing an offence for a criminal organization.

[89] OAS Act 1939, s 38(2) and SI 2016/183.

[90] These measures include extended pretrial detention, inference-drawing mechanisms, and the use of evidentiary presumptions.

[91] See e.g. *O'Leary v AG* [1993] 1 IR 102; *People (DPP) v Kelly* [2006] 3 IR 115; *DPP v Binead and Donohue* [2007] 1 IR 374; *Redmond v Ireland* [2009] 2 ILRM 419; *DPP v Donnelly, McGarrigle & Murphy* [2012] IECCA 78.

[92] *Kavanagh v Ireland*, CCPR/C/71/D/819/1998 (4 April 2001). The independence of the Special Criminal Court was unsuccessfully challenged before the European Court of Human Rights (ECtHR) in *Eccles & Ors v Ireland* (1988) 59 DR 212.

The right to a trial in due course of law under Article 38.1 Constitution is a vibrant source of protection for the defence and it applies in all courts including the SCC.[93] The Constitution does not contain a definition or explanation of what a trial in 'due course of law' means, and therefore the courts have interpreted the phrase broadly to encompass a myriad of fundamental protections such as the presumption of innocence, the rule against double jeopardy, and the right to prepare and present a defence. Although the right to cross-examination is also protected, the courts have held that there is no absolute right to confrontation at trial under the Irish Constitution.[94]

Whereas the Irish courts have the authority to exclude prosecution evidence that has been obtained by the State through a breach of the accused's constitutional rights,[95] the circumstances in which the courts can and must compel production of evidence in order to vindicate the accused's constitutional rights is less clear. Arguably the emphasis within Irish law on the exclusion of prejudicial prosecution evidence has inhibited the crystallization of a robust, positive right on the part of the defence to adduce potentially exculpatory evidence, notably through the mechanism of disclosure.[96]

The compatibility of belief evidence under section 3(2) of the Offences Against the State (Amendment) Act 1972 with the Constitution and the ECHR has been challenged on several occasions. In the landmark case of *People (DPP) v Kelly,*[97] the Supreme Court rejected an appeal against a conviction for membership where the accused had been precluded from cross-examining a chief superintendent about the basis for his belief evidence before the Special Criminal Court.[98] Mr Justice Geoghegan noted that s3(2) had been enacted in response to the legitimate difficulty of adducing direct evidence of membership of an illegal organization from lay witnesses who fear reprisal. Nevertheless, he favoured a narrow construction of s3(2) that would involve the minimum restriction on the rights of the accused.[99]

Concurring in the result but writing separately, Mr Justice Fennelly took the view that belief evidence was justified by various factors including the context of the statutory regime for offences against the State and the requirement that the restriction

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[93] *Murphy v Ireland* [2014] 1 IR 198.

[94] *Donnelly v Ireland* [1998] 1 IR 321 (SC); *White v Ireland* [1995] 2 IR 268 (HC).

[95] *DPP v JC* [2015] IESC 31; *People (DPP) v Kenny* [1990] 2 IR 110; *People (AG) v O'Brien* [1965] IR 142.

[96] L Heffernan and E J Imwinkelried, 'The Constitutional Right of the Accused to Introduce Demonstrably Exculpatory Evidence' (2005) 40 Irish Jurist 142.

[97] [2006] 3 IR 115.

[98] The High Court had previously upheld the constitutionality of s3(2) against a challenge grounded in the presumption of innocence. *O'Leary v Attorney General* [1993] 1 IR 102. *Kelly* has been applied in several subsequent cases. See e.g., *People (DPP) v Matthews* [2007] 2 IR 169; *People (DPP) v Vincent Kelly* [2007] IECCA 110 (6 December 2007); *People (DPP) v Birney & Others* [2007] 1 IR 337; *Redmond v Ireland* [2009] 2 ILRM 419.

[99] [2006] 3 IR 115, 121.

on the right to cross-examine be limited to the extent strictly necessary to achieve the subsection's clear objectives.[100] Both justices based their ultimate conclusion that the accused had received a fair trial partly on the presence in the case of other forms of prosecution evidence. However, Mr Justice Fennelly opined that an accused would have 'a powerful argument' based on the denial of his or her rights where belief evidence constituted 'the sole plank in the prosecution's case'.[101]

The compatibility of belief evidence with the ECHR was tested before the ECtHR in *Donohoe v Ireland*.[102] The applicant, who had been convicted of membership of the IRA, contended that his right to fair trial under Article 6 had been infringed because the sources of evidence which comprised the Chief Superintendent's belief had been withheld at his trial. He further contended that Irish law lacked adequate measures to counterbalance the detriment that the procedure surrounding privilege and belief evidence caused to the defence.

For its part, the government contended that section 3(2) was an essential tool in the prosecution of IRA, particularly given the violent and secretive nature of the illegal organization and the threat it posed to individuals willing to give evidence against it. If section 3(2) were repealed, the ability of the State to prosecute the IRA would be diminished and the security of the State would be threatened. While acknowledging that disclosure is a question for the courts, the government argued that information can be legitimately withheld in the interests of national security, witness protection, prosecuting subversive crime, and maintaining the confidentiality of police investigations.[103]

The applicant acknowledged the State's entitlement to restrict defence access to information through a valid assertion of informer privilege but emphasized that the restriction must be no more extensive than is strictly necessary and must be accompanied by counterbalancing procedures that offset the detriment to the defence.[104] The focus of the applicant's challenge was the perceived procedural deficiency of the SCC's review of the material upon which the belief evidence had been based in the applicant's case. The material had been reviewed by the Court in private rather than in an open hearing and, furthermore, had been received for the purpose of deciding both the issue of discovery and the ultimate decision on the merits of the case. It was the applicant's contention that this arrangement deprived him of a transparent and impartial evaluation that was the hallmark of a fair trial.[105]

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[100] [2006] 3 IR 115, 146–147.

[101] [2006] 3 IR 115 at 147.

[102] *Donohoe v Ireland* App no 19165/08 (ECtHR, 5th Section, 12 December 2013).

[103] *Donohoe v Ireland* App no 19165/08 (ECtHR, 12 December 2013*)* para [59].

[104] *Ibid.,* para [65]. The applicant cited *Edwards and Lewis v the United Kingdom; Rowe and Davis v the United Kingdom; Jasper v the United Kingdom* in support of this point.

[105] Para. [66].

In its judgment, a majority of the Fifth Section[106] located the case within the Court's jurisprudence on the withholding of evidence from the defence to protect police sources including the landmark case of *Al-Khawaja and Tahery v United Kingdom*.[107] At the same time, the Court drew a significant structural distinction in so far it held that *Donohue* did not involve the evidence of an absent or anonymous witness. The Court reasoned that, in contrast to *Al-Khawaja and Tahery*, the prosecution's evidence comprised the testimony of the Chief Superintendent and not the undisclosed sources that informed his belief.[108]

Notwithstanding this threshold determination, given the potential unfairness that privilege and belief evidence caused to the applicant, the Court decided that the application should be governed by the general principles set down in *Al-Khawaja and Tahery.* Thus, the Court went on to consider (i) whether it had been necessary to uphold the claim of privilege; (ii) if so, whether the Chief Superintendent's evidence was the sole or decisive basis for the conviction; and (iii) if it was, whether there were sufficient counterbalancing factors.

On the first point, the Court recalled the strong public interest in ensuring that organized and subversive crime is prosecuted.[109] It observed, in particular, that belief evidence, coupled with privilege, provides 'a crucial tool to overcome the evidential difficulties' in prosecuting the charge of membership of the IRA. Thus the justifications for the grant of privilege were 'compelling and substantiated'.[110] Similarly, having reviewed the extensive and varied body of evidence that the prosecution had adduced at trial, the Court had little difficulty in concluding that 'the Chief Superintendent PK's evidence cannot be considered to have been the sole or decisive evidence grounding the applicant's conviction'.[111] Even so, because the evidence 'clearly carried some weight' in establishing the applicant's guilt, the Court went on to consider the issue of counterbalancing factors and safeguards.

The Court noted that the SCC had been alert to the need to approach the Chief Superintendent's evidence with caution. It had reviewed the documentary material upon which the belief evidence and this 'exercise of judicial control over the question of disclosure' had enabled the trial judges 'to monitor throughout the trial the fairness or otherwise of upholding the claim of privilege in respect of the non-disclosed

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[106] The Fifth section comprised Villiger P and Power-Forde, Yudkivska, Potocki, Lemmens, Jäderblom, and Pejchal JJ. Judge Lemmens delivered a concurring opinion.

[107] [2012] 54 EHRR 23.

[108] Para [78]. The Irish Court of Criminal Appeal characterized belief evidence in a similar fashion in *DPP v Donnelly, McGarrigle and Murphy* [2012] IECCA, a decision which the ECtHR cited at a later point in its judgment.

[109] Para [80].

[110] Para [81].

[111] Para [87].

material'.[112] The SCC had referenced the innocence-at-stake exception and, furthermore, had stated that when ultimately weighing the Chief Superintendent's evidence, it had excluded from its consideration the material that it had reviewed on the disclosure question.[113] The Court was satisfied that there were other strong counterbalancing factors in the legislation governing belief evidence: the witnesses must be high-ranking Garda officers, the evidence is admitted not as fact but as the belief or opinion of an expert, and the possibility of cross-examination is not entirely eliminated.[114] Indeed the possibility that the witness could be questioned 'on all matters collateral and accessory to the content of the privileged information' distinguished the present case from those where the evidence of absent and/or anonymous witnesses is admitted.[115] Ultimately, the ECtHR held that the weight of the evidence other than belief evidence, combined with these various counterbalancing measures, was sufficient to ensure that the applicant's trial had not been unfair.[116]

In a persuasive concurring opinion, Judge Lemmens argued that the real issue in *Donohoe* was the role of the trial court with respect to privileged material. The crux of the applicant's complaint was that the same court had reviewed the material underlying the Chief Superintendent's belief *and* decided the applicant's guilt or innocence. By failing to address the trial court's dual role, the majority had neglected to answer the applicant's specific complaint.[117] Judge Lemmens opined that the Court should have been guided by its jurisprudence on the role of trial courts with respect to undisclosed documents,[118] which focuses on the potential impact of a trial court's review of material on the interests of the defence in adversarial proceedings. Viewing the case through this lens, Judge Lemmens ultimately concluded that 'the procedure in the applicant's case, taken as a whole, incorporated a number of safeguards which sufficiently protected his interests'.[119] Thus, 'despite the examination of some undisclosed, potentially damaging material' by the SCC, the applicant had not been deprived of a fair trial.[120]

The ultimate finding in *Donohoe* that reliance on belief evidence and informer privilege did not undermine the fairness of the applicant's trial is understandable when one considers the facts of the case. The extensive body of other evidence that the prosecution adduced at trial substantially reduced the role that belief evidence is

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112 Para [88].

113 Para [88].

114 Paras [90]–[92].

115 Para [92].

116 Para [93].

117 Concurring opinion para [3].

118 See e.g., *Rowe and Davis v United Kingdom* (2000) 30 EHRR 1; *Edwards and Lewis v United Kingdom* (2005) 40 EHRR 24.

119 *Ibid.,* para [11].

120 *Ibid.,* para [12].

likely to have played in the applicant's conviction. Furthermore, the ECtHR was persuaded that the SCC had employed as much care and caution as possible under existing practice and procedure. Nevertheless, the decision of the ECtHR has not put to rest concerns regarding the propriety of belief evidence and the adequacy of procedures surrounding the assertion of informer privilege. Belief evidence often forms the central evidentiary plank in the prosecution of the offence of membership of an unlawful organization before the SCC, and this begs the question whether the outcome would be less clear-cut if the ECtHR were to consider a case in which belief evidence were the sole or decisive evidence on which a conviction were based.

The structural distinction between belief evidence and absent/anonymous witnesses has some traction in a case like *Donohue* where the Chief Superintendent's belief was stated to be informed by a range of factors of which information provided by an undisclosed source was just one. However, an analogy with *Al-Khawaja and Tahery* becomes far more persuasive if the undisclosed source provides the exclusive (or even dominant) basis for the witness's belief. Similarly, the greater the evidentiary significance of the undisclosed source, the more extensive the restriction on the defence's right to cross-examine the witness and thereby unearth the import of the undisclosed information. Anecdotal evidence suggests that meaningful cross-examination on matters surrounding the protected material (one of the safeguards identified by the ECtHR) may be illusory in cases where privilege occupies centre stage in the proceedings.

Judge Lemmens's concurring opinion sheds welcome light on the importance of robust, flexible procedures to govern decisions on disclosure. The absence of a mechanism in Irish law whereby undisclosed material can be reviewed by a court other than the trial court is a particular concern, notwithstanding the ECtHR majority's endorsement of the dual function of the SCC in *Donohoe.* The time is ripe for Irish policymakers and legislators to review existing arrangements with a view to devising a principled scheme for adjudicating issues of non-disclosure in the context of belief evidence and, indeed, the broader setting of trials in relation to terrorism and organized crime. Although the particular features of the Irish constitutional and common law tradition outlined in the discussion above may present obstacles to radical reform, there is scope to enhance the SCC's capacity to respond to the challenge of non-disclosure, for example through the convening of pretrial disclosure hearings (*in camera* where necessary) and the use of technological aids such as video-link, sound-link, and screens.

2. Political and academic discourse

The use of secret evidence in criminal trials has generated surprisingly little commentary in domestic political and academic discourse. Such discourse as exists has been conducted for the most part within a broader public debate on the continued existence of the SCC and the possible reform of legislation relating to national

security. These subjects are interwoven with the historical narrative of conflict in Northern Ireland and the security threat posed by dissident paramilitary activity in the present day. However, a key concern is the application of the longstanding legal apparatus to other contemporary threats to security including Islamic extremism, drug trafficking, and human trafficking. Absent from the debate in all contexts has been an adequate and sustained focus on the conduct of trials relating to international terrorism and organized crime and the use of secret evidence.

The continued need for the SCC has been considered by a number of bodies. The Constitution Review Group, which reported in 1996, recommended no major changes to the manner in which the SCC was being run. In its report, the Group noted that the constitutional requirement of trial in public does not apply to the SCC, because it is a statutory creation. The Court invariably sits in public, although it has power to sit in private under the SCC Rules. The Review Group recommended that the Constitution be amended so as to provide that the publicity rule apply to the SCC and that it be required to sit in public unless legislation provides otherwise.[121]

In the wake of the Belfast Agreement, a special committee was set up to examine the operation of the Offences Against the State Acts 1939–1998. In the Report of the Committee to Review the Offences Against the State Act 1939–1998, a majority recommended the retention of the SCC due to the continued threat posed by paramilitaries and organized crime.[122] The Committee was openly divided on the issue of belief evidence under section 3(2) Offences Against the State (Amendment) Act 1972. A majority recognized that section 3(2) is 'not entirely satisfactory as it stands' and recommended that it should be amended to include a requirement that the statement of belief be supported by other evidence.[123] A minority called for the removal of this 'artificial' rule of evidence altogether.[124]

Similarly, the legality of belief evidence has tended to dominate academic commentary in this field. As O'Malley has noted, the safeguards commonly cited as ameliorating the effect of belief evidence have tended to have only limited support in practice:

> What renders the subsection problematic is not its particular wording, but rather the common, if not universal, practice for Chief Superintendents to claim privilege as to the sources of their information. This privilege is almost invariably granted, which means that the accused is deprived of the opportunity of cross-examining those who have furnished the information in the first place.[125]

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[121] *Report of the Constitution Review Group*, Pn 2632 (Dublin, 1996) 122. See also the *Fourth Report of the All-Party Oireachtas Committee on the Courts and the Judiciary*, Pn 7831 (1999).

[122] *Report of the Committee to Review the Offences Against the State Act 1939–1998* (Government Publications, Dublin 2002) [9.38].

[123] *Ibid.,* at para [6.93].

[124] *Ibid.,* at para [6.95].

[125] T O'Malley, *op cit*, para [4.55]. See also L Heffernan (2009), *op cit,* 68–69.

Beyond criticizing the practical difficulties that section 3(2) poses for those accused of membership, others have expressed concern that a mechanism of this kind could possibly be used to elevate questionable police intelligence to the status of evidence.[126] These and other concerns have been voiced regarding the expansion of the jurisdiction of the SCC into the adjudication of organized crime. It may be recalled that legislation provides for a mechanism corresponding to belief evidence in trials for the offences of directing a criminal organization and participating in the activities of a criminal organization.[127] It renders admissible in evidence as to the existence of a particular criminal organization the opinion of any present or former member of the Gardaí who appears to the trial court to be 'an appropriate expert'.[128]

II. Restrictive measures imposed in criminal pretrial proceedings

In criminal pretrial proceedings, the restrictive measures that can be applied are necessarily limited by the constitutionally guaranteed presumption of innocence.[129] The most widely used restrictive measure is the revocation or restriction of a suspect's right to bail. Bail is ordinarily dealt with by the District Court, but in the case of certain serious offences, such as murder, genocide, and treason, it is a matter for the High Court.[130] In accordance with Article 40.4.1 Constitution, the deprivation of liberty inherent in a refusal of bail must be in accordance with law. The right to bail is governed by the Bail Act 1997, which provides that where a person is charged with a serious offence,[131] a court may refuse bail if satisfied that such refusal is reasonably necessary to prevent the commission of a serious offence by that person. A Chief Superintendent's opinion that the refusal of bail is reasonably necessary is admissible as evidence.[132]

The Supreme Court has ruled that hearsay evidence can be admitted in the course of a bail application but only in limited circumstances and when a specific, recognized ground for its admission has been properly established by ordinary evidence.[133] Whereas these evidentiary rules are analogous to the rules at trial that are described

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126 M Robinson, *The Special Criminal Court* (1974), 31.

127 Criminal Justice (Amendment) Act 2009, ss 5 and 6.

128 Criminal Justice Act 2006, s 71B.

129 Art 38.1; *People (DPP) v D O'T* [2003] 4 IR 286.

130 Criminal Procedure Act 1967, ss 28 and 29.

131 This is an offence punishable by a term of imprisonment of 5 years or a more severe penalty.

132 Section 2A.

133 *People (DPP) v McLoughlin* [2010] 1 IR 590, 603.

at I.A above, it is noteworthy that the courts tend to be more flexible regarding the admission of evidence at bail hearings because they take place during the pretrial phase. In addition, a Garda officer is permitted to claim informer privilege when giving evidence during the course of a bail hearing.[134]

Other measures that authorities can impose in the pretrial process include orders for the confiscation and freezing of assets. Section 38 Criminal Justice Act 1994 gives a member of the Gardaí the power to seize and detain cash if he or she has reasonable grounds for believing that the money represents the proceeds of drug trafficking or will be used for that purpose. Section 39 provides for the forfeiture of any monies detained under section 38. Sections 23 and 24 Criminal Justice Act 1994 also provide for freezing orders. Pursuant to section 23, the High Court's power to exercise a freezing order applies where proceedings have been instituted in the State against the defendant for a drug trafficking offence, an offence of financing terrorism, or an indictable offence and the proceedings or application have not been concluded.[135] The freezing order prohibits the person concerned from dealing with the property. The DPP applies for the order and the application is heard otherwise than in public. The purpose of the freezing orders is to prevent the dissipation of assets prior to a confiscation inquiry being conducted by the trial court if the accused is convicted on indictment of the offence charged.

III. Restrictive measures imposed in non-criminal proceedings against individuals

A. The use of incriminating 'indirect evidence'

1. The system of civil forfeiture

Civil forfeiture is the primary restrictive measure that can be imposed in non-criminal proceedings against individuals in Ireland.[136]

The current regime of asset forfeiture has its roots in two murders that took place over twenty years ago. In June 1996, the murders of Detective Garda Jerry McCabe in the course of an armed robbery and of investigative journalist Veronica Guerin led to the enactment of the Proceeds of Crime Act (PCA) 1996. The legislation

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[134] *McKeon v DPP* (Supreme Court, 12 October 1995), and *Clarke v Governor of Cloverhill Prison* [2001] 2 IR 742.

[135] In addition, a freezing order can apply where an application has been made in respect of the defendant under section 7, 8, 8D, 8E, 8I, 8J, 13, or 18 of the Act.

[136] Post-conviction confiscation is primarily governed by the Criminal Justice Act 1994. It was enacted as a consequence of Council Directive 91/308/EE on prevention of the use of the financial system for the purpose of money laundering and the Law Reform Commission's *Report on the Confiscation of the Proceeds Of Crime* (LRC 35–1991).

provides for the implementation of civil asset forfeiture by the Criminal Assets Bureau (CAB), which itself was established by the Criminal Assets Bureau Act 1996. The unique aspect of the PCA 1996 is that it provides for the seizure and confiscation of assets deemed to be the proceeds of crime in the absence of a criminal conviction.[137]

CAB is a multi-agency body with its personnel derived from the An Garda Síochána, the Revenue Commissioners and Customs, the Department of Social Welfare, and the Department of Justice. Section 10 CAB Act provides that all reasonable care should be taken to ensure the identity of a Bureau officer shall not be revealed. In addition, the documents used in proceedings must not reveal the identity of an officer of the CAB.[138] Furthermore, the legislation empowers the judge hearing the matter, if satisfied that there are reasonable grounds in the public interest to do so, to give such directions for the preservation of the anonymity of the Bureau officer or member of the staff of the Bureau as he or she thinks fit. This can include the giving of evidence in the hearing but not the sight of any person.[139] The constitutionality of the anonymity provisions of the CAB Act 1996 were upheld in *CAB v PS.*[140]

The Proceeds of Crime legislation vests the High Court with the power to make an interim order over property that prevents a person from dealing with or disposing of property over the value of €13,000.[141] The interim order remains in place until the expiration of a period of 21 days from the making of the order unless an application is made for an interlocutory order.[142] The Court must make the interlocutory order unless it can be shown by evidence of the respondent or some other person that the particular property does not constitute, directly or indirectly, proceeds of crime and was not acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes proceeds of crime or that the value of the property does not exceed €13,000.[143]

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[137] See generally D Walsh and P McCutcheon *Confiscation of Criminal Assets Law and Procedure* (Roundhall, 1999); D Walsh, 'Seizure of Criminal Assets: An Overview' (1999) 9 Irish Criminal Law Journal 127; F Murphy and B Galvin, 'Targeting the Financial Wealth of Criminals in Ireland: The Law and Practice' (1999) 9 Irish Criminal Law Journal 133; S Murphy, 'Tracing the Proceeds of Crime: Legal and Constitutional Implications' (1999) 9 Irish Criminal Law Journal 160; J Meade, 'The Disguise of Civility—Civil Forfeiture of the Proceeds of Crime and the Presumption of Innocence in Irish Law' (2000) 1 Hibernian Law Journal 1; J Meade, 'Organised Crime, Moral Panic and Law Reform: The Irish Adoption of Civil Forfeiture' (2000) 10 Irish Criminal Law Journal 11. See also S Horan, *Corporate Crime* (Bloomsbury, 2011) Part 4.

[138] Criminal Assets Bureau Act 1996, s 10(7).

[139] Criminal Assets Bureau Act 1996, s 10(7)(iii).

[140] *CAB v PS* [2009] 3 IR 9.

[141] Proceeds of Crime Act 1996, s 2.

[142] Proceeds of Crime Act 1996, s 2.

[143] Proceeds of Crime Act 1996, s 3. The Proceeds of Crime Amendment Act 2016 extends the property over which CAB can seize to include property to a value of not less than €5,000.

Section 8 PCA 1996 permits an authorized officer to give 'opinion evidence' as to whether the respondent is in possession or control of specified property and whether the property constitutes, directly or indirectly, proceeds of crime, or that the property was acquired, in whole or in part, with or in connection with property that, directly or indirectly, constitutes proceeds of crime. The Supreme Court has held that the effect of section 8 is to make hearsay admissible in proceedings relating to the proceeds of crime.[144] A particularly controversial aspect of the regime is the standard of proof which applies in CAB proceedings, namely proof on the balance of probabilities, the standard that governs civil proceedings.[145]

The constitutionality of the Proceeds of Crime Act 1996 has been challenged on a number of occasions. In *Murphy v GM*[146] it was argued that the legislation forms part of the criminal law rather than the civil law and that persons affected are deprived of some of the most important safeguards that have historically characterized criminal trials: the presumption of innocence, the standard of proof, the rule against double jeopardy, and trial by jury.[147] However, the Supreme Court rejected the contention that the proceedings are essentially criminal in nature. Chief Justice Keane held that the absence of noteworthy criminal law features renders the proceedings civil in nature. Specifically, there is no provision for arrest or detention, the admission of persons to bail, the imprisonment of a person in default of payment of a penalty, the initiation of proceedings by way of summons or indictment, the recording of a conviction, or for entering a decision not to prosecute.

2. Grounds for non-disclosure and forms of indirect evidence

As the regime provided under the Proceeds of Crime Act 1996 is civil rather than criminal, the applicable rules relating to the disclosure of evidence is different from that of criminal trials. Discovery is the primary means by which parties in a civil trial can seek access to documentary evidence in advance of the hearing.[148] In *F McK v FC,*[149] the Supreme Court held that discovery is available in proceedings brought under the Proceeds of Crime Act 1996.

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144 *Murphy v GM* [2001] 4 IR 113,130.

145 Proceeds of Crime Act 1996, s 8.

146 [2001] 4 IR 113.

147 [2001] 4 IR 113, 132.

148 See generally H Delany and D McGrath, *Civil Procedure in the Superior Courts* (4th edn, Thomson Round Hall, 2018) ch 10; W Abrahamson, J Dwyer and A Fitzpatrick, *op cit;* L Heffernan (2011), *op cit* ch 7; C Reid (ed), *Civil Litigation* (Oxford University Press, 2009) ch 12; B Ó Floinn, *Practice and Procedure in the Superior Courts* (2nd edn, Bloomsbury Professional, 2008) 283 *et seq*; D O'Neill, *Ancillary Discovery* (Bloomsbury Professional, 2009); J Barron, *Practice and Procedure in the Master's Court* (2nd edn, Round Hall, 2001) ch 3.

149 [2001] 4 IR 521.

The rules governing discovery are a combination of case law and court rules.[150] Pretrial discovery can take place on a voluntary basis between the parties. Court-ordered discovery can also take place where the parties have not been able to agree on what is to be disclosed. In some circumstances, discovery orders can be made against third parties. Notwithstanding the differences, the discussion of privilege above at 1.A.1 and I.A.2 is applicable in the context of discovery. Generally, the forms of indirect evidence admissible in criminal trials are also admissible in civil forfeiture proceedings. In particular, as set out above, the Proceeds of Crime Act 1996 provides for the admission of the 'belief evidence' of an authorized officer that property is the proceeds of crime.

3. Court's access to an undisclosed source

In 2010, the High Court considered informer privilege and discovery in the context of various pretrial motions in a civil case. In *Millstream Recycling Ltd v Tierney & Newtown Lodge Ltd*,[151] Mr Justice Charleton noted that:

> It is also beyond [sic] that documents consisting of notes, or statements, from informers can never be discovered. To list them, under the heading of a schedule of informer privilege, even without any name would be to invite severe menace by reason of the possibility of investigation. If a serious issue were to arise then the appropriate procedure would be to ask the judge to privately inspect the documents in the presence of a high-ranking Garda officer under the strictest security. These principles are well established in consequence of the judgment of Carney J. in the High Court and of the Supreme Court in *Ward v. Special Criminal* Court [1999] 1 I.R. 60. In any event I have no potential reason to either believe that are [sic] informer statements in this case relevant to the issues, or to doubt that they are in truth informer statements; the only issue upon which a judge can ever been called to adjudicate.[152]

Millstream Recycling sheds some light on the procedural aspects of informer privilege in civil cases. While it may seem to be a minor detail, the judgment states how a judge should assess whether someone is an informer and whether the innocence at stake exception applies by examining documents in chambers in the presence of a senior ranking police officer. It is not clear if the approach suggested by Mr Justice Charleton would include the judge questioning the police officer in chambers where the protected material was not in documentary form.

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[150] RSC 1986 as amended, Ord 31, r 12 (inter-party discovery), Ord 31, r 29 (non-party discovery); CCR as amended, Ord 32, r 1 (inter-party discovery), Ord 32, r 9 (non-party discovery), DCR as amended, Ord 45B.

[151] [2010] IEHC 1.

[152] [2010] IEHC 1, 39.

B. Political and academic discourse

PCA 1996 has been described in the following way:

> The Proceeds of Crime Act 1996 is a muscular statutory initiative clothed in the finery of constitutional properties. It needed the most sophisticated drafting strategies to meet the challenge of complying with the requirements of due process and fair trial.[153]

The use of the PCA 1996 has attracted comment in both political and academic discourse. Some of the academic commentary has focused on the appropriateness of civil proceedings for what the commentators argue amounts to a punishment without any of the protections that the criminal law provides.[154] As King has stated:

> [I]t must be recognised that the non-conviction based approach to targeting criminal assets does pose serious questions as to the rights of the individual. Civil forfeiture also blurs the dividing line between civil and criminal processes.[155]

King has also argued that the use of 'belief evidence' in the context of civil forfeiture proceedings undermines the very notion of an adversarial contest. In addition, he is of the view that the use of anonymous testimony raises concerns with regards to secrecy. As he has stated:

> Ultimately the belief evidence and anonymity provisions lead to the view that the scales are firmly weighed in favour of the State, and that equality of arms between the parties is conveniently sidelined.[156]

Others have described the PCA 1996 as 'a proportionate response to the dramatic growth in organized crime which has occurred in the past decade'.[157]

At the political level, the discourse surrounding CAB and the PCA 1996 has been altogether more positive. As the Minister for Justice stated in Parliament in 1998:

> In the relatively short time it has been in existence, the outstanding performance and success of the Criminal Assets Bureau is hard evidence of what can be achieved when governments and statutory agencies put their heads together in a determined manner to hit the drugs barons and other serious criminals where it hurts most—in their pockets, bank accounts, fancy houses and fast cars. The bureau's use of the provisions of the Proceeds of Crime Act, 1996, has been most effective to date.[158]

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153 R Byrne and W Binchy, *Annual Review of Irish Law 2004* (Thomson Round Hall, 2005), 368.

154 J Meade, 'The Disguise of Civility; Civil Forfeiture of the Proceeds of Crime and the Presumption of Innocence in Irish Law' (2000) 1 Hibernian Law Journal 1.

155 C King, 'Civil forfeiture and Article 6 of the ECHR: Due Process Implications for England & Wales and Ireland' (2014) 34(3) Legal Studies 371, 394.

156 C King, 'The Difficulties of Belief Evidence and Anonymity in Practice - Challenges for Asset Recovery' in *The Handbook of Criminal and Terrorism Financing Law* (Palgrave 2018) 565–590.

157 S Murphy 'Tracing the Proceeds of Crime: Legal and Constitutional Implications' (1999) Irish Crim Law Journal 160, 175.

158 Dáil Debates, 19 November 1998, vol 497, col 122, per Mr J O'Donoghue TD.

More recently, the Minister for Justice, Frances Fitzgerald, while in the Upper House, introducing an amendment to the PCA 1996, said:

> The Irish model is one that has been studied and copied by some countries and envied by many that have not done so. In the intervening period, the Criminal Assets Bureau, CAB, has retrieved hundreds of millions of euro in proceeds of crime, unpaid taxes and fraudulently obtained welfare payments. It has been so successful that it has driven some gang leaders overseas, leaving only their accomplices here to run their day-to-day drugs businesses.[159]

Campbell's assessment of asset seizure in Ireland in 2007 remains the position today:

> The resounding popular and political support for civil forfeiture, which has also received judicial approval in the face of constitutional challenges, indicates that this process will continue to be a key weapon in the State's arsenal against organised crime.[160]

IV. Conclusion

The tension between the need to keep certain matters secret and the obligation to protect the accused's constitutional rights in a criminal trial is made clear in prosecutions that take place before the SCC. The use of 'belief evidence' coupled with informer privilege clearly restricts the ability of the accused to cross-examine and thus challenge the case that is being made against him or her. These difficulties are compounded by the use of the non-jury SCC, which does not enjoy the traditional common law separation of roles between the judge and jury. This means that at the admissibility stage the SCC may become privy to evidence that it decides should be excluded from its consideration of the ultimate issues in the trial. Common sense would suggest that it might be difficult for judges to entirely remove from their minds information that that they have reviewed in an admissibility hearing.

Whilst it is accepted that there is a need to keep certain categories of information secret, for example the identities of informers or intelligence related to the national security of the state, Ireland is still somewhat of an outlier in the common law world in the manner in which it deals with such secret evidence: first, in its use of a non-jury court to prosecute terrorism and organized crime, and second, in its refusal to countenance some form of special advocate system.

The creation of a security-cleared advocate system could ameliorate some of the difficulties the accused labours under when faced with 'belief evidence' that is protected by informer privilege in so far as an independent advocate would be entitled to view the information protected by the privilege and challenge it through cross-

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[159] Seanad Debates, 5 July 2016, per Minister for Justice, F Fitzgerald TD.

[160] L Campbell, 'Theorising Asset Forfeiture in Ireland' (2007) 71(5) Journal of Criminal Law 441, 460.

examination. This would ensure that all of the evidence would be subject to rigorous adversarial challenge whilst also recognizing the legitimate need on the part of the state to keep certain matters secret. However, it must also be noted that both the Irish Supreme Court and the ECtHR have examined the use of 'belief evidence' and informer privilege before the SCC and ruled that the accused's right to a fair trial under the Constitution and the ECHR, respectively, was not infringed in the cases presented.[161]

[161] See *The People (Director of Public Prosecutions) v Kelly* [2006] 3 IR 115 and *Donohoe v Ireland* App no 19165/08 (ECtHR, 5th Section, 12 December 2013).

Secret Evidence in Criminal Proceedings in Italy

Stefano Ruggeri

I. Introductory remarks

Secrecy has always been a fundamental requirement in criminal proceedings. Already in the mixed criminal justice systems with strong inquisitorial inspiration of the past, the need for secrecy played an essential role in investigation and evidence gathering prior to trial. In modern times, various arrangements have been enacted with a view to keeping criminal investigations secret for some time and to depriving suspects, and sometimes victims as well, of any knowledge of pretrial inquiries. Over the last two decades, moreover, recourse to secret investigations in criminal proceedings and the use of various forms of secret evidence have increased exponentially, largely as a result of developments in science and technology.

Italian criminal justice is no exception. A look at the last decade reveals the growing use of unprecedented investigative means (e.g. online searches) by the investigative bodies.[1] Legislation, however, was rather slow in following these developments.

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[1] *Marcolini*, Le cosiddette perquisizioni *online* (o perquisizioni elettroniche). In: *Ruggieri* & *Picotti* (eds) Nuove tendenze della giustizia penale di fronte alla criminalità informatica Aspetti sostanziali e processuali. Giappichelli 2011, 190 ff; *Parlato*, Perquisizioni *online*. In: Enciclopedia del diritto. Annali, X vol, Giuffrè 2017.

Only in 2020 a legislative reform that entered into force after a long and somewhat tortuous path enacted specific rules on the use of malware (spyware, Trojan horses, etc.), for purposes of interception of communications among present individuals in a specific context.[2] However useful it may be to take recourse to secret investigations, the costs are unquestionably high, not just for the accused but also for other individuals involved in criminal proceedings. The risks arising particularly from the absence of legal provisions defining conditions for using secret investigations are considerable. Today, technology can certainly provide very useful measures aimed at managing different types of witness hearings in order to avoid undue risks for the person under examination (minors, undercover agents, and so on). However, the lack of clear rules about the conditions legitimising these measures gives the competent authorities enormous leeway. Furthermore, the failure to define the subjective scope of communication intercepts, i.e. in terms of the individuals who may be subject to this intrusive measure, entails serious risks for persons who may be neither relatives nor part of the defendant's environment.

The present study, therefore, analyses this problematic area in relation to the Italian criminal justice system from a human rights perspective. To this end, some preliminary observations are due. Obviously, secrecy can be related to different entities. Secret investigations do not necessarily aim at providing information intended to be kept secret during the overall course of proceedings or from certain parties; and *vice versa*, secret evidence may be gathered from non-secret investigations. Therefore, secret evidence and secret investigations are two independent variables.

In sum, secret evidence is by definition a relativistic notion. Therefore, two further questions arise regarding secret criminal evidence from the point of view of Italian law, namely a) who is entitled to gather and/or keep secret evidence, and b) from whom should information be withheld? These two questions can also be expressed in the following terms: secret evidence a) of whom, and b) for whom? The two questions, moreover, are strictly linked to each other and can lead to different results. With regard to the former, we are used to consider secret evidence as information which the competent investigative authorities (law enforcement authorities, prosecutor, the investigating magistrate, etc.) can withhold from the accused. Yet the developments occurred in modern criminal justice in the last decades allow us to approach this problem also from other perspectives, which transcend the traditional dualistic view of criminal proceedings. Moreover, the enactment in Italy of specific rules on

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[2] Indeed, within some years various legislative interventions modified the rules on interception of communications. Arts. 266 et seqq. Code of Criminal Procedure (CCP) were first amended by Legislative Decree 216/2017 and Law 3/2019, followed by Law-Decree 161/2019, converted into Law 7/2020, and finally Law-Decree 28/2020, converted into Law 70/2020. Cf. among others *Signorato*, Modalità procedimentali dell'intercettazione tramite captatore informatico. In: Giostra & Orlandi (eds), Nuove norme in tema di intercettazioni. Tutela della riservatezza, garanzie difensive e nuove tecnologie informatiche. Giappichelli 2018, 263 ff.

the investigations of defence lawyers raises another question, namely whether and to what extent the defence can withhold information from the investigative authorities.

This scenario highlights the range of potential solutions that can arise from the second question. Thus, the traditional approach to this problem—in terms of information the authority may withhold from individuals—gains new significance in a modern concept of criminal proceedings. The rising importance accorded to the victim particularly under international human rights law and EU law poses the problem of whether and under what conditions the investigative authorities can keep evidence secret not only from the defendant but also from the victim. But the problem may have even more complex implications. It is widely accepted that the defendant can withhold relevant information from the prosecutor at the pretrial stage, e.g. in hopes of better chances of being acquitted at trial. As a result, the prosecutor may not be in a position to fulfil the victim's expectations of justice, and prosecution may not be instituted at all or may be instituted on the wrong basis. Moreover, irrespective of whether secret evidence was taken by the defence lawyer or the investigative authorities, another question is whether relevant information can also be kept secret from the judicial authority and what implications this solution may have for the aims pursued by the judiciary in criminal proceedings. How can the competent judge for the pretrial inquiry, who in the current Italian criminal justice system is not an investigating magistrate but a judge, responsible for procedural safeguards, be expected to discharge his duties and, in particular, how can he asses the proportionality of coercive measures if information can also be withheld from him? And what are the potential repercussions of secret evidence for the finding of facts if relevant evidence can be kept secret from the decision makers at trial?

These observations provide the general framework for this study. In order to properly deal with these problems, I shall start with some brief historical remarks on the shift in Italian criminal justice from the traditional mixed system of inquisitorial origin to the (largely) adversarial model adopted by the 1988 codification and the major developments since its enactment.

II. Secret inquiries under the Rocco Code

The Code of Criminal Procedure (CCP), the so-called 'Rocco Code', provided a clear example of the mixed criminal justice system, whose largely inquisitorial characteristics were certainly in line with the approach adopted by the the Penal Code of the same year. The authoritarian inspiration of the 1930 'twin codes', indeed, was not only reflected in the general structures of the new criminal law but furthermore, and perhaps even more significantly, in the way in which criminal offences had to be investigated, and individuals ought to be tried and adjudicated in criminal proceedings. One of the main features of the 1930 Code of Criminal Procedure was the central role of the intermediate stage (*istruzione*), which varied in structure

depending on the competent body, that is, the prosecutor (*istruzione sommaria*) or the investigative judge (*istruzione formale*).[3] Regardless of its structure, moreover, the pretrial inquiry was characterized by the dominant role of an investigating authority, which led the same body that charged defendants with a criminal offence to restrict their fundamental freedoms and to gather incriminating evidence against them.[4] In general terms, interference with fundamental rights was mostly regarded as a necessary tool for proper evidence gathering: it is worth observing that defendants were usually remanded into custody at the beginning of judicial proceedings and thus deprived of the right to take part in the criminal inquiry as free persons, with inevitable repercussions for their defence rights.[5] Although this inquiry was primarily aimed at the impartial collection of evidence, therefore, this result was difficult to achieve due to the concentration of powers in the same hands.

From the perspective of the present study, one of the most significant implications of the fact that evidence gathering was, to a great extent, brought forward to the pretrial stage was that the ascertainment of facts was ordinarily entrusted to secret inquiries by the investigative authorities. This approach led to different results, precisely because of the relativistic notion of 'secret evidence'. That the pretrial inquiry ought to be kept secret from the defence was also reflected in the weak involvement of the accused in the inquiries by the police and the prosecution. There can be little doubt that this result had serious repercussions for the defence rights of the individuals concerned. Nevertheless, it took several decades before the Constitutional Court eased the inquisitorial features of the 1930 Code, granting the defence important procedural safeguards during the pretrial inquiry. Furthermore, it should be taken into account that, as long as the 1930 Code was in effect, there were wide possibilities for using out-of-court evidence for purposes of the trial decisions, and even hearsay evidence and even police reports were frequently used for deciding the question of guilt. This result clearly entailed several risks not only for the defence rights but also for the reliability of decision-making.

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[3] *Siracusano*, Istruzione del processo penale. In: Enciclopedia del diritto (vol XXIII). Giuffrè 1973, 166 ff.

[4] This was especially true in cases of *istruzione sommaria*, since the prosecutorial inquiry, though initially conceived as an exception to the ordinary judicial inquiry, soon gained ground in practice, thus also frustrating the accused's right to be heard by an impartial body. Cf. the strong critizism by *Cordero*, L'istruzione sommaria nel conflitto tra le due corti, in Id., Ideologie del processo penale. Giuffrè 1966, 3 ff.

[5] It is noteworthy that the drafters of the 1930 Code included the rules on arrest and remand detention into the systematic structure of the 1930 Code at the beginning of the book on the intermediate stage. This systematic approach was clearly in line with the typically inquisitorial appreciation of pretrial custody as the most appropriate means of forcefully achieving the collaboration (if not the confession) of the defendant, who was also viewed as an instrument for the success of the criminal inquiries rather than a right holder. See *Marzaduri*, Misure cautelari personali (princìpi generali e disciplina). In: Digesto delle discipline penalistiche (vol VIII). Utet 1994, 61.

III. Secret evidence in domestic criminal proceedings

A. Premise

The 1988 Code of Criminal Procedure, also called 'Vassalli Code', followed the adversarial orientation of the 1987 Delegation Law,[6] which reflected the clear intention of the lawmakers to depart from the approach of the Rocco Code. This ambitious objective was pursued through some important innovations. The centre of gravity for fact-finding, in particular, was intended to be shifted towards the trial stage. The achievement of this result entailed an in-depth reform of the pretrial stage, which lost its old features of a judicial phase aimed at evidence-gathering and was re-structured as a preliminary inquiry (*indagini preliminari*) that fell into the competence of public prosecutors and aimed at the collection of all information necessary to enable them to examine whether and how to bring the defendant to court with a formal indictment.[7] Within this framework, the investigative magistrate was drastically eliminated and replaced by a new judge responsible for procedural safeguards in the pretrial inquiry (*giudice per le indagini preliminari*). Even more significantly, public prosecutors were deprived of almost their traditional powers of coercion and decision-making, and could no longer take evidence during the investigative stage with a view to the trial decisions. Indeed, one of the most remarkable innovations was the introduction of a general ban on using out-of-court evidence for decisions on guilt at trial. Nevertheless, information gathered during the pretrial inquiry could still be used as evidence even for purposes of a guilty verdict prior to trial. Thus the 1988 Code promoted a number of procedural initiatives by private parties, and especially agreements between defendants and the public prosecutor with a view to two alternative proceedings, aimed at either bringing forward the decision on guilt to the intermediate phase by means of abbreviated proceedings (*giudizio abbreviato*) or for purposes of a bargaining decision (*applicazione della pena su richiesta delle parti*, otherwise known as *patteggiamento*). In these contexts, information gathered by the investigative bodies during the pre-trial inquiry could generally be used.

On close examination, this set-up was not entirely consistent with the goals pursued by the drafters of the Vassalli Code, which, as has been observed,[8] probably contained the seeds that rapidly led to the disruption of the adversary model chosen in 1988. In particular, fact-finding at trial was not as airtight as it was expected to be, and only a few years after the Code's enactment, both the Italian legislature

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[6] Despite the clear intention of the Commission headed by *Giandomenico Pisapia* to draw the new criminal procedure law closer to the adversarial model of common law countries, only a single reference to the adversarial system was enacted in the Delegation Law for the new Code. Cf. Art. 1 Law 81/1987.

[7] Arts. 326 and 358 CCP.

[8] *Marzaduri*, Indagini preliminari e modello processuale: profili di incoerenza originaria del codice Vassalli. In: Verso la riscoperta di un modello processuale, Giuffrè 2004, 223 ff.

and the Constitutional Court opened up considerable possibilities of using evidence at trial that had been gathered out of court. Moreover, alongside the two aforementioned alternative procedures, prosecutorial and police evidence could also be widely used for purposes of interim decisions (e.g. decisions on the application for intrusive measures), which had an enormous impact on the fundamental rights of both defendants and third parties. In this context, the fact that the traditional secrecy of the pretrial inquiry was retained exacerbated these consequences. The developments occurred in Italian criminal justice in the years ahead raised two more problematic issues, which are of utmost relevance from the viewpoint of this discussion, namely the use of secret evidence in the decision to charge and the impact of secret investigations carried out by defence lawyers on both the prosecutorial strategy and the fair finding of facts.

B. Trial inquiry and secret evidence

1. Pretrial investigations and file selection

It has been noted that one of the main goals pursued by the 1988 Code was to deprive the prosecutorial pretrial inquiry of its aim of gathering information to be used at trial. The key instrument for pursuing this goal was the introduction of an unprecedented distinction between the trial file (*fascicolo per il dibattimento*) and the prosecutorial file (*fascicolo del pubblico ministero*).[9] The primary purpose for this distinction was to prevent decision makers from basing their decision on guilt or innocence on police reports and untested evidence and to compel them to use for fact-finding purposes, as a general rule, only the information gathered at trial.[10]

The Vassalli Code, indeed, ruled out almost any possibility of fact-finding based on out-of-court evidence gathered by means of secret prosecutorial or police

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[9] See respectively Arts. 431 and 433 CCP. Notwithstanding the heading of the latter Article, the 'prosecutorial file' never contained only the evidence gathered by the competent prosecutor but also the information collected by the police as well as the evidence taken in the intermediate stage by the competent judge. In the light of these comprehensive contents, the prosecutorial file is actually a general file typically containing all the pieces of evidence taken during the pretrial stages. At the time the Code was issued, the main reason for the reference to a 'prosecutorial file' was because there were still no specific rules on defence investigations. Since Law 397/2000 introduced a specific statute on defence investigations, the prosecutorial file has also included information gathered by the defence lawyers. Cf. Art. 391–*octies*(3) CCP.

[10] Of course, there were several exceptions, the first concerning the pieces of evidence that could be inserted into the trial file. Moreover, the new Code provided further situations in which out-of-court evidence could be used in court during the trial stage, e.g. by allowing the use of non-repeatable evidence, of out-of court statements rendered by the defendant with the assistance of a lawyer, and so on. It is worth observing, however, that all these specific exceptions were included in an exhaustive list of grounds for admitting out-of-court evidence at trial (Art. 514 CCP).

inquiries. By overruling the approach of the previous codification, Italian law drastically limited the knowledge of such evidence by the decision makers, who, as a rule, were denied access to any information gathered by the investigative authorities prior to trial and in other proceedings and inserted into the prosecutorial file, irrespective of whether it was exculpatory or incriminating evidence. Despite its artificial nature, however, this solution ensured full disclosure of the contents of the prosecutorial file to the accused as well as to other private parties[11] authorised to access and use it for various purposes at trial (e.g. to apply for bail or to challenge the reliability of prosecutorial witnesses).[12]

This set-up has been largely maintained to this day. It might be argued that the distinction between the prosecutorial and the trial file is to preserve the separation between the procedural stages, thus banning the use of untested evidence for any trial decision. But this conclusion would not properly reflect the high relativism of Italian evidence law.[13] Thus, as was noted before, the purpose of a separate trial file has always only been to avoid the automatic admissibility of out-of-court evidence for deciding the question of guilt, which did occur in the past. However, such evidence can still be used for any other decision pending trial (e.g. interim decisions on jurisdiction, remand proceedings, etc.). Moreover, as has been noted, the information in the prosecutorial file is principally admissible in alternative proceedings aimed at a decision on guilt or innocence in the pretrial stages (e.g. abbreviated proceedings, bargaining proceedings, penal order procedure). Therefore, the competent judges for all these decisions have full access to all the information gathered by the investigative bodies out of trial.

Though this file selection mechanism was set up to counter the practice of convictions based on prosecutorial and police evidence, the enactment of a statute on defence investigations by Law 397/2000 prompted Italian lawmakers to adopt the same solution for evidence gathered by defence lawyers. As a result of this reform, even the knowledge of exculpatory information gathered by the defence is nowadays withheld from the trial court or judge as a matter of principle. A significant deficiency of the Italian approach, moreover, still remains the lack of clear rules regarding the distribution of the material between the trial file and the prosecutorial file. Despite the exhaustive list in Article 431 CCP, some reference could lead (and did so in practice) to prosecutorial evidence being admitted into the trial file *ab initio*. In the first decade after the Code's enactment, particularly the notion of 'non-repeatable

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[11] Art. 433(2) CCP.

[12] Furthermore, as a rule, prosecutorial evidence is no longer confidential after the end of the pretrial inquiry. Cf. Art. 329 CCP.

[13] The first scholar who analysed this phenomenon after the enactment of the 1988 Code was Massimo Nobili. Cf. *Nobili*, Scenari e trasformazioni del processo penale. Cedam 1998, 10 ff.

evidence'[14] turned out to be open to multiple interpretations, therefore leading to very different applications.[15]

Furthermore, at that time the entire responsibility for dividing the evidence into two files was in the hands of the registry office of the competent judge for pretrial inquiry; the parties were not involved. Despite the potentially serious consequences of this for both the finding of facts and the rights of defence, the setting up of the two files was therefore an administrative task. More than one decade had to pass before Law 479/1999 transferred the responsibility for dividing the available information into two files—a difficult task that can require an *ad hoc* hearing, which, moreover, requires involvement of the parties—to a judicial authority, namely to the competent judge for the intermediate phase.[16] There are still some exceptions, however. Particularly in case of direct proceedings (*giudizio direttissimo*),[17] the public prosecutor is competent to establish the contents of the trial file.[18] Moreover, the competent prosecutor is authorized to set up the trial file in all cases in which the accused is directly summoned to a court hearing before a single judge (*tribunale monocratico*).[19] These cases pose sensitive problems regarding the justiciability of the system. Thus defendants can challenge the file selection only before the beginning of the trial hearing, namely during the examination of so-called "preliminary questions" (*questioni preliminari*).[20] Yet even this solution can lead to unsatisfactory results, for Italian law does not provide private parties a means of challenging the file selection before an independent authority other than the trial court, which should be kept in the dark about the results of the investigations by the police and the prosecution.[21]

At first glance, there should be no alternative to the trial file and the prosecutorial file, since the latter contains all the pieces of evidence other than those included in

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[14] Art. 431(1)(b–c) CCP.

[15] Remarkably, in the years after the Code's enactment, criminal law scholarship raised serious criticism against the rules on non-repeatable evidence, particularly against the references contained in the provision on the trial file, which may have disruptive effects on the principle of *contradictoire* governing the new Italian criminal justice system. See among others *Ferrua*, Declino del contraddittorio e garantismo reattivo: la difficile ricerca di nuovi equilibri processuali. In: Ferrua, Declino del contraddittorio e garantismo reattivo (vol III). Giappichelli 1997, 55 ff.

[16] Art. 431(1) CCP.

[17] Direct proceedings are instituted with a criminal law action aimed at opening the trial without the intermediate stage.

[18] Art. 450(4) CCP.

[19] Art. 553 CCP.

[20] Art. 491 CCP.

[21] This does not entail, however, that the rules on evidence disclosure can be infringed upon without further judicial control. Thus, in addition to the examination of the file seclection by the trial judge or court, the parties can appeal against the judgment based on inadmissible evidence, which may also be evidence inserted into the trial file by mistake. It should be noted that the non-usability of evidence appears among the cases of appeal on points of law before the Supreme Court. See Art. 606(1)(c) CCP.

the former.[22] On close examination, the 1988 Code provided for the possibility of setting up a third file. This is an option in cases of supplementary investigations conducted by either the prosecutor or the police upon delegation after the opening of the trial stage.[23] Although the information so gathered is not included in the prosecutorial file but is held by the secretary of the public prosecutor's office,[24] the private parties and their lawyers have the right to access it. Moreover, since Law 397/2000 extended the possibility of supplementary investigations to private parties, this third file may also contain information collected by the defence lawyers, with the rather surprising consequence that they are required to send the evidence gathered in favour of their clients to the secretary of the public prosecutor's office.[25] Furthermore, knowledge of this information by the decision makers depends on the strategy of either the prosecutor or the defence, for evidence obtained through supplementary inquiries will only be included in the prosecutorial file if one party's request is granted (e.g. by applying for bail or for release from seizure).[26]

2. Fact-finding and the use of out-of-court evidence

There are different problems associated with the admissibility of out-of-court evidence as well as information gathered through alternative forms of questioning to cross-examination in open court. A look at the international scenario reveals a general trend to broaden the use of out-of-court evidence. Italian criminal justice is no exception in several respects. Furthermore, we can also note appreciable developments leading to a recalibration of the balance between the accused's right to confrontation and the fundamental rights of the individuals examined, as protected by both the Constitution and the European Convention.

a) Hearsay evidence

Concerning hearsay evidence, the 1988 Code, while allowing the use of indirect witnesses, enabled competent judges to collect first-hand evidence at their own initiative, either during the pretrial stages or at trial.[27] The judicial initiative in taking evidence autonomously, however, is not on an equal footing with that of the parties. Thus, if at least one party requested the hearing of the first-hand witness who,

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[22] Art. 491 CCP.

[23] Art. 430 CCP.

[24] Art. 430(2) CCP.

[25] This solution may appear not to be in line with the logic of private investigations. Nonetheless, defence lawyers are not required to send all the information gathered to the secretary of the public prosecutor's office but always retain a margin of discretion in choosing the evidence they wish to attach, taking into account that if they do, the prosecutor will have access to them.

[26] Art. 433(3) CCP.

[27] Art. 195(2) CCP.

however, fails to appear in court, hearsay evidence cannot be admitted except in cases of death, illness, and non-traceability of that witness. By contrast, if the hearing of the first-hand witness who fails to appear was not requested by a party but by the judge, hearsay evidence is definitively admissible.[28] Moreover, it is interesting to note that, in the last decades, we have witnessed the increased use of hearsay evidence, which has been the result of the broad interpretation of the aforementioned exceptions by Italian courts.[29]

One highly sensitive problem relates to the admissibility of hearsay evidence produced by law enforcement authorities, since they do not gather information as normal witnesses but in the exercise of their duties. In order to avoid infringements on the new limitations stated regarding the admissibility of out-of-court evidence, the drafters of the 1988 Code had excluded the possibility of the police to provide hearsay testimony.[30] This radical ban was dropped by the antimafia legislation of 1992,[31] and it took almost ten years before Law 63/2001, implementing the constitutional fair trial reform of 1999,[32] reintroduced the exclusion of hearsay evidence of law enforcement authorities. Yet the new exclusionary rule was less radical than that of 1988, because it restricted the inadmissibility of hearsay evidence only to cases in which the police recorded the statements obtained by potential witnesses, co-defendants, or the aggrieved parties in the context of formal questionings. In 2008, moreover, the Constitutional Court broadened the protective scope of this provision by reinterpreting the prohibition of hearsay evidence by police officers on statements from first-hand witnesses as also encompassing cases where the police are required to set up official records of the statements collected, even if they did not do it.[33]

Another clear example of the tendency to limit the use of hearsay evidence is the way Italian law has progressively broadened the scope of the ban on using information obtained from informants of law enforcement authorities or agents of the security services if they were never examined as witnesses in the course of the proceedings.[34] In order to avoid the bypassing of this prohibition, the legislative implemention of the 1999 constitutional reform of the fair trial by means of Law 63/2001 extended this condition to some important interim decisions. This legislative solution was of the utmost importance for preventing the adoption of coercive measures based on untested indirect evidence, so that, today, defendants cannot be remanded into

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28 Art. 195(3) CCP.

29 In particular, case law broadened the notion of 'illness', extending it to cases where the hearing of minors in court (especially in case of victims of sexual crimes) might seriously disturb their mental and emotional equilibrium. Cf. Court of Cassation, dec. of 24 June 1998, *Scardaccione*, Guida al diritto (1998)(37), 88.

30 Art. 195(4) CCP (version 1988).

31 Law Decree 306/1992 converted into Law 356/1992.

32 Constitutional Amendment Law 2/1999.

33 Constitutional Court, dec. 308/2008.

34 Art. 203 CCP.

custody or subjected to further restrictions of liberty or their right to free movement based on evidence from informants who were not examined at the pretrial stage.[35] Moreover, given the general scope of Article 273(1-*bis*) CCP, the rules governing the use of evidence from informants also apply to control measures (such as the suspension of exercising parental authority or public office or service, or conducting a certain business or practising a profession). Doubtless, this reform enhanced the protection of the defendant's right to confrontation in view of the extensive use of indirect evidence for purposes of pretrial measures.[36] It is also worth noting that this exclusionary rule was extended to the decision on ordering the interception of telecommunications,[37] which certainly enhanced the protection of the constitutional right to free and secret communication not only of the accused but also of third persons, taking into account that the infringement of this legal prohibition affects the admissibility of the evidence gathered.[38]

Beyond these limits, however, Italian law does not provide specific rules governing the assessment of indirect evidence in general as well as in special cases where police officers can provide hearsay evidence. Nor are there limits to the evaluation of statements by informants. In general terms, provided that out-of-court evidence is admissible for purposes of deciding on criminal liability, there are no legal provisions delimiting or conditioning the free evaluation of the judge. Moreover, it is interesting to note that these conditions of admissibility of indirect evidence only apply within criminal proceedings and within the limits set by procedural law. Indeed, although Italian law has pioneered various forms of non-conviction-based forms of confiscation of property and seizure of assets, the cases of unusability provided for (final and even some interim) decisions in criminal proceedings cannot be extended to decisions on preventive measures. This conclusion also applies to the difficult decisions foreseen by Legislative Decree 159/2011 (the so-called 'Antimafia Code'), which established significant presumptions of illicit origin of assets based on a lack of proportionality between these assets and the income of or the economic activities performed by the addressee of patrimonial measures, presumptions which, however, do not seem to be inconsistent with ECHR law.[39]

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[35] Art. 273(1-*bis*) CCP.

[36] Notwithstanding that the drafters of the 1988 Code adopted a wording intended to clearly distinguish between the decision on suspicion of guilt and the trial decision on guilt, the 'strong evidence of guilt' (*gravi indizi di colpevolezza*) was soon reinterpreted as not relating exclusively to circumstantial or indirect evidence. See *Di Chiara*, Report on Italy. In: *Ruggeri* (ed), Liberty and security in Europe. A comparative analysis of pretrial precautionary measures in criminal proceedings. V&R Unipress 2012, 129 f.

[37] Art. 267(1-*bis*) CCP.

[38] Art. 271(1) CCP.

[39] See *Finocchiaro*, La confisca e il sequestro di prevenzine, www.penalecontemporaneo.it

b) Special forms of confrontation and the protection of vulnerable victims

It has been observed that Italian law has progressively enhanced the use of special measures aimed at balancing the defendant's right to confrontation and the protection of vulnerable victims through alternative forms of confrontation. In the last years prior to the constitutional fair trial reform of 1999, Italian lawmakers further strengthened the rules on hearings of minors by extending to the examination at trial some rules regarding the gathering of oral evidence in *incidente probatorio*. This important procedure aims at collecting evidence at the pretrial stage through an *in-camera* hearing before the competent judge for pretrial inquiry. In general cases, evidence is to be taken by using the adversarial method, but particularly in cases of serious crimes, minors must be examined in locations other than the courtroom. As a result of a relevant legislative reform carried out in 1998, this method must be complied with not only in the pretrial inquiry but also at trial.[40] Moreover, even though such hearing takes place in the presence of the parties, represented by their lawyers, they are not allowed to question the person examined; rather, the president of the trial court conducts the questioning based on questions raised by the parties.[41] Significantly, the same legislative reform also amended the rules on trial hearings of individuals victimized by certain serious crimes (sexual crimes, stalking, trafficking of human beings, and so on). In these cases, the aggrieved parties, whether they are minors or mentally ill adults, can be heard, either at their own request or at the request of their lawyers, through a glass mirror with an intercom system.[42] More recently, the 2013 reform on gender-based violence[43] broadened the scope of this provision and required trial judges to ensure the adoption of measures of protection if the victim is an adult in a vulnerable position.[44] It is worth noting, moreover, that such measures of protection, particularly for victims of sexual crimes and gender-based violence, aim at preventing the accused and their lawyers—but not the trial court—from seeing the witness.

c) Special rules on the trial hearing of co-defendants, collaborators of justice, undercover officers

Special forms of examination may also be necessary to protect individuals admitted to special protection programmes and special types of investigators. With regard to the former, Italian law allows the trial hearing of individuals admitted to a witness

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[40] Art. 498(4-*bis*) CCP, introduced by Law 268/1998.

[41] Art. 498(4) CCP.

[42] Art. 498(4-*ter*) CCP.

[43] Law-Decree 93/2013, converted into Law 119/2013.

[44] Art. 498(4-*quater*) CCP. These measures were further strengthened by the legislative implementation of the EU legislation on victims' rights. Thus, Legislative Decree 212/2015, implementing Directive 2012/29/EU, amended Art. 498(4-*quater*) CCP, introduced by Law 119/2013, requiring the general adopton of protective measures of examination of the aggrieved parties whenever they are in a particularly vulnerable condition.

protection programme (especially persons collaborating with justice authorities) by means of specific precautions adopted *ex officio* or at the request of the parties or the authority responsible for ordering the programme or the protective measures.[45] Special measures must also be set up in cases of undercover officers, including foreign police officers, who conduct their investigations pursuant to Law 146/2006, which ratified the UN Convention against transnational organized crime. The Vassalli Code does not provide for an exhaustive set of special protective measures, but, whatever measure is adopted, it must protect the individuals examined by concealing their faces.[46] In the event of a trial hearing of undercover officers in this specific case as well as in the proceedings for mafia-type crimes and other serious offences, procedural law further enhances the protection of the person examined, typically requiring hearings via remote audio-video connection.[47]

In order to avoid risks to the life and physical integrity of the individuals examined and their families, Italian law also requires undercover officers, including foreign police officers, members of information and security services, as well as auxiliary and third parties involved in undercover investigations under Law 146/2006, not to provide their personal information but only the identification details used for purposes of the undercover inquiry.[48] This is a typical case of almost absolute anonymous witness testimony, because the true identity of the person examined must be concealed not only from the defence but also from the competent court. By contrast, the competent prosecutor may request to be informed about the real identity of the individuals involved in undercover investigations.

C. Pretrial investigations, secret evidence, and interference with fundamental rights

1. The need for secrecy, the right to a fair examination, and the effectiveness of confrontation in the pretrial inquiry

It has been noted that the 1988 Code, notwithstanding its attempt to establish new trade-offs between pretrial evidence and the fact-finding at trial, retained the general obligation of secrecy during police and prosecutorial investigations prior to the institution of court proceedings. Pretrial inquiry, indeed, is still governed by the general obligation of the investigative authorities to keep the investigations secret until

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[45] Art. 147-*bis* of Legislative Decree 271/1989, containing the rules implementing the Code of Criminal Procedure (hereafter, RICCP).

[46] Art. 147-*bis*(1-*bis*) RICCP, introduced by Law 136/2010, enacting an extraordinary anti-mafia programme.

[47] Art. 147-*bis*(3)(c, c-*bis*) RICCP.

[48] Art. 497(2-*bis*) CCP, introduced by Law 136/2010 and further enhanced by the anti-terrorism reform of Law 43/2015.

the preliminary phase is completed.[49] It is important to mention that, despite the recent implementation of EU legislation on the right to information[50] and safeguards for victims in criminal proceedings,[51] prosecutors are required to provide the suspect and the victim even the information on the charge only under certain conditions,[52] and, in criminal proceedings for several serious offences, no information at all.[53] Nor were there significant changes in the obligation of the competent authorities to ensure that private parties have access to the information gathered at the pretrial stage.

The lack of knowledge of evidentiary material can have grave consequences for fundamental rights, starting with the right to a fair examination, also in view of the fact that, at the pretrial stage, even though suspects cannot be compelled to give evidence against themselves, they can be forced to appear before the competent prosecutor for an investigative hearing. Clearly, information on evidence gathered against them is a necessary condition for a fair pretrial hearing. Yet, except in case of immediate proceedings,[54] prosecutors are not required to disclose the sources of available evidence,[55] and the suspects' statements can be read out against them at trial where they do not appear in court[56] or where, during a trial examination, inconsistencies arise with their previous statements.[57] The failure to provide information on the evidence gathered by the investigative authorities also entails serious

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[49] Art. 329 CCP.

[50] Legislative Decree 101/2014 implementing Directive 2012/13/EU (hereafter, DirRICP).

[51] Legislative Decree 212/2015 implemented the Directive 2012/29/EU.

[52] Information on the charge, in particular, is ensured through the Notice of pretrial inquiry under Art. 369 CCP. With this Notice, the prosecutor must provide preliminary information both to the suspect and the victim, while informing them of the right to request information on the prosecutorial charge pursuant to Art. 335 CCP. However, since the legislative implementation of the 2014 Directive did not modify the general features of the Notice of information under Art. 369 CCP, there is nothing to ensure that suspects and victims will ever be given information on the charge. The main shortcoming of the current rules is that the duty to inform still only arises where the investigative authorities decide to carry out investigations where the defence lawyer can be involved. Paradoxically, the individuals who are most involved in a criminal inquiry will therefore be granted information depending on the strategy of the prosecutors and the police. A recent legislative reform, however, strengthened the victims' right to information by granting them the right to request information on the course of the investigations by the prosecutor and the police six months after presenting the complaint, provided this does not compromise the secrecy of the pretrial inquiry. See Art. 335(3-*ter*) CCP, amended by Law 103/2017.

[53] Art. 335(3) CCP.

[54] Like direct proceedings, immediate proceedings are instituted with a criminal-law action aimed at opening the trial without the intermediate stage. The conditions of admissibility of the two proceedings are different, however: direct proceedings are initiated in cases of arrest and confession, immediate proceedings in cases of manifest evidence and where the suspect is on remand or on house arrest.

[55] Art. 375(3) CCP.

[56] Art. 512(1) CCP.

[57] Art. 503(5) CCP.

implications where suspects, after being summoned to a prosecutorial hearing or to a hearing delegated to the police, agree to give evidence on issues not exclusively concerned with their own position. In this case, Italian law allows for the competent authority (and even the prosecutorial authority) to summon them to be examined pursuant to the special rules governing the co-accused's witness testimony with legal assistance (*testimonianza assistita*), rules that drastically reduce the scope of their right to remain silent while exposing them to prosecution for false or incomplete statements.[58]

The obligation to maintain secrecy about relevant evidence raises further risks for the right to confrontation during the pretrial inquiry. We saw that Italian law provides a special tool for evidence gathering at the pretrial stages, the so-called '*incidente probatorio*'. The 1988 Code introduced this procedure aimed at obtaining (primarily) evidence under time pressure. Yet subsequent reforms progressively broadened its scope of application: particularly noteworthy is the fact that this procedure may today be used to examine co-defendants even in the absence of any reason of urgency. Even though this hearing is not public, the taking of evidence during *incidente probatorio* must follow the same format governing the taking of evidence at trial.[59] It was precisely this solution that led the drafters of the 1988 Code to provide for the inclusion of all evidence gathered through this special court procedure into the trial file,[60] regardless of whether the urgent reasons that had justified using the *incidente probatorio* procedure, if any, materialized in the subsequent course of proceedings. This arrangement, however, does not entail that all pieces of evidence gathered with this procedure—including indirect evidence—are automatically admissible in court, since at trial, as a matter of principle, the information gathered during an *incidente probatorio* can only be used against defendants who, at the time, were represented by their lawyers and could therefore be actively involved in this judicial procedure.[61]

Given the aforementioned general obligation of secrecy governing the investigative stage, however, it is apparent that the effectiveness of the right to confrontation largely depends on the possibility for suspects or their lawyers to access information on the available evidence and the prosecutorial strategy. While the 1988 Code completely ignored this problem, the Constitutional Court was the first to acknowledge

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[58] Art. 197-*bis* CCP. On this topic see *Conti*, L'imputato nel procedimento connesso. Diritto al silenzio e obbligo di verità. Cedam 2003.

[59] Art. 401(5) CCP.

[60] Art. 431(1)(e) CCP.

[61] Art. 403 CCP. A significant exception are cases where a subsequent unpredictable event makes it impossible to repeat the evidence gathering at trial; in this case, the evidence can be used against a defendant whose lawyer was unable to take part in the *incidente probatorio* procedure, provided the suspicion of guilt against the defendant arose after that event. Moreover, this subjective limitation on using evidence applies only to decision-making at the trial stage; it does not apply to judgments rendered at the pretrial stages (abbreviated proceedings, bargaining procedure, penal order procedure).

the duty of the public prosecutor to disclose prior statements obtained from persons to be examined no later than the day of the court hearing.[62] This was clearly an unsatisfactory solution, often requiring defence lawyers to improvise cross-examinations based on information received at the court hearing. Italian legislature intervened almost ten years after the Code had been enacted[63] and required prosecutors to disclose prior statements by the person to be examined at the latest two days before the oral hearing.[64] The prosecutorial obligation, however, depends on the existence of prior statements by the individuals to be examined, whereas the investigative authorities continue to be subject to the general obligation of secrecy regarding the remaining information gathered. Full disclosure is only required in case of evidence gathered in proceedings instituted for certain serious crimes.[65] Yet even this solution entails relevant human rights risks, especially if information is disclosed on individuals other than those involved in the taking of evidence during the *incidente probatorio* procedure. Therefore, this exception must be restrictively interpreted: full disclosure, in particular, is only justified where the prosecutor requested the gathering of evidence at the pretrial stage.

2. Secret evidence and pretrial restrictions on fundamental rights

From a fundamental rights perspective, the current lack of information about evidence gathered by the prosecution and the police during the pretrial inquiry has even more serious repercussions when intrusive measures are to be taken against the suspect or third parties. Regarding remand detention and further restrictions on liberty, the 1988 Code left it completely up to the competent prosecutor to choose the evidence to be attached to the request for pretrial measures. Several years later, Law 332/1995 attempted to restrict the prosecutorial discretion by establishing the unprecedented duty to disclose exculpatory evidence. Italian legislature, however, retained the prosecutor's power to withhold information on incriminating evidence,[66] a solution confirmed by Legislative Decree 216/2017, which only provided for the obligation to disclose, along with the exculpatory evidence, the records of intercepted conversations, if any. Accordingly, prosecutors continue to retain some discretion in selecting the pieces of evidence to be forwarded to the competent judge for pretrial measures. Similar limits of disclosure apply to the competent court for judicial review (*riesame*), which can be instituted in case of an appeal lodged against

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62 Constitutional Court, dec. 74/1991.

63 Law 267/1997.

64 Art. 398(3) CCP.

65 Art. 393(2-*bis*) CCP.

66 Art. 291(1) CCP.

the judicial order imposing a coercive measure,[67] with the added provision of the obligation to disclose any subsequently gathered exculpatory information.[68]

Such power of non-disclosure in the hands of public prosecutors entails a number of grave risks not only for the defence rights but also for the proper exercise of judicial decision-making. It is true that the information produced by the competent prosecutor may not suffice for the judge to impose pretrial restrictions on liberty and other fundamental rights. Thus Italian law intended to enhance the prosecutorial duty to disclose evidence favourable to the addressee of the pretrial measures by declaring void a judicial order that fails to evaluate not only the exculpatory evidence gathered by the investigative authorities but also the evidence in rebuttal produced by defence lawyers.[69] Yet it is evident that the possibility of starting defence investigations presupposes that the defendant is aware of the proceedings. Moveover, the effectiveness of the prosecutorial duty to disclose exculpatory evidence clearly depends on the discretionary assessment of the meaning of 'exculpatory evidence' by the competent prosecutor. Worse still, Italian case law has provided a somewhat lax interpretation of the 'elements supporting the request', whereby prosecutors can not only select the information to be attached but are not even required to attach the entire pieces of evidence. The Supreme Court confirmed this approach by allowing prosecutors to attach extracts from evidentiary records[70] or summary transcripts of intercepted conversations.[71] It is surprising that neither the 2015 reform of pretrial measures[72] nor Law 103/2017 brought any changes in this respect. Nor was there any step forward as a result of the aforementioned legislative implementation of the rights to information in criminal proceedings, namely Leg. Decree n. 101/2014.

A look at this legal instrument reveals that Italian legislation is not in line with EU law. It is noteworthy that Directive 2012/13/EU made sure that the accused and the suspect have full access to all information essential for an effective challenge of the lawfulness of the arrest or detention in accordance with national law.[73] The EU institutions provided exceptions to this rule when necessary either to protect other individual interests or not to undermine the effectiveness of the criminal investigations. This approach clearly reflects the influence of Strasbourg case law, which, in order to avoid the dangers of arbitrary selection, acknowledged that prosecutors should 'disclose to the defence all material evidence for or against the accused'.[74]

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67 Art. 309 CCP.

68 Art. 309(5) CCP.

69 Art. 292(2-*ter*) CCP.

70 Court of Cassation, dec. of 6 July 2007, *Viapiana*, CED 237266.

71 Court of Cassation, dec. of 27 March 2000, *Giusti Rodriguez*, CED 215848.

72 Law 47/2015.

73 Art. 7(1) DirRICP.

74 The Strasbourg Court adopted this doctrine in *Edwards v United Kingdom*, notwithstanding that it found no infringement of the Convention by considering that the lack of

Yet the Court traditionally justified limitations to the access to incriminating evidence in order not to frustrate ongoing investigations. This approach was adopted, for instance, in the *Jasper* case, in which the European judges, however, pointed out that the limitations on the right to be informed of prosecutorial evidence must be restricted to a minimal extent and that the competent authority must adopt proper means to compensate for them.[75] In the light of this, one can argue that the European Convention requires that clear criteria be established to determine the extent to which limitations can be tolerated and that an independent body be charged with the task of balancing the interests concerned with the selection of the information that can be disclosed to the defence.[76] This also entails the need for the prosecutor to specify the risks that can arise from the access to the file in the individual case. EU legislation takes a similar approach by requiring Member States to 'ensure that, in accordance with procedures in national law, a decision to refuse access to certain materials in accordance with this paragraph is taken by a judicial authority or is at least subject to judicial review'.[77]

Precisely in this respect Italian law continues to give cause for concern. Notwithstanding the 1995 arrangements and all the aforementioned legislative reforms launched in the last years, prosecutors are not required to explain why the disclosure of further pieces of evidence may cause tangible risks in cases of pretrial restrictions on liberty. Even more worryingly, Italian law does not provide any tool for challenging the prosecutor's selection of the materials of the case before a judicial authority, since knowledge of relevant information can be denied not only to the defence but also to the judge competent to order pretrial measures.

Against this background one can truly question whether the prosecutor's discretionary powers to disclose relevant evidence can be sustained from a human rights perspective of criminal justice. With regard to the prosecutorial discretion concerning the right to liberty, it seems to me that this approach not only reveals a paternalistic understanding of the right to defence, which is rarely consistent with its constitutional acknowledgment as an 'inviolable right',[78] but also frustrates the possibility of judicial oversight over the lawfulness of restrictions on liberty.[79] The implications on the right to liberty are even more serious if one takes into account that under Italian law pretrial measures are usually adopted *inaudito reo* and that the first opportunity for the defence to obtain a judicial hearing is after the enforcement of pretrial measures through a special questioning of the defendant by the competent

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information had been remedied in the second instance. See ECtHR, judgment of 16 February 1992, *Edwards v United Kingdom*, Appl. No. 13071/87, § 36.

75 ECtHR, judgment of 16 February 2000, *Jasper v United Kingdom*, Appl. No. 27052/95.

76 *Trechsel*, Human rights in criminal proceedings. OUP 2005, 227.

77 Art. 7(4) DirRICP.

78 Art. 24 Const.

79 Art. 5(3) ECHR.

judge (the so-called 'protective judicial questioning', *interrogatorio di garanzia*).[80] Yet even in this hearing, the judge can be kept in the dark about specific pieces of evidence. Moreover, we saw that Italian law also leaves prosecutors a large margin of discretion in selecting the pieces of evidence to be forwarded to the competent court for the judicial review of coercive measures, and relevant information can generally be withheld from the competent courts for appeals against orders regarding coercive measures. This further example of discretionary power may seem to jeopardize the defendant's right to judicial review of the lawfulness of the deprivation of liberty, as acknowledged by both Art. 5(4) ECHR and Art. 7(1) Directive 2012/13/EU. Thus, the selection of evidence without providing reasons can lead to arbitrary restrictions on the right to liberty, which can not be tolerated under the Constitution[81] nor under the European Convention.[82] This conclusion seems to be exacerbated with regard to prosecutorial discretion in proceedings on the application of measures covertly interfering with fundamental rights, particularly when they are addressed against individuals other than the suspect. Sensitive problems arise regarding interception of communications, since prosecutors are not even required to disclose exculpatory evidence. Moreover, the absence of any statutory limit, along with the fact that prosecutors can, in exceptional cases, order telecommunication intercepts, can lead to unjustified restrictions on the right to respect for private and family life under the ECHR[83] and on the right to free and secret communications recognized by Art. 15 Const. and Art. 7 EU Fundamental Rights Charter.

There can be little doubt that *de lege ferenda* the current set-up should be thoroughly reformed. In particular, it should be avoided that the same prosecutorial authority responsible for the investigations can withhold information from the defence and (albeit exceptionally) order measures affecting the right to free and secret communications. It can no longer be tolerated that covert measures interfering with fundamental rights can be ordered on the basis of incomplete information. To be sure, these large powers of non-disclosure in the hands of public prosecutors do not automatically entail an equally wide margin of the applicable standards of evidence. But it is clear that despite the rigorous rules governing judicial decision-making, the judge's assessments can be compromised by the lack of disclosure or the partial disclosure of evidence, which often leads to the enforcement of unnecessary or disproportionate coercive measures against the individuals under investigation.

Furthermore, even the independence of the authority responsible for the oversight over the lawfulness of intrusive measures may be an insufficient safeguard if it can also be denied the necessary information. Therefore, disclosure to the competent

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[80] Art. 294 CCP.

[81] Art. 13 Const.

[82] Art. 5(1) ECHR.

[83] Art. 8 ECHR.

judge should always be ensured. The main problem involves the information due to the individuals concerned. We saw that even the solution adopted regarding pretrial restrictions on liberty cannot be sustained. In the light of this, the most coherent solution may seem to be to enhance the prosecutor's duty of information by granting defence lawyers full knowledge of the evidence gathered by the investigative authorities both in favour and against the defendant, while requiring them to withhold this information from their clients.

Ultimately, we should remember that the Italian legislature increased the protection of individuals concerned by extending some rules governing the use of indirect evidence at trial to proceedings aimed at the application of pretrial measures of coercion and control as well as communications intercept.[84] Thus, the decision-making process on the adoption of pretrial measures is governed not only by the rules regarding the assessment of co-defendants' statements on the basis of corroborating evidence and the exclusionary rules on the use of communication intercepts but also by specific provisions on hearsay evidence. As noted, such measures cannot be ordered based on information provided by police officers or agents who refuse to divulge the names of their informants or on the basis of testimony from a witness who refuses or is unable to provide the source of information.[85] We also saw that the prohibition of untested informer evidence also applies to the judicial decision on ordering the interception of (tele)communications (today, ultimately through spyware).[86] Nonetheless, the fragmentary nature of this reform, relating only to specific rules on fact-finding at trial, led to the return to old practices. For instance, the Supreme Court recognized that in the light of their general power of selection, prosecutors can withhold the names of the individuals who rendered incriminating evidence against the person for whom a pretrial restriction on liberty is requested.[87] Italian courts have often adopted a similar conclusion in relation the legislative extension to the proceedings on wiretapping of the ban on using evidence obtained by police informants if the latter were not examined as witnesses. Remarkably, the Supreme Court considered this provision as only prohibiting the exclusive use of confidential evidence, which could instead be used together with corroborating evidence.[88]

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[84] Above, III.B.2.a.

[85] Art. 273(1-*bis*) CCP.

[86] Art. 267(1-*bis*) CCP.

[87] Court of Cassation, dec. of 15 October 2003, *Abbruzzese*, Cassazione penale 2004, 3694.

[88] Court of Cassation, dec. of 5 March 2008, *O.L.M.E.*, CED 239458.

D. Charging decision and the right to access the information gathered by the investigative authorities

As noted, as a matter of principle, the obligation of secrecy ends after pretrial inquiry has been completed. Consequently, defendants also have the right to access the information gathered by the investigative authorities at the pretrial stage that provided the foundation for the competent prosecutor's decision to bring them to court. The 1988 Code granted this right by providing the accused full knowledge of the prosecutorial and police evidence after court proceedings had been instituted, together with the preferment of formal charges.[89] Nevertheless, this solution had relevant consequences for the defendants: specifically, it deprived them of the possibility of having, prior to the indictment, full knowledge of the evidence gathered and, therefore, of opposing the initiation of undue criminal proceedings. It took more than ten years, however, before the Italian legislature intervened. By introducing an unprecedented Notice of Completion of the pretrial inquiry, Law 479/1999 anticipated the disclosure of information gathered by the prosecutor and the law enforcement authorities during the pretrial inquiry. It is worth noting that, whereas access to information on prosecutorial and police evidence had long been anticipated for the defendant, recent legislative intervention extended the rights to information also to victims in specific cases.[90] Furthermore, it should be taken into account that this tool has a limited scope of application, thus covering only ordinary proceedings instituted through the prosecutorial request for the intermediate stage[91] and proceedings before single judges. By contrast, under prevailing case law, it cannot be applied to alternative proceedings, i.e. to the aforementioned proceedings aimed at a decision on guilt prior to trial (abbreviated proceedings, penal order procedure, and bargaining proceedings) and to proceedings aimed at the immediate institution of the trial stage (immediate and direct proceedings).

After court proceedings have been instituted, prosecutors are required to grant the accused and other private parties full access to the evidence collected by the investigative bodies and any supplementary information gathered after commencement of

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[89] Art. 416(2) CCP.

[90] Thus the 2013 legislative reform on gender-based violence amended Art. 415-*bis* CCP by requiring that, in cases of mistreatment within the family and stalking, Notice also be sent to the victim's lawyer or, if no lawyer has been appointed yet, to the victim. The merits of this legislative reform are evident. For the first time, victims are involved in the prosecutorial assessment of the need to initiate the court proceedings. This goal, however, can be frustrated by several factors. In particular, there are still grave deficiencies in the rules on the notification of victims. Although the Code requires that, in the absence of their lawyer, victims must be notified of the completion of the pretrial inquiry, there is nothing to ensure that they will also be informed personally. Thus Notice can also be served to the municipality of the place of residence, or, where this is unknown, to the registry of the court. See Art. 155 CCP.

[91] Art. 416 CCP.

judicial proceedings.[92] Although the Constitutional Court has long recognized the general scope of this obligation,[93] Italian courts nonetheless widely weaken the rights to information of private parties by excluding the invalidation of criminal proceedings in cases of partial disclosure. Furthermore, it should be taken into account that the duty of full disclosure is less strict than might be expected. Prosecutors have a considerable power of selection: particularly in cases of complex investigations carried out against several individuals, they are required to insert into the trial file the information specifically regarding the defendants indicted and the charges pressed against them.[94] This leaves a wide margin of discretion to the competent prosecutor, a result that raises serious human rights concerns, also in view of the fact that Italian law does not provide any form of judicial oversight over the prosecutorial selection of available information. This set-up can have problematic implications from the perspective of both constitutional law and international human rights law in particular, since partial disclosure can negatively affect the right to defence, depriving defendants of the right to properly prepare their own defence strategy.[95] This prosecutorial discretion seems to increase the shortcomings noted regarding pretrial inquiry, in the light of the requirement of a judicial review of the decision to withhold information from suspects or defendants laid down by the Directive 2012/13/EU. Nevertheless, Italian courts have generally underestimated this problem, and even after the 1999 constitutional fair trial reform, the Supreme Court rejected any questions on constitutionality and therefore did not refer the issue to the Constitutional Court.[96]

E. Secret evidence and defence strategy

The Italian legislature's choice to divide the evidence gathered in a criminal proceeding into separate files at the end of the pretrial stage raises another question, namely how and to what extent the defence should disclose evidence to the prosecutor and the competent court. This question has become highly problematic since the enactment of a legislative statute on investigations by the defence through the aforementioned Law 397/2000. This legislative reform provided for the possibility of defence lawyers of private parties (therefore not only of defendants but also the victim, the aggrieved party, and the person responsible for civil damages) to set up a formal file for the defence before the competent judge for the pretrial inquiry (*fascicolo del*

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[92] Art. 419(3) CCP. Apparently, disclosure may also lie with the lawyer with regard to information gathered after court proceedings have been initiated. However, this obligation must be interpreted in the light of the different obligations the prosecutor and the private parties' lawyers owe to each other.

[93] Constitutional Court, dec. 145/1991.

[94] Art. 130 RICCP.

[95] Arts. 6(3)(b) ECHR and 111(3) Const.

[96] Court of Cassation, 7 July 2006, *Amato et al.*, CED 234968.

difensore). However, the autonomy of this file vanishes at the time of file selection, as the information gathered by attorneys and attached to their files is incorporated into the prosecutorial file.[97] Moreover, this perspective of analysis highlights a different aspect of the problem under examination in this study, a problem related to the conditions allowed under the Italian model of fair trial for the gathering of secret evidence by the defence, particularly taking into account the requirements set out by constitutional law.

At first glance, this possibility may seem to be the obvious consequence of the fact that defence investigations are carried out in the interests of private parties. Yet the 2000 legislative reform largely tailored the rules on defence investigations to those regarding the prosecutorial inquiries and construed even investigative measures mostly inspired by the corresponding means of investigation as falling within the competence of public prosecutors.[98] Obviously, this approximation ended with the use of coercive powers, which defence lawyers lack during their investigations.[99] As noted, Law 397/2000 also allowed the defence to have an official file set up at the office of the competent judge for the pretrial inquiry. This innovation enabled private parties to put exculpatory evidence at the disposal of the judicial authority without having to forward it to the competent prosecutor, as happened in the past, or to request law enforcement bodies to carry out investigations especially in favour of defendants. Italian case law also contributed to these results, strengthening the responsibility of defence lawyers particularly with regard to the collection of oral evidence.[100]

The enhancement of the investigative powers of the defence lawyers, however, can lead to unjustified imbalances in favour of private parties. This is mainly due to the fact that, unlike prosecutors, lawyers are not required to incorporate all available information into the official file. This result can undermine the principle of equality of arms, making it impossible for both the decision makers and the prosecutor to verify the information available to the defence at a certain stage of proceedings. The right of the defence not to disclose relevant information is also of utmost importance

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[97] Art. 391-*octies* CCP.

[98] This is particularly the case for witness questioning by defence lawyers, technical surveys ordered by lawyers, and so on.

[99] In particular, Law 397/2000 gave formal status to testimonial interviews conducted by the defence lawyer, interviews that were already common practice. See Art. 391-*bis* CCP.

[100] This is a very sensitive issue with a view to a correct understanding of the institutional position and the responsibility of defence lawyers. The Joint Sections of the Supreme Court acknowledged that lawyers, despite being free to receive informal statements, must draw up complete documentation if they choose to record the statements obtained from informants, with the result that incomplete documentation makes them liable for falsification of documents while acting in an official capacity. From this it follows that the responsibility of lawyers depends on their choice to draw up official records of the statements collected or not. Cf. Supreme Court, Joint Sections, judgment of 28 June 2006, *S.L.*, CED 234214.

for purposes of admitting evidence that becomes unavailable at trial.[101] Although similar conditions to those governing the admission of out-of-court evidence gathered by the investigative authorities apply to the defence,[102] the failure to disclose relevant pieces of evidence makes it difficult for both the trial court and the prosecutor to confirm whether the circumstances that rendered the evidence sought unavailable at trial were known or foreseeable at the pretrial stage. Of course, this does not mean that the accused and further private parties should be burdened with disclosure obligations almost equal with the prosecutorial duty to disclose evidence. But a mechanism should be introduced to avoid that the decision-making process as well as the defence rights of other parties are compromised by the lack of disclosure of relevant information.

IV. Conclusion

Despite the Vassalli Code's inspiration by features of the adversarial system, Italian law is still widely characterized by secret investigations and the use of evidence concealed from the defence in the areas of both domestic and transnational criminal justice. Furthermore, disclosure of relevant evidence is often withheld even in cases of intrusive measures, not only from the accused and other private parties but also from the competent judge. This set-up greatly jeopardises both the rights of defence and the possibility of reliable fact-finding. Further concerns arise from the extensive use of indirect evidence and alternative forms of oral evidence, particularly where technical measures of protection limit the right of the accused to confrontation to an extent incompatible with the general requirements for a fair trial. The adoption of a human rights perspective allowed us to identify some of the main deficiencies of Italian procedure law in this regard, while highlighting the qualitative conditions under which the use of indirect and secret evidence can be tolerated in a model of criminal justice oriented towards international human rights law as well as constitutional and EU law.

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[101] Art. 512 CCP.

[102] Art. 391-*decies* CCP.

Secret Evidence in Criminal Proceedings in the Netherlands

Sven Brinkhoff

I. Introduction

In the Netherlands there are a few ways that individuals as well as national and foreign government organizations frequently provide information to the police and the Public Prosecutions Department in a covert, undisclosed way. For example, civilians can pass on tips anonymously via the Dutch Crime Stopper Program (*Meld Misdaad Anoniem*, Report Crime Anonymously). These anonymous tips are then forwarded to the police. Foreign (investigative) authorities also furnish information to the Dutch police in a covert way. The American Drug Enforcement Administration (DEA) is a case in point. In this chapter about the Dutch situation on Secret Evidence in Court Proceedings, I will use examples to discuss the work of two bodies in the Netherlands that provide undisclosed information, namely the police intelligence service TCI (*Team Criminele Inlichtingen* i.e. Criminal Intelligence Team) and the AIVD (*Algemene Inlichtingen- en Veiligheidsdienst* i.e. General Intelligence and Security Service). In criminal proceedings in the Netherlands, the undisclosed information provided by these intelligence services can be used to initiate criminal investigations, provide justification for using coercive measures and investigative powers, and these data may even be used as evidence.[1]

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[1] In the Netherlands there are non-criminal regimes leading to restrictive measures against an individual based on undisclosed information. By way of example I will discuss the Tem-

Given the definitions used in this book, the information provided by the aforementioned intelligence services in their reports, if it is used in court proceedings, will be labelled as incriminating indirect evidence. As I will discuss further below, this means that the original information carrier (a witness statement, document, or object) is in fact fully or partially concealed from the suspect and his or her lawyer in the report which these intelligence services provide to the police. Based on these reports, coercive measures and investigative methods may be applied against the suspect. The report itself becomes part of the case file and is thus disclosed to the suspect.

In the Netherlands incriminating indirect evidence may also be used by the trial court in criminal proceedings. According to Article 344a Dutch Code of Criminal Procedure (CCP), the judicial finding of facts cannot be based solely or to a decisive extent on evidence whose source has not been disclosed, but needs to be corroborated by additional evidence. Incriminating indirect evidence may arise from the Threatened Witness Act. The Code of Criminal Procedure provides the legal basis for the investigative judge (*rechter-commissaris*) to conduct *in camera* hearings of undisclosed witnesses. The Threatened Witness Act, which is incorporated in Article 226a–226f CCP, is an example hereof. The testimony of these kinds of witnesses will then be forwarded to, and can be used by, the trial judges in their judgment without disclosing elements (mostly concerning the identity of the witness) of these testimonies to the defendant.

Before I elaborate on incriminating indirect evidence, I will first look at the pre-trial phase and the role of the investigative judge in Dutch criminal proceedings. The pre-trial investigation is mainly performed by the police. The public prosecutor is (formally) in charge of the police investigation. Article 132a CCP makes this very clear. For instance, the public prosecutor decides what kind of coercive measures and special police powers have to be used and is also responsible for the case file. In the Dutch criminal justice system, the public prosecutor is ultimately responsible for the criminal investigation and for ensuring that the police comply with all statutory rules and procedures. Formally, the public prosecutor is the senior investigator, and although, in practice, the police handle most cases without prior consultation with the public prosecutor, the latter will be informed by the police on content and pro-

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porary Act on Administrative Counter-terrorism Measures (*Tijdelijke wet bestuurlijk maatregelen terrosismebestrijding*), which was implemented in 2017. Based on Article 2 of this Act, the Minister of Justice may summon a person who can be linked to a terrorist act or to participation in a terrorist organization to frequently report in person to the police station and to refrain from being present at certain places in the Netherlands or near certain persons. According to Articles 3 and 4, the Minister of Justice can, in the interest of national security, even prohibit a person to leave Dutch territory for a period of six months. These administrative counter-terrorism measures will be based, amongst others, on official reports of the AIVD. As discussed earlier, these official reports contain undisclosed information. As stated in Article 5 Temporary Act on Administrative Counter-terrorism Measures, an individual can appeal against these decisions of the Minister of Justice. Given the fact that this Act has only just been implemented, case law is not (yet) available.

gress of the investigation, particularly in important criminal cases. In the more serious cases, the public prosecutor can give detailed instructions to the police, for example to reduce or extend the scope of investigation, or to contact experts in certain types of expert investigations. In the pre-trial phase the investigative judge also plays a role. The task of this judge is to supervise the progress of the ongoing police investigation (Article 180 CCP), to hear witnesses (Articles 181–182 CCP), and to be involved in pre-trial detention. For instance, he or she can order the suspect to remain in custody (bewaring, Article 63 CCP) for fourteen days at the request of the public prosecutor. The role of the investigative judge is also significant in the Threatened Witnesses Act and the Protected Witnesses Act.

In the following I will describe how the information of the above-mentioned intelligence services finds its way into criminal proceedings in the Netherlands, how this information is used in criminal proceedings, and in which way the non-disclosure of the backgrounds of such information is ensured by provisions, legal or otherwise. In this context, I will mention the hazards and objections attached to the information. I will also discuss the possibilities for the defence attorney and the trial judges to assess the reliability of the information and the legality of the way in which this information was obtained. In this context, I will draw on a few concrete cases in which the protection of information generated heated discussions. After all, it follows from legal practice that the use of undisclosed information in criminal cases often results in a clash between the interest of protecting the information and the interest of the defence ensuing from Article 6 European Convention on Human Rights (ECHR) on the right to a fair trial. I will make a few recommendations with regard to how the Dutch legislator can strike a better balance between those conflicting interests. Furthermore, I will discuss the existing forms of undisclosed incriminating evidence in the Netherlands.

II. The use of incriminating indirect evidence

A. Grounds for non-disclosure, competent authority, and form of indirect evidence

As noted above, the reports of the intelligence services TCI and AIVD can lead to the start of the criminal investigation and may, for the most part, provide justification for the deployment of coercive measures and investigative powers. Theoretically, these reports may also be used as evidence, but this does not often occur in practice. Undisclosed indirect evidence can also arise, for example, from anonymous tips from the Dutch Crime Stopper Program or organizations such as the DEA.

Case law of the Dutch Supreme court shows that coercive measures such as the arrest, confiscation, bodily searches, and search warrants can be deployed solely based on these types of information. In fact, the Dutch Supreme court has repeatedly

stated that such undisclosed information can only lead to the assumption of 'a reasonable suspicion of guilt', which is required under Article 27 CCP for the aforementioned coercive measures.[2] This kind of undisclosed information may even lead to pre-trial detention. In general, such information must then be supported by other incriminating information discovered by the police during their investigation, such as witness statements, DNA-evidence, and information acquired through a wiretap.

The reports provided by the intelligence services TCI and AIVD will always be anonymized and as such are provided to the police, public prosecutor, defence attorney, and the investigative and the trial judge. Therefore, these parties remain in the dark as to which methods were used to obtain that information, nor are they informed of the identity of the source of the information.[3] As I will describe below, the reason for this protection may be the interest of protecting the human source of the information, the interests of the investigation, and/or the interest of national security.

1. The TCI (Criminal Intelligence Team)

The first example of an organization that provides undisclosed information or incriminating indirect evidence to be used in criminal proceedings is the Dutch Criminal Intelligence Team.[4] Each regional police unit has such a team. Under the supervision of a specific public prosecutor, the TCI seeks to obtain information that may be relevant to criminal proceedings by getting in touch with (criminal) informants, in other words, running the informants. In general, the focus of the TCI is to obtain information about serious and/or organized crime (for example drugs and weapons trafficking).

The human source of the TCI can provide information about the goings-on within the criminal fraternity, for example the imminent delivery of hard drugs or the location of a firearm. This information is recorded in internal TCI documents, the so-called journals. The data provided by the informant are then reviewed internally, they may be combined with other police information and then covertly provided to the tactical criminal investigation department by means of the anonymized TCI police report. The tactical criminal investigation department of the police, which is not

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[2] See HR 1 February 2000, *NJ* 2000, 264, HR 22 December 2009, ECLI:NL:HR:2009:BJ8622, HR 30 March 2010, *NbSr* 2010, 168, HR 29 November 2011, ECLI:NL:HR:BP8497, HR 5 March 2013, *NJ* 306 and 307 with annotation by Reijntjes, HR 16 September 2014, *NJ* 2014, 461 with annotation by Schalken, and HR 5 December 2017, ECLI:NL:HR:2017:3057.

[3] See also extensively on this subject S Brinkhoff, *Startinformatie in het strafproces* (diss. Nijmegen), Deventer: Kluwer 2014, 91–138 (i.e. 'Initial information in criminal proceedings', dissertation).

[4] For the rules of the TCI, see among other sources 'Besluit verplichte politiegegevens' (i.e. Decision Required Police Data), *Stb*. 2012, 465.

informed about the identity of the informant, may, based on this report and in consultation with the public prosecutor on the case, decide to start an investigation and subsequently deploy coercive measures. As stated earlier, the case law of the Dutch Supreme Court shows that coercive measures such as the arrest, confiscation, bodily searches, search warrants, and wiretap can be deployed solely based on this undisclosed information. In theory, this report can even be used as evidence. In theory, because Article 344a CCP states that information originating from an anonymous human source can only be used as evidence if the defence has been able to hear the anonymous source. In practice, the hearing of the informant of the TCI hardly ever occurs because the TCI and the specific public prosecutor will, as stated earlier, hardly ever allow this.[5]

The definition of informant in Article 12(7) Dutch Police Data Act (*de Wet Politiegegevens*, WPG) clearly shows that the informant of the TCI provides information only if his or her anonymity is guaranteed. After all, his or her life or that of third parties might be jeopardized if someone about whom information is provided finds out how the police obtained that information. This is why the TCI does not include the name of the informant in the TCI police report, and his or her identity is not revealed to other parties in the criminal proceedings, including the judge and the defence. These other parties only see the anonymized TCI police report. However, a specific legal provision to enforce the protection of the informant's identity does not exist. This obligation has only been articulated in internal regulations stating that once you are an informant, the TCI and the special public prosecutor (*TCI-officier van justitie*) will protect your identity.

The special public prosecutor governing the TCI is the authority who denies disclosure of the informant's identity. This public prosecutor has authority over the TCI and, amongst other things, decides if a person will be used as informant. However, as I will discuss later, the trial judge may order the public prosecutor to hear the informant as a witness. In the majority of cases, this public prosecutor refuses to hear the informant as a witness. In consequence of a refusal to comply with such order, the case of the Public Prosecutions Department is held to be inadmissible.[6] Still, from time to time an informant is in fact heard as a witness. In that case the investigative judge will hear the informant. Case law shows that in such a situation the informant, given the fact that his or her life may be in danger when his or her identity is revealed, is heard by using the Threatened Witness Act (Article 226a–226f CCP).[7]

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[5] See for instance HR 2 February 2010, NJ 2010, 246.

[6] See Court of Appeal in 's-Hertogenbosch 20 December 2007, *NbSr* 2008, 51 and Court of Appeal in 's-Hertogenbosch 23 December 2011, ECLI:NL:GHSHB:BV0293, District Court of Oost-Nederland 2 January 2013, ECLI:NL:RBON:BY7575 and District Court of Amsterdam 25 March 2014, ECLI:NL:RBAMS:2014:1460.

[7] See District Court of Noord-Holland 27 October 2015, ECLI:NL:RBNH:2015:9231.

2. The AIVD (Dutch General Intelligence and Security Service)

A second example of an organization providing undisclosed information or incriminating indirect evidence is the AIVD.[8] It is important to know that the aim and scope of work of this intelligence service is to protect the national security and explicitly not to investigate criminal offences. The AIVD has no police powers. This intelligence service may, however, discover criminal offences during their work. In such a case the service shares information with the police that is relevant for a criminal proceeding via an official report which is similar in form and contents to the TCI police report.[9] The interests of national security and protection of human sources are at the heart of this covert manner of furnishing information. The legal underpinning for this obligation of confidentiality can be found in Articles 23 and 135 Dutch Intelligence and Security Services Act 2017 (*Wet op de inlichtingen- en veiligheidsdiensten 2017*, WIV). The AIVD has a number of investigative methods at its disposal to obtain information, such as observation, searching confined places, and tapping means of telecommunication, which are elaborated in Articles 17–60 WIV 2017. The AIVD also obtains information by deploying human sources. The interaction with human sources is governed by the previously mentioned Article 23 WIV 2017. It follows from this Article that the AIVD is required to keep sources confidential and to guarantee their safety. If the AIVD deploys these methods and obtains information relevant from a criminal law point of view, the Service may decide on the grounds of Article 66 WIV 2017 to provide the Public Prosecutions Department with an official report.[10] Prior to this, there will be an extensive internal assessment of the information within the AIVD, and the information will be reviewed externally

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[8] See also S Brinkhoff, *Startinformatie in het strafproces* (diss. Nijmegen), Deventer: Kluwer 2014, 183–234, S Brinkhoff 'Ambtsberichten van de AIVD: belangrijke maar met risico's omgeven schakel in de strafrechtelijke aanpak van jihadisme, *NJB* 2014, 2633–2639 (i.e. Official reports from the AIVD: important but risky link in the criminal law approach of jihadism) and F Krips, 'Over de bruikbaarheid van AIVD-informatie in strafzaken' (i.e. About the usefulness of AIVD information in criminal cases), in: Preadviezen 2009 van de Vereniging voor de vergelijkende studie van het recht van Belgie en Nederland, Den Haag: Boom Juridische uitgevers 2009 (i.e. Preliminary Reports 2009 of the Association for Comparative Studies of Law in Belgium and the Netherlands).

[9] In the period from 2004 to 2005, a few hundred official reports were issued per year. In recent years, that number has slumped to a few dozen a year. See the Supervision reports nos 9a and 29 by the CTIVD (Commissie van Toezicht op de Inlichtingen- en Veiligheidsdiensten, the Committee of Supervision on the Intelligence and Security Services), which can be accessed via www.ctivd.nl. Because of the surge in jihadism, more official reports may be expected to be issued.

[10] The Guide on furnishing information of and by the AIVD and MIVD (Military Intelligence and Security Service) describes the procedure for the transfer of information between the intelligence services, the police, and the Public Prosecutions Department. See D van der Bel, A M van Hoorn and J J T M Pieters, *Informatie en Opsporing*. *Informatieverwerving, -verwerking en -verstrekking ten behoeve van de opsporingspraktijk*, Zeist: Uitgeverij Kerckebosch 2013 (i.e. Information and Investigation: Obtaining, Processing and Furnishing information for the Benefit of Investigations).

by a national public prosecutor in charge of counter-terrorism. This national public prosecutor reviews every official report of the AIVD before it is sent to a local public prosecutor. The fourth paragraph of Article 66 WIV 2017 establishes a right to scrutinize the information at the heart of this official report to enable an effective assessment by this public prosecutor. To this end, Article 66 WIV 2017 gives this public prosecutor the right to search the internal systems and databases of the AIVD to assess whether the information in the official report is reliable.

Based on the official AIVD report, a decision may be made to start a criminal investigation and to deploy coercive measures. The latest numbers show that in the 2005–2010 time frame a total of 132 of these official reports were sent to the public prosecutor. These reports may provide information about drugs and weapons trafficking. Substantial parts of these reports, however, will be information about alleged terrorism. As of 2006 the Dutch legislator made it possible in Article 344(1)(3) CCP to use official AIVD reports as documentary evidence. Yet, legal practice shows that the official report is hardly ever used as evidence, mostly for the same reason as mentioned before in the context of the TCI report.[11]

B. Access to an undisclosed source for courts and suspects

In criminal proceedings in the Netherlands, the defence, public prosecutor, and (trial) judge have legal options available to verify incriminating indirect evidence and the underlying undisclosed information. It should be pointed out that the trial judge never has more information on the matter than the defence and the public prosecutor. These options include the inspection of non-anonymized internal documents of intelligence services such as the TCI and the AIVD and the questioning of (legality) witnesses. A legality witness is a witness who is in a position to testify about the legality of the information gathering, which might include the anonymous source of an intelligence report. With these legal options it is possible to gain more insight into the background of undisclosed information and to assess the reliability and the legality of the way it was obtained.

1. Internal documents

As indicated above, the first option for verifying intelligence reports is to provide internal documents for inspection to the defence, public prosecutor, and (trial) judge. Based on these documents the aforementioned parties can gain insights into the background of evidence whose source has not been disclosed. Article 149a CCP plays a key role in the category of legal provisions that require relevant procedural docu-

[11] See for instance District Court Rotterdam 12 April 2017, ECLI:2017:2713 and District Court Rotterdam 25 October 2017, ECLI:2017:8870.

ments to be added to the case files. This Article stipulates that 1) during the preliminary investigation proceedings the public prosecutor is responsible for the composition of the procedural documents and 2) that the procedural documents include all the documents that may be relevant to the decisions the court must make during trial. The latter stipulation is a codification of the relevance criterion formulated by the Dutch Supreme Court.[12] This provision must be read in connection with Articles 30–34 CCP.[13] These Articles state that the suspect may request the public prosecutor to add clearly specified documents as procedural documents. These stipulations therefore constitute a legal basis to add to the case files (internal) documents relating to the undisclosed source of incriminating information and therefore to verify the undisclosed information. However, this does not mean that the public prosecutor has access to the internal documents, for instance of the TCI and AIVD. Consequently, the defence may request that certain documents be added to the case file which even the public prosecutor cannot access.

However, there are also stipulations providing justifications for withholding such documents from the defence. After all, in Article 34(4) and Article 149(b) CCP, the Dutch legislator stipulated in a similar way that the public prosecutor, having been authorized by the investigative judge, may abstain from adding documents to the case file. There are three circumstances in which this may be the outcome, namely 1) the fact that a witness (such as a TCI informant) would be seriously inconvenienced as a consequence, 2) the interests of the investigation would be harmed (for instance when information about a covert police operation may be submitted to the case file), or 3) the interest of national security would be harmed. Thus, these three legal provisions make it possible to withhold the (internal) documents relating to undisclosed information.

Looking at the actual options for verification, it becomes clear that the ruling by the European Court of Human Rights (ECtHR) in the *Fitt* case is relevant here.[14] The ECtHR ruled in this case that the right of access to all relevant evidence or material in criminal proceedings is not absolute. Sometimes it can be necessary to withhold certain evidence or material from the defence in order to guarantee the rights of

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[12] See HR 4 January 2000, *NJ* 2000, 537 with annotation by Schalken. In this context I must also refer to A A

Franken, 'Regels voor het strafdossier', *D&D* 2010, pp. 403–418 (i.e. Rules for the criminal file).

[13] See R H Hermans, 'Kennisneming van processtukken in het voorbereidend onderzoek in strafzaken', *D&D* 2009, pp. 494–526 and T Prakken, 'Interne openbaarheid in het strafproces: een bedreigd goed', *NJB* 1995, pp. 1451–1458 (i.e. 'Taking note of procedural documents in the preliminary investigation in criminal cases' and 'Internal disclosure in criminal proceedings: a commodity at risk').

[14] ECtHR 16 February 2000, *EHRC* 2000, 32 (Fitt). See also ECtHR 22 July 2003, *EHRC* 2003, 81 (Edwards and Lewis).

somebody else or an important general interest (including the interests of investigations). The ECtHR also considered that such restrictions on the rights of the defence have to be strictly necessary and that, in addition to this, the restrictions of the rights of the defence need to be balanced by good judicial procedures.

A ruling of the Dutch Supreme Court of 5 October 2010 is equally pertinent.[15] In this ruling the Supreme Court stressed the importance of proper internal documentation of the phase preceding the start of investigation proceedings—this is the phase in which both the TCI and the AIVD can operate—and it implies that it may be necessary to add these internal records to the case files with a view to allowing an effective verification (of the legality of evidence). A case in point is one where the suspect stated that he had been instigated by the informant of the TCI.[16]

In a ruling dated 5 December 2000, the Dutch Supreme Court had already stated its point of view on this matter specifically in relation to the TCI.[17] In the case at hand, the lower court had rejected the request by the defence for access to the journals of the runners, because the runners had already been questioned in court. These journals contain the contact with a specific informant as well as the information he had provided. Thus, the court denied access to the journals. The Supreme Court followed the same line of reasoning and referred to the conclusion of the Advocate General. The latter had argued that if there was no reason to doubt the veracity of the statement made by the runners about the contents of the journals, their content was already known, and there was no need to peruse the journals.

A ruling of the Court of Appeal in The Hague on 5 July 2001 is also exemplary for the fact that decisions to add internal documents to the case file are not lightly or easily made.[18] In this case, the Public Prosecutions Department refused to submit internal TCI documents because of the importance of protecting the informant's identity. This position by the Public Prosecutions Department made it impossible for the Court of Appeal to carry out the investigation it deemed necessary in a way that was compatible with fair trial proceedings, where the interests of the defence are sufficiently taken into account. In consequence, the case brought by the Public Prosecution Department was declared inadmissible.

The District Court of Amsterdam ruled on 26 July 2013 in a similar vein. In that case, the defence attempted to have internal TCI documents added to the case file.[19] The investigative judge, who himself had no access to the internal documents, gave

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[15] HR 5 October 2010, *NJ* 2011, 169 with annotation by Schalken.

[16] See HR 29 June 2010, ECLI:NL:HR:BL0655.

[17] HR 5 December 2000, *NJ* 2001, 206.

[18] Court of Appeal in The Hague 5 July 2001, *NJ* 2001, 590. See also District Court of Rotterdam 22 May 2006, *NbSr* 2006, 322 and Rb. Rotterdam 30 September 2003, *NbSr* 2003, 398.

[19] District Court of Amsterdam 26 July 2013, ECLI:NL:RBAMS:2013:5180. See for a familiar case District Court of Rotterdam 4 July 2017, ECLI:RBRT:2017:5125.

the defence two reasons for turning down their request: besides citing the interest of protecting the informant's identity, the examining judge found that the internal TCI documents were not procedural documents in the sense intended by Article 149a CCP. These examples demonstrate that, despite legal provisions stipulating a general duty of the prosecutor to add relevant procedural documents to the case files, it is far from easy for the defence to ensure that non-anonymized (internal) documents that are at the heart of the undisclosed information are added to the case file. The public prosecutor, the investigative judge, as well as the trial judge may deny this access.

2. Questioning (legality) witnesses

To verify intelligence reports, witnesses can also be questioned in a special way. These witnesses may be the human source of the report, an informant, or an employee of the intelligence service that provided the information contained in the report.

First, the relevant provisions in this context are Articles 187b and 293 CCP. On the basis of Article 187b CCP, during an examination of a witness, the investigative judge can prevent the witness from answering a question that may involve divulging the source of an intelligence report; the trial court can do the same based on Article 293 CCP.[20] Second, according to Article 187d CCP, if the public prosecutor so demands, the investigative judge can prevent answers relating to the methods used by the TCI or the AIVD and that were provided during an pre-trial examination of a witness from coming to the attention of the defence.

It is also possible to take measures to protect the identity of the witness during the examination (such as non-disclosure of name, address, visually concealing the witness from the defendant (also from his or her lawyer, disguising the voice of the witness) on the basis of Article 190(3) CCP (investigative judge) and Article 290(3) CCP (trial judge). A more far-reaching provision to conceal the identity of a witness has been included in the scheme for threatened witnesses of Article 226a–226f CCP. This provision is used when a witness fears for his or her live when they would be forced to give a statement at a public hearing. These witnesses will then be questioned by the investigative judge in a closed setting without the defence having any knowledge of their identity. Finally, there is also a provision for the protected witnesses in Article 226m–226s CCP. This scheme only makes it possible for AIVD employees to be questioned about the backgrounds of the official report in a closed session in the privacy of the investigative judge's offices. The written statement of the investigative judge may then be used as evidence.

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[20] In this context see P van der Kruijs, 'De informant', *NJB* 2001, pp. 391–393 and HR 17 March 1981, *NJ* 1981, 382 with annotation by Van Veen, HR 2 March 1982, *NJ* 1982, 460 with annotation by Van Veen, HR 5 October 1982, *NJ* 1983, 297 with annotation by 't Hart and Court of Appeal in 's-Hertogenbosch 4 June 2010, ECLI:NL:GHSHE:BM6781.

Looking at a few reported examples of verification through the questioning of witnesses, the first important case is the ruling of the Dutch Supreme Court of 2 February 2010.[21] In this case, the defence put it to the judge that an informant was probably in possession of exculpatory information. The court decided to question the informant about this, the public prosecutor refused, and subsequently the prosecution's case was declared inadmissible. The Public Prosecutions Department appealed and argued in cassation that an informant cannot qualify as witness. The Dutch Supreme Court rejected this argument, referring to the conclusion of the Advocate General, and also ruled that the Court of Appeal had correctly explained why in this case the informant had to be questioned and why questioning the head of TCI would not suffice. See in the same regard also the Supreme Court judgment of 2 December 2017, in which the Court of Appeal's decision to refuse hearing the informant who was probably in possession of exculpatory information was reversed.[22] In all likelihood, the Supreme Court in both cases reasoned this way because the informant was a key witness. In actual fact, these cases share a refusal to divulge the identity of an informant who is to be summoned as a witness. The possibilities of hearing an informant as a witness are thus slim. Even if a questioning of the informant is suggested using the scheme for threatened witnesses as laid down in Article 226a–226f CCP. The *Kok* case of the ECtHR, which will be discussed below, is an exception to this.[23] In the majority of cases, the consequence of such a refusal is that the case of the Public Prosecutions Department is held to be inadmissible.[24]

Second, the ruling of the Court of Appeal in 's-Hertogenbosch of 23 December 2011 is also relevant.[25] In this case the suspect stated that he had been a TCI informant. This claim could explain why he had committed the offences he was charged with. The head of TCI was questioned in court about this and it was revealed that, prior to this hearing, a TCI officer had given instructions to the head of TCI not to answer questions resulting in the disclosure of the identities of informants. The Court subsequently declared the case of the Public Prosecution Department to be inadmissible. The Court arrived at this judgment partly because the submission by the suspect, which was not implausible, could not be verified as a consequence of the prosecutor's position.

A telling example of preventing a witness from answering questions is hidden in the ruling of the Court of Appeal in 's-Hertogenbosch of 4 June 2010.[26] In this case,

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[21] HR 2 February 2010, *NJ* 2010, 246 with annotation by Schalken.

[22] HR 7 December 2017, ECLI:NL:HR:2017:3060.

[23] ECtHR 4 July 2000, *EHRC* 2000, 71 (Kok).

[24] See Court of Appeal in 's-Hertogenbosch 20 December 2007, *NbSr* 2008, 51 and Court of Appeal in 's-Hertogenbosch 23 December 2011, ECLI:NL:GHSHB:BV0293, District Court of Oost-Nederland 2 January 2013, ECLI:NL:RBON:BY7575 and District Court of Amsterdam 25 March 2014, ECLI:NL:RBAMS:2014:1460.

[25] Court of Appeal in 's-Hertogenbosch 23 December 2011, ECLI:NL:GHSHB:BV0293.

[26] Court of Appeal in 's-Hertogenbosch 4 June 2010, *LJN* BM6781.

the defence argued that the public prosecutor's case had to be declared inadmissible in view of the fact that the prosecutor refused to indicate whether or not the information included in the TCI report came directly from a witness. The Court rejected the defence, arguing that questions about this had been prevented for good reason: to protect the identity of the informant. The Court attached more importance in this respect to the interest of protection and, moreover, considered that the defence had been sufficiently compensated for the prosecutor's refusal to answer these questions by the fact that other questions put to other witnesses, police officers of the TCI, had been answered.

Case law has also been developed in the context of the scheme for protected witnesses as described in Article 226m–226s CCP, from which the tension between the interests of protection and the interests of the defence arises. For example, the head of the AIVD refused to let some of his employees take the witness stand in the *Piranha* case.[27] This refusal, after a referral by the Dutch Supreme Court, was later upheld in the proceedings at the Court of Appeal in Amsterdam.[28] This is remarkable, because the Amsterdam Court of Appeal referred the case to the examining judge of the Rotterdam District Court in order to question the AIVD employees as protected witnesses. The scheme for protected witnesses (that is witnesses from the AIVD) has never been put into practice to date.

The examples given with regard to verifying confidential information by inspecting internal documents or questioning witnesses show that Dutch legal practice struggles with this and that the results are often extreme: the requests by the defence for transparency and openness are rejected, or the trial court declares the case of the public prosecutor to be inadmissible on account of his or her refusal or inability to provide the level of openness and transparency required. The main responsibility for this lies with the TCI and AIVD: in the individual case either the trial court considers a verification of the legality of undisclosed information unnecessary, or the trial court considers such verification necessary but the TCI or AIVD is then unwilling to disclose the relevant additional documents and/or witnesses. This can lead to no other conclusion than that the verification of the legality of undisclosed information in the Netherlands is flawed.

C. Evidentiary value

In identifying the value of incriminating indirect evidence, there is an important role for the way this evidence is used in a criminal proceeding: it is merely used to deploy coercive measures or it may be used as evidence. It follows from the legal practice that incriminating indirect evidence, which includes the reports from the

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[27] HR 15 November 2011, *NJ* 2012, 36 with annotation by Schalken.

[28] Court of Appeal in Amsterdam 25 March 2014, ECLI:NL:GHAMS:2014:915.

TCI and the AIVD, is in the vast majority of cases strictly used as initial information in the Netherlands. Its purpose is to enable the start of a criminal investigation and offers justification for the deployment of coercive measures and the use of investigative powers. The Dutch Supreme Court has already repeatedly ruled that there are no objections against this.[29] In some cases, the trial court uses such information as evidence as well.

With regard to the use of such information, the ruling of the ECtHR in the *Kostovski* case is important.[30] The ECtHR considered that the ECHR does not rule out the use of anonymous sources in the investigative phase preceding the trial in court, but that the subsequent use of anonymous statements as if they were sufficient evidence for a conviction is another matter altogether. This may limit the rights of the defence in a way incompatible with Article 6 ECHR.

In other words, it can be assumed that if undisclosed information is only used as a basis to start an investigation, a less thorough verification and, thus, disclosure may be acceptable. This is also the message from a ruling by the Court of Appeal of Amsterdam, upheld by the Dutch Supreme Court, in which a request to hear the informant during the court session was rejected, given that the head of TCI had already made a statement during the court session about the reliability of the informant.[31] The Dutch Supreme Court was of the opinion that the trial court had made the correct decision in finding that the reliability of the informant had thus been made sufficiently plausible. This assumption was merely based on the statement of the head of the TCI. In two other rulings, the Dutch Supreme Court even found that hearing a legality witness can be dispensed with if there is no reasonable interest for the defence to hear such a witness.[32]

If incriminating indirect evidence such as the reports of TCI and AIVD is used as evidence in the trial phase, then one can claim that Article 6 ECHR necessitates a complete assessment: the reliability of the human source of this information will then have to be investigated if the defence so requests.[33] Additionally, the judicial finding of facts cannot solely be based on evidence whose source has not been disclosed, according to Article 344a CCP, but needs to be corroborated by additional evidence. As discussed earlier, a full assessment of incriminating indirect evidence will be most effective by questioning the human source of that information, for example an

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[29] See HR 1 February 2000, *NJ* 2000, 264, HR 22 December 2009, ECLI:NL:HR:2009:BJ8622, HR 30 March 2010, *NbSr* 2010, 168, HR 29 November 2011, ECLI:NL:HR:BP8497, HR 5 March 2013, *NJ* 306 and 307 with annotation by Reijntjes, HR 16 September 2014, *NJ* 2014, 461 with annotation by Schalken.

[30] ECtHR 20 November 1989, *NJ* 1990, 245 with annotation by EAA (Kostovski).

[31] Hoge Raad 19 January 1999, *NJ* 1999, 253.

[32] Hoge Raad 14 September 1992, *NJ* 1993, 83 and Hoge Raad 5 December 1995, *NJ* 1996, 422 with annotation by Knigge.

[33] Hoge Raad 12 May 2009, ECLI:NL:HR:BI3359.

informant, or by examining internal documents. The human source will then be designated as witness and the defence is entitled by virtue of Article 6(3)(d) ECHR to have a witness for the prosecution questioned. As this approach is clearly in conflict with the interest to protect the human source, the police and the Public Prosecutions Department hardly ever allow such questioning, for example with regard to the TCI report.[34] The same is generally true for the report of the AIVD.[35] For this reason these reports are hardly ever used as evidence in criminal proceedings.

Two provisions in the CCP may lead to the use of incriminating indirect evidence: the Threatened Witnesses Act (Article 226a–226f CCP) and the Protected Witnesses Act (Article 226m–226s CCP). These far-reaching provisions aim to conceal the identity of a witness and, at the same time, to focus on providing useable evidence to the trial judges.

As stated in Article 226a CCP, the investigative judge may label a witness as threatened witness if in case of testifying the witness's health, security, or safety is at stake and if the witness refuses to testify because of this danger. The public prosecutor, the suspect, and the witness will be heard by the investigative judge prior to labelling the witness as threatened witness. As described in Article 226b CCP, the suspect and his or her attorney can lodge an appeal against the decision of the investigative judge to label the witness as threatened witness. When the appeal leads to nothing or no appeal is lodged, the threatened witness will be questioned by the investigative judge. The judge can order that the suspect and/or his or her attorney not be present during the questioning. In fact, whenever a threatened witness is questioned, the suspect is not present during questioning. According to Article 226f CCP, the investigative judge is authorized to make all sorts of provisions to conceal the identity of the witness, including that the written report of the witness questioning will not contain information about the witness's identity. The written report will become part of the case file which is sent to the trial judges and will also be fully accessible by the defence. A threatened witness will not be heard at trial. As described in Article 288 section 2 CCP, trial judges are not allowed to question the threatened witness even if the defence counsel calls for this witness to be heard at the trial stage.

The *Kok* case is one example of applying the Threatened Witness Act.[36] In this case, the TCI's human source was heard anonymously based on the scheme for threatened witnesses under Article 226a–226f CCP. However, the witness statement becomes part of the case file. In the *Kok* case, the ECtHR considered that the decision to keep the identity of the threatened witness secret was based on sufficient grounds, and it is important that this decision was based not only on the information the witness himself had provided but also on background information obtained via police

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[34] See for instance Hoge Raad 5 December 2017, ECLI:NL:HR:2017:3060 and District Court Den Haag 26 November 2015, ECLI:2015:13529.

[35] Court of Appeal in Amsterdam 25 March 2014, ECLI:NL:GHAMS:2014:915.

[36] ECtHR 4 July 2000, *EHRC* 2000, 71 (Kok).

sources. Thus, the necessity to keep the identity of this witness secret was a clear and undisputed fact for the investigative judge. The defence and the trial judge, however, were not able to assess this information. They only saw the witness statement of the threatened witness in the case file. It was also important that the conviction of the complainant was not exclusively based on the witness statement of the anonymous witness: there was a considerable body of other evidence from which the complainant's guilt had been inferred. Finally, the ECtHR decided that the procedure that was followed in hearing the anonymous witness had to be regarded as sufficient so that the conclusion was drawn that the rights of the defence had been sufficiently respected.

According to Article 344a CCP, the written report of the investigative judge can be used as evidence by the trial judges when 1) the witness is labelled as a threatened witness by the investigative judge, 2) the case involves a serious crime, and 3) the verdict is not based solely or to a decisive extent on the written report of the investigative judge. Based on the *Kok* case it seems justified to conclude that the Dutch Threatened Witness Act meets the fair trial standards of the ECHR as set out by the ECtHR.

Specifically in relation to the use of incriminating indirect evidence from the AIVD, the Dutch Supreme Court considered that reports based on undisclosed information may be used as evidence at trial. However, the Dutch Supreme Court provides guidelines. The most important of these is that the fact that the court must keep in mind that the use of such reports as evidence must still meet the requirements of Article 6 ECHR. This is of course very closely linked with the limited verifiability of such information in criminal proceedings, in particular by the court.[37] At first glance it would appear that official reports from the AIVD can be used as evidence. First, the Dutch Supreme Court itself does not rule this out in its standard ruling of 2006. Moreover, in expanding Article 344 CCP, the Dutch legislator pronounced itself to be in favour of using official reports as evidence. Furthermore, the Dutch legislator clearly indicates here that the official report is an independent piece of evidence that can contribute to the judicial finding of facts. However, legal practice has shown that the official reports provided are hardly ever used as evidence in criminal proceedings. The Supreme Court attributed this to the limited (or even non-existent) options of verifying such information. This also becomes clear from the ruling of the Court of Appeal of Amsterdam dated 17 December 2010 in the *Hofstadgroep* case, an alleged terrorist organization.[38] The court did not use the official reports from the AIVD as evidence in view of the fact that the defence had not been able to

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[37] In this context see M. Alink, 'AIVD-informatie als bewijs in het strafproces' (i.e. AIVD information as evidence in criminal proceedings), in: PD Duyx, P D J van Zeben, *Via Straatsburg* (Myjer-bundel), Nijmegen: Wolf Legal Publishers 2004, 155–179 (Myer bundle of essays).

[38] Court of Appeal of Amsterdam 17 December 2010, *LJN* BO7690.

verify the information underpinning the reports. The District Court of Rotterdam had used the same line of reasoning years earlier. In its ruling of 5 June 2003, it considered the fact that the official reports of the AIVD could not be used as evidence, as the information it contained could not be verified for the benefit of the defence, among other parties.[39] Recently there have been a few examples of cases where the AIVD report was used as evidence. The case of the District Court Gelderland is interesting in this regard. In this case, the court used the AIVD report as evidence, since it was corroborated by additional evidence.[40]

The procedure of the Protected Witnesses Act is similar to the Threatened Witness Act. However, the Protected Witnesses Act is focused on the protection of interests of national security. It is for this reason that according to Article 226m CCP a protected witness can be heard by the investigative judge when national security interests are at stake. This scheme makes it possible for employees of the intelligence service AIVD only to be questioned about the backgrounds of the official report which was sent by the AIVD to the police (see paragraph I A 1) in a covert way in the privacy of the examining judge's offices.[41] According to Article 226n CCP, the investigative judge again is authorized to make all sorts of provisions to conceal the identity of this witness. These provisions also include that the written report of the questioning of the protected witness will not contain information about his or her identity. According to Article 344a CCP, the written report of the investigative judge can be used as evidence by the trial judge when 1) the witness is labelled as threatened witness by the investigative judge, 2) the case involves a serious crime, and 3) the verdict is not solely or to a decisive extent based on the written report of the investigative judge. As previously mentioned, the Protected Witnesses Act has never been used since it was incorporated into the CCP in 2007. In the so-called *Piranha* case, concerning a terrorist network, the attorney called for the hearing of several protected witnesses. The AIVD actually refused to send one of their employees to be heard as a protective witness.[42] This refusal was based on the statutory obligation of confidentiality as stated in Articles 23 and 135 WIV 2017.

One may conclude that, in most cases, incriminating indirect evidence is only used as initial information and serves as justification for the deployment of coercive measures and investigative powers. Although incriminating indirect evidence does not appear to have the function of serving as evidence, there are conditions under which it may be used to that end. In such a case, the first requirement is for the

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[39] District Court of Rotterdam 5 June 2003, *LJN* AP9546. The same approach was adopted by the District Court of Rotterdam on 1 December 2006, *LJN* AZ3589.

[40] District Court of Gelderland 15 June 2016, ECLI:NL:RBGEL:2016:3239.

[41] S. Brinkhoff en J. Mensink (2019). Tweede evaluatie van de Wet Afgeschermde getuigen, WODC 2019, (i.e. Second Evaluation of the Protected Witnesses Act).

[42] Court of Appeal Amsterdam 25 March 2014, ECLI:2014:915.

defence to be able to question the human source or have it questioned by the investigative judge. These two legal provisions may be helpful in this regard: the Threatened Witnesses Act (Article 226a–226f CCP) and the Protected Witnesses Act (Article 226m–226s CCP). Second, the court is not allowed to base the judicial finding of facts exclusively or decisively on incriminating indirect evidence and the subsequent statement submitted by the human source.

III. Remedies against non-disclosure

There is no legal remedy against the non-disclosure of the sources of incriminating indirect evidence. All the defence can do is question the reliability and legitimacy of the report of the TCI and AIVD before the court (see extensively II 1 para 2).

The Threatened Witnesses Act contains a form of remedy against non-disclosure. In fact, the defence can complain that a witness is given the status of threatened witness by the investigative judge. The court will then assess this status. This procedure may have two outcomes. The witness was rightly given the status of threatened witness or the witness was wrongly given this status. In the last situation the report of the investigative judge will have to be deleted from the case file. Such a provision does not exist in the Protected Witnesses Act.

IV. Constitutional law framework and assessment

A. Political and academic discourse

In Dutch political and academic discourse there has not been a real fundamental debate about the admissibility of indirect or undisclosed information/evidence. The debate usually takes place at trial when the suspect and/or the attorney question the reliability or legality of these types of evidence.[43]

Based on this debate the following dangers and objections can be put forward with regard to the use of undisclosed information in criminal proceedings. First, there is the danger that organizations such as the AIVD and the TCI unintentionally provide incorrect undisclosed information. This may happen if a human source deployed by

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[43] See for instance S Brinkhoff, *Startinformatie in het strafproces* (diss. Nijmegen), Deventer: Kluwer 2014, pp. 91–138, F Krips, 'Over de bruikbaarheid van AIVD-informatie in strafzaken', in: Preadviezen 2009 van de Vereniging voor de vergelijkende studie van het recht van België en Nederland, Den Haag: Boom Juridische uitgevers 2009, T Prakken, 'Interne openbaarheid in het strafproces: een bedreigd goed', *NJB* 1995, 1451–1458 HR 29 June 2010, ECLI:Nl:HRL:BL0655 HR 5 December 2017, ECLI:NL:HR:2017:3060.

such an intelligence service (knowingly or unknowingly) passes on incorrect information. Should that information be related to a terrorist offence or to the presence of a collection of firearms, the tactical criminal investigation department of the police and the public prosecutor on the case will quickly (want to) take measures under criminal law without making many more enquiries, which will impinge on the privacy or freedom of an innocent citizen.

The second risk has to do with the legality of obtaining information. While one would expect that an organization such as the AIVD obtains information legally, one cannot ignore the fact that, in terms of retrieving information, international cooperation carries the risk that a Dutch intelligence service *also* uses information that was unlawfully obtained. This would be information that finds its way into criminal proceedings through the official reports. The unlawfulness may be a violation of the right to privacy but may also involve a violation of (other) fundamental rights of the suspect or third parties, for example abusing them or otherwise putting them under severe pressure to extract useful information from them. Furthermore, when human sources are used, there is always a danger that information is obtained in a way that runs counter to the prohibition on instigation, i.e. the prohibition on unacceptable incitement.

Third, there can be an objection from a criminal procedural point of view and, in connection with Article 6, in the refusal to be transparent about the data behind the indirect evidence. A similar objection exists where the impression is created that exculpatory information is withheld or not revealed by the organization that provides undisclosed information. The foregoing can occur in the event of a refusal to reveal the identity of the human source and the, possibly exculpatory, knowledge the source possesses, on grounds of the interest of protection or with reference to the interest of state security.

The dangers and objections mentioned that come with the use of undisclosed information in criminal proceedings necessitate a thorough verification of the reliability and legality (of the obtainment) of this kind of information. This verification is hampered by the covert manner in which information is provided, which is justified primarily by the necessity, in the context of protecting human sources and state security, to keep the methodology used and the human sources a secret. It is evident that the foregoing severely limits the possibilities to check (the obtainment of) this kind of information in criminal proceedings, possibly even in a way that is squarely at odds with Article 6 ECHR, such as withholding potentially exculpatory information or refusing to disclose information necessary to verify the legality of the activities of organizations such as the TCI and the AIVD. One such an example is divulging information about a possible incitement of the suspect by a human source deployed by such an organization. Therefore, the fundamental question arises whether covertly obtained incriminating evidence can always or should always be used in Dutch criminal procedures and, if so, under what circumstances. The way in which undisclosed information is used plays an important role in this

context. Below, I will discuss this question in more detail. I will then dwell on the possibilities of assessing undisclosed information.

B. Limits on the use of secret evidence and procedural safeguards

The question arises whether the flawed nature of verifying undisclosed information/evidence in Dutch criminal proceedings presents a problem. The answer to this, both from the perspective of the Public Prosecutions Department and that of the defence, must be in the affirmative. For the Public Prosecutions Department, the court's decision to declare the prosecution's case inadmissible when the possibilities for verifying undisclosed information in a concrete case are deemed to be too limited is undesirable. After all, the consequence is that the case will founder, without a court ruling about any facts that have been established or without sentencing. This has adverse effects on society, the victim(s), and any survivors.

From the point of view of the defence, the flawed legality verification is also undesirable. It implies the possibility that information was obtained in a way that violates Article 6 ECHR or that it cannot be discounted that exculpatory or otherwise relevant information is withheld. Moreover, both the ECtHR and the Dutch Supreme Court have on several occasions maintained that the court must ensure that criminal procedures meet the requirements of Article 6 ECHR and that this entails that if a defence is based on this ground there are more pressing reasons that necessitate an investigation into the background of indirect evidence.[44] The ECtHR is very clear in the *Ramanauskas* and *Bannikova* cases, specifically with regard to acts of instigation that constitute offences. After all, the Court in both cases asserted that if a not implausible defence based on instigation is made, the prosecuting party will need to present conclusive evidence that there was no instigation or incitement. If such proof is not furnished, the court must carry out an adequate investigation into this. In other words, a defence based on instigation in the context of the TCI or the AIVD seems to require transparency on this on the part of these organizations. Taking into account the possibility of undesirable so-called *fishing expeditions,* there is one condition which obviously must always be met, namely that the defence make it plausible that an unlawful act may have been committed, that there may have been some legal irregularity.

The flawed (legality) verification with regard to undisclosed information is therefore undesirable from the perspectives of both the Public Prosecutions Department and the defence and may even impact the essence of a fair criminal trial. An extreme

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[44] See ECtHR 5 February 2008, *NJ* 2008, 499, with annotation by Schalken (Ramanauskas) and ECtHR 4 November 2010, no 18757/06 (Bannikova), HR 5 September 2006, *NJ* 2007, 336, with annotation by Schalken (Eik case) and HR 5 October 2010, *NJ* 2011, 169 with annotation by Schalken.

consequence of this may be that the proceedings fail to reveal a violation of article 6 ECHR. In the light of the foregoing, I advocate improving the verification of undisclosed information. It is possible to pursue two (independent) avenues in this respect. One way out of the current, undesirable situation may be to create a uniform judicial procedure for verifying undisclosed information, in other words a disclosure procedure. In addition alternatively to this, a non-judicial verification body could be established, modelled on the CTIVD. In future, a legal possibility could be created allowing the trial court to request, in a concrete case, the CTIVD to launch a fact-finding mission into the activities of the TCI or AIVD with regard to a specific point. One important advantage of this latter method of verification is that the aforementioned intelligence services may be more inclined to be open and honest with such a verification committee than in a verification procedure in a criminal proceeding.

Then there is the option of the disclosure procedure.[45] Before going into any detail, it is worth asking in which cases this procedure should be used and what the roles of the trial court and the examining judge would be. First, the trial court must see the need for an investigation into (the background of) the undisclosed information. A crucial part in this are variables such as the way in which it is made plausible that an unlawful act has been committed, the corresponding quality of the plea by the defence, the nature of the alleged unlawfulness, and the status of potential evidence. To begin with, the judicial verification can be implemented by a secondary legality verification, in other words, the protected source of the information is *not* questioned nor are internal documents inspected by the trial court. It will suffice, for example, to question the head of the AIVD or the head of the TCI. Should this verification not lead to the result envisaged by the defence (namely, establishing that an unlawful act has been committed), while there are still lingering doubts about the legality of the information gathering, the trial court may instruct the examining judge.

The proposed uniform disclosure procedure could be as follows. After referral by the trial court, the procedure is initiated, whereby the examining judge is given the opportunity to effectively verify the legality of obtaining the anonymous information in the privacy of his or her offices (in camera). In this phase it is also possible to envisage the deployment of an external monitoring body outside the framework of criminal proceedings, for example the CTIVD, to implement this judicial verification effectively. This procedure can be legally enshrined in an extension of Article 177a CCP in combination with expanding the range of the protected witness scheme of Article 226m–226s CCP. Before the examining judge proceeds to apply this procedure, he or she can choose to carry out a witness examination in combination with using the enhanced possibilities of Article 187d CCP. Should this yield no results or appear pointless from the start, for example because of the position taken by the authority providing the information, the examining judge may, in the alternative,

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[45] See for more detailed information also S Brinkhoff, *Startinformatie in het strafproces* (diss. Nijmegen), Deventer: Kluwer 2014, 346–348.

order a protected witness examination. For this legality verification to be effective, the protected witness scheme will have to be modified in two areas. The examining judge must be the one to decide whether or not to add the protected witness examination to the case file, and he or she must also be given an explicitly articulated right of access to the investigation details from the authorities providing the information.

Secret Evidence in Spain

Andrea Planchadell Gargallo

I. Introduction and rationale

Article (Art.) 120 of the Spanish Constitution provides for the publicity of proceedings, establishing that 'court proceedings shall be public'.[1] The right of defence,

[1] The political nature of the publicity of judicial proceedings is discussed by Fairen Guillén, V., 'Los principios procesales de oralidad y de publicidad general y su carácter técnico o político', *Revista de derecho Procesal iberoamericano* 1975, nos 2–3, 322–323; Otero González, M.P., *Protección penal del secreto sumarial y juicios paralelos*, Ceura, Madrid 1999, 12. See also Rodríguez Bahamonde, R., *El secreto de sumario y la libertad de información en el proceso penal,* Dykinson, Madrid 1999*,* 231 ff.

established in Art. 24 Spanish Constitution as a fundamental right, implies for the parties the effective possibility of asserting their rights and interests within the process, complying with the principles of an adversarial process and equality of arms.[2] As such, the right of defence includes the right of the accused to know the facts and evidence against him or her.[3]

However, Art. 120 of the Constitution also mentions that this procedural safeguard is subject to certain limitations, i.e. 'the exceptions specified in the procedural laws'.[4] Similar stipulations are established in Art. 14.1 International Covenant on Civil and Political Rights and Art. 6.1 European Convention on Human Rights (ECHR). One of these limitations is included in the Spanish Criminal Procedure Act (*Ley de Enjuciamiento Criminal* or LECrim), which governs the procedural steps in preliminary proceedings (preliminary investigations) regarding the right of secrecy and confidentiality (currently known as '*reserva*' [confidence]) as well as the possibility to restrict the public nature of the trial.

Before analysing the Spanish regulations on secrecy and confidentiality, it should be noted that the Spanish Constitutional Court recognized in its Judgment 13/1985 of 31 January 1985 that this possibility is an exception to the institutional safeguard established in the above-mentioned Art. 120 Spanish Constitution, as the restriction on publicity cannot be considered a blank cheque to legislators, since the Constitution provides for the publicity of proceedings as a principle, especially in criminal proceedings, establishing a safeguard for citizens to scrutinize the actions of judges and courts.[5] However, this paper questions whether this 'scrutiny' or 'control' is unlimited. As we will see, it is not. The State must be able to restrict citizens' access to the information contained in the preliminary investigation. Nevertheless, this possibility is itself subject to limits. A balance must be achieved between the interests of all the parties involved.

As set out in the Constitution, due to the relationship between publicity and the right to access the information, the limitations on publicity are established by statute

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[2] Moreno Catena, V., *La defensa en el proceso penal*, Civitas, Madrid 1982, 24. See also Constitutional Court decisions 162/1993, 18 May; 110/1994, 11 April; 175/1994, 7 June; 97/1997, 19 May; Supreme Court decisions of 10 September 1997 (RA 6656) and 14 September 1997 (RA 7387).

[3] Planchadell Gargallo, A., *El derecho a ser informado de la acusación*, Tirant lo Blanch, Valencia 1998.

[4] Unless otherwise indicated, all translations of Spanish legal sources are the author's own.

[5] Del Moral García/Santos Vijande, *Publicidad y secreto en el proceso penal*, Comares, Granada 1996, 4 and 7 ff., states that this publicity has a double nature: 'it appears as a pragmatic principle' but it is also useful for the parties involved in the proceeding, since 'this principle protects the parties against a justice that is removed from public scrutiny' (Judgment 96/1987 Spanish Constitutional Court), 'becoming a curb on and a safeguard against potential arbitrary decisions'. See also Otero González, M.P., *Protección penal del secreto sumarial y juicios paralelos*, op cit, 17 ff.

(LECrim) and the judicial application of the restrictions must comply with the relevant regulations. The following requirements must be met:

(i) The limitation or exception must be provided for in a legally binding rule, more specifically, in the procedural laws.

(ii) The limitation must be justified by the protection of other relevant constitutional principles.

(iii) The decision must be reasonable and proportionate.

As pointed out by the Constitutional Court, in deciding to restrict publicity, it must be recognized that 'the statutory regulation of the secrecy of the proceedings is not established as a restriction on the freedom of information but, in general and in a broader sense, as an obstacle to prevent anyone, including the parties to a case in some occasions, from gaining access to the evidence and the proceedings… The imposition of secrecy aims to prevent the disclosure of the information in order to achieve, according to the inquisitorial principle, a secure suppression of crime.' Thus, the disclosure restriction contributes to the security and safety of citizens. Cortes Dominguez is correct in adding that the so-called public reputational sentence resulting from being in the dock is another reason that may justify the restriction of publicity, as the disclosure restriction may avoid the detrimental impact that publicity has, on certain occasions, on the reputation and good name of a suspect.[6]

For the statutory regulation of secrecy, that is, the non-disclosure of certain information and evidence, it is important to consider the procedural stage of the proceedings. As a rule of thumb, the investigation stage is subject to 'external secrecy', which means that the disclosure of information to the parties involved is at the judge's discretion. During oral proceedings (trial), full disclosure of evidence is the rule but obviously also subject to certain exceptions. This is why we will distinguish between these two stages in the proceedings.

II. Secrecy of the investigation

A. Current status

In criminal investigations, it is self-evident that a wide range of procedural steps is taken, involving different subjects. Throughout the development of the investigation stage, the police, the Public Prosecutor's office, and the jurisdictional bodies take many procedural steps that are not actually disclosed to the other parties involved, because, as *Gómez Colomer* puts it, the intention to apprise all parties of every single

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[6] Cortes Domínguez, V., in Moreno/Cortes, *Derecho Procesal Penal*, (7th edn), Tirant lo Blanch, Valencia 2015, 205. See also Judgment of the Spanish Constitutional Court 216/2006 of July 3.

procedural step during the preliminary stage of a criminal case is impossible,[7] considering that many of these steps will not even be used, may lead the parties nowhere, or cannot be used to 'set the foundations' for an investigative measure and will not provide any piece of evidence.

In view of the fact that the investigation stage aims to find out whether de crime was committed (Art. 299 LECrim),[8] Art. 301 of the Spanish Criminal Procedure Act (LECcrim) requires that the investigation steps be taken in a 'reserved' manner (LECcrim no longer uses the term 'secret' but 'reserved'). This is, therefore, a secrecy approach oriented at the public, i.e. at third parties who are not party to (not involved in) the proceeding (Art. 301: '*The preliminary investigation shall be reserved and shall not be of public nature, except for the specific circumstances established in this Act*, until the commencement of the trial stage').

However, limitations to the right of the parties to a proceeding to gain access to the contents of the proceeding[9] can obviously affect the right of defence. That is why it is important to know the scope of limitations we are faced with. Let us now set aside the regulatory framework established in Art. 120 Constitution and focus on Art. 24 Constitution, the principle of contradiction, and the right of criminal defence.[10] Considering the fundamental nature of the rights at stake in a criminal defence case, it is self-evident that limitations on these rights must be subject to special safeguards. Again, it is essential in this context to reconcile the interests of the criminal investigation with the criminal suspect's right of defence, considering that exercising the right of defence may compromise the efficacy of the investigation.

The relevant Article for the parties to a proceeding is Art. 302 LECrim, which reiterates the parties' right to be made aware of, to intervene or participate in, and to have knowledge of all the procedural steps, ensuring the principle of contradiction and the right of defence (Art. 302: '*The parties represented in a case shall be able*

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[7] Gómez Colomer, J.L., in Montero/Gómez/Barona/Esparza/Etxeberria, *Derecho Jurisdiccional III. Proceso penal*, (24th edn), Tirant lo Blanch, Valencia 2016, 175, pointing out that 'the law must only regulate the investigational actions that interfere in the fundamental rights of the criminal suspect and those that will be used as a piece of evidence in the trial.'

[8] Burgos Ladrón de Guevara, J., *El valor probatorio de las diligencias sumariales en el proceso penal*, Civitas, Madrid 1992, 68 and 84 ff.

[9] This is the difference between internal and external publicity referred to by Del Moral García/Santos Vijande, *Publicidad y secreto en el proceso penal*, op cit, 3; Muerza Esparza, J., 'Algunas cuestiones sobre la publicidad en la investigación penal', in Moreno Catena (Dir.), *Reflexiones sobre el nuevo Proceso penal (Jornadas sobre el borrador del nuevo Código Procesal Penal)*, Tirant lo Blanch, Valencia 2015, 582; González García, J.M., 'Una aproximación a la regulación del secreto y la publicidad de las actuaciones en el borrador de Código procesal penal de 2013: del secreto de la investigación a los juicios paralelos', in Moreno Catena (Dir.), *Reflexiones sobre el nuevo Proceso penal (Jornadas sobre el borrador del nuevo Código Procesal Penal)*, op cit, 5, pointing out that generic secrecy is applied by operation of law, without the need to make a reporting restriction order.

[10] Otero González, M.P., *Protección penal del secreto sumarial y juicios paralelos*, op cit, 25.

to gain access to and intervene in all the procedural steps'). However, this Article also provides for potential limitations on this right:

a) The crime must be subject to public prosecution (public crime). However, this rule is also deemed to apply to semi-public crimes provided there is a previous complaint from the victim (see administrative order *Circular 8/1978* issued by the *Fiscalía General del Estado* [Chief Public Prosecutor's Office]).

b) The power to restrict the disclosure of the investigative file or its content is granted to the Investigating Judge upon request of either the Public Prosecutor or any of the parties to the case, or at the judge's own initiative. The decision is taken by means of an order issued by the Investigative Judge. The judge must justify the limitation. Art. 302 provides the grounds for such limitation: (i) to avoid a serious risk to the life, freedom, or physical integrity of another individual; or (ii) to prevent a situation that may seriously compromise the outcome of the investigation or the proceedings. As will be discussed below, the latter situation is the justification for most of the decisions that restrict the disclosure of criminal proceedings, since this measure prevents the accused parties, the suspects, or any individuals related to them from tampering with the evidence. The Spanish Supreme Court states in Judgment 874/2000 of 24 May 2000 that declaring a pretrial proceeding secret 'aims to avoid interferences or actions that may compromise the success of the investigation and the inquiries conducted to find out the truth of the facts'.

c) Moreover, a new element, referred to in Art. 301 bis LECrim, must be added. This Article deals with the protection of the victim's privacy or the due respect for the victim or his/her family and provides the possibility to decree any of the measures specified in Art. 681.2 LECrim, that is, the prohibition to disclose or publish the victim's identity, any details that may identify the victim, and the prohibition to disclose or publish images of the victim or his/her relatives.

d) The secrecy of proceedings can be applied to the entire procedure but, as explained below, secrecy usually applies only to parts of the proceedings (for instance a search and arrest warrant, a confiscation order).

e) All parties to the case are bound by this limitation. Nevertheless, due to judicial practice and the dominant role of the Public Prosecutor in the Spanish legal system, acting as an unbiased body, Public Prosecutors are not affected by these disclosure restriction orders and have therefore knowledge of all investigative actions.[11]

f) The disclosure restriction order cannot extend to more than one month and must always be lifted ten days prior to completion of the preliminary investigation. It is surprising that the statutory law makes no explicit mention of the possibility to extend said one-month term, considering that these extensions do exist in

[11] This differentiation is, however, debatable, as pointed out by Del Moral García/Santos Vijande, *Publicidad y secreto en el proceso penal*, op cit, 59.

practice. However, such extensions are admitted by Spanish case law.[12] In spite of the legal vagueness regarding the possibility to extend the reporting restriction term, such one-month term may be inadequate for highly extensive or complex cases.[13] In case of doubt about the term, the actual term should depend on the proper application of the principle of proportionality. Therefore, the restriction order cannot be extended beyond the time period strictly necessary to meet its purpose according to the requirements of the investigation. In practice and despite the one-month limitation, the judge may decree an extension of the reporting restriction order as long as reasons are provided as required.

The Supreme Court Judgment of 14 November 2002 (RJ 10862) established that in order to show that a non-disclosure order has prejudiced the defence, affecting the right of criminal defence, the complainant must specify 'the inquiries mentioned in the grounds of the appeal that could not be made or heard as a result of the extension of the reporting restriction order'.[14]

Once the reporting restriction order is lifted and the trial stage reached, the proceedings, including the inquiries made during the preliminary investigation and unknown to the parties, become public. It is only then that the accused becomes fully aware of all the results of the investigation.

Therefore, the restriction of the right of access to the information during the preliminary investigation is especially based on the State's and the court's interest to find the truth[15] without any obstacles or setbacks by the parties to the proceedings. Yet, it is self-evident that this interest must be reconciled with the right of defence, which is also a requirement at this stage of proceedings.

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[12] See Judgments of the Spanish Constitutional Court 185/1988 of 14 October 1988; 174/2001 of 26 July; 12/2007 of 15 January, and the Judgment of the Spanish Supreme Court of 15 March 2007, tol. 069837).

[13] In fact, the Spanish Criminal Procedure Draft Bill of 2013 considered a 3-months term. The Spanish Criminal Procedure Draft Bill of 2020, however, does not stablish a specific term. It is de Public Prosecutor who will fix a maximum term and possibles extentions of that term.

[14] As to the possibility to extend a reporting restriction order, the Judgment delivered by the Spanish Supreme Court on 8 September 2003 (RJ 2103) points out that 'considering the complex investigation, with multiple alleged offenders, some of them living abroad, comprising a drug trafficking organisation and with travels abroad to carry the substances, the reporting restriction order, as well as the extensions of such order, have been justified. This reporting restriction order, as well as the court-authorised wiretapping, was advisable to prevent the destruction of evidence, so that it could be useful, which it was. Besides, the appellant was able to gain access to the proceedings in plenty of time before the trial and become aware of the evidence that may affect him, so he was able to prepare the defence with all the safeguards.' A similar reasoning is set out by the Spanish Constitutional Court in other judgments, including Judgments 176/1988 of 4 October and 100/2002 of 6 May.

[15] Del Moral García/Santos Vijande, *Publicidad y secreto en el proceso penal*, op cit, 45 ff.

As a result, the issuance of a disclosure restriction order means there will be no notifications regarding any order, ruling, or decision subject to the restriction and, once the restriction has been lifted, the parties will be able to gain access to the entire investigative file and will even be able to file an appeal against any decision they were not aware of.

B. Some effects of the disclosure restriction during the investigation on the trial

For the parties to the proceedings, an order to restrict disclosure of the pretrial proceedings has a direct impact on certain procedural steps in the trial, specifically:

1. Witness testimonies (Art. 435 LECrim)

Whereas the law provides that, during the preliminary investigation stage, witnesses must only testify before the Investigative Judge and the Clerk of the Court, to be able to use such testimony for evidentiary purposes in trial, the testimony must also be given in accordance with the principle of contradiction, as established in Arts. 448 (anticipation of the deposition before the indicted and his or her lawyer) and 449 (in similar terms when there is an imminent risk of death of the witness).

2. Protection of witnesses and experts

The protection of the identity of witnesses specifically provided for in the Act *Ley Orgánica 19/1994* of 23 December 1994 allows the identity of witnesses to be concealed from the accused. This may entail an infringement of the accused's right of defence and, therefore, to properly defend himself/herself against the witness' testimony or to challenge the witness' credibility.[16]

Art. 2 of said Act establishes that, without affecting the right of the accused's defence to confront the witness, the following measures can be taken in order to protect the identity of witnesses and experts: information such as their place of work, occupation, and any other details that may be used to identify such individual shall not be revealed to the accused or his or her lawyer in any procedural steps or inquiries that may be carried out. Instead, a number or code can be used. Whenever such individual appears before the court, for any inquiry, special procedures or techniques shall be used to prevent his/her visual or acoustic identification for everyone except for

[16] As pointed out by Climent Durán, C., *La prueba penal*, (vol I), Tirant lo Blanch, Valencia 2005, 139, this is the reason why the Spanish Act 19/1994 allows the accused to request information about the ientity of a protected witness, provided the accused provides a well-reasoned justification and such reasons are found 'acceptable'. See also the Judgments of the Spanish Supreme Court 1230/1990 of 19 July 1999, 98/2002 of 28 January 2002, and 1027/2002 of 3 June 2002.

the judge (these special techniques are not established by law but are for the judge to determine, for instance the use of screens or deposition by videoconference with pixelated face). For purposes of sending notices and summonses, the intervening court shall be established as the individual's address, and the court shall serve these documents on such individual by confidential means. The Constitutional Court (S TC 64/1994, 28 February) has long recognized the validity of such measures provided that the principle of contradiction is respected during the interrogation in trial, that is, the possibility of the accused to question and confront—but not visually—the witness.

Notwithstanding the above, Art. 4.3 *Ley Orgánica 19/1994* entitles the parties to request the judge or court, by providing a well-reasoned justification in the provisional pleadings of the prosecution and the defence, to be provided with the identity of the witnesses or experts proposed. In these cases, the judge must provide this information.

According to this Act, the following interests must be taken into account: (i) the State's interest in eradicating delinquency and facilitating the investigation, (ii) the witness' interest to testify without being subject to any pressure on himself/herself or his/her relatives, (iii) and the accused's interest in being made aware of all the details of the accusation, in order to be able to exercise his/her right of defence without any limitation.

C. Precautionary measures or measures restricting the accused's rights

The law provides that precautionary measures may be taken without previously hearing or notifying the party affected by such measures because, as well as for the investigative procedures, the purpose of the proceedings may be compromised if the affected party is informed about them. This limitation is offset by the possibility to challenge the decision, especially by filing an appeal, in which case it is quickly processed (Art. 766 LECrim), but also by filing a petition for a writ of *habeas corpus*.

Art. 520.2 LECrim provides that any arrested individual has the right to be immediately informed about the reasons for the arrest as well as about other rights, including the right to have access to the elements of the proceedings essential to challenge the lawfulness of the arrest warrant or the deprivation of freedom (Art. 520.5). In case of arrest, Art. 527 establishes that the arrestee in solitary confinement (deprived of his/her right to communicate with other persons) can be deprived of some of the rights provided for in Art. 520, including the right to gain access to the investigative file or to appoint a lawyer of trust, except for the essential elements that may be required to challenge the lawfulness of his/her arrest (Art. 527).

Obviously, one of the goals of pretrial detention is to prevent evidence tampering and to act as a precautionary measure. This goal blurs the actual purpose of pretrial

detention, namely, to ensure the criminal suspect's presence or appearance in the proceedings. As said, provided the statutory requirements are met, Art. 509 allows, by exception, the deprivation of the arrestee's or prisoner's right to communicate. This measure is designed, amongst other purposes, to prevent criminal proceedings from being compromised by the suspect. In such a case solitary confinement will last as long as absolutely necessary to carry out the investigation measures urgently required to avoid such danger. However, this period shall not exceed a term of five days. In case a solitary confinement order is decreed for any crimes referred to in Art. 384 bis and any other crimes committed in an organized manner, this confinement may be extended for an additional five-day term. It is self-evident that solitary confinement includes the deprivation or restriction of the arrestee's right (and of his/her lawyer) to have access to the proceedings and even to attend the investigative proceedings and inquiries that may be conducted.

Arts. 505 to 507 and Art. 539 provide for the procedure to decide on the release or continuation of pretrial detention by the judge. In general, these procedures consist of a contradictory pretrial hearing attended by the Public Prosecutor, the arrestee and his/her attorney, and any other parties to the case. Nevertheless, if such hearing cannot be held (for instance because a party or a lawyer fails to appear), the judge may decree pretrial detention or a release order, but such decision is subject to a hearing within 72 hours.

In case the proceedings are declared secret for the parties, any elements that need to be kept secret must be specified in the pretrial detention order that must be served on the arrestee (Art. 506.2 LECrim). Once the disclosure restriction order is lifted, the arrestee must be provided with all the information. In these cases, an appeal can be filed against the detention order. If full notification of the detention order failed, the appeal can be filed once the arrestee has been provided with the notice.

D. Legal protection of reporting restriction orders

In addition to the provisions of Art. 301 LECrim, Arts. 416 and 417 Spanish Criminal Code (*Código Penal*) provide for the fines and sanctions that apply to judges, public prosecutors, attorneys, or solicitors, as well as any other parties involved in the proceedings who disclose any information declared secret.

E. Judicial review of the secrecy of proceedings

Considering the rights at stake, the law provides for the possibility to challenge a reporting restriction order. However, as set out above, the appeal must state the impact the secrecy of the proceedings had on the rights of the affected party. The party claiming that the reporting restriction order infringed his/her rights must identify the specific measures or inquiries that could not be carried out as a result of the secrecy

of proceedings or that cannot be carried out in trial, as well as the specific negative impact of the lack of defence suffered due to the reporting restriction order. Hence, it is not possible to merely criticize or object to the secrecy in general, and the specific damage caused to the right of defence must be proven.[17]

III. Limitations on publicity during the trial stage

The publicity of the trial must be distinguished from the publicity of other proceedings or actions that may be carried out during the trial stage such as the reading of the judgment.

A. General limitations on the publicity of the trial

Art. 681 LECrim, following the provisions of Art. 232.1 Spanish Judiciary Act (Ley Orgánica del Poder Judicial or LOPJ), establishes that the judge or the bench can decide to hold the trial behind closed doors if this is required for reasons of security or public order, or for the appropriate protection of the fundamental rights of the parties to the case, especially the right to the victim's privacy, the due respect for the victim or his/her family, or whenever it may be necessary to avoid any relevant damage to the victims that may arise from the ordinary development of the proceedings. Art. 682 specifically refers to the possibility to restrict the presence of the media, the prohibition to record the trial, the disclosure of personal details of the victims or participants, etc.

B. Exemption from the obligation to testify as a witness (Art. 417)

Art. 417–2 provides that any civil or military public officer will be entitled not to testify if, as a result of his/her public office, the testimony gives rise to the disclosure

[17] Judgment of the Spanish Supreme Court of 25 September 2002 (RJ 9846): 'The challenge against the reporting restriction order does not specify to what extent the secrecy of the proceedings damaged the right to defence and such challenge does not analyse the proportionality of the measure by comparing the needs of Justice, the need to keep an investigation of serious events secret and the right to defence. The secrecy of the proceedings, declared at the start of the investigation, prevented the criminal suspect from becoming aware of and from being able to intervene in connection with some events that are being investigated. This reporting restriction order was decreed in order to make the investigation possible, without interferences or manipulations intended to impede or hinder such investigation. Therefore, it is clear that the said reporting restriction order restricts the right to defence but it does not result in the defencelessness of the criminal suspect, because the criminal suspect will be able to fully exercise such right upon the lifting of the restriction, once the investigative aim has been achieved.'

of confidential information that he/she must keep secret or in the event, by virtue of his/her obligation of due obedience, he/she is not authorized to testify by his/her hierarchical superior.[18] With this provision, lawmakers have opted to forgo information that may be relevant for the proceedings rather than forcing such individuals to provide the judge with an account of the events, since it may result in contradiction and, therefore, interfere with the secret nature of the information.

C. Hearsay witnesses

As pointed out by *Climent Durán*, the 'essence of the evidence consists of the fact that the evidence refers to the statements made by any individual regarding something that he/she has personally and directly seen or heard. The witness' testimony is based on the immediate presence in the event that has been seen or heard'.[19] However, the testimony of hearsay witnesses is considered valid, even though hearsay witnesses did not personally see or hear the facts they refer to. Therefore, this evidence is accepted very cautiously. In fact, the examination of the evidence depends on the existence of further pieces of prosecution evidence in order to verify the testimony of indirect (hearsay) witnesses. This means that the sentence or judgment will not be exclusively based on the statement by a hearsay witness, but such testimony must be ratified or confirmed by further pieces of evidence, including, amongst other elements, circumstantial evidence.

The acceptance of hearsay evidence is contingent on the impossibility of having direct witness or eyewitness testimony (Art. 710 LECrim) or, exceptionally, to ensure the interests of particularly vulnerable persons in order to avoid their double victimization (e.g. the declaration of the psychologist in certain cases of sexual abuse).

Accepting the validity of hearsay evidence grants probative value to the pretrial testimonies of direct witnesses who, for duly justified reasons, are not able to appear and testify during trial. The same applies to the reading of direct witness testimonies by virtue of Art. 730.[20] Hearsay testimonies are accepted only in case of:[21]

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[18] Sánchez Ferro, S., *El secreto de Estado*, Centro de Estudios Políticos y Constitucionales, Madrid 2006, 425 ff.

[19] Climent Durán, C., *La prueba penal*, (vol I), op cit, 262.

[20] Climent Durán, C., *La prueba penal*, (vol I), op cit, 267, finds that 'the basis for the acceptance of this type of evidence is the same reason specified in Art. 730 Spanish Criminal Procedure Act, namely, to reach natural justice…'. Art. 730 LECrim states that 'Proceedings in the summary which, for reasons beyond the control of the parties, cannot be reproduced in the oral proceedings, and statements received in accordance with article 448 during the investigation phase for victims who are minors and victims with disabilities in need of special protection, may also be read or reproduced at the request of any of the parties'.

[21] Climent Durán, C., *La prueba penal*, (vol I), op cit., 269 ff.

(i) witnesses of full legal age who do not appear before the court for justified reasons, e.g. death, being abroad, or impossibility to be contacted;

(ii) underage witnesses, especially minors requiring protection;

(iii) hearsay evidence is used as an instrument to assess the direct evidence provided. In this case, hearsay evidence is not used to replace the testimony given by direct witnesses but to make a better assessment of the testimony of direct witnesses by verifying such evidence.

In contrast, hearsay testimonies are inadmissible if the means that could provide direct testimony can be accessed by the trial court and have not been used yet.

If the requirements established to accept hearsay evidence are met, the admissibility of hearsay witnesses depends on whether such witness has personally heard the testimony given by the eyewitness (first-hand information), apart from the above-mentioned verification using other evidentiary means. In addition, for the weighing of evidence, the eyewitness, i.e. the source of his/her knowledge, must be fully identified and the reasons why they know about the facts.

Hearsay evidence linked to police informants and undercover agents gives rise to special problems.

D. Police informants

Police informants are individuals whose identities are kept confidential in order to ensure both the personal security and safety of such informant and the results of current and future investigations. Therefore, the 'secrecy' of the informant's identity is a must.

Art. 5 *Ley Orgánica 2/1986* of 13 March *on the Spanish Security Forces* provides that the members of these forces 'will not be obliged to disclose their sources of information, except for the performance of their duties or whenever otherwise [is] statutorily established'. However, the provision above raises questions: if a police officer needs to appear and testify in a proceeding, is he/she obliged to act differently? That is, does this mean that Art. 710 LECrim must be literally applied to these proceedings? In that case, the police officer is in a delicate situation: on the one hand, he/she is forced to make a statement about what he/she knows and to disclose the name of his/her informant, damaging the public interest in keeping the police's source of information secret; on the other hand, if these informants are granted the secrecy privilege and the hearsay evidence is accepted, there is no doubt that the right of defence and the evidentiary safeguards are affected.

Bujosa Vadell claims that a possible, satisfactory solution may be reached by keeping the informants' identity confidential while restricting the agents' duty to testify. The damage caused to the right of defence is obvious, since a criminal suspect may

be sentenced based on data and information provided by someone unknown to the criminal suspect, without the possibility to personally refute or question his/her reliability.[22] Furthermore, information provided by police informants is usually confidential, requiring the corroboration or verification by the police itself.

Although this paper will not assess the lawfulness of this, there is no denying that the acceptance of this element is unquestioned, as it constitutes merely a means of investigation, a source of information that enables to 'articulate' the investigation but not a means of evidence. It must be emphasized that police informants have no evidentiary value, as they are not witnesses.[23] Besides, for evidentiary purposes, the information cannot be validated through hearsay testimony of the police officers to whom the informant is reporting because, as mentioned above, the source of the knowledge, i.e. the police informant's identity, must be provided. Accepting the testimonies of these anonymous witnesses would result in the violation of the principle of contradiction and, therefore, the right of defence.

The Supreme Court stated in its Ruling 210/2012 of 8 March that 'the acceptance and assessment as proof of responsibility of the declarations of anonymous police confidants, brought to the process through the referential testimony of the police, violates the constitutional right to a process with all the guarantees (Art. 24.2 Constitution) and, specifically, the right to interrogate and question the prosecution witnesses, which guarantees the Art. 6.3.d) of the Rome Convention … [the] Art. 710 requires, expressly, that the reference witnesses "specify the origin of the news, designating with their name and surnames, or with the details with which it is known, the person who has communicated it", that is to say the reference testimony cannot legally serve as a means for bringing to the process, as proof of charge, the anonymous testimonies of police confidants. In short, the use of testimonials of anonymous confidants as proof of their position, which cannot be interrogated by the accused nor even questioned in their impartiality because they do not know their identity, is prohibited in our Order in any case'. And the Ruling continues with an important point: '… second question arises as regards the prior collection of information, carried out by the police in their preventive work, … In this preliminary phase, effectively, the police use multiple sources of information: citizen collaboration, their own investigations and, even, data provided by collaborators or police confidants. The jurisprudential doctrine of the ECHR has admitted the legality of the use of these

[22] Bujosa Vadell, L., 'La prueba de referencia en el sistema penal acusatorio', *Pensamiento Jurídico* (Bogotá) 2008, 65 ff., specifically recommending 'the introduction of another additional limitation: in these cases, hearsay evidence cannot have an evidentiary value, but this can be only used as a source of investigative activities, from which further more direct pieces of evidence may be obtained'.

[23] Climent Durán, C., *La prueba penal,* (vol I), op cit, 297, states that this is the reason why 'police informants are a lawful element, even when they are anonymous; however, their legal status is limited. Beyond the specific information that they supply, anonymous informants have no legal existence, it is as though they did not exist; they are irrelevant from the legal point of view.'

confidential sources of information, provided that they are used exclusively as means of investigation and do not have access to the process as proof of position (Kostovski Sentence, 20 November 1989, Windisch Sentence, 27 September 1990). However, the situation is different if a police informant or a repentant wrongdoer, due to his/her personal circumstances, is willing to provide his/her identity'.

E. Undercover agents

Similar to informants, undercover agents provide leads for the investigation; however, the information obtained by undercover agents can also be taken into account by the court in order to confirm the trial court's conviction, provided the undercover agent, protected by the measures required to ensure his/her personal security, testifies at trial.[24] Therefore, undercover agents can testify at trial by concealing their actual identity or their capacity as law enforcement officers.

F. Police inquiries

Although police inquiries are of a pretrial nature and, therefore, in principle, do not amount to a taking of evidence, their results will subsequently be brought to the trial so they can be introduced as evidence.

How can the outcomes of police inquiries (and specifically the intelligence reports) be assessed as evidence? There are two ways: first, by summoning the officers who conducted them as experts or witnesses to explain the outcome of their inquiries; and, secondly, as provided for in the abovementioned Art. 730. The debate focuses on the ways in which police inquiries are incorporated into trial to be assessed by the court: should they be assessed as expert testimony or as witness testimony?[25] Notwithstanding this debate, it is accepted that these inquiries can be brought to the proceedings as evidence (Supreme Court Judgment 655/2007 of 25 June mentions the 'police intelligence' evidence, which is used to shed light on a fact or event that cannot be directly verified by the judge. Besides, this so-called 'police intelligence'

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[24] Planchadell Gargallo, A., 'El agente encubierto en la lucha contra la criminalidad organizada' in Cubas/Girao, *Los actos de investigación contra el crimen organizado*, Instituto Pacífico, Lima (Perú), 2016, 189 ff.

[25] Both legal interpretations are recognized in case law. E.g. the Spanish Supreme Court's Judgments 263/2012 of 28 March, 783/2007 of 1 October, 480/2009 of 22 May, 290/2010 of 31 March, 156/2011 of 21 March, 2084/2001 of 13 December, and 786/2003 of 29 May consider that police inquiries are to be regarded as 'expert testimony', whereas the Spanish Supreme Court's Judgment 1097/2011 of 25 October treated police inquiries as 'witness testimony'. However, the Spanish Supreme Court's Judgments 1029/2005 of 26 September, 556/2006 of 31 May, or 119/2007 of 16 February consider these to be 'circumstantial witness evidence'.

evidence is subject to the provisions of Art. 741 LECrim, which establishes the free assessment of evidence by Spanish courts.) [26]

G. Reading of contradictory inquiries and proceedings (Art. 714 LECrim)

In case of a contradiction between the investigations and the evidence provided at trial, even after the appropriate debate in trial, the investigations can be assessed as evidence in order to find the accused guilty.

H. Reading of preliminary proceedings (Art. 730 LECrim)

As established in Art. 730 LECrim, the reading of, say, a witness testimony is absolutely an exception and the application of this Article is only admitted in case the witness is unable to testify in trial. However, the impossibility to reproduce at trial the pretrial testimony or any preliminary investigation will give rise to their admission as evidence.

Yet, apart from the case where a witness testimony at trial is impossible, in order to be admissible as evidence, the testimony or investigation must have been made before or conducted by a judge or validated by the judge, in compliance with the principle of contradiction (even though this requirement poses several problems). The testimony is not to be incorporated by simple reference but must be duly read aloud in order to avoid this piece of evidence from being treated as documentary evidence. The requirement to read the testimony aloud will submit this piece of evidence to the principle of contradiction, at least in a limited sense, thereby allowing the defence counsel to refute its content.

The impossibility to reproduce the investigative proceedings may be: a) anticipated by the investigating authorities (the witness is to be abroad by the day of the hearing); in this case, in order to assess the value of the evidence, the testimony must be read aloud in compliance with the principle of contradiction; b) unexpected (in particular the death of a witness). For these cases, the evidence must be considered valuable from the probative point of view, even without contradiction, provided the reading of the testimony is requested by either party. In that case, Art. 729.2 provides that the reading of the testimony may also be carried out at the judge's own initiative.

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[26] In fact, the Judgment of 27 March 2003 passed by the Special Division (Sala Especial) of the Spanish Supreme Court regarding Art. 61 LOPJ is significant. After analysing this issue, the Judgment questions whether police inquiries and reports are objective and unbiased or whether, on the contrary, police officers are biased.

IV. Intelligence reports from police and security forces

Although the intelligence investigations carried out by the secret services of the national security department are placed at a different level and are alien to criminal procedure, *Bachmaier Winter* points out that, as a consequence of the new forms of crime, especially the serious threats represented by terrorism and organized crime,[27] this separation has faded, placing intelligence services, in many cases, in a prominent position in the fight against this type of crime.

The question arises whether the reports prepared by the police and other security agencies outside of criminal proceedings can be used in a criminal case, notwithstanding that these reports are essentially prepared under the strictest of secrecy. Thus, based on the interest of the State, can the principle of contradiction and the right of defence give way to national security?[28] Even though the Spanish legal system does not explicitly allow the use of evidence obtained from intelligence reports prepared outside of criminal proceedings, such reports are nevertheless accepted under certain circumstances.[29]

The Supreme Court itself authorizes the introduction of intelligence information through so-called 'second-hand evidence'. This type of evidence is based on the testimonies of officers or agents who, as hearsay witnesses, have not had direct access to the relevant source of information. This is confidential, classified information and accepted as valid evidence, even though it is not presented to the court as established by statute like the other types of evidence. However, a general rule for admissibility of such reports cannot be established and, as a consequence, Spanish judicial authorities must assess each individual case based on the circumstances before deciding whether to admit this type of evidence or not, always mindful of the availability of other evidentiary means and the scope of the report's content.

As set out above, the general rule in the Spanish legal system is that any police inquiries conducted outside of trial have no evidentiary value. To be accepted as evidence in trial, these inquiries must be brought to the proceedings through one of the statutory evidentiary means.[30] As said, although it is established that courts can

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[27] Bachmaier Winter, L., 'Información de inteligencia y proceso penal', in Bachmaier Winter, L (Coord.), *Terrorismo, proceso penal y derechos fundamentales*, Marcial Pons, Madrid 2012, 45 and 46.

[28] Diez Picazo, L.M., *Sobre secretos oficiales*, Civitas, Madrid 1998; Lozano Cutanda, B., *La desclasificación de los secretos de Estado,* Civitas, Madrid 1998; Cousido Gonzàlez, P., *Comentarios a la Ley de Secretos Oficiales y su Reglamento*, Bosch, Barcelona 1995.

[29] Bachmaier Winter, L., 'Información de inteligencia y proceso penal', in Bachmaier Winter, L (Coord.), *Terrorismo, proceso penal y derechos fundamentales*, op cit, 69 ff.

[30] In spite of the discussion, Spanish case law usually describes the (police)-intelligence-collected evidence (see the recent Spanish Supreme Court Judgment of 24 February 2016 [RJ 2172) as the 'report issued by the members of the police forces, who enhance their explanations by including a description of the modus operandi of this type of organisation and include documents, pictures and fingerprints provided as the basis of the report …'. A similar description is set out in the Spanish Supreme Court Judgments of 2 December 2014 (RJ

principally only assess lawful evidence, which must be examined according to the principle of contradiction, respecting the principles of publicity and immediacy, certain exceptions are accepted in cases where evidence cannot be reproduced in trial: the expert report on controlled drugs, the testimony taken prior to trial, and the reports made by official agencies, etc. (Art. 788.2).

Specifically, the principle of immediacy is questioned whenever intelligence evidence is introduced into a criminal proceeding. Intelligence evidence may come from the State's police and security forces in connection with inquiries conducted during the investigation stage or even before the commencement of criminal proceedings. Such reports analyse all the available documents and include an assessment on the outcome of the inquiries. The issue revolves around whether, in an indirect way, these reports put evidentiary value on police inquiries that have been provided to the court only in writing.

In addition to the report resulting from an analysis of the information collected during the criminal investigation, there is another type of report that contains information obtained by the intelligence services outside of the criminal proceedings and based on elements and investigative measures whose source is not controlled by the judicial authorities, requiring a different treatment.

To the first type of reports, the Supreme Court applied two interpretations, accepting in both cases the report's introduction into the proceedings but questioning whether it should be considered an expert report or witness testimony. The importance of these reports rests on the fact that the assessments or conclusions set out can be compared to the documents provided in the proceedings.

From the point of view of the principle of contradiction, another major question arises: 'under the umbrella of the expert's evidence, can the investigations that have not been carried out within the proceedings be granted an evidentiary value?'[31] The risk of admitting this type of evidence is obvious, since it may be used to justify the judgment even though the investigations or inquiries mentioned in the report may not have been carried out. Therefore, 'in such a case, in the event that the so-called "intelligence reports" were granted evidentiary value, the principles of the criminal procedure, including the principle of contradiction and the principle of immediacy, would be subverted.'[32]

As to the second type of report, a connected and even more worrying issue revolves around whether the inquiries and investigations conducted by the intelligence services outside of the proceedings can be brought to a criminal proceeding, either

6759), 28 March 2012 (RJ 7512), 29 December 2010 (RJ 135), and 17 July 2008 (RJ 5159), amongst others.

[31] Bachmaier Winter, L., 'Información de inteligencia y proceso penal', in Bachmaier Winter, L (Coord.), *Terrorismo, proceso penal y derechos fundamentales*, op cit, 85.

[32] Bachmaier Winter, L., 'Información de inteligencia y proceso penal', in Bachmaier Winter, L (Coord.), *Terrorismo, proceso penal y derechos fundamentales*, op cit, 85.

as information provided to start a criminal investigation, to order precautionary measures, or to be used with an evidentiary value. It would be unrealistic to assume that such information is not linked to the criminal proceedings and will not be reflected in these proceedings. As *Bachmaier Winter* pointed out,[33] the issue consists in determining the scope of such information, whether such information can be brought to the proceedings, and whether judicial control on said intelligence information is required to take this data into consideration. EU Council Framework Decision 2006/960/JAI of 18 December (especially Arts. 7 and 8) seems to allow its admission, for instance through separate records and subject to strict prior judicial control over the lawfulness of the sources of evidence (a similar approach can be observed in Art. 7.4 Act LO 31/2010 of 27 July on the simplification of the exchange of information and intelligence between the security services of the European Union Member States).

It seems that judicial control prior to the application of intelligence measures may overcome one of the most significant obstacles presented by the admission of intelligence information. Such prior judicial control would ensure the protection of the fundamental rights in the investigations conducted by the secret services, similar to the safeguards established for the investigations of criminal proceedings. Art. 12 Act *Ley 11/2002*, which governs the prior judicial control over the Spanish Intelligence Agency (*Centro Nacional de Inteligencia* or CNI),[34] specifically includes some provisions for prior judicial control over certain investigations and inquiries.[35] This judicial control is carried out outside of the criminal proceedings and there is no possibility for an accused or any other individual to request the review of the decision taken regarding such control.[36] Thus, would it be lawful to admit the outcome of these inquiries as evidence? Based on the limited number of applicable regulations, it seems that this question cannot be answered in the positive without first asking for the declassification of the information.

The aforementioned Act is supplemented by the Act *Ley Orgánica 2/2002*, which governs the prior judicial control over *Centro Nacional de Inteligencia*, establishing administrative (but not judicial) procedures for the adoption of measures affecting fundamental rights that are deemed necessary for CNI to comply with its statutory duties, for instance, the interception of communications.[37] For this purpose, said Act specifically provides that CNI must request the authorization of the competent judge

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[33] Bachmaier Winter, L., 'Información de inteligencia y proceso penal', in Bachmaier Winter, L (Coord.), *Terrorismo, proceso penal y derechos fundamentales*, op cit, 88.

[34] Sánchez Ferro, S., *El secreto de Estado*, op cit, 275 ff.

[35] S TS num. 1094/2010 of 10 December (RJ 2011\2369), which points out the following interests to be balanced with the right of defence and the contradiction principle: threats to the economic, industrial, or commercial interests of Spain and threats to the welfare of the people.

[36] De la Oliva Santos, A., 'El control judicial previo de la inteligencia nacional (o de cómo el remedio resulta peor que la enfermedad', *Tribunales de Justicia*, May 2003, 5.

[37] S TS num. 1094/2010, 10 December (RJ 2011/2369).

in the Supreme Court, i.e. the judge responsible for the case. The State Secretary-Director of CNI must request the competent judge in the Supreme Court, in accordance with the LOPJ, for consent to take measures affecting the right to domestic privacy and the secrecy of communications, provided such measures are necessary to comply with the duties entrusted to the Spanish Intelligence Agency. This request must be submitted in writing and include, amongst other details, the measures intended to be taken, the grounds supporting the request, the purposes giving rise to the request, and the reasons supporting the adoption of such measures, as well as the identity of the individual or individuals involved, the place where such measures are to be carried out, and the duration of the measures. This duration shall not exceed a 24-hour term for measures affecting the right to domestic privacy or a 3-month term for the interception of communications. These measures, however, can be extended for an equal term. The judge also decrees the appropriate orders to protect the secrecy of the investigations.

For these reports (intelligence reports from the police as well as reports from intelligence services) it must be emphasized that even though state secrets aim to protect the security and defence of the State, this should not be taken to mean that state secrets and any underlying interests have an absolute, indiscriminate priority over fundamental rights. This can be observed in the regulation of evidence as established in Art. 417.2 LECrim, which provides the exemption to testify as witness in criminal proceedings. This exemption from the duty to testify will deprive the criminal suspect of an important evidentiary element (at least for the abovementioned principles) for his/her defence. Therefore, such limitations of defence rights can only be supported in extremely serious situations or in case of essential state interests by virtue of the principle *salus publica suprema lex*. However, qualifying such events as state secrets requires meeting all statutory safeguards, as in any democratic state. As established by our Supreme Court,[38] our system is open to the possibility that an organ of criminal jurisdiction knowingly incorporates material initially classified as secret into the case. This requires the judge to strongly recommend a declassification procedure whose outcome is simultaneously subject to jurisdictional control. Art. 2 *Ley 11/2002* states that '... without prejudice to the protection of its activities, the performance of the National Intelligence Center will be subject to parliamentary and judicial control in the terms that this Law and Ley Orgánica reguladora del control judicial previo del Centro Nacional de Inteligencia determine'. In the area of interest to us—which is the proper criminal process—the existence of judicial control initiated by the request for declassification of documents or materials declared secret opens a way of examination enabling the declassification of matters previously declared secret or reserved. Our legal regime does not impose the passive acceptance of such security files. Their secret nature does not entail an exclusion of absolute effects. Arts. 4 and 7 Ley 9/1968 of April 5 on official secrets provide, in addition to a

[38] S TS num. 1094/2010, 10 December (RJ 2011/2369). Similarly, TS num. 921/2001, 26 September.

procedure for classifying certain matters as secret, the corresponding procedure for cancelling such qualification.

Thus, what should the State do to prevent the disclosure of certain information and to ensure the safeguards for the criminal suspect: refrain from sentencing a criminal or use the information, even though this may result in a lowering or violation of said safeguards? It appears that, under certain circumstances and subject to judicial control, such information can be used after an adequate balancing of the interests at stake.

State Secrets at Trial in Turkey

Mehmet Arslan

I. Subjects and limits of the analysis

The notion of state secrets and their protection is one of the most controversial legal concepts in Turkey's public debates of the last decades.[1] The claim is that some of the fundamental values of a democratic society and the rule of law, such as transparency of government activities, accountability of public servants, accessibility of state-held information, freedom of the press, and judicial review of executive acts are at stake when restrictions are imposed on them for the protection of state interests.[2]

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[1] See for instance the following cases, trucks of Turkish Intelligence Services reveal state secrets [AA, 18 September 2015] <http://www.aa.com.tr/tr/turkiye/mite-ait-tirlarin-durdurulmasina-iliskin-dava-1-ekimde-yargitayda-gorulmeye-baslanacak/137932> accessed 29 November 2015; search and seizure in 'cosmic room'[AA, 12 March 2015] <http://www.aa.com.tr/tr/turkiye/kozmik-oda-sorusturmasinda-ihbarci-tespit-edilemedi/67531> accessed 29 November 2015; criminal trial regarding the 28 February post-modern *coup d'etat* and the press release of National Security Council <http://www.mgk.gov.tr/index.php/basin-aciklamasi> accessed 29 November 2015.

[2] H Dursun, Yargı Organlarının Yolsuzlukla Mücadelesi Sırasında Karşılaşılan Sorunlar ve Çözüm Önerileri in TBBD 55/2004, 145; H Zeki and M Özen, Türk Ceza Hukukunda Devlet Sırrına Genel Bir Bakış in ABD 68–1/2010, 21 et seq.; İ Özgenç, Devlet Sırrı ve Ceza Hukuku in Adem Sözüer (eds) Dünyada ve Türkiye'de Ceza Hukuku Reformları Kongresi (2011), 289; B Aras, Devlet Sırrı Kavramı ve Uygulamada Yaşanan Sorunlar in TAAD 2–4/2011, 544; F Erem, Türkiye Barolar Birliği Başkanı Konuşması in YD 3–4/1975, 20.

I will confine my contribution to the criminal trial, whose primary purpose is to ensure criminal justice. I will attempt to examine the question of how the administration of criminal justice incorporates the notion of state secrets and their protection. As for criminal proceedings, I will focus only on the evidentiary relevance and status of documents which are kept or to be produced by authorities of the state, such as ministries or the intelligence services.[3] Consequently, I will not address the hearing of witnesses on state secrets or the introduction of their respective statements into trial by hearsay evidence or substitutes.[4] In fact, there are cases where documentary evidence and witness testimony overlap at trial. A witness can refuse to testify in a public hearing because he or she would otherwise reveal the content of documents relating to a state secret. Similarly, state authorities may refuse to submit certain documents in order to protect the identity of a witness considered to be a state secret.[5] These constellations must be kept in mind when assessing specific evidence-taking procedures.

Furthermore, I will limit my contribution to the process of evidence taking during *the trial hearing*, which is designed to prove the soundness and substance of the criminal charge brought against the defendant.[6] Thus, the use of state secret-related evidence in the earlier stages of criminal proceedings, such as by the prosecutor's office during the investigation stage, will not be covered here.

Documents are typically submitted in evidence to the court by disclosing or producing them.[7] However, as the criminal trial is principally public and adversarial,[8] the protection of state secrets during trial may necessitate some restrictions on the introduction of documentary evidence relating to state secrets. In this regard, state authorities are using the following three major protective strategies: refusal to submit any documents, disclosure in an *in-camera* hearing, and submission using some substitutes. These strategies will be described below. Finally, whenever state secret-related documentary evidence requires protection during the criminal trial, several secondary measures are applied, including excluding the public from the trial hearing,[9] refusing access to trial records,[10] or redacting the judgment. These strategies will not be addressed here.

In Turkey, the protection and introduction of state secrets as evidence into criminal trials developed in two stages, as a result of the country's two criminal procedure codes namely, the code in effect until 2005 und the current code in effect since

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3 Turkish Criminal Procedural Code (abbreviated: CPC) s 125.

4 CPC s 47.

5 CPC s 58(1).

6 CPC s 217(1).

7 CPC s 124(1).

8 CPC s 182(1) and s 206(1).

9 CPC s 182(2).

10 CPC s 153(2).

2005. They have completely opposite approaches. Given the fact that the new regulation was a reaction to the experience with and the deficits of the former code, a historical reflection on the old approach may be worthwhile to find out how the lawmakers handled the notion of state secrets in criminal proceedings and to understand the current approach.[11] In addition to the normative framework for the protection of state secrets in trial, the jurisprudence of the Turkish Constitutional Court and the Court of Cassation will be considered. Finally, the analysis will include opinions expressed in doctrine regarding the application of respective provisions and as yet unanswered questions.

II. State secrets privilege (in the former CPC)

A. Approach and implementation

1. The broad outlines

Until 2005, the criminal procedure code provided that an executive authority can reject a court's request to produce or submit certain official documents if divulging their content in a criminal trial would be *prejudicial to the safety of the state*.[12] Information, facts, or other items of this nature were described and classified by the executive branch as official or state secrets.[13] Whenever the court was not convinced of the substantiality of the refusal and considered the desired documents essential to the trial, only one remedy was available, namely to ask the Minister in charge, as superior official, to review the decision of the executive body under his or her control.[14] The Minister's decision on the necessity of the classification and the protection of requested documents was final.[15] If the decision was an adverse one, in other words, if no declassification occurred, the participants in the trial had the right to appeal this administrative decision by initiating administrative court proceedings.[16] The judges could not initiate this remedy themselves. Furthermore, judges were expected to be able to deliver a judgment without obtaining the documents from the authorities. At the same time, they had no power to dismiss or

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[11] Another special regulation regarding state secrets in the course of administrating criminal justice involves information by the National Intelligence Service. See below II.B.

[12] Former Criminal Procedure Code (abbreviated: fCPC) s 88.

[13] S Kaymaz, Uygulamada ve Teoride Hukuka Aykırı (Yasak) Deliller (1997), 205 et seq.; M Feyzioğlu, Ceza Muhakemesi Hukukunda Tanıklık (1995), 182 et seq.

[14] O Yaşar, Açıklamalı ve İçtihatlı Ceza Muhakemeleri Usulü Kanunu Cilt 1 (1998), 472; B Kantar, Ceza Muhakemeleri Usulü Birinci Kitap (1950), 134; MT Taner, Ceza Muhakemeleri Usulü (1955), 176; AF Gözübüyük, Ceza Muhakemeleri Usulü Kanunu Şerhi Cilt 1. (1994), 603.

[15] AP Gözübüyük, *op. cit.*, 603.

[16] M Feyzioğlu, *op. cit.*, 190 et seq.; S Kaymaz, *op. cit.*, 209.

drop the case based on the invocation of the state secrets privilege by an executive body. This increased the likelihood that defendants had to be acquitted for lack of evidence.

A closer examination reveals that the administrative court procedure was an ineffective remedy for several reasons. First, due to the procedural rules for an administrative court trial, which permitted the executive body to withhold the documents from the administrative court hearing as well.[17] Thus, it was simply unlikely for an administrative court to properly assess the legality of a refusal decision without being able to see the original documents. Second, even if, *theoretically*, the administrative court ruled the refusal decision as unfounded, given the fact that the executive body did not present the factual basis for its decision, i.e. the requested documents themselves,[18] the administrative court apparently never took this step, as the available jurisprudence of administrative courts shows.[19] The most likely reason for the decision was the administrative courts' assumption that both the criminal and the administrative procedural code give the Executive the power to make the final and ultimate decision on the necessity for and the ways of protecting state secrets in a criminal trial. Thus, neither procedural code offered the person affected by the respective classification by the Executive a realistic and effective remedy.

2. Results in practice

Another consequence of the state secrets privilege was that the criminal and administrative courts never developed a definition of state secrets,[20] since this determination was legally and factually in the hands of the Executive.[21] The most curious effect of this court practice was the fact that even a crime committed by a state official could be considered a state secret by the *Executive* if disclosing the crime and confirming it by convicting the official was likely to harm some outweighing interest of the state. This could be the case, for instance, if clarifying the circumstances of the alleged offence would *inevitably* expose the structure, methods, or relations of the security forces, which should not be divulged in the interest of the national security. As the ultimate power to decide on the determination of state secrets resided in the Executive, the Judiciary was not authorized to review such

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[17] Procedure Code of Administrative Courts 1982, s 20(3)(1).

[18] As defendant, the authorities were not allowed to argue the legality und soundness of their refusal before the administrative court by relying on undisclosed material [Procedural Code of Administrative Courts 1982, s 20(3)(1)].

[19] E. 1993/3084 K. 1995/3898 (Kazancı) [Council of State 5 December 1995]; A İyimaya, 'Gizli Belgeli Adalet (Yahut Savunmasız Yargı)'in TBBD 1/1988, 101 et seq.; S Kaymaz, *op. cit.*, 18.

[20] S Kaymaz, *op. cit.*, 18.

[21] B Kantar, *op. cit.,* 97.

considerations of the Executive from any legal point of view.[22] In this way the Judiciary de facto provided the Executive a considerable amount of discretion supposed to achieve the goals of a specific policy and to deliver solid results in certain crucial areas, such as the internal security policy against terrorist or separatist threats or foreign policy. That meant that doctrine indicated that the interest protected by state secrecy took precedence over any other constitutionally guaranteed interest, including achieving criminal justice and finding the truth.[23] Accordingly, the Executive was allowed to set aside the principle of due process of law if fundamental interests of the constitutional order, such as independence, sovereignty, territorial integrity, were at stake. Any judicial intervention into the operational part of the security policy was thought to destroy the effectiveness of executive actions. In fact, the lack of any judicial control in the field of state secrets facilitated the establishment of a culture of secrecy in the entire executive branch.[24]

At this point, it should be noted that this approach is closely linked with another doctrine justifying certain government actions, namely the doctrine of necessity of reason of state. In this context, some of the conclusions reached by the Investigation Committee of the Turkish Parliament in 1997 are remarkable.[25] It was established that several officers in the security forces were conducting a 'dirty war' against terrorism. They had built networks of people involved in politics, the economy, and organized crime. One aim of these networks was to create a 'lawless' space and to avoid any judicial control over their actions and activities in order to be effective in their fight against terrorists.[26] Apparently, the notion of state secrets was a very useful pretext to conceal their criminal activities by invoking the state secret privilege against every court order.[27] According to the report of the parliamentary committee, some entities of these security forces evidently evolved into a state within the state, i.e. a 'deep state'. As a legally effective pretext, the notion of state secrets was used to 'immunize' certain state officials against criminal pros-

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[22] MT Taner, *op. cit.*, 194; A Önder, Ceza Muhakemeleri Hukukunda Tanıklıktan Çekinme Hakkı in İÜHFM 4/1963, 905; F Erem, Ceza Muhakemeleri Usulü Kanunu (Şerh) (1996), 192; A İyimaya, *op. cit.*, 103.

[23] This result criticizing F Erem, (Şerh) *op. cit.*, 190 et seq.

[24] F Erem, *op. cit.*, 16; H Dursun, *op. cit.*, 145; B Aras, *op. cit.*, 544.

[25] Investigation Committee of the Grand National Assembly of Turkey on so-called 'Susurluk-Accident' Report, 310 et seq. <https://www.tbmm.gov.tr/tutanaklar/TUTANAK/TBMM/d20/c027/tbmm20027098.pdf> accessed 26 November 2015.

[26] Report, *op. cit.,* 314.

[27] Report, *op. cit.,* 317; thus, it was also possible to bypass a fundamental principle of material criminal law, namely that an order which in itself constitutes an offence shall under no circumstances be executed; the person who executes such an order shall not avoid responsibility. An order constituting an offense must never be followed. Otherwise, both the person following the order and the person giving the order are held responsible. [Turkish Constitution Article 137(3) and Turkish Penal Code, s 24(3)], translated by the author; see also Z Hafızoğulları and M Özen, *op. cit.,* 24.

ecution, liability, and punishment.[28] In fact, the invocation of state secrets in the criminal trial was the principal obstacle to proceeding against state officials allegedly involved in serious criminal activities. In some cases, the courts had no choice but to acquit the officials for lack of evidence.[29]

The concept of state secrets and its promising invocation in criminal trials against officials seemed to be an important cornerstone of the 'deal' between the government and the intelligence and security agencies in order to promote a thorough, far-reaching, and uncompromising fight against terrorism. Considering that in Turkey the 1990s were the decade of weak coalition governments, the Executive obviously seized the reins to 'finish off' serious security problems, claiming greater expertise and exploiting a lack of political oversight by passive governments and deeply divided parliaments.[30]

B. Reform efforts during the drafting of a new criminal procedure code

During the preparation of a new criminal procedure code in 2004, it became clear to the parliamentary committee on legal affairs and the advisory board that the then-current statutory concept of protection of state secrets in criminal proceedings was unacceptable.[31] As shown above, agencies in the executive branch *had the authority to withhold any official document* from criminal trials, arguing that the content was a state secret and any disclosure would harm state security. Speeches by the lawmakers in parliament are proof that they were determined to turn the tables on state secrets.[32] Paragraph 1 section 125 new CPC states this unambiguously: 'Documents that include information about a fact related to a crime *shall not be concealed as a state secret from the court.*'[33] This is known as the 'principle of openness' in front of the court and was celebrated as a milestone in the history

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[28] Report, *op. cit.*, 319.

[29] Report, *op. cit.*, 208 et seq. and 316.; see also Z Hafızoğulları and M Özen, *op. cit.*, 25; İ Özgenç, *op. cit.*, 307; M Erdal, Herkesin Yargısı Kendine. Demokratikleşme Sürecinde Basının Yargı Algısı (2010), 291 et seq.

[30] These circumstances in the intelligence and security agencies and forces, to a certain degree, trace back to the structural deficits in the control mechanism over the intelligence community. Due to the fact that parliament is quite a new actor in terms of control over the Intelligence Services and that the government with its majority still wields influence on the works of a parliamentary commission, the subsequent judicial review in specific cases could ultimately serve as some kind of indirect oversight.

[31] Justice Committee of the Grand National Assembly of Turkey – Report on Amendment of Criminal Procedural Code (1/153, 1/292), 172 <https://www.tbmm.gov.tr/sirasayi/donem22/yil01/ss698m.htm> accessed 6 June 2017; see also İ Özgenç, *op. cit.*, 294 et seq.; C Şahin, Ceza Muhakemesi Kanunu Gazi Şerhi (2005), 175 et seq., and 349.

[32] S Kaymaz, *op. cit.*, 98 et seq.

[33] Translated by the author.

of criminal justice in Turkey.[34] In a second step, the new code defines the notion of state secrets: 'Knowledge which, if disclosed, could harm the external relations of the state, national defence and national security, or create a danger in respect to the constitutional order and in external relations shall be considered as a state secret.'[35] However, the new section 125 did not completely waive the protection of state secrets for *other participants in a criminal trial and the public*. On the contrary, the Code provides for an *in-camera* hearing by the trial judge where he or she inspects *ex parte* the documents related to state secrets.[36] Obviously, this is the compromise worked out between the executive branch and the Judiciary. Finally, the new law requires the trial judge to enter on the record only information in documents suited to resolve the crime as charged.

These are principles designed to be the new parameters for the introduction and protection of documentary evidence related to state secrets in Turkey. Nevertheless, since the new law was enacted, the interpretation and implementation of these new parameters have caused numerous problems. In the following, I will try to explain these problems and evaluate the new law from several perspectives. At this point, I need to make two additional remarks about the subject matter of this contribution.

The first concerns an important exception from the § 125 new CPC, which was enacted in 2014, nine years after the new CPC. Until then, section 125 new CPC regulated evidence-taking related to documents at the disposal of state entirely.[37] Even the protection of state secrets was not sufficient reason for withholding documentary evidence from a criminal court. However, under the amendment, the judiciary bodies, including the criminal courts, *shall not request* information, documents, dates, registrations, or analyses from the National Intelligence Service (MIT) which the Service considers *intelligence*.[38] This is a significant step backwards at the expense of the 'principle of openness' towards the court and is, in fact, a reintroduction of the former state secrets privilege, namely the refusal strategy in favour of the MIT.[39] Nevertheless, the Turkish Constitutional Court approved the

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[34] İ Özgenç, *op. cit.*, 307; M Altunel, Devlet Sırrı İçerdiği İddia Edilen Bilgi ve Belgelerin Ceza Yargılamasındaki Yeri in YD 7/2011, 31.

[35] CPC s 47(1).

[36] CPC s 125(2); see also İ Özgenç, *op. cit.*, 305; B Aras, *op. cit.*, 556.

[37] S Kaymaz, *op. cit.*, 17.

[38] National Intelligence Law 2937 additional-section 1(1).

[39] The step backwards in the new law on the MIT evokes on the one hand the old and well-known unwillingness of the executive branch to make the intelligence service accountable to the Judiciary. On the other hand, the trust the new Criminal Procedure Code had placed in the Judiciary no longer seems to exist. Numerous reasons come into question in this regard, and are, in fact, of a speculative nature: did the agency harbour reasonable and objective concerns in assuming that the criminal courts cannot protect state secrets during an *in-camera* hearing or even misuse their authority to review them? In this respect, the Criminal Procedure Code seems to have made its fair contribution as it allows, without discrimination, all criminal courts in the country to review state secrets as long as they do

constitutionality of the new law.[40] Criminal courts are no longer empowered to compel the production of intelligence evidence by the MIT. It is at the discretion of the Intelligence Service to disclose its intelligence during *in-camera* hearings. This exemption needs to be kept in mind while reading the following explanations.

The second exemption from the *in-camera* hearing is more general. The introduction of sensitive official information and findings into criminal trials neither was nor is totally regulated or covered by the protection of state secrets. In other words, the executive branch had and has *procedural means other than* refusal or an *in-camera* hearing to respond to a court order. To this end, the authorities can produce so-called second-hand evidence and use it as a substitute in order to protect state secrets, although CPC s 125(1) equips the courts with the power to compel direct disclosure of evidence in questions. However, the Intelligence Services still prefer to share their knowledge with the Judiciary through reports (*istihbarat notu/raporu*).[41] But even without the invocation of the state secrets privilege at the time of the former code, and now the request to hold an *in-camera* hearing, the Intelligence Services could and can also protect their official secrets by controlling the flow of information into the criminal trial.

III. In-camera hearing (the current CPC)

A. Evidence taking by the court

1. Principle of openness towards court

Except for the national Intelligence Service, the new law is very clear about the fact that the state secret privilege cannot be invoked against a criminal court. However, the fact that the court has the power to request documents from the authorities related to a state secret does not mean that it will do so whenever there is a link between them and the charge brought against the defendant. There are at least two thresholds before state secret-related documents are introduced in an *in-camera* hearing: a formal order issued by the court to the authority in question and an administrative act taken in response to it. Numerous grounds are conceivable for

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so due to a crime with a mandatory minimum sentence of five years [see CPC s 47 (3) and s 125 (33)].

[40] E. 2014/122 K. 2015/123 R.G. of 01.03.2016 – 29640 [Turkish Constitutional Court, 30 December 2015].

[41] See for instance E. 2011/10–212 K. 2012/42 (kazancı) [Turkish Court of Cassation Grand Criminal Chamber 14 February 2012]; E. 2010/9–88 K. 2010/255 (kazancı) [Turkish Court of Cassation Grand Criminal Chamber 14 December 2010]; E. 2005/10–15 K. 2005/29 (kazancı) [Turkish Court of Cassation Grand Criminal Chamber 15 March 2005]; E. 2005/5497 K. 2005/7945 (kazancı) [Turkish Court of Cassation 9th Criminal Chamber 24 October 2005].

the introduction to fail for lack of relevance. More specifically, the outcome will depend first on the interpretation of the *inquisitorial duty of the judge* to ensure the best possible search for the truth by gathering all relevant evidence including documents related to state secrets.[42] Secondly, it will depend on the decision of the judge on a corresponding motion by the defence exercising its right to take evidence. Practical difficulties may arise because the judge is not in a position to name a particular classified document that must be surrendered in full. In that case, he or she would merely ask the authorities for official knowledge related to the facts or circumstances of the criminal charge. In reality, it is up to the executive body to comply with this request properly.

De jure, the new law revoked the definitive power of the Executive which the former CPC had de facto granted.[43] In practice, the former code meant that a refusal or no-knowledge decision taken by an executive body could not be challenged and was binding on a judge. The new code revoked the executive privilege of refusing to surrender state secret related documents to the court. Accordingly, an executive body is no longer empowered to deny the disclosure of certain official documents or the production of them for a criminal trial. It is no longer allowed to argue by pointing to the danger of possible harm to a relevant interest of the state if documents classified secret find their way into a criminal trial. Like everybody else, an executive authority that stores material likely to be useful as evidence is obliged to surrender it under a court order.[44] If the authority fails to comply properly with this obligation, the court has the *option* to order a search for confiscation if the location of the desired material is known and its recovery does not depend on the cooperation of the authorities.[45] If the location of the desired material is not known, the authority is obliged to provide the location of the documents.[46] Otherwise, the court can impose disciplinary arrest on the possessor.[47] In other words, a criminal court has the power to compel the disclosure or production from any authority of a document that could be relevant in the search for the truth about the accusations.[48]

The same is true for a proportionality decision by the executive body in charge. The Executive is not authorized to reject a court request after the interest at stake has been weighed in favour of the public interest. The new law considers an

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42 S Kaymaz, *op. cit.*, 109.

43 İ Özgenç, *op. cit.*, et seq 305.

44 CPC s 124(1).

45 CPC s 119(1) and 123(1).

46 CPC s 124(1).

47 CPC s 124(2).

48 S Kaymaz, *op. cit.*, 110; see also Z Hafızoğulları and M Özen, *op. cit.*, 27; M Altunel, *op. cit.*, 33.

in-camera hearing *effective* and *sufficient* protection of state secrets.[49] State secrets related to a crime must always be reviewed by the trial court. This also means that the authority in charge is empowered to demand an *in-camera* hearing to prevent disclosing state secrets contained in these documents in a public trial and becoming known to third parties.

2. Reach of the court's competence

As already stated, the trial court will receive documents related to state secrets and not disclose them to the participants in a criminal proceeding, including the prosecutor. It will hold an *in-camera* session. After reviewing the transmitted documents, the court must deal with many questions which, until now, jurisprudence in Turkey has not yet answered: who has the power to decide finally and ultimately that a particular information is a state secret and whether its disclosure would harm or threaten some interests protected by the notion of state secrets? Indeed, even though CPC s 47(2) includes a definition of state secrets, the definition is so broad as to allow many different interpretations.[50]

More specifically, CPC s 125(1) unequivocally authorizes the court only to compel the Executive to disclose the requested documents in a closed session. However, the section is not clear about whether the authorities must convince the court that the content of the documents are state secrets and that their public disclosure would harm certain protected interests of the state. Nor is it clear whether the court has the power to verify the lawfulness of the executive decision or the assessment regarding the classification and conducting a closed session.[51] The same can be said for the question whether the court can order alternative measures to an *in-camera* hearing for the protection of state secrets, such as producing a summary or editing the documents.[52] As those measures facilitate not only the protection of state secrets but also enable the defence to become aware of the transmitted information, they are important regarding the rights of the defence. The court's authority in this regard must be affirmed as a matter of principle, at least in theory. In case of alternative measures, it will indeed not be easy for the judge to reconcile the adequate protection of state secrets, the rights of defence, and, finally, his/her obligation to ensure the best possible search for the truth in a proper and satisfactory manner. And yet, this is what the inquisitorial role of the judge in a criminal trial demands.

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[49] S Kaymaz, *op. cit.*, 106.

[50] Z Hafızoğulları and M Özen, *op. cit.*, 217; M Altunel, *op. cit.*, 30; İ Özgenç, *op. cit.*, 293 et seq.

[51] Affirming C Şahin and N Göktürk, Ceza Muhakemesi Hukuku II (2015), 46; İ Özgenç, *op. cit.*, 305; M Altunel, *op. cit.*, 32; VS Evik and AH Evik, Devlet Sırrını ve Yayılması Yasaklanan Bilgileri Açıklama ve Elde Etme Suçları in AÜEHFD 3–4/2004, 126.

[52] Affirming S Kaymaz, *op. cit.*, 113 and 134 et seq.

In *reality*, the court will face serious difficulties in collecting evidence or identifying circumstantial evidence in order to confirm or rebut *assessments* by the executive body regarding the classification of a certain document as a state secret. The summoning of an expert will be a proper step,[53] but this remains entirely at the discretion of the judge. More realistically, the judge will already be convinced, to the extent required by law, by arguments of the executive body which also has the expertise in respective questions.[54] Therefore, in many cases it would not be difficult for an executive body to persuade the judge that the materials in question are state secrets and the holding of an *in-camera* hearing is the only and strictly necessary measure to protect them. In practice, the court tends to award the Executive considerable discretion in some areas, such as national security, terrorism, and foreign policy, just because it sees no reason not to accept the expertise of the executive bodies. It is rather unrealistic for a judge to try to immerse him- or herself—alone or with the help of an expert—in the pertinent subject matter/material, to provide an assessment about their importance, and to predict the harm or threat potential emanating from the way and the amount of their use in a criminal trial. The classification of state secrets remains solely within the power of the Executive, judiciary oversight is rather restricted.[55] Psychologically, any decisions by the court deviating from those of the executive body in question could be understood by the latter as a sign of 'distrust', and this could cause a crisis within the state apparatus and harm the long-term relationship between the two branches. As the Judiciary will not be interested in creating such a conflict, it is to be expected that it will typically not intervene in predominantly administrative matters such as state secrets and their protection.

Theoretically, the question whether the trial judge has the power to lift the classification imposed by an executive body has still not been answered.[56] In this regard, some scholars in Turkey hold that the new code contains not only a positive definition of state secrets and a procedural mechanism for how to introduce state secrets into criminal trials, but it also provides a negative definition of state secrets (so-called illegitimate secrets), which can be based on two considerations. First, they emphasize the principle of openness towards the court, which CPC s 125(1) clearly affirms. They recall that as long as official information is related to a crime, it shall not be considered a state secret and withheld from evidence-taking by the court.[57]

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[53] CPC s 63(1).

[54] See for instance E. 1975/11–5 K. 1975/16, YKD 8/1975, 155 et seq [Court of Cassation 9th Criminal Chamber 8 May 1975]; for other examples see S Kaymaz, *op. cit.*, 107 fn. 262.

[55] This result criticizing A İyimaya, *op. cit.*, 103.

[56] In principle affirming C Şahin and N Göktürk, *op. cit.*, 46 et seq; S Kaymaz, *op. cit.*, 40 fn. 72; M Feyzioğlu, 5271 Sayılı Ceza Muhakemesi Kanunu Hakkında Bazı Tespit ve Değerlendirmeler in TBBD 62/2006, 35.

[57] Z Hafızoğulları and M Özen, *op. cit.*, 24; M Altunel, *op. cit.*, 27.

Second, they draw attention to the historical development of the provision. It was the unmistakable intention of the lawmakers to set up a regulation, which state authorities cannot take to mean that they can declare information regarding *their illegal activities* as state secrets. Consequently, so the argument goes, the judge must prove whether the disclosed information concerns *criminal acts committed by state officials*.[58] If that is the case, he or she must remove the state secret classification and, most importantly, transmit the entire evidence to be presented in open session at trial.[59] However, some limitations may be necessary, so the scholars argue, if, besides so-called illegitimate secrets, the disclosure of the entire first-hand evidence in trial introduces some other inextricably linked state secrets and may infringe legitimate interests. But this must not lead to similar situations as in the past![60] Unlike under the former doctrine of the state secrets privilege, the fact that a state official committed a crime can *never* be considered a state secret. Even with the last restriction, this interpretation of the new code must be seen as a minority opinion. The wording of the code, which in court practice is more convincing and binding, can also be interpreted in the opposite sense.

In fact, CPC s 125(1) stipulates only that the court must be given access to documents related to state secrets. In a strict sense, an *in-camera* hearing itself does not ensure that the court will even utilize the official documents in its search for the truth in a criminal case, and the court is only required to keep records of facts that are material for resolving the crime. There is still the possibility for the court to waive their use altogether to protect certain state secrets that will inevitably come to light by the mere continuation of the hearing in a certain direction or by the outcome of the criminal proceedings. Accordingly, the new law does not abolish the well-established prior doctrine of reasons of state entirely. It subjects this doctrine to judicial review. The invocation of state secret protection may not be used to withhold official documents from a criminal trial, and the Judiciary is no longer blocked by the privilege of state secrets.[61] Finally, the success of judicial review is not only a matter of procedural law. It also depends on the actual independence of the judges, in other words, their independence within the living framework of the constitutional order. In this respect, it is remarkable that there is no case law of the Court of Cassation on the introduction of documents related to state secrets in a criminal trial. One possible reason might be the Court's traditionally very weak awareness of the importance of defence rights in the criminal trial. The other is its established practice of 'inspecting the court files' to verify whether the instance

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[58] Z Hafızoğulları and M Özen, *op. cit.*, 22 et seq; İ Özgenç, *op. cit.*, 296.

[59] VS Evik and AH Evik, *op. cit.*,128 et seq.

[60] S Kaymaz, *op. cit.*, 143 fn. 344.

[61] A Erdoğan, Avrupa İnsan Hakları Mahkemesinin 31 October 2006 Günlü Kahraman-Türkiye Kararı Değerlendirmesi in ABD 65–1/2007, 208 et seq.

court's *verdict* was based *on sufficient facts*.[62] In doing so, the Court fails to review the compliance of the instance court's *proceedings* with the principles of procedural law.[63]

At this point, another shortcoming of the regulation of an *in-camera* hearing in Turkish law becomes apparent, namely the lack of participation by the defence in a decision on this procedural issue and the further procedure after the *in-camera* hearing. In the following I will attempt to explore the impact of an *in-camera* hearing on the rights of the defence.

B. Rights of the defence during in-camera hearings

CPC s 125 does not provide any participation by the defence in the decision-making process of the court when determining the legal necessity or scope of protection for state secrets in a criminal trial. In particular, the law does not explicitly require a notification or an *inter parte* hearing on these procedural issues. Similarly, there is no requirement that the defence be informed about the nature of the documents in question, such as whether they are inculpatory or exculpatory, nor must the court provide any indication about the content of the documents, such as their category or connection with a specific issue. This weak position of the defence was, in fact, in one case sufficient for the Turkish Constitutional Court's finding that the right of the defence to a fair trial[64] had been violated because the non-disclosure of the *complete* material evidence deprived the defendant of the ability to prove its reliability, for instance by consulting an expert.[65]

In fact, the CPC completely ignores the question of whether and how the difficulties of the defence associated with the *in-camera* hearing could and should be counterbalanced. The only requirement regarding the evidentiary results of an *in-camera* hearing is that the judge puts 'only the information included in these documents that is suitable to reveal the charged crime' on the record. Whether this record will be later disclosed to the defence is not answered in CPC s 125 and is controversial among scholars.[66] Even if affirmed, there is still no consensus on the question of what the disclosed record should entail: a summary of the *facts* the judge obtained from the documents or only *general conclusions* of which he

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[62] For this practice see in detail M Arslan, Die Aussagefreiheit des Beschuldigten in der polizeilichen Befragung. Ein Vergleich zwischen EMRK, deutschem und türkischem Recht (2015), p 526 et seq.

[63] M Arslan, *op. cit.*, 528 et seq.

[64] Turkish Constitution Article 36(1).

[65] App no 2014/253 [Turkish Constitutional Court 9 January 2015], par 75 et seq; see also App no 2013/2312 [Turkish Constitutional Court 4 June 2015], par 76 et seq.

[66] See for instance C Şahin and N Göktürk, *op. cit.*, 46 et seq; İ Özgenç, *op. cit.*, 305 et seq.

or she is convinced or not convinced based on undisclosed original facts in the documentary evidence?[67]

Even given a limited disclosure of the record, substantial doubts remain whether this constitutes *sufficient* information for the defence, for instance about the *factual basis of allegations* brought against the defendant. There might be incriminating evidence that the court took into account in an *in-camera* hearing [but not shared with the defence], whereas the defence will not be able to challenge this evidence by arguing its unlawfulness, unreliability, or incredibility. In this respect, it is possible for a criminal court to be actually influenced by secret evidence in forming its judgment, whereas the defendant cannot challenge this secret evidence as he or she is excluded from the *in-camera* hearing. Moreover, the defence will be restricted in its ability to bring contrary evidence. The danger is obvious: by allowing an *in-camera* hearing, the new CPC allows that at least some evidence in a criminal trial remains entirely secret to the defence.[68]

Even if, under Turkish law, the role of the criminal judge is principally *inquisitorial*, it is unclear how far he or she must probe the admissibility of documents related to state secrets. The same *inquisitorial* duty must normally be met when assessing the reliability, trustworthiness, or probative value of closed material.[69] However, the new code does not explain in detail how the judge shall use the evidentiary results of the *in-camera* hearing and counterbalance the procedural disadvantages from an *in-camera* hearing for the rights of the defence.

There is no doubt that the new law was designed to establish a proper balance between the interest of the Executive to protect state secrets and the interest of the Judiciary to provide justice in criminal cases.[70] But the most important result of this balancing, namely conducting an *in-camera* session, *categorially* fails to take the right of the defendant to an adversarial hearing into consideration.[71] *Empirically*, there is no realistic and practicable chance for the defence to limit the disadvantages of the *in-camera* hearing to an acceptable extent. There is no remedy to appeal against this particular decision of the court and of the executive body in question before judgment is reached.

In-camera hearings and the danger of secret evidence in criminal trials must also be evaluated under evidence law. In forming the judgment, the judge is principally

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[67] For these alternatives, see A İyimaya, *op. cit.*, 109.

[68] Pointing out this result S Kaymaz, *op. cit*., 118; Z Hafızoğulları and M Özen, *op. cit.*, 28; B Aras, *op. cit.*, 559; A İyimaya, *op. cit*., 106.

[69] For this obligation of the trial court in general see E. 2011/43 K. 2012/10, R.G. 5 April 2012 – 28225 [Turkish Constitutional Court 19 January 2012]; see also E. 2010/1–253 K. 2011/11 (Kazancı) [Turkish Court of Cassation Grand Criminal Chamber 1 February 2011].

[70] Skeptical M Feyzioğlu, *op. cit.*, 35 et seq; Z Hafızoğulları and M Özen, *op. cit.*, 28.

[71] S Kaymaz, *op. cit.*, 17; M Feyzioğlu, *op. cit.*, 36 et seq; A Erdoğan, *op. cit.,* 208 et seq.

allowed to rely only on evidence presented at a public hearing and discussed in his/her presence.[72] This principle of adversarial hearing is also provided under the constitution.[73] However, conducting an *in-camera* hearing deprives the defence of the possibility to consider state secret-related evidence and of the opportunity to be heard on it. The court's use of classified materials absent any realistic and meaningful counterbalancing measures for the defence counteracts these rights.

Unlike the principle of adversarial hearing,[74] the so-called principle of free evidence unfortunately supports the use of secret evidence. In other words, 'guilt may be proven by *all kinds of evidence* obtained through lawful means.'[75] Turkish doctrine understands this principle in the following, rather sloppy way: '*Everything* can be proven by *everything.*' This means at least two things: *first*, there is no restriction on *the kind of evidence* at a trial hearing.[76] This interpretation actually does not exclude that the judge considers state secrets-related evidence unilaterally at an *in-camera* hearing. Thus, it appears that the private knowledge of the trial judge becomes admissible as evidence. Additionally, there are no restrictive formal evidence rules that might limit the number/scope of admissible evidence under Turkish criminal procedure. *Second*, the judge may base his or her judgment on any *kind of proof*.[77] This means that there is no obligation to prove certain offence elements by a certain probative quality of evidence. Nevertheless, the probative value of the aforementioned private knowledge of the judge could only be estimated as low, as it was not established in an adversary hearing. Its significance for the grounds of a conviction could be critical if the allegations against the defendant are based, to a considerable extent, on closed material.

VI. Conclusion

Conducting an *in-camera* hearing in order to introduce documentary evidence related to state secrets should, according to its advocates, accomplish several purposes: first, to break the resistance of authorities traditionally reluctant to transmit documents to the courts. Second, to enable the criminal courts to verify the lawful-

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[72] CPC s 217(1); see also E. 2008/12 K. 2011/104, R.G. 28 December 2011 – 28156 [Turkish Constitutional Court 16 June 2011]; E. 2008/1–90 K. 2008/100 (Kazancı) [Turkish Court of Cassation Grand Criminal Chamber 6 Mai 2008]; F Yenisey, Criminal Law in Turkey (2012), 221.

[73] Turkish Constitution Article 36(1); see also App no 2013/2767 [Turkish Constitutional Court 2 October 2013] par 22.

[74] CPC s 217(1).

[75] CPC s 217(2).

[76] F Yenisey, *op. cit.*, 226; with the exception that unlawfully obtained evidence may not be used (CPC s 217(2)).

[77] N Centel and H Zafer, Ceza Muhakemesi Hukuku (2015), 218 and 222.

ness of the intended protection of state secrets in a criminal trial, among others by an *in-camera* hearing. Third, to put the court in a position to ensure a fair trial.

Considering that *in-camera* hearings have been conducted for more than ten years, these goals have unfortunately not been reached. The exemption clause regarding the National Intelligence Service is a good example for the strong resistance still continuing within the Executive against control by the Judiciary, thus considerably reducing the scope of the principle of openness to the court. Furthermore, there is no legal certainty about the application of this principle in practice. The lack of practicable guidelines for the ordinary courts by the Constitutional Court or Court of Cassation is one of the main reasons for legal uncertainty. In the end, the application of the relevant provisions and the manner in which the judge will close the existing gaps regarding the numerous unregulated situations will, in practice, decisively depend on the specific circumstances of each case.

With regard to the third goal, the *in-camera* hearing indeed reflects the honest intention that the involvement of a judiciary body will be *sufficient* to address state secrets in criminal matters in a *proper* manner. However, the analysis above has shown that the reach of the current regulation and application of an *in-camera* hearing falls quite short as the court is still in the position to allow state interest to prevail over the interests of justice or the defence. In fact, the *in-camera* hearing privileges the search for the truth over the rights of the defendant to a fair trial. Bearing in mind that there are still some uncertainties about the meaning, scope, and aftermath of the requirements of written records of *in-camera* hearings, Turkish criminal procedure offers mainly two primary guarantees: the inquisitorial role of the judge in the criminal trial and the requirement of a careful assessment of the evidence by the judge him- or herself. As secondary guarantees, the judge must decide according to the principle of *in dubio pro reo* and he or she has to provide the reasons for the judgment in writing. Finally, reference may be made to the legally guaranteed independence and impartiality of a judge.

But these measures do not address the defence's inability to challenge the evidence and allegations against the defendant, and they cannot compensate for the disadvantages the defence faces by *in-camera* hearings. *In-camera* hearings fail to exclude with acceptable certainty the possibility that the criminal charge brought against a defendant is based solely or decisively on secret evidence. Some critics argue that an *in-camera* hearing can only be fair if the judge assigns a special advocate to the defendant who stands up for him or her during the hearing. For some opponents, the introduction of state secrets through an *in-camera* hearing produces secret evidence, and they hold that this cannot be counterbalanced by any means. This opinion deserves approval. The rights of defendants must be understood as a purpose in itself, and should not be sacrificed for purposes of effectiveness or an 'accurate' verdict, as the legitimacy and rationality of the process and the verdict are at the stake.

Indeed, at the time the new CPC was prepared, lawmakers were predominantly thinking about cases where state officials are accused of being involved in crimes and where the invocation of the state secrets privilege could protect them from being held accountable before criminal justice. But the new law covers all cases in which state secrets could be relevant as evidence, regardless of the defendant. In view of the fact that the *in-camera* hearing was not discussed from this perspective, it seems a rather unfortunate result that, for instance, the use of secret evidence in cases of terrorism or organized crime is possible. This is a new development, unlike the long-standing practice of using intelligence information by producing and introducing so-called second-hand evidence into trial, which is disclosed to all participants, while its sources and the methods of collecting it remain unknown or unattainable. Thus, *in-camera* hearings created new problems. Other unacceptable consequences of secret evidence are not addressed in Turkey at all: what about the drafting of the judgment? Is it possible that some parts of its reasoning remain closed/secret?

Delisting Procedure before the Ombudsperson to the Security Council's ISIL (Da'esh) and Al-Qaida Sanctions Committee

Confidentiality and other issues arising in the context of the Ombudsperson's process

Catherine Marchi-Uhel[*]

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[*] The article reflects the opinions of its author and not the views of the United Nations.

Introduction

Restrictive measures are used at the United Nations level in the context of the Security Council's 'sanctions regimes'. In particular, the Al-Qaida and Taliban Sanctions Regime created in 1999 (now the ISIL (Da'esh) and Al-Qaida Sanctions Regime)[1] imposes the measures of assets freeze, travel ban, and arms embargo on its listed individuals and entities.[2] At the time of its creation in 2009, the Office of the Ombudsperson was welcomed as a significant improvement to the 1267 Sanctions Regime. It is undeniable that elements of increased fairness and transparency have since then progressively continued to improve the Ombudsperson process for the review of delisting requests. As a result, the mechanism has come a long way since the Office became operational in July 2010, even if there remains room for improvement.

Most of the remaining critics from States, academics, and practitioners against the Ombudsperson mechanism focus on the fact that it is not a judicial mechanism and thus falls short of important guarantees that would be necessary to provide effective judicial protection. However, despite the strength of these critics, the Security Council has so far not been convinced that judicial review at the UN level is necessary.

During my two years of practice as the Ombudsperson, I met many Petitioners in person and measured the impact of sanctions on their lives. I also saw what this review mechanism represents for them. As of December 2018, individuals and entities have brought 82 cases to the Ombudsperson. Out of the 74 delisting requests fully completed through the Ombudsperson process,[3] 57 petitions have been granted, resulting in 52 individuals and 28 entities being delisted, and only 17 delisting requests have been refused.[4] My interaction with Petitioners tells me that not only are they anxious about the outcome of their delisting request, they are also very interested in the process that leads to this result. It is particularly important for them to hear the information against them so they can respond to it.

The use of confidential information in this framework must follow clear principles. The starting point of this article is to describe the unique role the Ombudsperson mechanism plays in a context where the rights of individuals under sanctions must be balanced against the interest of security. With the Ombudsperson process, Petitioners get an opportunity to know more about their case than the content of the

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[1] This regime was created by the United Nations Security Council resolution 1267 of 15 October 1999 and developed in subsequent resolutions (hereinafter '1267 Sanctions Regime'). It is administered by the 1267 Sanctions Committee, which is composed of the 15 members of the Security Council.

[2] For the purpose of the present study, the meaning of 'restrictive measures' is limited to detention, house arrest, and the freezing of assets applied against natural persons. Measures applicable against legal entities are excluded from the scope of this study.

[3] Some requests concerned several entities or an individual and an entity.

[4] Updated statistics are available on the Ombudsperson's website [https://www.un.org/securitycouncil/sc/ombudsperson/status-of-cases].

public Narrative Summary of Reasons for Listing, which accompanies the publication of the listing decision. They are heard by an independent reviewer with the power to conduct independent research and to recommend delisting. They have the assurance that a delisting recommendation by the Ombudsperson will be followed unless there is a consensus of the 15 members of the 1267 Committee to retain the listing or the issue is referred to the Security Council for decision.[5] Finally, whether ultimately successful or not, Petitioners receive reasons for the decision on their request.

Although the Ombudsperson's process is not a judicial one, the Ombudsperson must address fairness issues stemming from the various forms of confidentiality arising in the context of the review of delisting requests. This article describes these forms of confidentiality, including why and when the Ombudsperson may need to access such information. It then explores the way the Ombudsperson treats the issue of access to and reliance on confidential information vis-à-vis the Petitioner and issues of fairness arising from the same. The article finally discusses how the Ombudsperson process and judicial proceedings have the potential to be mutually reinforcing in that area and more broadly. It concludes on the subject of two areas of much needed improvement in the Ombudsperson mechanism.

I. The 1267 Sanctions Regime in context and main stages of the review of delisting requests

A. The 1267 Sanctions Regime in context

Sanctions constitute an important tool for the Security Council to maintain or restore international peace and security under Article 41 of Chapter VII of the United Nations Charter. Since 1966, the Security Council has established 30 sanctions regimes, 14 of which are active as of December 2018. The Council really started making extensive use of sanctions in the 1990s. Sanctions are imposed to support peaceful transitions and political settlement of conflicts, deter non-constitutional changes, protect human rights, promote non-proliferation of weapons of mass destruction, and constrain terrorism. First-generation sanctions were global, and targeted States were posing a threat. They included the interruption of economic relations and of various means of communication as well as the severance of diplomatic relations. The objective was to isolate the State at the origin of the threat and thus to urge it to modify the attitude which constituted the threat. These global sanctions rapidly faced growing criticism due to their unwanted but devastating consequences on the civilian populations of the concerned States.

[5] None of these two scenarios has occurred since the power to make recommendations was granted to the Ombudsperson in 2011.

In response to these criticisms, by the mid-1990s, the Security Council instead started using selective sanctions known as 'targeted' sanctions.[6] These sanctions did not target States but rather specifically the factions, groups, individuals, or entities which were considered responsible for a threat to international peace and security. In addition to more traditional forms of sanctions such as arms embargoes, new sanctions included asset freezes and travel bans. The sanctions which were imposed against ISIL (Da'esh) and Al-Qaida by the 1267 Committee and fall under the Ombudsperson's mandate are of this second generation. Targeted sanctions were soon the subject of equally strong criticism. This was particularly so in the context of the 1267 Sanctions Regime when, after the tragic events of 9/11, the names of hundreds of persons were placed on the list without any notice of reasons for being listed and without recourse.

Sanctions are imposed as a result of a political process. Usually, information is provided by the designating State in support of its request to impose sanctions.[7] According to resolution 2368 (2017), paragraph 51, when proposing names to the 1267 Committee for inclusion on the ISIL (Da'esh) & Al-Qaida Sanctions List, Member States must provide a statement of case that should include as detailed and specific reasons as possible describing the proposed basis for the listing. According to the 1267 Committee's internal Guidelines,[8] the statement of case should include but not be limited to:

1) specific information demonstrating that the individual/entity meets the criteria for listing;
2) details of any connection with a currently listed individual or entity;
3) information about any other relevant acts or activities of the individual/entity;
4) the nature of the supporting evidence (e.g. intelligence, law enforcement, judicial, open source information, admissions by subject, etc.);
5) additional information or documents supporting the submission as well as information about relevant court cases and proceedings.

The statement of case is releasable, upon request, except for the parts the designating State identifies as being confidential to the Committee, and may be used to develop the narrative summary of reasons for listing. This is a public summary providing information to the public and the Petitioner on these reasons. However, nothing prevents the Committee from taking into account additional information not

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[6] See on this development in more detail in I Cameron (ed), *EU Sanctions: Law and Policy Issues Concerning Restrictive Measures*, Intersentia 2013; TJ Biersteker, SE Eckert, M Tourinho, *Targeted Sanctions*, Cambridge University Press 2016.

[7] In certain cases, listings have occurred through Security Council resolutions. In those cases, there is no designating State.

[8] Security Council Committee pursuant to Resolutions 1267 (1999), 1989 (2011), and 2253 (2015) concerning ISIS (Da'esh), Al-Qaida, and associated individuals, groups, undertakings, and entities, Guidelines of the Committee for the Conduct of its Work, adopted on 7 November 2002, as last amended on 5 September 2018, para 6(h).

available in the public summary, including confidential information. There is no clear standard at the Committee level on the evidentiary threshold that information should meet in order to justify a listing. I understand that certain States proposing listings apply the same evidentiary standard as domestically. This allows those States to respond appropriately if there is a challenge to the sanctions at the national level. However, this is not a uniform practice among States.[9]

When sanctions target individuals, they raise valid human rights and fair process concerns, because they impose very strict limitations on a number of these rights.[10] In the 2005 World Summit declaration, the General Assembly called on the Security Council, with the support of the Secretary-General, to ensure that fair and clear procedures are in place for the imposition and lifting of sanctions measures.[11] These concerns were significantly driven by litigation related to the implementation of sanctions before domestic and international courts (notably the European Court of Justice (ECJ)).[12] The Security Council has taken numerous measures to enhance the fairness and transparency of the 1267 Sanctions Regime.[13] The establishment of the Office of the Ombudsperson, although limited to the 1267 Sanctions Regime, is without doubt a major milestone in the ongoing process to create fair and clear procedures for targeted sanctions at the UN level.

B. Establishment of the Office of the Ombudsperson

The Office was established by resolution 1904 (2009)—that is ten years after the establishment of the 1267 Committee—and it became operational in July 2010. The first Ombudsperson was Kimberly Prost. The Ombudsperson mechanism is the product of a compromise designed to bring elements of procedural fairness into the process without affecting the decision-making power of the Security Council. The role

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[9] In fact, it should be noted that Security Council Resolution 2368 (2017), at para 17, urges Member States to take note 'of best practices for effective implementation of targeted financial sanctions related to terrorism and terrorist financing' and 'to apply an evidentiary standard of proof of "reasonable grounds" or "reasonable basis", as well as the ability to collect or solicit as much information as possible from all relevant sources.'

[10] For the transposition of UN targeted sanctions within the EU legal order, see C Eckes, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions*, Oxford University Press 2009.

[11] UN General Assembly, Resolution adopted by the General Assembly on 16 September 2005, A/RES/60/1, at para 109.

[12] See notably litigation which led to the judgment of the ECJ (Grand Chamber) in the case of *Kadi and Al Barakaat International Foundation v Council and Commission*, C-402/05, judgment of 3 September 2008. Cases were later brought before the European Court of Human Rights. See eg ECtHR (Grand Chamber), *Nada v Switzerland*, app no 10593/08, judgment of 12 September 2012.

[13] In addition to the establishment of the Office of the Ombudsperson, these measures include humanitarian exemptions to the asset freeze, the development of guidelines for Committee processes, and the introduction of requirements for the statement of case and narrative summaries accompanying the listings.

of the Ombudsperson is defined in Security Council resolution 2368 (2017) and its Annex II. It offers individuals and entities whose names are inscribed on the ISIL (Da'esh) and Al-Qaida Sanctions List (hereafter, the Sanctions List) a recourse to an independent and impartial reviewer. Since its establishment, the Office of the Ombudsperson's mandate has been significantly strengthened through successive resolutions.[14]

C. Procedure applicable to delisting requests

To allow a better understanding of the various forms of confidentiality applying to the Ombudsperson's process, it seems necessary to briefly recall the main stages of the review of delisting requests. To ensure that individuals and entities whose names are on the Sanctions List are aware of the existence of this recourse, the Office of the Ombudsperson sends them a personalized letter if and when their address becomes available. This letter notably refers to the Narrative Summary containing the information on which the listing is based, the listing criteria set by the Security Council,[15] and the standard applicable before the Ombudsperson, i.e., whether there is sufficient information to provide a reasonable and credible basis for maintaining the listing.[16] Furthermore, since February 2016, these letters have referred to a document available on the website of the Office of the Ombudsperson, which contains further information about the Ombudsperson's approach to analysis, assessment, and use of information. In a framework within which—due to the non-public nature of her or his decisions—no case law of the practice of the Ombudsperson is available, such information assists Petitioners in presenting their case. Finally, the letter contains the contact details of the Office of the Ombudsperson, and it is not rare for an individual or counsel to contact the Office by phone prior to formally presenting a delisting request.

The Ombudsperson process can be initiated very easily. A letter or an e-mail from the Petitioner or from a lawyer acting on his or her behalf containing a request to be delisted suffices. When the Ombudsperson receives such a request, she or he firstly

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[14] See resolutions 1989 (2011), 2083 (2012), 2161 (2015), 2253 (2015), and 2368 (2017).

[15] The listing criteria are set out in paras 2–9 of Security Council resolution 2368 (2017). In particular, acts or activities indicating that an individual, group, undertaking, or entity is associated with ISIL or Al-Qaida and therefore eligible for inclusion in the ISIL (Da'esh) & Al-Qaida Sanctions List include:
(a) participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of;
(b) supplying, selling, or transferring arms and related materiel to;
(c) recruiting for, or otherwise supporting acts or activities of Al-Qaida, ISIL, or any cell, affiliate, splinter group, or derivative thereof.

[16] This standard was autonomously defined by the first Ombudsperson after a review of the standards applicable at national level in several jurisdictions.

assesses whether it properly addresses the listing criteria. In practice, to do so a Petitioner would need to raise one or more of the following types of arguments:

– the facts in the narrative summary are non-existent; or
– such facts do not amount to support to ISIL or Al-Qaida as defined by the Security Council; or
– such support no longer exists, in other words, the Petitioner has disassociated her- or himself from ISIL or Al-Qaida.

If the petition does not sufficiently address the listing criteria, the Ombudsperson will seek further information from the Petitioner. Once satisfied that the petition fulfils the basic admissibility criteria, the Ombudsperson transmits the request to relevant actors, starting with the 1267 Committee—via its chair—and seeks information relevant to the request from them. This communication formally starts the review process and its four months' information gathering phase. Other relevant actors include the designating State(s), the state of nationality, residence, or incorporation and any other relevant state, as can be inferred from the case, and the Analytical Support and Sanctions Monitoring Team.[17] The Ombudsperson also informs the Petitioner of the general procedure for processing delisting requests and of the identity of the designating State(s) unless the State(s) in question have requested this fact to remain confidential. During the information gathering phase, the Ombudsperson also conducts independent research, reviewing relevant articles, books, and, where relevant, the Petitioner's activity on social media. The purpose of this phase of the process is to obtain as much relevant information as possible. If the Ombudsperson determines that more time is required for information gathering, she or he may extend that phase once for up to two months.[18]

The information gathering phase is followed by the dialogue phase. To the extent possible, the Ombudsperson travels to the country where the Petitioner resides and meets with him or her in person. The Petitioner may be accompanied by Counsel. During this meeting, the Ombudsperson puts to the Petitioner in as much detail as possible the information gathered from various sources during the initial phase of the process. This means that Petitioners are fully aware of the case against them, subject to any confidentiality constraints.[19] For instance, while the Petitioner may have been made aware of the identity of the designating State(s) and of information of a non-classified nature gathered by the Ombudsperson, she or he will not know the origin of each piece of information. Importantly, the Ombudsperson gives Petitioners the opportunity to tell their side of the story and, through her or his comprehensive report, to be heard by the final decision-maker, the 1267 Committee. The comprehensive report contains a summary of the information gathered, the position of the Petitioner, the Ombudsperson's analysis, observations, and recommendation that the 1267 Committee consider

[17] Resolution 2368 (2017), Annex II, paras 2 and 4.
[18] Ibid, para 5.
[19] Ibid, para 7 (a, c, and g).

delisting the individual or entity or that the listing be retained.[20] The Ombudsperson has two months to complete the dialogue phase and issue her or his comprehensive report. She or he can extend this period once only for two months.

After translation of the report into all working languages of the United Nations and review by the 1267 Committee, the Ombudsperson presents her or his report orally to the 1267 Committee, which on this occasion considers the report.[21] Within 60 days of such consideration, the 1267 Committee conveys to the Ombudsperson whether sanctions are to be retained or terminated.[22] The decision to delist or to retain a name on the ISIL (Da'esh) and Al-Qaida sanctions list rests with the Committee, but the Ombudsperson's recommendation carries very heavy weight.[23]

The letter from the Committee informing the Ombudsperson of its decision also sets out reasons for the retention or termination of sanctions. In fact, in cases where the Committee's decision follows a recommendation to retain or to consider delisting the Petitioner, the Committee's letter contains a summary of the reasons which reflect the basis for that recommendation. The letter specifies that these reasons are not attributable to the Committee or any individual Committee member. Where appropriate, the Committee also provides an updated Narrative Summary. The Ombudsperson then transmits this information to the Petitioner. Resolution 2368 (2017) allows the Ombudsperson to immediately inform the Petitioner of the decision of the Committee, pending approval of the letter containing the summary of reasons, in both retention and delisting cases.[24]

II. Forms of confidentiality applying to the Ombudsperson's process

There are three forms of confidentiality applying to the Ombudsperson's process. The first applies to the Ombudsperson's comprehensive reports to the Committee. According to resolution 2368 (2017), these reports and their contents must be treated

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[20] Ibid, para 8.
[21] Ibid, paras 9 and 10.
[22] Ibid, para 16.
[23] If the Ombudsperson recommends that the 1267 Committee consider delisting the Petitioner, sanctions no longer apply after 60 days unless there is a consensus of the 15 members of the 1267 Committee to retain the listing. In the absence of such a consensus, it is also possible for a member state to refer the matter through the Chair to the Security Council for decision. This reversed consensus was introduced by resolution 1989 (2011) and since then none of these two scenarios has occurred.
[24] Resolution 2368 (2017), Annex II, para 16. (Previously, the Ombudsperson was only able to immediately inform the Petitioner when the decision of the Committee was to remove the listing, as the delisting took effect immediately. Conversely, when the petition for delisting was unsuccessful, the actual decision of the Committee was communicated only at the same time as the letter summarizing the reasons for the retention, which the Committee had 60 days to approve.)

as strictly confidential and not be shared, even with the Petitioner and States, without the approval of the Committee.[25] In addition to the members of the 1267 Committee (i.e., the 15 members of the Security Council), only a closed circle of States can, with permission of the 1267 Committee, receive an integral or redacted copy of the comprehensive report. These are the designating State and the States of nationality, residence, or incorporation. Upon approval of their request, these States receive a watermarked copy of the report. Outside of this closed circle, even States which have provided information to the Ombudsperson have no standing to request access to the comprehensive report.

The purpose of the second category of confidentiality is to protect the Petitioner. According to the practice established by the former Ombudsperson, unless the Petitioner requests otherwise, Petitioners' names remain confidential to the Office of the Ombudsperson and the Committee while under consideration and in the case of denial or withdrawal of a petition. I retained the same approach. By extension, reasons letters provided to Petitioners, which draw on the analysis contained in the comprehensive report of the Ombudsperson, are in principle confidential as regards the public, unless Petitioners decide to share them.

The third category of confidentiality pertains to confidential information which States or other information providers consent to share with the Ombudsperson. Providers of confidential information place restrictions on its use, which the Ombudsperson is bound to respect. She or he cannot share it with anyone, including the Petitioner and the 1267 Committee, or only in the way consented to by the provider. The Office of the Ombudsperson has concluded agreements or arrangements[26] for access to confidential and classified information with 18 States,[27] the last of which was signed with Canada in November 2016. There is an undeniable advantage both for States and the Ombudsperson in entering into such an agreement without waiting for a specific case. Even if it is possible to provide confidential information on an *ad hoc* basis, this may be difficult to achieve within the limited time frame allotted to gather information. Having an arrangement or agreement already in place usually expedites and eases this process as the channels for sharing such information are operational well in advance.

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[25] Ibid, para 13.

[26] The text of the Agreement with Austria signed on 27 July 2011 is available at https://www.un.org/sc/suborg/en/ombudsperson/classified_information. The text of the arrangements is not public.

[27] Switzerland (25 February 2011), Belgium (19 April 2011), Austria (27 July 2011), United Kingdom (7 October 2011), Costa Rica (10 November 2011), New Zealand (23 November 2011), Germany (30 January 2012), Australia (24 February 2012), Portugal (26 March 2012), Lichtenstein (27 March 2012), France (15 May 2012), The Netherlands (9 August 2012), Finland (31 March 2014), Luxembourg (20 June 2014), Ireland (19 December 2014), Denmark (2 March 2015), United States (13 November 2015), and Canada (29 November 2015).

I now turn to circumstances where the Ombudsperson may need to access confidential information and the fairness issues arising from the use of such information.

III. Circumstances requiring access to confidential information and fairness issues arising from the use of such information by the Ombudsperson

A. Why, when, and how?

It may be critical for the Ombudsperson to obtain confidential information in some cases. To fully understand this, it is important to recall that, in the practice of the Ombudsperson, when reviewing a delisting request, the applicable standard[28] does not usually apply to 'evidence' in a strict sense. This is so even in cases where the Petitioner has been domestically charged and convicted for crimes whose material facts include those alleged in the Narrative Summary. Even in these cases, the Ombudsperson does not in principle receive transcripts of the hearings held by the Court or documents produced in evidence by the parties. Instead, in such cases the Ombudsperson usually gets access to the court's judgment in the criminal case in question and, with the consent of the Petitioner, psychiatric or psychological reports as well as reports from the prison authorities where applicable. Furthermore, in many instances, listed individuals have not been charged in criminal proceedings for the allegations contained in the Narrative Summary.[29] In such cases, what the Ombudsperson gets access to is primarily information provided by States or even *summaries* of relevant information about the Petitioner's activities that the States are able and willing to share. The Ombudsperson rarely gets to know the source of such information and does not have the option to test it in the way a criminal court of law would test evidence. In this context, it is critical that the shared information be sufficiently specific for it to provide a reasonable basis for maintaining the listing.

An example can illustrate this point: a Petitioner is listed for having acted for several years as a financier of a listed group based in the Middle East and associated with Al-Qaida. This is a typical example of information lacking specifics: as to the period in question, the location, the amount of financial support alleged to have been provided, the modalities of such support, the identities of the petitioner's contacts

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[28] The standard is whether there is sufficient information to provide a reasonable and credible basis for maintaining the listing at the time of review. It was developed by the first Ombudsperson.

[29] See Guidelines of the Committee for the Conduct of its Work, adopted on 7 November 2002, as last amended on 5 September 2018, para 6(h)(4), which specifies that the supporting evidence of a Member State's listing proposal can notably be of an 'intelligence, law enforcement' or 'judicial' nature.

within the group, any intermediaries, etc. Without further specifics, there is not much difference between this vague information and a mere allegation. It may only form part of the basis for a recommendation to maintain the listing if it is bolstered by more specific information.

The Ombudsperson's independent research may bring such information, but this is not always the case. With the support of a team of one legal assistant and one administrative staff member, the Ombudsperson clearly does not have the capacity to conduct an exhaustive review of all materials publicly available in every single case. This is especially true because sometimes no one on the team speaks the language in which public material is available. Intelligence services are obviously better equipped than the Office of the Ombudsperson in this respect. This is why, if independent research does not suffice, the Ombudsperson will go back to the relevant States and request additional details. But even then, the Ombudsperson is not always successful. In this situation, it would be important for those States to use their resources to look for relevant public material. If there is none, the information provider should consider declassifying some of the details it possesses about these facts. Finally, if such details are too sensitive to be declassified, this would be a good case to consider sharing confidential information with the Ombudsperson, based on an agreement or an arrangement to that effect, if there is one, or on an ad hoc basis.

Resolution 2368 (2017) strongly urges Member States to provide all relevant information to the Ombudsperson, including any relevant confidential information, where appropriate. It also encourages Member States to provide detailed and specific information, when available and in a timely manner.[30] Having access to information is critical to the effective fulfilment of the Ombudsperson's mandate and, as shown above, this may require access to confidential information.

B. Fairness issues arising from the access to and use of confidential information by the Ombudsperson

The best-case scenario in terms of fairness is when the Ombudsperson can put to the Petitioner all the information on which she or he will rely in her or his report, i.e., when the information in question is public or declassified. But as illustrated above, sufficient information of that kind does not always exist. This is why confidential information can be useful in helping the Ombudsperson in her or his analysis and can ultimately be relied upon as a basis for her or his recommendation.

Sometimes the Ombudsperson obtains access to confidential information which corroborates information that is shared with the Petitioner. In such cases, the fact that the Ombudsperson may not be able to share the full material with the Petitioner does

[30] Resolution 2368 (2017), para 66.

not necessarily affect the overall fairness of the process.[31] Returning to the previous example, the Petitioner is listed for having acted for several years as a financier of a listed group based in the Middle East and associated with Al-Qaida. In one scenario, the Ombudsperson may obtain confidential information about the content of a conversation between the Petitioner and a contact within the group in which they discuss the modalities of a funds transfer. In this case, the Petitioner knows that he is alleged to have transferred funds to the group and the Ombudsperson is able to independently and impartially review the corroborative information. The Ombudsperson may rely on it without its secrecy necessarily affecting the overall fairness of the process, particularly if she or he is authorized by the provider to at least inform the Petitioner that she or he has reviewed confidential information concerning this aspect of his or her conduct. By contrast, in another scenario, the classified information may contain details on how the Petitioner has provided weapons to the group. In that case, the Petitioner has not been put on notice that he is also alleged to have supplied the group with weapons. Here, in fairness to the Petitioner, the Ombudsperson would have to return to the State to ascertain whether it would consent to declassify the general information that the Petitioner provided weapons to the group. At the same time, the specific details of the transaction in question could remain confidential, without the overall fairness being affected. However, if the State refused to declassify the general information, then the Ombudsperson would have to strike a balance between fairness to the Petitioner and the security interests at stake. The degree to which, in the circumstances of each case, the confidential information is decisive in showing the existence of an association with ISIL or Al-Qaida undeniably constitutes an important factor to consider. Information providers are under no obligation to inform the Ombudsperson of specific reasons for maintaining the confidential classification, but they may elect to do so. Having such reasons would undeniably be an important factor in that weighing exercise.

By contrast, no issue of fairness arises in a case where, despite the guarantees embedded in arrangements they conclude with the Ombudsperson, States refuse to communicate decisive confidential information in their possession to the Ombudsperson. In such cases, no adverse impact for the listed individual or entity should occur because the Ombudsperson cannot base her or his recommendation on information which is not before her or him. But even though such situations do not raise fairness issues, they are unsatisfactory because they may lead to the delisting of an individual or entity that in fact continues to be associated with ISIL (Da'esh) or Al-Qaida.

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[31] On similar challenges to ensure fairness in the context of judicial closed material proceedings, see G Van Harten, 'Weaknesses of adjudication in the face of secret evidence', The International Journal of Evidence and Proof (2009) vol 13, p 10–18; R Goss, in L Lazarus et al. (eds), *Reasoning Rights: Comparative Judicial Engagement*, Hart Publishing 2014, p 124–132.

After this overview of the fairness issues arising in the practice of the Ombudsperson in relation to the use of confidential information, it is worth exploring areas where the Ombudsperson's process and judicial processes can be mutually reinforcing.

IV. Situations where the Ombudsperson's process and judicial proceedings can be mutually reinforcing

Two situations illustrate cases where the Ombudsperson's process and judicial proceedings can be mutually reinforcing in increasing overall transparency and access to confidential information. The first relates to reasons letters and channels permitting disclosure through domestic or regional proceedings. The second concerns the use of confidential information by regional courts and their future jurisprudence in that area. The first situation arises in instances where an individual listed by the 1267 Committee attempts two parallel recourses: on the one hand, a recourse to the Ombudsperson to seek delisting and, on the other hand, a challenge to the implementation of sanctions before a court. The challenge could pertain to the implementation of sanctions by the European Union and be brought before its regional Courts. It could also relate to the implementation by a State and be brought before its domestic courts and subsequently a regional court such as the European Court of Human Rights (ECtHR).

A. Reasons letters

Under the Ombudsperson's mechanism, Petitioners do not have access to the Ombudsperson's comprehensive report in their own case. This is to some extent compensated by the fact that the Security Council requires the Committee to provide a summary of reasons for its decision on each delisting request.[32] In several of her reports to the Security Council, my predecessor deplored the fact that, despite these important improvements, there was still considerable reluctance, in practice, to provide reasons, particularly in delisting cases. In her ninth report of February 2015, she highlighted that several communications from the Committee transmitted by the Ombudsperson to the Petitioners contained no factual or analytical references. In her

[32] Resolution 2368 (2017), Annex II, para 16. Originally, this requirement only applied in retention cases and there was no deadline for the Committee to do so. The obligation to provide reasons in delisting cases was introduced by resolution 2083 (2012). By resolution 2161 (2014), the Council imposed a deadline of 60 days for the Committee to convey reasons to the Ombudsperson, who then transmits them to the Petitioner. Resolution 2368 (2017) reduced the deadline to 30 days.

opinion, these communications did not comply with the requirement to provide reasons as mandated by resolution 2161 (2014).[33]

Petitioners now receive a reasons letter which summarizes the basis for the Ombudsperson's recommendation. This summary is not attributable to the Committee or any individual Committee member. In my eleventh and twelfth reports to the Security Council, I noted that during the period covered by these reports—August 2015 to July 2016—reasons letters tended to reflect the analysis contained in the comprehensive reports more completely and accurately than previously.[34] Given the importance of those letters to the transparency of the process and its overall fairness (and the perception thereof), it would have been useful for the Committee to maintain that positive trend. Unfortunately, as indicated in my thirteenth report to the Security Council, during the second half of 2016 and at least until the end of my tenure as Ombudsperson in August 2017, the Committee discontinued that trend altogether.[35]

However, resolution 2368 (2017) adopted a few days before I left the position of Ombudsperson provides new language, which I am hopeful will improve the substance of these letters. Article 16 of Annex II to this resolution specifies that the summary of reasons must accurately describe the principal reasons for the Ombudsperson's recommendation. This summary is prepared by the Office of the Ombudsperson and reviewed by the Committee. However, the purpose of this review is limited to addressing any security concerns, 'in particular whether any confidential information is inadvertently included in the summary'. Therefore, the Committee may not rely on other considerations, such as the mere length of the summary, to justify deletions to the text proposed by the Ombudsperson. The resolution is particularly protective of the substance of the reasons letter in retention cases, indicating that in such cases the summary of the analysis of the Ombudsperson must cover all the arguments for delisting presented by the Petitioner to which the Ombudsperson responded. In cases of delisting, the summary must include the key points of the analysis of the Ombudsperson (but not necessarily all the arguments covered by her or his analysis).

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[33] Letter dated 2 February 2015 from the Ombudsperson to the President of the Security Council, S/2015/80, Report of the Office of the Ombudsperson pursuant to Security Council resolution 2161 (2014), para 43.

[34] Letter dated 1 February 2016 from the Ombudsperson to the President of the Security Council, S/2016/96, Report of the Office of the Ombudsperson, submitted pursuant to Security Council resolution 2253 (2015), paras 40–41; Letter dated 1 August 2016 from the Ombudsperson to the President of the Security Council, S/2016/671, Report of the Office of the Ombudsperson, submitted pursuant to Security Council resolution 2253 (2015), para 30.

[35] Letter dated 23 January 2017 from the Ombudsperson addressed to the President of the Security Council, S/2017/60, Report of the Office of the Ombudsperson pursuant to Security Council resolution 2253 (2015), para 28. In the same report, I noted that: 'For such a summary to adequately reflect the reasons, it must at a minimum address the arguments of the petitioner and fully reflect the analysis contained in the Ombudsperson's comprehensive report.' (para 29).

Positive developments took place in this area in the months following my departure from the position. However, it appears that the text of the new resolution was not respected in at least one case while the Ombudsperson position was vacant, thereby compromising the fairness of that case. In her update to the Security Council in lieu of a report by the Ombudsperson, the Legal Officer supporting the Office of the Ombudsperson noted that in three cases in which a summary of reasons had been approved by the Committee after my departure, the summaries accurately described the principal reasons for the recommendation of the Ombudsperson as reflected in her analysis. However, she noted that in a fourth case, 'the summary prepared in consultation with the former Ombudsperson was amended to omit a key point of the analysis of the Ombudsperson, and as a result the summary that was transmitted to the petitioner no longer accurately reflected the principal reasons for the recommendation of the Ombudsperson, as required by the resolution. The reasons put forward in support of the deletion of the key point did not include the necessity to address any security concerns or the inadvertent disclosure of confidential information, which is the only purpose for the Committee's review under resolution 2368 (2017)'.[36]

B. Channels for disclosure of reasons letters

As explained above, reasons letters are confidential as they are only shared with Petitioners. There are two channels through which a reasons letter can find its way into judicial proceedings and thus become public. First, the Petitioner is free to disclose and to produce the reasons letter in support of a lawsuit before a domestic or a regional court. This will obviously occur only in cases where the Petitioner considers that the reasons letter will support his or her case. Second, paragraph 93 of resolution 2368 (2071) directs the Committee to consider requests for information from States and international organizations with ongoing judicial proceedings concerning the implementation of sanctions measures. The Committee is required to respond as appropriate with additional information available to it. When it is seized of such a request, the Committee may decide to share information contained in comprehensive reports from the Ombudsperson or the reasons letter.

[36] Letter dated 8 February 2018 from the Legal Officer supporting the Office of the Ombudsperson addressed to the Chair of the Security Council Committee pursuant to resolutions 1267 (1999), 1989 (2011), and 2253 (2015) concerning Islamic State in Iraq and the Levant (Da'esh), Al-Qaida, and associated individuals and entities, S/2018/120, Update of the Office of the Ombudsperson pursuant to Security Council resolution 2368 (2017) in lieu of a biannual report, para 26.

C. Use of such letters by courts

An illustration of such use can be found in the January 2016 judgment of the Supreme Court of the United Kingdom in the case of *Youssef v Secretary of State for Foreign and Commonwealth Affairs*.[37] In this case, the Petitioner had been retained on the sanctions list following a recommendation by the Ombudsperson. The Supreme Court notably referred to some of the information contained in the letter providing reasons and the analysis of the Ombudsperson.[38]

This case concerns a retention, but in principle a reasons letter could be useful in both retention and delisting cases. A letter obtained pursuant to the above-mentioned article 93 of resolution 2368 (2017) could, for example, assist a State in demonstrating that the right to have access to information in one's case, subject to legitimate interests in maintaining confidentiality, and the right to be heard have been respected. This assessment is based on the reasoning of a judgment of the General Court in the case of *Al-Faqih* et al in October 2015.[39] The judgment refers to correspondence between the European Commission and the Sanctions Committee in which the former requested to be informed of the reasons for rejecting a delisting request. The Committee had rejected a request to delist Mr Al-Faqih's name, which had been submitted before the Office of the Ombudsperson became operational. The context was therefore different, but the Court's reasoning related to the above-mentioned rights. The Court's reference, in this specific case, to the European Commission's dialogue with the UN Sanctions Committee offers a good idea of how the process conducted before the Ombudsperson and the information contained in a reasons letter could be relevant to such assessment.[40] The information gathered by the Ombudsperson and summarized in the reasons letter, provided that it continues to address the arguments of the Petitioner and is not excessively reduced in substance, could be very useful in the context of judicial proceedings. Representatives of the European Union Commission indicated during a seminar on sanctions held jointly by the European Union and the United Nations in New York during the spring of 2016 that they were using the increased transparency of the mechanism as an argument in their submissions before the Courts of the European Union. They also intended to rely on case-specific information if released by the Committee.

The second situation in which the Ombudsperson's process and judicial proceedings can be mutually reinforcing relates to the treatment of confidential information by regional or domestic courts. This could potentially have an impact on the practice of the Ombudsperson. In order to fully appreciate that potential, it is necessary to

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[37] *Regina (Youssef) v Secretary of State for Foreign and Commonwealth Affairs* [2016] UKSC 3; [2016] WLR (D) 35.

[38] Ibid, paras 5–7.

[39] General Court of the European Union, *Al-Faqih et al*, T-134/11, judgment of 28 October 2015.

[40] See ibid, para 67.

compare the frameworks governing the treatment of confidential information in the Ombudsperson mechanism and judicial settings. I have used the framework applicable before the General Court for the purpose of this comparison.[41]

V. Comparison of frameworks governing the treatment of confidential information by the Ombudsperson and the General Court

As is clear from section IV. A above, the Ombudsperson's process is far less transparent in individual cases than the General Court's procedure. While publicity is the rule and confidentiality the exception before the General Court,[42] confidentiality is the rule and publicity the exception in the context of reviewing delisting requests. However, both the General Court and the Ombudsperson face similar issues when it comes to the treatment of classified information and to *ex parte* reliance on classified information. Before the Ombudsperson, the question is framed as one of fairness. By contrast, before the General Court, the question is the extent to which an exception to the adversarial principle, which may result from such reliance without disclosure, is acceptable.[43]

A. Modes of communication

Modes of communication differ in the two mechanisms. The following procedure applies to the General Court. A party may claim that the disclosure of material or information it intends to produce would harm the security of the Union or that of one or more of its Member States or the conduct of their international relations. In such cases, that party would produce that information or material by a separate document and apply for confidential treatment thereof. This application would set out the reasons why the confidentiality of that information or material should be preserved.[44] By contrast, once the Ombudsperson is informed by a State that it is willing to provide access to classified information, she or he usually goes in person to the premises of the Mission of the State to the United Nations to review the material containing the confidential information. Furthermore, unlike at the General Court, the information provider is not required to give specific reasons for imposing restrictions on

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[41] On this in more detail Nanopoulos, elsewhere in this volume.

[42] See ECJ (Grand Chamber), *European Commission et al v Kadi*, C-584/10, judgment of 28 July 2013, paras 100–101.

[43] Ibid, para 125. See Article 105 of the rules of procedure of the General Court. An equivalent rule exists before the European Court of Justice (Article 190bis). These articles entered into force on 25 December 2016.

[44] See Article 105.1 of the rules of procedure of the General Court; OJ L 105 of 23 April 2015, p 1.

the use of such confidential information by the Ombudsperson, including non-disclosure to the Petitioner and the 1267 Committee.

B. Determination of the confidential nature of the information

Both the General Court and the Ombudsperson examine the relevance of the information in question. However, at the General Court, a preliminary determination must be made before the court decides to which extent it will rely on the information for which confidentiality has been requested. It must first determine whether the relevant information produced before it is *confidential for the purposes of the proceedings before the General Court*. The rules specify that a request to maintain confidentiality must be based on the submission that disclosure of the information in question 'would harm the security of the Union or that of one or more of its Member States or the conduct of their international relations'. However, the rules do not elaborate on the basis for the court to determine the preliminary question whether the confidential classification is justified in the first place. In making such a ruling, the court seems to determine only whether it is convinced by the security reasons put forward by the requesting party to justify the confidential treatment of that information or material. At this stage, it does not appear to weigh the requirements of the adversarial principle against those security requirements. In the negative, it will ask the concerned party to authorize the communication of that information or material to the other party. If the first party objects to such communication or fails to reply within a certain period, that information or material will not be taken into account in the determination of the case.[45] In the positive, the Court does not communicate that information or material to the other party.

The Ombudsperson also enters into *ex parte* communication with the provider of confidential information, where appropriate. However, unlike before the General Court, this interaction is triggered by the mere provision of confidential information. The Ombudsperson makes no determination on whether the confidential classification is justified.[46] *Ex parte* communication between the Ombudsperson and the provider is aimed at exploring the possibility of declassifying all or part of the relevant information or at least allowing the Ombudsperson to put the Petitioner on notice that she or he has seen confidential information in relation to a specific aspect of his or her alleged conduct. The purpose of this notice is to ensure the fullest transparency possible vis-à-vis the Petitioner. If unsuccessful in obtaining partial declassification, the Ombudsperson will be in the same position as the General Court when it determines that certain information or material is relevant but should remain confidential

[45] Article 105.4 of the rules of procedure of the General Court; see ECJ (Grand Chamber), *European Commission et al v Kadi*, C-584/10, judgment of 28 July 2013, para 123.

[46] See Resolution 2368 (2017), Annex II, para 8(a).

vis-à-vis the other party. In such cases, the Ombudsperson and the General Court are able to rely on that information or material but do not communicate its content to the Petitioner or other party.

C. Weighing rights against security

In such a situation, the General Court weighs the requirements of the right to effective judicial protection, particularly observance of the adversarial principle, against the requirements flowing from the security of the Union or of one or more of its Member States or the conduct of their international relations.[47] After weighing these requirements, the General Court makes a reasoned order specifying the procedures to be adopted to accommodate them. The Court could require, for example, the concerned party to produce a non-confidential version or summary of the information or material for subsequent communication to the other party. This document should contain the essence of the confidential information or material and enable the other party, to the greatest extent possible, to make its views known.[48]

In the Ombudsperson's review of delisting requests, the provider of confidential information may refuse to declassify certain information or to disclose to the Petitioner the aspects of his or her alleged conduct to which the confidential information pertains, or even that confidential information has been shared with the Ombudsperson.[49] In such cases, the Ombudsperson must weigh fairness to the Petitioner against the security interests at stake. When the confidential material is of relevance in reaching a determination on the sufficiency of the case, the result is that the Petitioner is not apprised of all the gathered material underlying each statement. The Ombudsperson must therefore be satisfied on the particular facts of the case that the Petitioner has received sufficient information to be aware of the case against him and that he has had an opportunity to respond and to be heard in the course of the process. It is also relevant that in such cases all of the information relied upon is seen by the Ombudsperson and is thus independently reviewed.

In a situation where the confidential information is decisive, the Ombudsperson is at a disadvantage compared to the General Court since the provider is under no obligation to disclose any specific reasons underlying the requirement of confidentiality towards the Petitioner.[50] However, the provider may elect to do so, and in such cases, those reasons may constitute an important factor for the Ombudsperson to take into account in this weighing exercise. An example of decisive confidential

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47 Article 105.5 of the rules of procedure of the General Court.

48 Article 105.6 of the rules of procedure of the General Court. See ECJ (Grand Chamber), *European Commission et al v Kadi*, C-584/10, judgment of 28 July 2013, para 125.

49 Resolution 2368 (2017), Annex II, para 7(g).

50 In contrast, see General Court of the European Union, *Kadi v European Commission*, T-85/09, judgment of 30 September 2010, para 176.

information would be a situation where, on the one hand, if relied upon, the confidential information would, alone or cumulative with non-confidential information, be sufficient to provide a reasonable and credible basis for maintaining the listing, but on the other hand, non-confidential information alone would not be sufficient to meet that standard. Ultimately, if the Ombudsperson is of the view that her or his reliance on confidential information would render the overall delisting process unfair, she or he can decide not to rely on it when making her or his recommendation.

Where the General Court considers that information or material which, owing to its confidential nature, has not been communicated to the other party is essential in order for it to rule in the case, it may, by way of derogation from Article 64 and confining itself to what is strictly necessary, base its judgment on such information or material. When assessing that information or material, the General Court takes account of the fact that a party has not been able to make its views on it known.[51] Likewise, the Ombudsperson may rely on such information and take into account the fact that the Petitioner has not had an opportunity to comment on it. Reference to the content of such information in the comprehensive report of the Ombudsperson is constrained by the restrictions imposed by the provider and may be limited to a mere reference to the fact that the Ombudsperson has relied on confidential information.

It seems clear from the above comparison that future jurisprudence on the treatment of confidential information by the General Court will be of great interest and that it may, where appropriate, have an impact on the practice of the Ombudsperson. Domestic legal frameworks and related practice is also particularly informative as can be seen from other chapters of this study on secret evidence.

Conclusion

This study has shown that in the field of sanctions, which are preventive in nature, confidential information may be needed and used in certain circumstances. However, relying on such information in the review of delisting requests impacts on the fairness of the particular case. It is therefore crucial that it only be used within a set framework. Otherwise, relying on such information would jeopardize the fairness of the process as a whole.

Since the establishment of the Office of the Ombudsperson, the Security Council has repeatedly stated its commitment to continue to improve the fairness and transparency of sanctions procedures. In a field where confidential information is used to impose restrictive measures, it would be important for the 1267 Committee to avoid

[51] Article 105.8 of the rules of procedure of the General Court; see ECJ (Grand Chamber), *European Commission et al v Kadi*, C-584/10, judgment of 28 July 2013, para 129.

further setbacks in the area of transparency. This could be done by ensuring that Petitioners at least receive comprehensive reasons limited only by the needs to preserve confidential information and addressing their arguments in response to their delisting requests, irrespective of their outcome. The Ombudsperson's comprehensive reports, which are the basis for these reasons when the Committee follows the recommendation of the Ombudsperson, do not contain confidential information. This should in theory assist the 1267 Committee in providing comprehensive reasons. The Committee's practice during my mandate demonstrated that this is possible.

Transparency is usually seen through the lens of fairness and due process. However, transparency, which indeed contributes to rendering the process fair, does not only concern Petitioners. A court relying on confidential information when disposing of a challenge to the imposition of sanctions will need to ensure that its decision does not disclose the information in question to the moving party. The fact is that the court which makes the decision has seen and weighed all the information. By contrast, the irony is that when confidential information is withheld from a Petitioner during the Ombudsperson process, it is also equally withheld from the 1267 Committee, unless the provider requires otherwise. This is a unique setup, where the ultimate decision-maker may not have access to the full information. This means in turn that confidentiality limits the Ombudsperson's ability to be transparent with the Committee itself by sharing all the reasons supporting her or his recommendation. This could in turn hamper the Ombudsperson's ability to convince the Committee of the legitimateness of her or his recommendation and lead to a lack of understanding of the same by Committee members. This is even more the case when confidential information is in favor of Petitioners.

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Confronted with politically motivated violence and profit-driven organised criminality, legal orders extensively rely on covert surveillance measures to detect, avert, and investigate offences. The rise of such measures and the increasing role of intelligence-gathering as a criminal policy tool does, however, pose considerable challenges to the fairness of criminal proceedings. This volume seeks to address these challenges by inquiring into how legal orders, in the context of criminal trials and related provisional preventive measures, deal with confidential information that must not be disclosed to the defence. To this end, it analyses the criminal procedure law of numerous European countries as well as related frameworks at the UN and EU levels. Comparing these findings and adding an analysis of the jurisprudence of the European Court of Human Rights, the volume then outlines ways to safeguard fair-trial guarantees while respecting the operational needs of investigative authorities and intelligence agencies. The findings highlight how legal orders have increasingly accepted that the courts will often consider, in the assessment of the reliability of incriminating evidence, information that is not disclosed to the defence at any point during the proceedings. As a consequence, there is an urgent need to develop novel procedural approaches to improve judicial scrutiny of confidential material by strengthening the involvement of the accused and, at the same time, to prevent triers of fact at trial from becoming exposed to undisclosed material.

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