

**Section III. Criminal Procedure**

**SPECIAL PROCEDURAL MEASURES AND RESPECT OF  
HUMAN RIGHTS**

**GENERAL REPORT**

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**List of Abbreviations**

- CC: Code of criminal law or statutes, acts on criminal law
- CCP: Code of criminal procedure or statutes, acts, rules on criminal procedure
- CIPA: US Classified Information Procedures Act
- CPIA: UK/English Criminal Prosecution and Investigation Act
- CT INFO Box: Dutch Counterterrorism Data Bank
- ECHR: European Convention on Human Rights
- ECtHR: European Court of Human Rights
- EU: European Union

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FEC: Dutch Financial Expertise Centre  
FISA: US Foreign Intelligence Surveillance Act  
HR: Human rights  
IACHR: Inter-American Convention on Human Rights  
IC: intelligence community (intelligence agencies, police intelligence units)  
ICCPR: International Covenant on Civil and Political Rights  
LEC: law enforcement community (judicial police, public prosecutor, judiciary)  
MCA: Military Commissions Act (US)  
NCT: Dutch Counter-terrorism Coordination Centre  
OCAM: Belgian Coordination Centre for Threat Analysis  
PACE: UK Police and Criminal Evidence Act  
PPO: Public Prosecutor's Office  
SOCA: UK Serious Organised Crime Agency  
UN CTC: United Nations Counter-terrorism Committee

#### **PURPOSE OF THE GENERAL REPORT**

This is the general report for the Third Section of the XVIIIth International Congress on Criminal Law that will take place in Istanbul on 20-27<sup>th</sup> September 2009 under the auspices of the AIDP (Association Internationale de Droit Penal/International Association of Penal Law). The purpose of the congress is to study the transformations of criminal justice systems as a response to globalization. These transformations have already been studied in the fields of general criminal law (Section I),<sup>1</sup> special criminal law (Section II)<sup>2</sup> and international criminal law (Section IV).<sup>3</sup> As a general reporter for the Third Section I have the privilege of relying not only on excellent national reports, but also on the findings of my co-general reporters and the draft resolutions of their respective sections.<sup>4</sup> For the aim of this topic the AIDP has decided not to prepare regional reports or reports from regional supranational forums, but to prepare two specific in-depth reports.

The general report for the Third Section is based on national reports from 17 countries:<sup>5</sup> Argentina, Austria, Belgium, Brazil, Colombia, Croatia, Finland, Germany, Hungary, Italy, the Netherlands, Poland, Romania, Spain, Turkey, the

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<sup>1</sup> Lorenzo Picotti, The expanding forms of preparation and participation.

<sup>2</sup> Nikos Passas, Financing of Terrorism.

<sup>3</sup> Isidoro Blanco, The principle/theory of universal jurisdiction.

<sup>4</sup> These draft resolutions were adopted at the preparatory colloquia of the First (Coruña, Spain), Second (Cleveland, USA) and Fourth Sections (Xian, China) and will be submitted to the XVIIIth International Congress on Criminal Law that will take place in Istanbul on 20-27<sup>th</sup> September 2009 under the auspices of the AIDP.

<sup>5</sup> Unfortunately the reporting countries do not cover all the continents and do not reflect all legal and political cultures.

United Kingdom (England & Wales), the United States<sup>6</sup> and on two specific in-depth reports on *Judicial investigation and gathering of evidence in a digital, online context*<sup>7</sup> and on *the presumption innocentiae*.<sup>8</sup> Of course we also used existing scholarly research materials on the topic from which we were able to include valuable materials on non-reporting countries, such as, e.g., the study by P. Pfützner on organized crime in the French criminal procedure<sup>9</sup> or specialized books on comparative criminal procedure<sup>10</sup> that included, in their latest editions, specific chapters on *special forms of procedure*. Finally, we did take into account many recommendations, principles, declarations, reports of GOs and NGOs in the field:

The UN General Assembly resolution 50./186 Human Rights and Terrorism, adopted on 22 December 1995; the Commission on Human Rights resolution 2003/37 on Human Rights and Terrorism, adopted on 23 April 2003; the UN Global Counter-Terrorism Strategy, adopted on 8 September 2006; the reports of the special rapporteur on the promotion and protection of human rights while countering terrorism to the Human Rights Council (formerly Commission on Human Rights)

The Inter-American Commission on Human Rights Report on Terrorism and Human Rights, 2002

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<sup>6</sup> The authors are: Javier de Luca (Argentina), Michael Leitner (Austria), Paul de Hert & Ann Jacobs (Belgium), Fábio Ramazzini Bechara & Fauzi Hassan Choukr (Brazil), Fernando Velásquez Velásquez & Christian Wolffhügel Gutiérrez (Colombia), Zlata Durdevic (Croatia), Johanna Niemi (Finland), Tonio Walter (Germany), Erika Roth & Csongor Herke (Hungary), Renzo Orlandi & Roberto Kostoris (Italy), Peter Bal & Martin Kuijter & Karin Veegens (the Netherlands), Paweł Wiliński (Poland), Gheorghită Mateut & Ion Neagu & Mircea Damaschin (Romania), Juan-Luis Gómez Colomer (Spain), Gülşah Kurt Yücekel & Güçlü Akyürek (Turkey), Marianne Wade (UK/England & Wales) and Steven W. Becker (US).

<sup>7</sup> This report, written by Gabriella di Paolo, compares the US-Canadian approach with the Italian one, and these are three pioneering jurisdictions in this field.

<sup>8</sup> The report was written by Elies van Sliedregt.

<sup>9</sup> P. Pfützner, *Organisierte Kriminalität im französischen Strafverfahren. Zur Einführung eines besonderen Strafverfahrens durch die Loi Perben II*, Max-Planck-Institut für ausländisches und internationales Strafrecht, Band S 110, Duncker & Humblot, Berlin, 2008; M. L. Cesoni (Ed.), *Nouvelles méthodes de lutte contre la criminalité. La normalisation de l'exception. Etude de droit comparé* (Belgique, Etats-Unis, Italie, Pays-Bas, Allemagne, France), Bruylant, Brussels, 2007.

<sup>10</sup> Vogler & Huber (eds.), *Criminal Procedure in Europe*, Max-Planck-Institut für ausländisches und internationales Strafrecht, Band S 112, Duncker & Humblot, Berlin, 2008; M. Delmas-Marty & J.R. Spencer (eds.), *European Criminal Procedures*, Cambridge Studies in International and Comparative Law, Cambridge University Press, 2002; J. Pradel, *Droit Pénal Comparé*, Dalloz, 2002.

The Council of Europe Recommendation Rec(2001) 11 of the Committee of Ministers to member states concerning guiding principles on the fight against organized crime, adopted on 19<sup>th</sup> September 2001; the Council of Europe Recommendation Rec(1005)9 of the Committee of Ministers to member states on the protection of witnesses and collaborators of justice, adopted on 20<sup>th</sup> April 2005; the Council of Europe Recommendation Rec(2005)10 of the Committee of Ministers to member states on “special investigation techniques” in relation to serious crimes including acts of terrorism, adopted on 20<sup>th</sup> April, 2005; The Council of Europe Guidelines on Human Rights and the fight against terrorism, adopted by the Committee of Ministers on 11 July 2002 at the 804<sup>th</sup> meeting of the Minister’s Deputies; Opinion no 8 (2006) of the Consultative Council of European Judges (CCJE) for the attention of the Committee of Ministers of the Council of Europe on the role of judges in the protection of the rule of law and human rights in the context of terrorism adopted 8-10 November 2006

The Ottawa Principles on Anti-Terrorism and Human Rights – Les Principes d’Ottawa relatifs à la lutte au terrorisme et aux droits de l’homme, 2006

The Berlin Declaration of the International Commission of Jurists, August 2004 on Upholding Human Rights and the Rule of Law in Combating Terrorism

The Johannesburg Principles on National Security, Freedom of Expression and Access to Information. Article 19, November 1996

The Siracusa Principles on the Limitation and Derogation in the ICCPR, 1985

The Paris Minimum Standards of Human Rights in a State of Emergency, 1984

The EU Network of Independent Experts in Fundamental Rights (CFR-CDF), the Balance between Freedom and Security in the Response by the EU and its Member States to the Terrorist Threats, March 2003

The International Helsinki Federation for Human Rights (IHF) Report on Anti-Terrorism Measures, Security and Human Rights, April 2003

Assessing Damage, Urging Action. Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights, International Commission of Jurists (ICJ), February 2009

The choice for the topic *The Principle Challenges Posed by the Globalization of Criminal Justice* is very much in line with the main interests of the AIDP in the past. This is the reason why in this general report we do take into account the general reports and resolutions of the XVI<sup>th</sup> International AIDP Congress on *The Criminal Justice Systems Facing the Challenges of Organized Crime*,<sup>11</sup> held in

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<sup>11</sup> See the Reports by Thomas Weigend, Christopher Blakesley, Jean Pradel and Christine van den Wyngaert in *International Review of Penal Law*, 1996, 527-638.

Budapest in 1999, especially the general report by Jean Pradel on criminal procedure.<sup>12</sup>

There is no doubt that substantial and far-reaching changes have occurred during the last decade. We are currently witnessing a very profound transformation in the objectives, nature and instruments of the criminal justice system and its procedural law. The excellent national reports clearly articulate the serious dilemmas facing the transformation of the criminal justice system, as part of the global security paradigm and counter-terrorism policy, in combination with due respect for the standards of human rights, the rule of law and the safeguards of criminal procedure.

International pressure for a common procedural approach to terrorist investigation, prosecution and judgment has been intense. Both at the UN and at the Council of Europe an impressive set of international and regional Conventions have been elaborated on Organized Crime and Counterterrorism. After 9/11 the UN led the way with Security Council resolutions and the establishment of a Counter-Terrorism Committee that is supervising the implementation of the resolutions, including the substance of the conventions.<sup>13</sup> Negotiations on a comprehensive counterterrorism UN Convention are underway.

It is definitely not the aim of the general report to prepare a descriptive analysis of the national reports or to compile a summary report, nor is it the aim to mention all legal technicalities of the domestic legal orders, both in law and in practice. The aim of the general report is to deduce from the comprehensive answers to the questionnaire and thus from the comparative analysis of the national reports the main transformation processes in the domestic criminal justice systems when defining and dealing with special procedural measures and human rights protection. Any reader who is truly interested in the topic should read each separate national report for more detailed and accurate information. The national reports received will be published in a CD-rom format as an addendum to the general report, the special in-depth reports and the resolutions.

The main question to be dealt with is whether and how criminal justice systems, in particular their criminal procedure, have been transformed by the paradigm<sup>14</sup> of organized crime and terrorism and whether and how, in doing so, they have departed from their own fundamental rules, procedures, principles and applicable

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<sup>12</sup> International Review of Penal Law, 1996, 599-606 and the elaborated version in International Review of Penal Law, 1998, 643-671.

<sup>13</sup> See <http://www.un.org/sc/ctc/countryreports/reportA.shtml> for the comprehensive national reports.

<sup>14</sup> I explicitly call it a paradigm and not a phenomenon, because criminological studies provide no support to substantive empirical changes in crime patterns in that sense.

human rights standards. There are six themes that are dealt with in this general report:

Part I. Transformations in the legal framework of special procedural measures and human rights protection

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Part V. Transformations in the trial setting

Part VI. Transformations in the post-trial setting

This general report will follow the questionnaire (see annex I) that was submitted to the national rapporteurs, with some exceptions. After reading the national reports a couple of questions have found a more logical setting in another part of this general report. Any changes will be explicitly indicated. It is also clear from the national reports that the main substantial changes and special procedures have been implemented in the pre-trial setting, with consequences for the trial-setting. The hardcore of the general report for this reason will deal with parts I-IV.

#### **PART I TRANSFORMATIONS IN THE LEGAL FRAMEWORK OF SPECIAL PROCEDURAL MEASURES AND HUMAN RIGHTS PROTECTION**

##### **Criminal Procedure and applicable International law and Human rights law standards**

*Q1. To what extent do international human rights treaties and international humanitarian law treaties (Geneva conventions) apply in your domestic legal system? Are there any limitations to the application of these international standards in your country? Can citizens (suspects, accused, victims, witnesses...) derive rights from these treaties in your domestic legal order?*

The country reports clearly show that the status of international human rights (HR) standards in the domestic legal systems does vary a great deal. Binding HR standards for states do not always result in rights and remedies for citizens in the courts. Not in all countries do the international HR standards have binding legal effect. The Inter-American Convention on Human Rights (IACHR) for example, although signed by the US, was never ratified. Nor do all the countries accept the jurisdiction of international HR courts.

The enforceability of individual rights in the courts depends on various factors. Not in all countries do the international HR standards have a self-executing status. In the US, self-executing treaties do bind the individual states pursuant to the Constitution's Supremacy Clause, and the remedies provided must be applied by the courts as a requirement of federal law. However, neither the International Covenant on Civil and Political Rights (ICCPR) nor the Geneva Conventions have

a self-executing status in the US. Thus, the individual rights enumerated in the ICCPR are not enforceable in the courts. Federal courts in the US have consistently held that the Geneva Conventions are not self-executing, and they therefore provide no basis for the enforcement of private rights in the domestic courts. Recently, the US Supreme Court has held in the *Hamdan* case that, at a minimum, Common Article III, which is included in all four Geneva Conventions, is applicable and can be invoked by the petitioner to challenge the legality of his trial by military commissions. However, the US Congress, in passing the Military Commissions Act (MCA) of 2006, overruled the US Supreme Court's decision. Yet, in *Boumediene v. Bush*, the Supreme Court found that section 7 of the MCA constituted an unconstitutional suspension of the writ of habeas corpus and that Guantánamo Bay detainees have a constitutional privilege of habeas corpus, which cannot be withdrawn except in conformity with the U.S. Constitution's Suspension Clause. Habeas corpus was thus re-established but not because of the self-executing status of international provisions.

The status of international HR standards also depends upon national constitutional parameters (dualism versus monism) and the ranking of these standards in the hierarchy of domestic norms. Not in all reporting countries do international HR standards have an equivalent status with constitutional norms having primacy. In Turkey, although it has a monist system, HR obligations do not have priority over conflicting constitutional norms. The result is that the standards of art. 6 of the European Convention on Human Rights (ECHR) are set aside by conflicting constitutional clauses, for instance resulting in the absence of appeal procedures in military trials. Also in Brazil there is a complex relationship between international law and the domestic legal order. The Brazilian Supreme Court is not willing to give a constitutional status to HR treaties, including the IACHR. As the Supreme Court does not differ between trade treaties and HR treaties, international HR standards are not self-executing, and their application depends on a complex ratification and promulgation process. Italy traditionally has a dualist regime with no recognition of a self-executing effect, even for the ECHR. However, the Constitutional Court has recently recognized that the ECHR forms part of Italian constitutional standards. Also in Latin America, countries like Peru and Colombia do include HR standards as the highest standards in their constitutional ranking. The same is true for Germany.

In some countries, like Croatia, HR standards are standards which lie somewhere in between ordinary law and constitutional law, although it has to be said that in most European countries ECHR standards are equivalent to constitutional standards. In most countries, like Belgium, Colombia, Spain, the Netherlands, Romania, Finland and Hungary, HR standards are equivalent to self-executing constitutional standards and are enforceable in the courts. This self-executing

character does however depend on the nature of the norm. The norm must be clear and precise in order to be self-executing.

#### **Criminal law, human rights and emergency situations**

Q6. *Does your legal system allow for the suspension of human rights in emergency situations (including war)?*

- *Who has the power to make this decision and which control mechanisms apply?*
- *What safeguards may be suspended? Does your legal system distinguish between derogable and non-derogable human rights?*
- *Can emergency serve as a ground to shift from common criminal proceedings to special proceedings (military forum, police procedure, administrative procedure, military commissions)?*

Most reporting states do have constitutional procedures by which certain HR and procedural safeguards might be suspended in exceptional circumstances. In most reporting countries these special circumstances are limited to a situation of war. Even in this situation, these states provide for hardcore rights that cannot be suspended, although the list of non-derogable human rights does differ. Most states limit this to the right to life and the prohibition of torture; other states, like Croatia, also include freedom of thought, conscience and the legality principle; Turkey does extend the list to the right to freedom of religion and presumption of innocence. Interesting is that the Argentinean Constitution refers directly to the IACHR, by which a substantive list of HR are de iure not derogable, including habeas corpus and the right to a legal review. In situations of war, in many reporting countries the competence of military criminal justice increases substantially.

For special circumstances not being war, I do use the concept public emergency, including the declaration of a formal state of emergency and the use of emergency powers for national security reasons (with or without formal declaration).

In a minority of reporting countries, like Colombia, Italy, the Netherlands, Spain, Turkey, the UK and the US, it is possible to suspend certain HR, not only in cases of war, but also in cases of an emergency. In most reporting states, the suspension has to be decided by Parliament, even sometimes with the special qualified majority of constitutional reform. In other states, like Finland, the Netherlands and Colombia, the President or the Prime Minister has this power, subject to parliamentary scrutiny. In the UK and in the US this is a royal, respectively presidential, prerogative. Also here the types of rights that can be suspended do vary. In all reporting countries, with the exception of the US, Colombia and the Netherlands, it is not possible to shift from common criminal proceedings to special proceedings in emergency cases. The Netherlands, for instance, does have constitutional provisions by which it is possible to derogate,



not only in times of war but also in times of emergency, from the natural judge, thereby replacing the ordinary criminal courts with courts martial. In contrast, however, the Spanish Constitution explicitly precludes military courts in emergency situations. In practice, a state of emergency, for instance due to a terrorist threat, has only been used in a few reporting countries (Colombia, the US) as a reason for setting aside the normal criminal procedure in favour of other procedures, although we know that in several non-reporting countries this is the case or indeed has been the case.

The HR Conventions themselves do provide for emergency procedures and for the possibility to suspend the application of certain HR. Art. 15 ECHR allows for derogation "in time of war or other public emergency threatening the life of the nation." The British Anti-Terrorism, Crime and Security Act 2001 provided for detention without charge for foreign nationals who, in accordance with article 3 ECHR, could not be deported, thereby derogating from art. 5 ECHR. A derogation from article 9 of the ICCPR was also provided for. The Government had a broad discretion to decide what a state of emergency is because this is a political judgement. The House of Lords found it disproportionate to and in conflict with articles 5 and 14 of the ECHR when read together. It was repealed in 2005. Since this scheme was replaced by the control orders scheme (see *infra*), the UK Government controversially claims that no derogation is required.

#### Legal Reform at the Domestic Level

Q2. *What important legislative reforms were carried out in your country in the last decades in the interest of national/global security and public safety? Are there currently any such reform plans? (brief description)*

- *Did the reforms amend the existing common legal framework of criminal law enforcement, or did they elaborate an alternative track of special proceedings (military justice, police justice, administrative justice, military commissions, etc.) outside the regular criminal justice system?*
- *Are these legislative reforms governed by constitutional provisions on emergency (including war)?*
- *Did criminal justice practice play a role in defining and carrying out the reforms? Did, e.g., higher courts (cassation or constitutional court) reverse elements of these reforms?*
- *Were the reforms subject to political or public debate?*

Criminal law provides for an integrated system, offering both *protection* to individuals (not only suspects) (the shield dimension), *instruments* for the law enforcement community (LEC) made up of the police, the Public Prosecutor's Office (PPO) and the judiciary (sword dimension), and providing for *checks and balances/triás politica* (the constitutional dimension). There is no doubt that substantial and far-reaching changes have occurred during the last few decades.

Three paradigms, the war on drugs, the war on organized crime and the war on terrorism swept like a tidal wave through the criminal justice system. All three dimensions of the criminal justice system have been affected by these three waves. These reforms have profoundly affected the objectives, nature and instruments of the criminal justice system and its procedural law. The counter-terrorism third wave of reforms is older than the 9/11 events and the events in Madrid and London, etc., but has certainly been intensified by these terrorist attacks. The impact of the third wave is very different from country to country, as some countries, like Spain, Italy, Colombia, etc., had already elaborated counter-terrorism legislation and practice in the 1970s and 1980s in order to deal with internal terrorism or public disorder. In most countries we can see that the terrorism paradigm has resulted in a very impressive list of reforms. I will just give a couple of examples to illustrate the impact in the reporting countries. In Croatia at this very moment in time we can see a draft CCP before Parliament, which contains a shift from a judicial investigation (by the investigating judge) to a prosecutorial investigation, including the setting up of a pre-trial judge of liberties. Belgium and the Netherlands have seen very significant reforms. Reforms include substantive criminal law (and a tremendous increase in offences), procedural criminal law (including the introduction of special investigative and proactive techniques), legislation on the security and intelligence forces (including special surveillance techniques) and the setting up of a special centre for the exchange of data dealing with terrorism and security. Civil servants in administrative agencies are increasingly used as agents of the judicial police, and there is an extension of the administrative investigation of and sanctioning for the disruption of public order. In some countries these reforms go hand in hand with an increasing constitutionalization of this field. Both in Belgium and in Germany we see that the Constitutional Court plays a decisive role in protecting the rule of law when dealing with counter-terrorism. However, there are significant differences in the wave of reform. Countries like Belgium and the Netherlands are in fact deviating from their long-standing tradition of the rule of law, while countries like Spain – certainly linked to the traumatic Franco experience – are very keen on their constitutional law tradition, but are confronted with domestic problems of terrorism. Spain does have a specialized judiciary for dealing with the investigation and prosecution of terrorism. Franco's anti-terrorist legislation has de facto been replaced by special terrorist legislation with a specialized track of criminal procedure for investigation, prosecution and adjudication. On the other hand, for non-terrorist crimes Spain has a criminal justice system with strong procedural safeguards and full constitutional and HR protection. In Turkey we can see that many reforms are driven by the EU (in the pre-accession process), such as the abolition of the death penalty and the security courts. Many reforms in the field of criminal procedure include ECHR compatibility with procedural safeguards, but also the introduction of special investigative techniques.

From the reporting countries we can derive some common features and conclusions:

First, all reporting countries have introduced substantial changes in their criminal procedure systems and have also introduced special procedural measures to deal with serious crime, especially organized crime and terrorism. No country is reform-free. All countries are also struggling with the equilibrium between public liberties and freedoms versus national or public security. Today, more or less all reporting countries have introduced special investigation techniques, such as wire-tapping, infiltration and observation, in their criminal procedure regime. Some reporting countries have also introduced special measures for collaborators with justice (*pentiti, repentis, kroongetuigen, Kronzeuge, supergrassés*) or special anonymous witness statutes for infiltrating agents or informers. Some reporting countries have introduced concepts of proactive or preventive criminal investigation. The result of the intensity of the reforms is that the legal framework for criminal procedure in many countries resembles more of a patchwork or a building site than a consistent codification.

Second, all reporting countries have done this within the constitutional framework and within the international HR framework, so not setting aside or freezing constitutional or international HR standards. There are no reports of cases of emergency legislation extra-constitucionalis or extra-*legem*.

Third, more or less all the reporting countries have realized the reforms without using emergency clauses (state of emergency) in their constitution or in international HR conventions. The only exceptions in our reporting countries are Colombia, which has used a constitutional emergency on a frequent basis, and the US since 9/11.

Fourth, the majority of the reporting countries have elaborated special procedural measures to deal with organized crime and terrorism within their ordinary criminal procedure. We could state that the ordinary criminal procedure does include special measures. The three waves did result in an integrated<sup>15</sup>, but special track of criminal procedure for serious offences, including the drug trade, organized crime and terrorism. We can see in all reporting countries a net-widening effect of the special measures in relation to competence *ratione materiae*. Special measures were originally introduced for a narrow set of offences related to organized crime and/or terrorism, but their scope of application has been increased, including in the end most offences qualifying as serious offences. The French Perben II Act is a clear example of comprehensive reform in that sense, including the criminal procedure elements thereof. In the 1970s Italy introduced special criminal legislation against the Mafia. That legislation was widened in the

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<sup>15</sup> With integration in the CPP I do not mean that it has been done in a very coherent way. In Italy, for example, it is a patchwork of special legislative acts that amend the CPP rules.

1990s so as to include organized crime and after 9/11 it was amended in order to include international terrorism. Although Italy introduced a full adversarial criminal procedure in 1989, the special legislation against the Mafia remained in place. After the killing of judges Falcone and Borsellino in Sicily, special investigative powers were further elaborated.

In the majority of the reporting countries the special procedure did convert from the exception into the main and common procedure for serious crimes, by which we can speak of the normalization of the exception. Britain's temporary exceptional counter-terrorism measures, for example, in place for almost 30 years, naturally led to these becoming normalised in the last decade. The consequence is a split within the ordinary criminal justice system between a criminal procedure regime for serious offences and one for "petty" offences or special legislation replacing substantial parts of the ordinary criminal justice system. In fact criminal procedure is no longer organized in line with the general part of criminal law, but in line with the dual use in the special part of criminal law. For the "petty" offences there is in some reporting countries, like the Netherlands, also a shift in the sanctioning power, from the judiciary to the investigators and prosecutors.

Alternative tracks of special proceedings, outside the regular criminal justice system, have only been used in the reporting countries of Colombia and the US. Colombia even has a three-track system: ordinary criminal justice, criminal justice for enemies of the state through emergency legislation (mostly against guerrillas) and criminal justice for those that enter into the lenient regime of Peace and Justice (mostly paramilitary forces). In the US, since 9/11 there is clearly a double-track regime, making a distinction between criminals and enemy combatants. In the US the 9/11 events have dramatically altered the traditional approach to terrorism-related acts by shifting the paradigm from the ordinary criminal justice system, under which such crimes have historically been prosecuted, not to the military criminal model (martial law), but to an extraordinary model based on the interest of national security. The USA Patriot Act of 2001, the Detainee Treatment Act of 2005 and the MCA of 2006 are clear examples of criminal emergency legislation, providing for an alternative track for investigation, prosecution and adjudication. It is thus striking that in the US, neither ordinary criminal justice, nor military criminal justice are considered to be able to deal with terrorism and that a third way is elaborated, setting aside the classic procedural guarantees and rights of both the ordinary and military criminal justice system.

Fifth, the dominant paradigm of the war against organized crime and the war against terrorism has changed the main goals of the criminal justice system. It has converted the reactive system with the aim of punishing crimes and

rehabilitating offenders into a proactive and preventive system of protection of public order by procedures to exclude potentially dangerous people.

Sixth, this conversion was further strengthened by the technological evolution by which technical devices in an online and digital context replace the old concepts of judicial investigation such as search and seizure, including techniques that are more intrusive in the key areas of the private sphere.

Seventh, on the other hand, we do see in the majority of reporting countries that there is an increasing process of the constitutionalization of criminal procedure, both in law (including constitutional norms concerning the rule of law and fair trial) and in practice (by the case law of the higher courts and the supranational HR courts). Special criminal procedures dealing with organized crime and counter-terrorism are dealt with by Supreme Courts, Constitutional Courts and HR Courts.

Nevertheless, the driving factors for the reforms are not always the same. Of course all countries are under the supervision of the UN CTC, but in some countries, like the Netherlands and Italy, there is a strong national agenda. In other countries, like Romania, Hungary, Croatia and Turkey there has been a strong influence by the EU within the framework of access or pre-access supervision schemes, by which reforms to strengthen the rule of law and reforms aiming at introducing measures against corruption, organized crime and terrorism were introduced in a parallel way. In all EU member states there has been the strong influence of EU framework decisions, but mostly in the area of criminal substantive law, not that much, as yet, in the area of criminal procedural law.

Although in most reporting countries the massive reforms of the criminal procedure are the result of a political instrumentalization of crime and the fear of crime, it is also quite clear that, at least in some reporting countries, these reforms were not part of a substantial political or public debate. The debate was in some countries between the executive and judicial branches of the trias politica, leading to interesting rulings of the higher courts.

The transformation of the criminal justice system, especially the introduction of special measures in the area of counter-terrorism (third wave), did have consequences for

- the type of **players/authorities**;
- their **powers and investigation techniques** (including digital) – the sword
- the **safeguards and constitutional and human rights to be respected** – the shield
- the **architecture** (checks and balances, trias politica, constitutional dimension)
- the **objectives of the criminal justice system**

For the analysis it might be interesting to make a distinction between the reporting countries that have introduced special procedural measures within their regular criminal justice system and those that have done so outside the criminal justice system.

*Group I Special measures within the criminal justice system*

At first glance it might seem that the main architecture, the constitutional dimension of the criminal justice system (checks and balances/trias politica), is not touched upon. However, if we take an in-depth look at the transformations we do see substantive changes which also affect the constitutional dimension of the criminal justice system.

**- Redefinition of players (authorities)**

Traditionally, criminal investigation is led by judicial authorities and coercive measures are authorized and/or are executed by members of the judiciary (investigating judges or pre-trial judges or trial judges). In many reporting countries we can see a shift in judicial investigation from the judiciary to prosecutorial and police investigation. We can clearly speak of a reshuffling in the law enforcement community (LEC). Magistrates are less and less involved in the judicial investigation as such; there is a clear shift to the executive or semi-executive branches of state power.

Second, there is not only a shift between the classic players, but new players, administrative enforcement agencies, play an increasing role in the field of fighting serious crime. Gaining ground in the criminal justice system is also the Intelligence Community (IC), both specialized police units dealing with police intelligence and security agencies. They are responsible as the forerunners for police and intelligence-led investigations, and in some reporting countries they have even obtained coercive and/or judicial competence. Classic LEC agencies do convert into intelligence agencies and do change their culture and behaviour.

Third, many reporting countries have increased the use of private service providers (telecom, business operators, financial service providers) and professions with information privileges (lawyers, journalists, etc.) as gatekeepers and as the long-arm collectors of enforcement information. Journalistic and legal privileges are no longer safe havens.

Fourth, in some reporting countries we can clearly see a coordinated multi-agency approach in a formal or informal way, by setting up a joint expertise centre or a shared database. The LEC and IC communities both participate in these new agencies or database structures.

Fifth, exclusive jurisdiction for investigation and/or for trial is gaining strength in several reporting countries.

**- Redefinition of their competences and their techniques (the sword)**

First, in most reporting countries the paradigms of the drug trade, organized crime and terrorism are not only used to redefine investigative, coercive instruments, but also to introduce new, special investigative techniques, such as wire-tapping, infiltration, observation, which can only be applied to serious crimes. The result is a set of coercive measures with a double use (for serious and less serious offences) and a set of coercive measures with a single use for certain serious crimes.

Second, in many reporting countries the classic measures dealing with securing evidence and the confiscation of dangerous instruments or products in relation to crime have become an autonomous field of security measures concerning goods and persons (seizure and confiscation, detention orders, security orders, etc.). Linked to that, investigations into the financial flows from the drug trade, organized crime (financing, money laundering) and terrorism (financing) have been converted from a classic investigation for gathering evidence into an autonomous financial investigation, dealing with extensive seizure and confiscation of the proceeds of crime (asset recovery) and/or into autonomous financial surveillance and investigations into the financing of serious crime.

Third, the triggering mechanisms or minimum thresholds for the use of coercive measures to combat serious crimes are changing. Criminal investigation no longer starts with a reasonable suspicion that a crime or an offence has been committed or attempted or a reasonable suspicion that a preparatory act for committing a serious crime has been committed or attempted. Investigation techniques and coercive measures are also used in a proactive way to investigate, *anti-delictum*, the existence and behaviour of potentially dangerous persons and organizations in order to prevent serious crimes. We can qualify this as criminal law without suspects.

Fourth, the sword of criminal justice has changed substantially in all reporting countries by the use of digital-led investigation (online criminal searches, the monitoring of data flow, data processing) and the use of advanced technology in judicial investigations (digital surveillance, detection devices, etc.). Information-led investigation replaces mere suspicions.

**- Redefining the safeguards and the constitutional and HR dimension (the shield)**

In many reporting countries some procedural guarantees are considered by the legislator as being a burden to the efficiency of serious crime prevention, serious crime investigation and serious crime prosecution. First of all, the use of existing instruments such as search and seizure and police detention is submitted to other parameters for serious offences than for less serious offences. Moreover, judicial authorization or approval (in the form of warrants) is weakened or abolished for

some coercive measures (warrantless coercive measures). The role of the defence and of the judge of procedural guarantees is hindered. This means in practice that the police and prosecutors have in practice more autonomy and less supervision by the judiciary concerning their investigative work. We could speak of a double-use of the existing coercive measures, one with less safeguards and one with more safeguards. Generally speaking, we can say that the seriousness of the crimes under the paradigms does justify raising the sword and lowering the shield. In the case of serious crimes, in many reporting countries the relationship between the intrusiveness of the measures and judicial control has changed: the greater the intrusiveness, the less the judicial control and the procedural safeguards. However, in some countries, like in France and in Romania, the wielding of the sword is counterbalanced by special warrant procedures, so we can here say that the shield is raised at the same time.

Second, by lowering the thresholds (reasonable suspicion or serious indications to simple indications, reversed burden of proof, legal presumptions of guilt) for triggering the criminal investigation and for imposing coercive measures, the presumption *innocentiae* is undermined and replaced by objective security measures. The shields protecting the citizen against the *ius puniendi* of the state are put at the back of the stage in the theatre of criminal justice. This has, of course, direct consequences for habeas corpus, habeas data, fair trial rights, redefinition of evidence rules, public proceedings, etc.

Third, in many reporting countries, through schemes of criminalizing financing of terrorism and material support for terrorism, criminal defence lawyers are under pressure. Their legal privilege is questioned and some defence activities are indicted as material support.

Fourth, in many reporting countries there is also a need to secure the functioning of the criminal justice system and its players. The protection of witnesses has also been converted into the protection of anonymous witnesses, including those from the police authorities and intelligence agencies involved in infiltration. The criminal justice system is increasingly shielding its agents against the defence by *ex parte* proceedings and forms of secret evidence gathering as well as the use of secret evidence in the pre-trial and trial setting.

- Consequences for the architecture (checks and balances, *trias politica*, constitutional dimension)

The reforms result in a clear expansion of the punitive State<sup>16</sup> thereby not favouring the Rule of Law. The focus on public security and preventive coercive investigation is clearly undermining the criminal justice system and its balances between the sword and the shield. Administrative and preventive forms of punitive

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<sup>16</sup> J. Simon, *Governing through Crime*, Oxford University Press, 2007.



justice are expanding. The result is also that the equilibrium between the three branches of the trias politica is under great pressure in favour of the executive.

- **Consequences for the objectives of the criminal justice system**

The conversion from a reactive punishment of crime into a proactive prevention of crime does have far-reaching consequences. The distinction between police investigation and judicial investigation is under pressure. Coercive proactive enforcement becomes important for serious crimes. IC becomes a main actor in the law enforcement field. Preventive criminal law is not about suspects and suspicion, but about information gathering (information and criminal intelligence investigation) and procedures of exclusion against potentially dangerous persons. The criminal justice system is increasingly used as an instrument to regulate the present and the future and not to punish for behaviour in the past. The criminal process does increasingly become a procedure in which the pre-trial investigation is not about truth-finding related to committed crime, but about construction and de-construction of social dangerousity.

*Group II Special measures outside the criminal justice system*

Let us now take a look at those reporting countries that have introduced special procedural measures outside their regular criminal justice system: Colombia and the US. These countries have chosen solutions that completely redesign the checks and balances and the trias politica dimension. They have not suspended the Constitution, however, but many reforms have been considered by their Supreme and/or Constitutional Courts to be partially incompatible with Constitutional requirements. Both have used constitutional emergency procedures to introduce the reforms.

Colombia has introduced, under the Constitution of 1886, many decrees concerning security and public order and emergency legislation increasing substantially the martial law and the competence of military jurisdiction in criminal matters. Under that regime, the famous *Justicia sin rostro*, with anonymous judges, was also introduced. Under the new 1991 Constitution, the regular use of emergency legislation went one step further. In 1997 the Statute on Peace and Justice was approved, providing for a separate criminal justice system for paramilitaries and guerrillas leaving the battlefield, confessing their offences and being willing to contribute to the compensation mechanism. This special criminal procedure regime is considered to be very lenient towards these offenders, especially considering the atrocity of their alleged crimes.

In the US, reforms have dramatically altered the traditional approach to terrorism-related acts by shifting the paradigm from a criminal model, under which such crimes have historically been prosecuted, not to the ordinary military criminal model (martial law), but to an extraordinary model based on the interest of

national security. The USA Patriot Act of 2001, the Detainee Treatment Act of 2005 and the MCA of 2006 are emergency legislation.

**- Redefinition of players (authorities)**

In fact the theatre of criminal justice has fully changed for a play not on the suspect, but on the enemy. Classical judicial authorities are being replaced by new authorities acting under special statutes. The investigators at Guantánamo Bay are of course the most striking example.

Colombia is more complicated because there is one play on the enemies and one on the friends of the state. In the latter case, we can refer to the investigations and prosecutions under the Justice and Peace Act.

**- Redefinition of their competences and their techniques**

In the US, the investigative powers are powers to combat the enemy. They have a strong inquisitorial character, are very much based on intelligence and include coercive measures such as acts of torture. The adjudication is transferred to executive military commissions.

In Colombia, although the role of adjudication by the military tribunals in criminal cases has been decreased by several reforms, it is clear that consecutive declarations of emergency have militarized, to a large extent, the police forces and thus substantial parts of the judicial investigation. On the other hand, the legislation on Justice and Peace has created a category of suspects for which a very favourable regime of criminal procedure has been put into place, converting the defence lawyer into PPO and vice-versa. In fact, the suspect has a due interest in increasing the severity of the indictment under this regime in order to avoid indictment under the regular criminal procedure.

**- Redefining the safeguards and the constitutional and human rights dimension**

In the US, the main aim of the special measures is to avoid the procedural safeguards and HR. The emergency measures intended to avoid a great deal of the basic constitutional and international standards. However, the US Supreme Court and several federal judges have been very active in avoiding the circumvention of constitutional safeguards, such as habeas corpus, fair trial, etc.

In Colombia, the emergency legislation had the aim of suspending certain safeguards and constitutional rights. As in the US, the Colombian Constitutional Court did declare several aspects of the legislation to be unconstitutional and avoided the introduction of special anti-terrorist legislation for the same reason.

**- Consequences for the architecture (checks and balances, trias politica, constitutional dimension)**

In the US and in Colombia the function of the legislature and of the judiciary is to a large extent replaced by the executive branch of the trias politica, using

punitivity as an instrument of warfare and instrumentalising criminal justice for political victory. However, Supreme and/or Constitutional Courts try to rebalance the trias politica. In Colombia this has led to uncertainty as to the future of the Constitutional Court, because of very serious clashes with the Executive.

- Consequences for the objectives of the criminal justice system

The result is a massive expansion of the Punitive State (security law, preventive coercive investigation, enemy law), by which the criminal justice system and its balances between the sword and the shield are fully circumvented. The interests of national security prevail over justice.

**PART II TRANSFORMATION IN THE NATURE AND GENERAL PRINCIPLES OF THE DOMESTIC CRIMINAL PROCEDURE**

In this part we focus on only some of the main characteristics of the criminal justice system and its criminal procedure. Specific aspects will be further discussed in detail in parts III-VI. Questions 4 and 8 will be dealt with in part IV. Question 6 has been included in part I.

**General Principles of Criminal Procedure**

*Q3. What are the general principles of your criminal procedure (e.g., principle of legality, fair justice, and equality of arms) and what is their legal source (e.g., constitution, statute)?*

In general we can say that in the reporting countries general principles of criminal procedure have become more important. Reforms were introduced in favour of adversarial proceedings, based on accusatorial principles as orality, equality of arms, fair trial, an independent and impartial judiciary, etc. However, at the same time parallel reforms have been introduced to reduce the scope and application of these principles when investigating, prosecuting and adjudicating serious offences.

The basic norms and principles of the criminal procedure system, related to the administration of justice, access to justice, fair trial, etc. do not all have constitutional standards in the reporting countries. In some countries one can see a strong and historic process of the constitutionalisation of criminal justice, especially the due process of law and fair trial, including specific procedural safeguards and rights by the impact of constitutional case law. This constitutional legacy is supplemented by rules of criminal procedure. This is clearly the case in the US, with the US Constitution, the US Supreme Court's case law and the Federal Rules of Criminal Procedure. In Spain one can see the same since the re-establishment of democracy and the rule of law. The Spanish Constitutional Court has developed very important constitutional case law on criminal procedure, in which HR (ECHR) standards are used as minimum standards. In some other countries, like in the Netherlands, the constitutional framework is rather weak, mostly because of the lack of a Constitutional Court and the

constitutional norm excluding competence for the judiciary to review acts and statutes as to their compatibility with the Constitution. However, thanks to the self-executing status of the ECHR, this is compensated to a certain extent.<sup>17</sup>

The character of criminal proceedings (inquisitorial, semi-inquisitorial or accusatorial or adversarial) is rarely prescribed by the Constitution, although a great deal can be derived from constitutional fair trial aspects. Generally speaking, we can state that in all reporting countries the general principles of criminal procedure are constitutionally enshrined and/or enshrined in HR treaties and are applied in statute law in strict compliance with basic constitutional norms and HR standards. This general conclusion concerns the legal framework as such. The general principles of criminal procedure, also when dealing with organized crime and terrorism, are designed to be in line with constitutional and HR standards. This means that constitutional and HR standards remain as the mandatory framework for dealing with these paradigms of crime. However, in some reporting countries, like Colombia and the US, this mandatory framework has been undermined by punitive procedures elaborated by the executive. Moreover, in these countries many substantive parts of these new procedures have been declared unconstitutional by their Supreme Courts or Constitutional Courts and have resulted in a legal battle between the executive and judicial authorities, turning justice and fair trial into a political battlefield.

The general conclusion on the legal relationship between HR treaties, the constitution and criminal procedure does not imply, however, that the paradigms of organized crime and terrorism have had little influence on the main architecture of criminal procedure and its basic principles. We will see in parts III-VI how transformations have changed the scope of the principles and their de facto application.

#### **Criminal Procedure, Scope Ratione Personae and a Subject Distinction**

*Q5 Does your common criminal procedure or special proceedings provide for a distinction between citizens and non-citizens, nationals or non-nationals, or specific categories of subjects (aliens, enemies, non-persons)?*

It is very clear from the reporting countries that all of them, with the exception of the US, the UK and Colombia, do not make a distinction between citizens and non-citizens or nationals and non-nationals and between resident aliens and non-resident aliens. Most reporting countries do have a special criminal jurisdiction for certain subjects, like Members of Parliament or military personnel when performing their duties.

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<sup>17</sup> The ECHR only contains minimum standards, and the European Court of Human Rights has not developed strong HR protection in the pre-trial phase and has given a large margin of appreciation to States in relation to counter-terrorism.

In Britain there is no fundamental difference in the treatment of British citizens and non-British citizens inherent in the criminal law, but Britain did have detention without trial for foreign, non-deportable suspects, which was in force between 2001 and 2004, but was declared to be in breach of articles 5 and 14 ECHR by the House of Lords. The Government then replaced this with the control orders scheme which falls outside of the criminal justice system and is applicable to both British citizens and foreigners (see *infra*).

In some reporting countries, like Colombia and the US, a wider distinction is introduced between categories of subjects, like enemy aliens, enemy combatants, disarmed guerrilla fighters or paramilitary soldiers, etc. For a variety of reasons new systems have been set up to circumvent ordinary criminal procedure or even ordinary military criminal procedure.

We can state that the reporting countries that use emergency criminal procedures also provide for distinctions in the scope *ratione personae* of their punitive systems. Each emergency punitive procedure has its own insiders and outsiders. Some special punitive procedures, like in Colombia, are in favour of the insiders, and include the risk of impunity concerning very serious offences. Some special punitive procedures, like in the US, do not favour the insiders, and include the risk of reducing the insiders to mere objects of investigation and include prosecution denying that they are subjects, bearers of rights.

#### Criminal Procedure *Sub Rosa*

*Q7. Does your legal system recognize special measures by which parts of the legislation and/or parts of the criminal process may be classified (classified legislation, secret procedures, secret actors of justice, secrecy in the administration of criminal justice)?*

Although the large majority of the reporting countries, with the exception of the US, do not have systems or procedures fully based on secrecy, there is no doubt that in a substantive group of countries there have been, in the last decade, very in-depth reforms concerning the tasks of LEC and IC, by which investigative powers have been increased, procedural safeguards weakened and secrecy introduced in the procedures.

Secrecy is meant here as classified, by which the main functioning of the criminal justice system and its procedures remains secret, not only to the general public, but also secret to key actors in the criminal justice system, such as judges and/or defence lawyers.

Secret or classified legislation in criminal matters, with the exception of the US, does not occur in the reporting countries.<sup>18</sup> Neither do we see, with the exception of the US and the UK, the reporting of covert judicial proceedings or executive

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<sup>18</sup> The UK has secret proceedings in deportation cases concerning illegal migrants.

secrecy using secret procedures and secret actors of justice (secret tribunals). Of course, all criminal justice systems do have *ex parte* judicial investigations at certain stages for obtaining evidence, but this is another issue dealing with the adversariality of ordinary criminal proceedings (see *supra* under parts IV and V). In 1978 the US did introduce the FISA surveillance,<sup>19</sup> which makes it possible to bug and tap foreign powers and their agents, foreign networks or persons or terrorist activities<sup>20</sup> without a warrant. For the tapping or bugging of related US citizens or US residents a warrant must be issued by a secret FISA court. The investigative acts involved are always secret and the persons concerned are not informed either before or afterwards. In the UK a few procedures introduced by anti-terrorist legislation feature the use of classified evidence in non-criminal proceedings. Those relating to determining whether the proscription of an organisation was correct and proceedings before the Special Immigrations Appeals Committee can involve the introduction of classified evidence by the Government which the court views in order to reach its decision. Where such evidence is introduced a Special Advocate, who works in the interest of the appellant but is not briefed by him/her/it, views the evidence and makes related arguments on his/her/its behalf, although he/she naturally never communicates with him/her/it.

Astonishingly, no reporting countries make any mention of potentially illegal secret procedures dealing with the arrest, abduction or kidnapping, detention and interrogation of several persons, considered by the US as having contacts with Al Queda. Several reports by the European Parliament and the Council of Europe contain indications of secret surveillance, secret arrests and abductions, secret transfers to secret detention centres in Europe and abroad.<sup>21</sup> In several European countries and in Canada administrative and criminal investigations are under way against European and US civil servants and law enforcement officials.<sup>22</sup>

For further details on secret evidence and the use of intelligence in criminal proceedings see part IV, Question 9.

### **PART III ELABORATION OF PROACTIVE ENFORCEMENT (COMMON POLICE OR COMMON CRIMINAL PROCEEDINGS, SPECIAL PROCEEDINGS)**

#### **Proactive enforcement and coercive investigation**

#### *Q9. Do intelligence forces, regular police forces, or administrative enforcement*

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<sup>19</sup> Foreign Intelligence Surveillance Act.

<sup>20</sup> It does not have to be shown with probable cause that these persons or activities are involved.

<sup>21</sup> [http://www.venice.coe.int/site/dynamics/N\\_Opinion\\_ef.asp?CID=90&L=E](http://www.venice.coe.int/site/dynamics/N_Opinion_ef.asp?CID=90&L=E), Opinion on the international legal obligations of Council of Europe Member States in respect of secret detention facilities and Inter-State transport of prisoners.

<sup>22</sup> The most famous case is the Milan Abu Omar case, actually still taking place in Milan.

*agencies (such as customs or tax agencies) have the competence in your country to use coercive powers in a pro-active way? If yes*

*- under which conditions?*

*- must there be a suspicion based on probable cause to use these coercive powers or are indications of dangerousness for the national security or public interest sufficient? Has the definition of suspicion been changed for serious offences?*

*- can these coercive powers be used for persons other than suspects/accused of crimes (e.g., enemy combatants, enemy aliens, persons having no right to the protection of regular criminal procedure, etc.)?*

*- how is division of labour regulated within the investigative authorities?*

*- can the information obtained through the pro-active enforcement by means of use of coercive measures be shared between intelligence, police, administrative enforcement agencies, and judicial authorities?*

All reporting countries are familiar with preventive measures and enforcement mechanisms in the area of police law and administrative law, but the legal regimes do differ. They all foresee in their legislation classic competences for administrative agencies that might be traditional ones, such as customs, or new ones, such as police and intelligence agencies, to collect and process information and to investigate certain objectives (compliance with customs duties, prevention of corruption, and protecting the constitutional public order). For the IC the main task is to process information on persons or organizations giving rise to a serious suspicion that threats are posed to national security. Traditionally, the intelligence agencies, while not belonging to the LEC, cannot use the classic coercive measures of criminal procedure, such as search and seizure, or new ones, such as infiltration. However, they do have general surveillance powers and can apply certain preventive coercive measures (physical searches, the seizure of dangerous goods). Traditionally, the prosecution of crime, the collection of information, the processing of information and the judicial investigation in that respect are the exclusive domain of the LEC. A group of reporting countries still reflect this traditional approach by precluding the use of coercive powers in a proactive setting by the LEC. The triggering mechanism for the LEC is the commission of a crime, the attempt thereof, and, for the most serious crimes, the investigation into preparatory acts.<sup>23</sup> Investigations of general situations, general patterns or specific groups, etc. are activities that fall outside the realm of the criminal investigation. These countries seem to adhere to a clear-cut distinction between criminal law (reactive) and police/administrative law (proactive).

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<sup>23</sup> See the general report by Lorenzo Picotti, The expanding forms of preparation and participation, Session I.

Intelligence gathering is considered to be part of prevention, in which only the police, administration and intelligence agencies can operate. This means that in these reporting countries there is a clear borderline between criminal law enforcement and intelligence gathering. The agencies are strictly separated and the gathering of information by the preventive agencies and the reactive law enforcement authorities serves separate goals. The IC has moreover a limited set of powers and very little coercive force. Transferring intelligence information to the LEC for a criminal prosecution is hindered by Chinese walls or can only be used as evidence in a fully adversarial setting. These reporting countries, like Austria, Brazil, Argentina, and Poland, retain the classic definition of a criminal judicial investigation in their criminal procedure. The investigation is triggered by indications of a reasonable suspicion that a crime has been committed, is about to be committed or that specific preparatory acts have taken place. However, if the last-mentioned is combined with preparatory acts for a crime, such as the existence of a criminal organisation or a terrorist organisation, it becomes clear that specific preventive aims form part of the criminal investigation and convert the reactive criminal investigation into a proactive one, even under the classical regime. Preparation in the form of plotting (conspiracy) or recruitment is then already part of the playing field of the classical criminal justice system.

At the other side of the spectrum are, of course, the US and the UK with a strong IC community. In the US, for example, the IC does not only consist of the CIA, the National Security Agency, the Defense Intelligence Agency and the National Reconnaissance Office, but also of the intelligence units of the Department of State, the FBI, the Department of the Treasury, the Department of Energy and the armed forces. The fact that there is no organizational division between the IC and the LEC – both the CIA and parts of the FBI belong to the IC – does not mean that there are no strict distinctions in respect of objectives, methods and control. However, under recent counter-terrorist legislation the distinction between law enforcement objectives and intelligence objectives overlaps.

A substantial group of reporting countries, which do not include the US and the UK, have also amended their rules of criminal procedure, by which the classic criminal investigation has been widened to include also proactive criminal investigation (*Voremittlung*). This proactive criminal investigation includes the situation in which there are not yet any indications of a reasonable suspicion that a crime has been committed, is about to be committed or that specific preparatory acts have taken place and in which, of course, there can be no suspect(s) legally speaking. The objective of proactive investigations is to reveal the organizational aspects in order to prevent the preparation or commission of a serious crime and to enable the initiation of criminal investigation against the organization and/or its members. This use of coercive measures for crime prevention can be realised by intelligence agencies, police authorities or judicial authorities. When doing so they



belong to the IC, even if they are normally authorities belonging to the LEC. In that time frame they might collect information and use certain coercive measures of criminal procedure in order to prevent the preparation or commission of the crime. For certain coercive measures prior authorisation by the judiciary is mandatory. This widening of the criminal procedure was in certain reporting countries linked to scandals due to the illegal use of coercive measures by police authorities and/or the PPO. Legislators decided that it might be better to include it in the CCP, in order to give it a legal basis, than allowing it to occur in a state of legal limbo. The results were the laying down of existing practice, but also an increase in proactive investigative measures. The changing mandate for the LEC and especially for the police also resulted in changes to working methods. Instead of investigating crime and producing reports and *procès-verbaux*, the police authorities are increasingly busy in preventive investigations into patterns of crime and potentially dangerous persons and organisations. In many reporting countries systems of police intelligence, linked to specialised databases, are mushrooming and are changing the structure and culture of the judicial police organisations.

On the other hand, several reporting countries have amended their mandate for intelligence forces and their powers. Their investigative competences today include coercive powers, parallel to the ones in the CPP, and their objective also includes the prevention of serious crime, as this is a threat to national security. In some countries they do need the authorisation for the use of these powers by the PPO (or by the Executive). De facto the IC is using judicial coercive powers without being a judicial authority and without the guarantees of some form of judicial warrant and/or judicial supervision. We can see an overlapping competence between the intelligence agencies and the police authorities (sometimes including specialised PPO) acting as IC in the preliminary pre-active investigation. Obviously, we can speak of US influence in the organization of the pre-trial investigation.

Finally, some reporting countries indicate a substantial increase of the use of punitive, preventive measures as seizure, administrative detention, freezing orders, etc. during the pro-active investigation. Definitely, the new phase of pro-active investigation is gaining substantial ground in the criminal justice system.

As this proactive criminal procedure is very new for many reporting countries (with the exception of the US and the UK), let us take a look in more detail at some regulations in the reporting countries. Belgium and the Netherlands have both comprehensively introduced the new concept of proactive enforcement in their CCP. Let me illustrate the concept by explaining the evolution in Dutch criminal law. In 1999 special investigative techniques, like observation, infiltration, wire-tapping and systematic and electronic surveillance became part of the CPP in

order to combat organized crime.<sup>24</sup> Very recently a further change has been introduced in the CCP according to which, in the case of a criminal investigation into terrorist crimes, the triggering mechanism of a reasonable suspicion in order to lawfully apply coercive measures against a person has been replaced by indications of a terrorist offence. Indications of a terrorist crime is the third threshold in the CPP, in addition to a reasonable suspicion of a crime being committed and a reasonable suspicion that crimes are being planned or committed in an organized context. What is the real difference between indications and a reasonable suspicion? Rumours as to a conspiracy to commit a terrorist offence or anonymous information stemming from a general risk analysis carried out by the police, administrative agencies or the secret intelligence services might not fulfil the criterion of a reasonable suspicion but do fulfil the criterion of indications. Moreover, concrete indications are not necessary. Indications are present if facts and circumstances point to the actual commission or future commission of a terrorist crime. Meanwhile, in the Dutch CPP, due to the EU framework decision of 2002, criminal terrorist associations have been criminalized. The result is that an indication of the existence of a terrorist association or of membership of such an association, without the commission of or preparations for any terrorist offence, is a sufficient triggering mechanism for using coercive measures, such as observation, electronic surveillance, pseudo-dealing or infiltration. For an arrest and pre-trial detention the reasonable suspicion remains the threshold, so these coercive measures remain linked to the status of being a suspect.<sup>25</sup> In other words, the thresholds for the use of coercive measures, including special investigative techniques, in the field of counter-terrorism have been further widened and weakened. The LEC is authorized to impose coercive measures on non-criminally suspected persons during the proactive phase. Methods available in the pre-trial investigation can be used at any time when they can produce information that is relevant for the prevention of a terrorist attack. The changing thresholds also change the subject of the investigation. It is clear that proactive investigations are used against groups of people instead of against suspects, including preventive searching powers, such as searching objects, vehicles and physical searches. In certain security zones (airports, risk areas, etc.) it is possible to apply these three types of search at any time, also without any indications of a terrorist crime. In the latter case, the label of security replaces the threshold of indications of a terrorist crime. Finally, the

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<sup>24</sup> See N. Keijzer, J.F. Nijboer, H. Sanders, A. Sennef and P.J.P. Tak, *Organized Crime & Criminal Procedure in the Netherlands*, in *International Review of Penal Law*, 1994, vol 69, 957-986.

<sup>25</sup> However, in many countries we can see a mushrooming of all types of administrative detention, for shorter or longer periods, not at all linked with the status of being a suspect (e.g. in the field of immigration law).

proactive enforcement strategy also introduces new methods of investigation such as data mining (*Rasterfahndung*) between the databanks of public and private bodies.

From 1992 on, Germany also introduced and/or widened special investigative methods (wire-tapping, data mining, surveillance, etc.) against organized crime but without changing the triggering mechanisms and using them for proactive enforcement. This changed under the paradigm of counter-terrorism, by which the concept of proactive enforcement as preventive enforcement by police authorities (*Vorbeugende Verbrechensbekämpfung* and *Vorfeldaufklärung*)<sup>26</sup> was introduced. Some Länder have introduced preventive wire-tapping in their police legislation. In 2004 the Constitutional Court imposed a judicial warrant procedure for the protection of private life,<sup>27</sup> which was laid down in legislation in 2005.

In Hungary the regulations of the PPO have been changed, by which the PPO can secretly collect information. Secretly collecting information can now be performed by five secret services, the police and the PPO. The secret collection of information has two separate regimes. The warrantless category includes the use of informers and undercover agents, the general surveillance of persons and premises and certain forms of wire-tapping. These measures can take place both before and during the judicial investigation (even in a parallel setting). The other category (a warrant procedure or an executive authorization (by the Minister of Justice)) does include the surveillance and searching of private homes and telecommunication interception. Secret information gathering can last until the judicial investigation is triggered. Once the judicial investigation is triggered, the judicial authorities can secretly obtain data by intercepting telecommunications, conducting searches, etc. These measures need a judicial warrant. The CPP has recently been amended in order to include the use of special investigation techniques, such as secretly retaining data.

In Romania the CCP provides for a preliminary investigation, by which civil servants from the Ministry of the Interior may instigate police operations, such as the gathering of information and data, intercepting and recording conversations, including telecommunications, and the use of undercover agents. The intelligence services have the same powers. Both have to act under the supervision of the PPO.

Also in Turkey elements of a proactive investigation have been introduced, by which under the rules of specific Acts, other than the CPP, the police authorities and some administrative agencies might intercept telecommunications and even apply preventive search and seizure (with the exception of private homes).

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<sup>26</sup> J. Kinzig, *Die rechtliche Bewältigung von Erscheinungsformen organisierter Kriminalität*, Berlin, Duncker & Humblot, 2004.

<sup>27</sup> BVerfG, 1 BvR 2378/98, 03.03.2004, Absatz-Nr. (1-373).

In Croatia intelligence forces, as well as police forces and customs authorities, have the competence to use coercive powers in a proactive way. The proactive powers of the intelligence agencies are the widest. Since 2006 their tasks include the prevention of terrorism and organised crime. They have wide powers to secretly collect data. They can only use these powers after a specific warrant procedure. The warrant has to be issued by a Judge of the Supreme Court. However, the standard of proof for obtaining this warrant is not based on a reasonable suspicion. It is sufficient that the intelligence agency indicates the persons and/or organisations to be subjected to surveillance, the reasons for and the objectives of the surveillance and the specific surveillance measure which is necessary.

Italy has a double-track system: the ordinary criminal law and special criminal legislation against the Mafia. This country has an elaborate set of proactive criminal law instruments. Personal preventive measures from 1956 were, after 1965, elaborated under the CPP against the Mafia: special surveillance by the police, limited free movement, and house arrests. The measures are not based on a reasonable suspicion, but linked to the listing of Mafia organisations. Since 1982, the preventive measures have been further expanded, including also the preventive seizure and confiscation of assets. Preventive financial investigations were introduced, according to which police and administrative agencies obtained surveillance powers (preventive wire-tapping and communication surveillance – agencies can ‘sneak and peak’ and place bugging devices) and could conclude deals with convicted persons in order encourage them to cooperate with the justice machinery. There is also a stronger cooperation between the judicial police and the intelligence services. Anti-mafia preventive measures were *ratione materiae* extended to terrorism in 2001 and in 2005. These preventive measures, aimed at general information gathering so as to prevent serious crimes, are warrantless, even in the case of private homes (without serious indications that this place is the theatre of serious crimes), and have longer time-limits. It is sufficient that they are necessary, not absolutely indispensable, for preventive aims and general information gathering. If they are linked to crime prevention, it is sufficient that there are indications of a crime, not serious indications or a reasonable suspicion. At the other hand, the secret services are mandated to intercept communications under authorisation of the PPO of the Court of Appeal, bypassing the special anti-mafia or anti-terrorist units of PPO and bypassing the judicial warrant procedure. Clearly, Italy has very strong proactive powers, but the information thereby obtained cannot be used in the pre-trial or trial procedure.<sup>28</sup>

In Colombia the intelligence service has a double head. It is at the same time an autonomous secret service dealing with gathering intelligence and processing

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<sup>28</sup> See Part IV.

information and an organ of the judicial police in relation to a set of specific crimes against the constitutional order of the state.

Concerning Britain we must be careful as the PPO has no investigative role. A great deal of power is vested in the police and the emerging strong intelligence orientation (combined with the weakness of privacy protection) means that they are comparatively very powerful. The police can, for example, take DNA samples with no permission having to be obtained from any other institution. The Investigatory Powers Act (RIPA) 2000 regulates many forms of surveillance (although some forms of covert police surveillance remain outside this Act). Where residential premises are involved a judge acting as a Commissioner must allow the intervention. Electronic bugging of premises was regulated in the 1997 Police Act and is only available for the prevention or investigation of serious crime. Traffic data is not regulated and is available as evidence. SOCA-regulated powers of arrest allow the police to arrest without a warrant where they have reasonable grounds for believing that it is necessary to do so to facilitate a prompt and effective investigation of the offence or the "conduct of the person in question." This triggers a right to search the premises where the arrest took place (the common law power of arrest).

On the other hand, in some reporting countries we can see substantial reforms in the statutes, powers and objectives of the intelligence forces. In the Netherlands and in Belgium, due to reforms of the legislation on the secret services, intelligence agencies may use coercive measures such as observation, inspection, digital supervision, the non-content surveillance of communication, infiltration, setting up a company or lending particular services, opening letters, entering computers, tapping and intercepting telecommunications and ordering the production of information to service providers, etc. The result is that they have a wide set of coercive powers, very similar to the ones in the CPP, but warrantless.

The result of these reforms is that in some reporting countries, like the US, the UK and the Netherlands, the dividing line between the intelligence authorities and the law enforcement authorities is becoming blurred, and the Chinese walls between their functioning and the data which they have at their disposal are played down for functional information sharing. The widening of the judicial investigation into a proactive investigation and the increasing overlap between the LEC and IC has been further increased by the technological developments in investigative devices: the sword of technology with far-reaching eyes and razor-sharp edges. Thanks to new technology the methods of surveillance for communication, the physical surveillance of persons and their movements and activities and for transactional surveillance (of their services) have changed dramatically. Technology has completely changed not only the behaviour of citizens, but also, by using wire-tapping, video surveillance, tracking devices, detection devices and

see-through devices, data mining, etc., the environment of enforcement and proactive enforcement.

We can clearly conclude that there is a double reform in the second group of reporting countries, by which the LEC authorities are becoming IC authorities and the IC authorities are becoming LEC authorities. The clear-cut division between preventive administrative enforcement and reactive criminal enforcement is replaced by a common playing field of actors with new overlapping powers and competences, although the type and the reach of these powers do differ between the countries. This third wave goes clearly beyond the reforms of the last two decades dealing with the paradigm of organised crime, by which special investigative techniques were introduced in the CCP. The paradigm of counter-terrorism is not just widening the predicate offences (*Vorfeldstrafbarkeit*) and the application of special measures of criminal procedure (*Vorermitlung*), but is also redefining the objectives, nature and scope of criminal justice. The result is that *Vorfeldkriminalisierung* through criminal procedure is completely converting the aim of the CCP from prosecuting crime to crime prevention and controlling public order and security. Secondly, there are the first appearances of a phenomenon which is prevalent in the common law tradition and meanwhile also in EU strategies on the police: intelligence-led policing of crime and criminal justice. In all the reporting countries the cooperation between the IC and the LEC does seem to be increasing, not only at the moment of gathering information, but also at the moment of data processing and data sharing. Reporting countries, with the exception of the US and the Netherlands, hardly give us any insight into the separation and cooperation between proactive policing and criminal investigation and into the specialised networks in this field. There appear to be great differences both with regard to the role of the IC under criminal law and – in reverse cases – the role of the LEC in the field of intelligence. We also see great differences concerning the judicial control (warrant procedures) and procedural guarantees.<sup>29</sup> Countries like Romania, Hungary and Croatia provide for strict supervision by judicial authorities, others leave it to the police authorities and intelligence agencies. Special procedures are always special, but some are more permissive, others are more restrictive.

Finally, in our digital societies the definitions of private life, public authority and data need to be renewed with the aim of protecting citizens against massive intrusion into their liberties, also by IC and LEC.

#### Torture

*Q10. Does your legal system allow for the use of tough forms of investigation techniques (torture or cruel, unusual, or inhuman treatment) during pro-active*

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<sup>29</sup> See Part IV.

*enforcement, and, if yes, under which conditions? What is the practice of your country in this field?*

All reporting countries, with the exception of the US, exclude these forms of investigation and gathering and refer to the absolute character of art. 3 ECHR, the Geneva Conventions and the International Convention against Torture. Only the US does not apply the international law standards and has elaborated a narrow, domestic definition of torture in the MCA, by which certain torture practices, such as water boarding, have been institutionalized.

#### Habeas Data and Habeas Corpus

*Q11. In case of serious offences, does your legal system allow for limiting*

- *the right to habeas data (data protection, private life)?*
- *the right to habeas corpus (arrest, detention, deportation, extraordinary rendition, etc.)?*

*(includes also sub questions of Q 15)*

Reporting countries focus on habeas data from very different perspectives, such as privacy, the internal publicity of proceedings, the external publicity of proceedings, etc. It is however quite clear from the information provided by the reporting countries that the classic definitions of habeas data and the protection of private life are no longer sufficient to deal with the intrusiveness of modern coercive investigation by the LEC and IC in the case of serious crimes. This can be perfectly illustrated by discussions in Germany and their very interesting case law of the higher Courts, including the Constitutional Court. Already in 1983 the German Constitutional Court recognized the right of every person to decide upon the communication and use of information in relation to his/her private life as a basic constitutional right (*Recht auf informationelle Selbstbestimmung*). Parts of the North-Rhine Westphalia Act on Intelligence and Protection of State Security were declared unconstitutional in 2008,<sup>30</sup> because of the fact that online surveillance and online investigation by the intelligence agencies related to organized crime were related to the prevention of unclear predicate offences, were not the most appropriate and effective measure and could be executed without a judicial warrant (*Vorbehalt richtlicher Anordnung*). In 2007 the Higher Federal Court<sup>31</sup> annulled a judicial warrant, issued in a case where there was a suspicion of a terrorist organisation having been established, authorizing a secret online search (by selling a computer program to a suspect and installing it in his computer), without the presence of that person and not subsequently informing him of that fact and of the judicial remedies which were available. The Court did consider that the device was more intrusive than a search, which is executed in

<sup>30</sup> BVerfG, 1 BVR 370/07 of 27.02.2008, Absatz-Nr. (1-333).

<sup>31</sup> Bundesgerichtshof, Beschluss of 31.01.2007, StB 18/06.

the presence of the suspect and against which there are certain remedies available. It is quite clear from the German case law that these new techniques can only be used when no other means are available and when they do not interfere with key areas of private life (*unantastbaren Kernbereich privater Lebensgestaltung*). Some authors contend that a new right to privacy in the public sphere should be created.

Concerning habeas corpus, which is often considered to be the principle guardian of liberty, in all reporting countries, except in the US, the right to habeas corpus applies to all offences, including serious offences and terrorist offences. No special rules of proactive detention have been elaborated, but some countries do report administrative forms of liberty-limiting or liberty-depriving measures. What has changed in some reporting countries is the moment *ab quo* when the habeas corpus procedure can be triggered, in other words the delay between the police detention and the subsequent judicial review. In the Netherlands a remand in custody (14 days) for a terrorist suspect can currently be ordered on the mere basis of a reasonable suspicion, whereas for ordinary crimes there must still be serious grounds for detaining the suspect, and the detention can last for 14 days. France has extended the regular police detention (*garde à vue*) from 24 hours up to 6 days for terrorist offences. In Spain, the maximum time-limit for terrorist offences is 5 days. In the UK, under an extraordinary derogation from ECHR, the maximum delay is now 28 days after vociferous opposition against the government proposal of 90 days. A fierce discussion currently focuses upon increasing detention for uncharged terrorist suspects from 28 to 42 days.<sup>32</sup> What has also changed is the maximum duration of pre-trial detention. In the Netherlands, for example, the duration has been extended from 110 days to 2 years, a period during which there is no disclosure of the file to the defence lawyers.

Although in Britain all liberty-depriving measures are fundamentally open to a writ of habeas corpus and there are no provisions for secret arrests or extraordinary renditions, a form of detention without trial was introduced under the Prevention of Terrorism Act 2005. The Home Secretary or Secretary of State can impose control orders when he/she has reasonable grounds for suspecting involvement in terrorist activities. The control orders, including house arrest and other restrictive orders, are mostly based on secret evidence and closed hearings. Only lawyers appointed by the Attorney General have access to the file. The duration of the control order is 12 months, but it can be renewed indefinitely. Some control orders derogate and require court approval; others do not derogate and do not need the approval of the courts. Orders that are supervised by the courts involve confidential material and special advocates appointed by the Attorney General.

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<sup>32</sup> At the time of writing, the House of Lords has rejected the government proposal.



The Council of Europe Human Rights Commissioner criticized the fact that the orders could be made by an executive decision with limited judicial control and significantly reduced procedural guarantees. He was concerned that there is no clear cut-off point between a non-derogating and a derogating control order.

With the exception of the US national rapporteur, the national rapporteurs do not mention any legal framework or practice of extraordinary rendition in their legal system, including the ones that are linked to the CIA secret, extra-ordinary rendition program. However, several cases came to light and some of them are under judicial investigation or have gone to trial.<sup>33</sup>

#### **PART IV. TRANSFORMATIONS IN THE PRE-TRIAL SETTING (COMMON CRIMINAL PROCEEDINGS, SPECIAL PROCEEDINGS)**

##### **Increase in Investigative powers and cooperation duties**

*Q12. Did your legal system experience an increase of*

*- investigative powers and coercive powers (search and seizure, bugging and tapping, freezing orders, evidence production orders, arrest and detention, infiltration, etc.) of the investigation authorities? If yes, in which way?*

*- cooperation duties of the investigated persons? If yes, in which way? Are there any new cooperation duties foreseen in transnational settings (e.g., transnational production orders of information)?*

Under Q2 and Q9 we have analysed the substantive impact of the reforms on investigative and coercive powers. Concerning cooperation duties for investigated and/or third persons we can identify some significant changes concerning:

1. The right to silence and the consequences thereof. See Question 4 (infra).
2. Further possibilities for striking deals with suspects. See Question 20 (infra).
3. The use of internet service providers, travel agencies, airline companies and credit card companies as gatekeepers and as long-arm collectors of enforcement information. See Question 16 (infra).
4. Extensive use of production orders by intelligence agencies, the police, and administrative agencies and the use of transactional surveillance (personal computers, service providers, and public data). See Question 16 (infra).

##### **Shift in Investigative powers**

*Q13. Did a shift of powers occur in your country*

*- from the judiciary (investigation magistrates, judges for the preliminary trial setting) to the executive dealing with investigation (police, prosecutors,*

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<sup>33</sup> M. Nino, The Abu Omar Case in Italy and the effects of CIA extraordinary renditions in Europe on Law Enforcement and Intelligence Activities, 78 (1 & 2), *Revue Internationale de Droit Pénal*, 113 (2007).

*intelligence forces, administrative enforcement agencies, army)? If yes, how and to what extent?*

*- from the public prosecutors to police, etc.? If yes, how and to what extent?*

As we have seen in parts I-III, in most reporting countries the shift has been towards increasing powers for the executive. This shift is certainly stronger when it comes to new investigation techniques and proactive investigation, such as electronic covert surveillance and physical surveillance by electronic devices. Generally speaking, however, we can state that police powers are increasingly substantial or are historically strong (as in Finland) and that there are strong tendencies in shifts from the judiciary towards the PPO. However, some countries also show a reverse direction. In Romania, Poland and Colombia there tends to be a tendency towards more judicial control, especially when traditional coercive measures are concerned. In Colombia the new adversarial CCP of 2006 introduced stronger judicial control by the judge of preliminary proceedings.

The reporting countries reveal very little information about the relationship between LEC and administrative enforcement agencies. The Belgian report contains several indications of increasing administrative enforcement powers and increasing information sharing between all enforcement actors, especially in the financial enforcement field.

#### **Criminal procedure and a shift in procedural safeguards and procedural rights**

*Q4. At what stage(s) of the criminal process does your legal system provide for*

*- the presumption of innocence?*

*- the right of the suspect/accused to remain silent and the right not to be compelled to testify against himself or to confess guilt?*

One of the main points is the triggering mechanism for the *definition of a suspect* and the related procedural safeguards. Already under the classic procedural regimes this is a tricky point for which countries use very different objective or subjective criteria. For instance in Poland the rights are only triggered at the moment of accusation, in a late stage of the proceedings. Lowering the thresholds for triggering coercive measures by changing the standard of a reasonable suspicion or serious indications into simple indications without concrete substance does have substantial consequences for the applicable procedural safeguards. When does the person investigated by IC/LEC become a suspect and bearer of rights (including remedies)? Many reporting countries, like Finland, Romania, the US, the Netherlands, Italy, Germany and the UK do indicate these lower thresholds within criminal law. The UK Terrorism Act 2000 provides for stop and search mechanisms without a reasonable suspicion. The courts have held that such stopping and searching must have a reasonable connection with the perceived terrorist threat. In the Netherlands special

investigation techniques can be used in relation to terrorist offences without the classic threshold of a reasonable suspicion; indications are sufficient. In other reporting countries it is mostly outside the criminal law, but with punitive aims. The consequence is that the procedural safeguards linked to the division of labour and power between administrative and criminal law enforcement has lost its architectural link. Coercive measures are used in preventive settings and not always by judicial authorities. There is a triple problem. What type of procedural safeguards should apply in a proactive setting in which the IC is active? What type of procedural safeguards should apply in a proactive setting in which the LEC, especially the police and/or the PPO, is active? What type of procedural safeguards should apply to their sharing of information and the use of IC information and/or proactive information in the criminal procedure?

We can illustrate this very well with the *presumptio innocentiae*. Traditionally, the presumption starts when the suspect is first charged and disappears after the defendant has been afforded a fair trial and convicted. However, many reporting countries demonstrate that the definitions of a criminal charge and coercive measures are changing, and the same can be said of the definition of a suspect. Some changes have been considered as unconstitutional and a violation of the presumption of *innocentiae*, such as the Italian proactive financial investigation linked to the illegal possession or ownership of values and goods, based on the *onus probandi* which the "suspect" has. From the reporting countries it is quite clear that countries qualify the investigative techniques and their coercive and intrusive character in very different ways. This has consequences for the competent authorities, for the need for a judicial warrant and for the use of the information obtained as evidence (see Question 15).

In most reporting countries *the suspect's right to remain silent* is considered to be an important feature of criminal justice. Suspects are made aware of their right to remain silent upon their arrest or, in some reporting countries, upon interrogation. However, in serious crime cases, information does become a main target, even if the information providers are the suspect or his/her lawyer. We also see that in some reporting countries a negative inference can be drawn from the silence of the defendant and that a failure to provide information in relation to terrorist offences is itself punishable as an offence. Britain is a very interesting case in this respect. In court proceedings this right is ensured by the provision that any testimony by a charged person can only be given on a voluntary basis (see *infra*). Controversially, this right is however subject to an important exception since the CJ&PO Act 1994, which permits juries to draw negative inferences from the silence of the defendant during police questioning. The judge must, however, provide the jury with careful direction on this issue or there is great danger of a breach of article 6(1) ECHR.

In some countries, like the USA, the right to silence is even a constitutional prerogative, but the communication must be testimonial, incriminating and compelled. The disclosure of one's identity to a police officer is not protected by this prerogative and can lead to a criminal conviction for such non-disclosure.

There is no doubt that third persons' duty to cooperate can be used so as to circumvent the right to silence. Britain imposes broad criminal liability on people who have information which they know or believe might be of material assistance in preventing an act of terrorism or securing the apprehension, prosecution or conviction of another person who was involved in the commission, preparation or instigation of an act of terrorism and do not report this to the police and provide them with the relevant information. The 2001 Anti-Terrorism, Crime and Security Act 2001 also included similar active duties to inform on persons working in the financial sector.

Some reporting countries unequivocally recognize *the nemo tenetur* principle, even outside the criminal justice system, as the US does. Other reporting countries, such as the Netherlands, do not recognize the principle as a general principle and even have restrained the application of the HR norms in that respect. Some countries do recognize the principles, but limited to criminal proceedings, as Germany does.

Many reporting countries have also, in one way or another, limited the privileges of the liberal professions in criminal proceedings, such as legal or journalistic privilege. In Belgium an investigating judge can impose disclosure obligations in terrorist (prevention) cases upon journalists. Due to EU regulations, the legal privilege has been restricted in cases of money laundering and terrorism financing investigations. Defence lawyers cannot rely on legal privilege when they act as legal-financial advisers; they can only rely on the legal privilege when they act as bench attorneys.

#### Specialization in the administration of criminal justice

*Q14. Did a specialization and/or centralization of the judicial investigative authorities take place in your country?*

In a substantial part of the reporting countries, specialization has taken place. Most reporting countries do have specialised agencies in the field of police investigation. Some countries, like Belgium, the Netherlands, Croatia, Poland, Romania, Italy, Brazil, Germany etc., also have specialised PPOs with mostly national competence, like the anti-Mafia and anti-terrorism PPO in Italy, the *Bundesstaatanwaltschaft* in Germany or the Directorate for investigating crime and terrorism offences in Romania. The UK Serious Organised Crime Agency (SOCA) was formed and became operational in 2005 as a specialist, centralised body to fight serious crime. It must be noted, however, that centralisation and specialisation are not new to the British system: terrorist investigation has always

been centralised within the Metropolitan police who, in this regard, have national jurisdiction. The Serious Fraud Office (SFO) is a further example of a separate policing agency specialising in the investigation of serious crimes within one centralised institution.

Countries like Belgium and Spain also have specialised investigating magistrates with national jurisdiction. Spain, Croatia and France even have a specialised judiciary for serious crimes, but that is rather exceptional. Specialisation as such is of course excellent, but it sometimes also means exceptional rules. The Spanish *Audiencia Nacional* is quite a good example of special criminal justice against serious crimes, including terrorism.

#### Use of Intelligence information

Q8. *Does your legal system allow for the use of intelligence information (e.g., general police intelligence, national or foreign intelligence services information) in criminal proceedings, such as*

- *preliminary information for opening a criminal investigation?*
- *evidence for probable cause for using coercive measures on goods and on persons (e.g., search and seizure, arrest, and detention)?*
- *evidence of liability/guilt in criminal proceedings?*

I do define intelligence information as information that is obtained by intelligence agencies and/or is obtained by the IC in a proactive setting (intelligence-led policing). There is no international agreement on a framework for the use of intelligence information in criminal matters. Reading the reports by the reporting countries reveals a wide variety in this respect. As we have seen in Part III there appear to be great differences, both with regard to the role of the IC under criminal law and – reversely – the role of the LEC in the field of intelligence. Most countries, like Austria, Italy, Spain and Finland, deal with this topic under the ordinary procedure. Some countries, like the US, the UK and the Netherlands, provide special procedures for the use of intelligence in criminal matters.

The majority of the reporting countries do consider intelligence to be general information that can be used as ordinary information in the criminal process, but not as evidence and certainly not as the only or key evidence. However, we can see that intelligence-led policing and investigation is steering the criminal process, which results in some major reforms in the law or in the case law in some countries. Secondly, intelligence information is mostly classified information, the result of which is *ex parte* criminal proceedings in the pre-trial and trial setting.

We do have to make a distinction between different types of use in this respect:

Use as steering information and data sharing

Use as triggering information to open a judicial investigation

Use as triggering information as probable cause for using coercive measures

#### Use as evidence in criminal proceedings

All reporting countries, except Turkey, where the intelligence information can be used only and strictly for prevention purposes, accept that intelligence information can be used as steering information and as triggering information to open a judicial investigation by the police or the public prosecutor. This means that secret information can be the starting point for a judicial investigation. The consequence is a fairly open flow of information between the IC and LEC. We can really speak of a transfer of information between the LEC and IC in both directions. In some reporting countries we can also identify the setting up of shared databanks (such as the Anti-Terror File in Germany, the CT Info box in the Netherlands) and expert centres to deal with serious crimes or terrorism: OCAM in Belgium, the NCT and FEC in the Netherlands or the Joint Terrorism Analysis Centre in the UK. The anti-terrorism coordination centre is an expert centre based on shared information responsible in most cases for joint terrorism risk and threat analysis, but in some cases, like OCAM in Belgium, also for some investigative tasks (such as joint investigation teams responsible for the surveillance of specific organisations and persons). In most cases these joint centres do have access to the computer data of the intelligence services, administrative agencies (migration, transport) and the judicial authorities.

Reporting countries differ strongly when it comes to the use of intelligence information as probable cause or a reasonable suspicion to trigger coercive measures. In most countries, like in Croatia, it depends on the type of coercive measures. Intelligence is excluded as a triggering mechanism for reasonable suspicion and arrest or pre-trial detention, but it can be used in the case of surveillance and search and seizure. In the UK intelligence can also form the basis for a "probable cause" in order to justify coercive measures. In a recent case the courts have explicitly discussed this, even where the intelligence may have been obtained by torture although this becomes questionable if it was done in collusion with the British authorities. In Italy there can be no procedural use of declarations by informants, not even as a triggering mechanism for coercive measures such as serious indications for wire-tapping authorisation. The Italian Supreme Court decided also that the blacklisting of terrorists or terrorist organisations cannot be used as evidence in (pre)trial.

When it comes to the point of the use of intelligence as evidence in criminal proceedings we can clearly identify completely antagonistic positions. Very few reporting countries explicitly exclude the use of intelligence information as evidence, as Croatia does, but their legal regime on the rules of evidence (e.g. Spain) or their legal regime on the adversarial procedure (e.g., Italy and Germany) make it very difficult for intelligence to qualify as legal evidence in criminal matters. In Italy, for instance, the CPP does not exclude the use of intelligence as evidence in court, but submits it to the strict condition that the

source of the information (including secret agents or their informants) can be heard and cross-examined in court during the trial hearing. Such a provision of an adversarial trial nature concerning intelligence information is quite unique in Europe. The Italian CPP also provides that the results of preventive measures, including preventive wire-tapping, may never be joined to the pre-trial or trial file. They can only be used as triggering information for judicial investigations. Revealing this information is heavily penalized under Italian law. Although Germany also applies the adversarial principle, it is possible to use in camera proceedings and to use hearsay evidence in the case of national security. This was the reason why the *Oberlandesgericht* of Hamburg decided to make use of information provided by the secret services of the United States in the Motassadeq terrorist case, even without the presence of the agents as witnesses at the trial.<sup>34</sup> It is striking that reporting countries with a tradition of special or emergency situations, such as Italy and Colombia, have very strict rules on adversarial proceedings, even in the case of emergencies and terrorism and the use of intelligence in such proceedings.

At the other side of the spectrum we can see the US, the UK and recently the Netherlands. In the US the CIPA regulates the use of "classified information" in the regular criminal trial. Essentially, it is decided in a pre-trial conference, in camera, what information will be used during the hearing, while a protective order (secrecy) is imposed on the defence, which has access to the information. CIPA provides for ex parte proceedings for both parties when using classified information. However, the Executive's interest in protecting classified information does not overcome a defendant's right to present his case. If the trial court determines that classified information is relevant and material to the case, the item must be admitted unless the government provides an adequate substitution. When such a substitution cannot be found, it is up to the government to decide to disclose or to withhold.

In the UK the possibility of a pre-trial hearing has been extended considerably under recent anti-terror legislation. Under the Terrorism Act 2006, preparatory hearings became mandatory in many terrorist cases. In principle, witnesses may be heard, and nothing precludes intelligence officers from being heard as witnesses at pre-trial hearings. However, cross-examination is presumably mandatory, also during these preparatory hearings. The cross-examination is conducted by Special Advocates handling cases involving security-classified materials. They are specially appointed lawyers (typically, barristers) who are instructed to represent a person's interests in relation to material that is kept secret from that person and his ordinary lawyers. When intelligence officers operate as witnesses in these preparatory hearings, their testimony and the

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<sup>34</sup> OLG Hamburg, decision of 14 June 2005, IV-1/04.

information upon which they rely will presumably be classified as (highly) sensitive material. Under the CPIA, intelligence may be classified as sensitive, or even highly sensitive, when it consists of covert human intelligence source material. The police disclosure officer places this information on a schedule that is not disclosed to the defence. Only the prosecution has access to both the evidence and the schedule. Although the general 'golden rule' of disclosure, which was only laid down in the current law 92 in 1996 and exists in the case law, demands that the prosecution must in principle disclose all information to the defence, it will make a Public Interest Immunity claim when it seeks to use the intelligence in the criminal proceedings. Exclusion under Public Interest Immunity is a decision to be taken by the court, not by the intelligence officer. Where the statement was prepared for the purpose of a criminal investigation, or for criminal proceedings, the statement is only admissible if the court decides that it is in the interests of justice to admit it. The judge will have to examine the reliability of the evidence, the credibility of the witness and the probative value of the evidence.

The Dutch legislature has adopted a new bill on the use of intelligence in criminal proceedings, including as evidence in criminal trials. A separate *ex parte* procedure is introduced for the interrogation of secret agents as anonymous shielded witnesses. Like the threatened witness, also the shielded witness no longer has to appear at the hearing. The decision is taken by the examining magistrate at the request of the Public Prosecutions Department, the suspect, the trial judge or *ex officio*. The examining magistrate must be aware of the witness' identity. The examining magistrate organizes the *ex parte* interrogation. The trial judges only receive the written transcript of the intelligence officer's testimony, and only after his consent. Reports by Dutch and foreign intelligence services may from now on serve as legal evidence in criminal proceedings and not just as documents which may only serve as evidence in connection with the contents of other evidence.

In some countries, like Belgium, we can see an interesting new, mid-way solution. The Belgian criminal procedure (see *supra*) has increased intelligence-led investigation and cooperation between the IC and LEC. The Belgian criminal procedure provides for a double file, a classified file with the *modus operandi* (the mandate, identity, etc.) of the proactive and/or special investigation methods (like observation and infiltration) and a non-classified file with the substance and the results of the proactive and/or special investigation methods. Interesting is also the fact that there is complete judicial control of the classified file by the Belgian pre-trial chamber. The hearing at the pre-trial chamber is *ex parte*, but the chamber can hear the PPO, the investigating magistrate, the police officers involved, the intelligence agents, and the defence lawyer. Each party is heard separately. The pre-trial chamber decides on the legality of the pre-trial proceedings, including the evidence gathering. The trial judges do not have



access to this file, as the classified file is shielded from the trial judges. They do not decide on the elements that are excluded for the parties. The second file (*procès-verbal*) is part of the adversarial proceedings at trial. The content thereof can also be used as evidence, but never as exclusive or determining evidence. The Supreme Court has excluded intelligence as evidence, but it can be additional information, in this case anonymous declarations, to analyze the evidence (corroborating information).

Changes in the basic rules of criminal procedure: coercive measures, evidence and disclosure

Q15. Were the rules in your legal system changed on

- the conditions to approve coercive measures (warrants) of the judiciary? If yes, how and to what extent? Has there been a redefinition of the probable cause for warrants?

- the compilation of the investigative dossier or on the disclosure of evidence in order to keep part of it *ex parte*, thus not available for the defence?

- evidence in order to include the defendant as a source of evidence?

- the conditions for arrest and detention? Does your legal system provide for possibilities of secret arrest and detention, deportation, and extraordinary rendition without *habeas corpus*? See Q11

Most reporting countries seem to adhere to the principles of a prior *judicial warrant* and reasonable suspicion requirements. Most countries also arrange for duties of notification *apriori* or *aposteriori*. However, many reports demonstrate problems with the need for and the reach of judicial warrants. This is certainly, but not only, the case with many digital surveillance techniques. For many electronic surveillance measures they are considered in some countries as equivalent to a search; others, however, can be used without a warrant for confirming indications or for bugging (placing technical listening devices). The increase in the proactive use of and the overlap between the IC and LEC further undermines the judicial warrant requirements. In the UK the Regulation of Investigatory Powers Act 2000 provides for the interception and production of communications and billing data on the basis of a warrant produced by the Secretary of State. In some reporting countries the higher Courts impose mandatory judicial warrants for special investigation techniques, as the French *Conseil Constitutionnel*, insisting on the fact that restrictions on public liberties must be necessary for finding the truth, and must be proportional and non-discriminatory. In Belgium in 1994 the *Cour d'Arbitrage* (today called the Constitutional Court) considered several parts of the reform on special and proactive investigation techniques to be unconstitutional. In 2005 a new reform Act on proactive enforcement was adopted, but in 2007 the Constitutional Court still declared some parts of it to be unconstitutional. The Belgian Constitutional Court did touch upon very essential elements of the rule of

law. The basic presumption of the Court was that investigative methods that consist of interference with HR do need effective judicial control. The absence of such control on investigative methods, by which the PPO and judicial authorities collect incriminating evidence, affects the notion of fair trial and fair justice. The result is that observation and bugging in private homes cannot be realized without a mandatory judicial warrant, as these competences can be compared to searches and tapping and recording of private communications. The Court did not accept the circumventing of judicial guarantees through a preliminary or proactive investigation, at least when the interference with HR does affect the private sphere. Access to bank accounts and freezing orders cannot be compared to searching a private home, which is the reason why it can be executed by the PPO without a judicial warrant. In the case of an *a priori* or *a posteriori* judicial review through the warrant procedure, there is in some reporting countries, like in the US, a great deal of discussion on the standard of the review by the courts. In some countries, like in Britain, the procedures by which judicial approval is sought for coercive measures has not recently changed although the conditions for detaining those suspected of terrorist-related crimes (NB this definition is very broad covering not just “terrorists;” the inclusion of substantive offences relating to the disclosure of information also spreads the net much wider) have changed dramatically because other measures outside the criminal justice system have been developed with special procedures attached – see e.g. control orders and asset recovery.

In many reporting countries the *disclosure* rules have not changed as such. In some reporting countries, like in Britain, they are circumvented by alternative proceedings relating to the proscription of organisations (and thus the criminal offence of membership of such organizations), and Special Immigration Appeals involve classified information which cannot be disclosed although the use of Special Advocates on behalf of the “accused,” who are granted full access, is an attempt to find a balance. In criminal procedures, full disclosure at the start of the trial should be the rule and is also the rule in many reporting countries. However, we also see in some reporting countries limited disclosure in case of terrorist offences, by which certain information and evidence is shielded in *ex parte* proceedings from the defence lawyers (like in the Netherlands with anonymous witnesses). The limitations on full disclosure are possible on various grounds (mostly to protect the lives of witnesses, sometimes in the interest of an ongoing investigation or national security). Many questions do remain: who decides on the composition of the case file; what type of supervision exists; what possibilities are there for the defence to add information and to test evidence; what limitations on what grounds and until when?

Some reporting countries underline the difficulty for the defence lawyer in having access to the file.

Turkey reports real problems in having access to the file, certainly when the file is with the police. At this stage, access is impossible without the authorisation of the PPO. In the Netherlands the same occurs when the special pre-trial detention period of 2 years is applied for serious offences.

Concerning the *evidentiary standards*, there is no doubt that adversarial reforms have strengthened the rules on evidence. However, many reporting countries illustrate that not only the semi-inquisitorial criminal procedure, but also the adversarial procedure has many exceptions to the rules on oral evidence and the immediacy and prohibition of hearsay or *de auditu* evidence. In Britain the hearsay rules which applied to exclude unsubstantiated statements in criminal proceedings were softened by the Criminal Justice Act 2003, provided that certain standards are attained and statements are admissible particularly if they were made by someone who is outside the UK. Courts must decide whether to admit out-of-court statements and documentary evidence for which they must centrally decide whether it is in the interests of justice to declare it admissible. Evidentiary standards have, however, been stringent. Intelligence coming, in particular, from foreign secret services is thus likely to be subject to intense scrutiny. Some reporting countries do exclude certain evidence obtained in proactive settings. Croatia, thanks to its case law, excluded conversations between defendants and undercover agents as evidence until 2005. Since 2005 the legislator permitted the use of this conversations as evidence for offences of organised crime and corruption. Italy excludes all information as a result of proactive or preventive measures as evidence in a criminal court. The Belgian Supreme Court has excluded intelligence as evidence, but it can serve as corroborating information, in this case anonymous declarations, to analyze the evidence.

#### Production orders

Q16. *Were specific production orders (subpoena or not) introduced in your country for stored information at disposal of the service providers (internet providers, travel agencies, air companies, credit card companies)?*

In many reporting countries, but not in all, powers to demand information from public and private companies during an exploratory inquiry have been broadened if it concerns the preparation of a criminal investigation into terrorist offences. It is obvious that real-time information (communication) or information on transactions (credit cards) or sensitive information (race, religion), combined with data retention obligations and a decryption obligation, are becoming increasingly part of judicial investigations. The national security letters in the US are the clearest example in that sense. All this gathered information can be processed and compared in preparing criminal investigations into terrorism. However, it is difficult to say if there is an increased duty to cooperate by investigated persons. In general, the standard on *nemo tenetur*, especially the duty for suspects, to produce incriminating documents and information has not been lowered. Third

persons and organisations, however, have become by and large the target of cooperation duties. Reporting countries have not informed us about transnational production orders, such as, for instance, in the *Swift* case.

#### Judicial control of pre-trial evidence?

*Q17. Is pre-trial evidence, gathered by police and judicial authorities, subject to judicial control (admissibility of pre-trial evidence) in your country? Are there special measures in the field of serious offences?*

Most reporting countries do have procedural mechanisms or special pre-trial courts by which there is inter-party control on the evidence (disclosure) or a judicial review of the regularity and legality of the evidence obtained. These filtering mechanisms have not really changed as such for serious offences such as terrorism. However, illegal evidence does not automatically mean that that evidence is excluded, as there is always a balancing between the interests involved. In the case of serious offences, the security interest or public interest has its proper weight. In most reporting countries illegal evidence is only excluded if it consists of a serious incursion on the rights of the accused.

#### Foreign evidence

*Q18. Does your country allow for the use of evidence obtained abroad (extraterritorial use of evidence)? If yes, under which conditions?*

The reporting countries have not submitted any information on specific legislation on this subject. Most reporting countries do use the *lex loci* rule, by which the legality of the evidence gathering is regulated by the law of the country where the evidence was obtained. Of course problems can arise with regard to the admissibility of foreign evidence (the following are sources of conflict: the rule of non-inquiry, the locus rule and the immediacy principle). A further complication lies in the use of foreign intelligence.<sup>35</sup> Finding a legal remedy in cases of transnational cooperation sometimes proves difficult, especially for aliens, as is the case in the US. All reports are silent on possibilities for the defence to gather foreign intelligence in *bonam partem*.

#### Coercive measures and fair trial

*Q19. Have coercive measures been introduced in such a way that they could definitely preclude fair trial norms?*

The reporting countries, with the exception of the US, offer a clear negative answer. However, in the case law we can see some very interesting conflicting situations concerning this point. The increase in special and proactive investigation techniques have led to secrecy as to the identity of the investigators,

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<sup>35</sup> The US has experience with this [which resulted in infringements of due process - *Salah*].

secrecy about their modus operandi and in some reporting countries even to the secrecy of the information obtained and secret evidence in the pre-trial and trial setting. It is obvious that these in camera and/or ex parte proceedings and other protective measures are limiting defence rights and put the notion of fair trial in jeopardy. Several reporting countries have been working on special procedural arrangements to combine fair trial notions and the protection of specific interests (witness protection, public security or public interest protection, etc.). Some have done so after rulings by the higher courts or supranational HR courts, also in the light of the *Doorson, van Mechelen, Kostowski* cases at the ECtHR concerning anonymous witnesses. Some reporting countries have introduced arrangements at the trial phase by protecting the identity of a witness or agent, giving the court and the defence lawyers some possibility to interrogate behind a shield, but without revealing the identity of the witness in question. However, many reporting countries are using the pre-trial judge or the investigating judges as a filter and a long arm to shield information. The solutions do differ a great deal and some of them are certainly on the edge of conforming to HR standards, and the question remains whether these solutions, substantially limiting the rights of the defence, can be sufficiently compensated at the trial stage in order to realize a fair trial, based on equality of arms, during the criminal proceedings as a whole. In 1990 the ECtHR<sup>36</sup> blamed France for violating art. 6 because of the impossibility to interrogate infiltration agents either in the pre-trial procedure or in the main procedure. The French legislation was thereby amended making it possible under French law to interrogate infiltration agents, but without revealing their identity. Under Belgian law the trial judge can ask the investigating judge to investigate and interrogate the anonymous witness and make a report. The President of the court can be present at the interrogation.

In Germany exceptions have been admitted to the golden rule of the oral and adversarial proceedings to protect undercover agents, informants and collaborators and also if interrogation would endanger high state interests. The CCP provides for special interrogation by a judge, in camera, but not ex parte. However, this procedure is not much used. In practice the police or the Minister of the Interior submit a declaration (*Sperrerklärung*), by which, for the protection of the witness, the interrogation is held in camera and the results are used as *de auditu* evidence in court.

The Belgian criminal procedure provides for a double file, a classified file with the modus operandi (the mandate, identity, etc.) of the proactive and/or special investigation methods (like observation and infiltration) and a non-classified file with the substance and the results of the proactive and/or special investigation methods. Interesting is also the fact that there is full judicial control of the

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<sup>36</sup> ECHR 19 December 1990, *Delta c. France*, A191-A, Rn. 37.

classified file by the Belgian pre-trial chamber. The trial judges do not have access to this file, as the classified file is shielded from the trial judges. They do not decide on elements that are excluded for the parties. The second file (*process-verbal*) is part of the adversarial proceedings at trial. The content thereof can also be used as evidence, but never as substantive evidence.

Also in France there is a double file, like in Belgium. But the CPP gives the defence lawyer the right to interrogate anonymous witnesses at a distance, using a mechanism that changes the witness' voice (a witness without a face and a distorted voice). The witness can also be interrogated by the investigating judge or by a trial judge, using the same mechanism.

In the Netherlands, the defence lawyer only has an indirect possibility to interrogate the anonymous witness through the investigating magistrate, and the trial judges only receive the written transcript of the intelligence officer's testimony, or they can call the investigation magistrate as a 'witness'.

In Italy generally, anonymous witnesses are impossible because of the adversarial trial and the oral nature of the proceedings as well as the need to cross-examine at the trial. The CPP provides for the interdiction of *de auditu* declarations. Exceptions are provided to protect witnesses because of a serious danger to them. However, they are part of the adversarial questioning, but without having to reveal their identity.

#### **Witness protection**

*Q20. Were special measures introduced in your country for the protection of the secrecy of witnesses, victims, judges, etc.?*

The reporting countries show a real tendency towards protecting the functioning of the criminal justice system itself. Witness and victim protection becomes functional for the security of the system. This is also why there appear to be various grounds for protective measures: protecting the safety of witnesses; protecting the means of (criminal) investigations; protecting national security. The last-mentioned has recently been introduced in the Netherlands. Several reporting countries have introduced, in the last decade, special measures to protect witnesses, including the status of anonymous witnesses. A good example is the Belgian legislation of 2002, under which anonymous witnesses are accepted, partially or completely, by the investigating judge in the case of serious offences and a serious threat to witnesses. These witnesses include police officers who have infiltrated criminal organizations. In the Netherlands they even include intelligence agents. Thanks to ECHR case law, their evidence in European countries can never be used as the only substantive evidence. In some countries, like Italy, evidence thus obtained can only be used as corroborating evidence.

The reporting countries have not reported any special protection for judges, with exception of Colombia under the former CPP.

I would like to include here the issue of crown witnesses or justice witnesses. Several reporting countries, like the Netherlands and France, have introduced forms of premium cooperation with suspects (*pentiti*, *repentis*, *kroongetuige*, *Kronzeuge*, *supergrass*) as crown witnesses, justice witnesses or justice collaborators. Other countries, like Italy, did have long-standing practice in this respect, but in the last decade have introduced some more stringent conditions (for fewer crimes and with no longer a total waiver of the penalty). In some countries, like the Netherlands, the *pentiti* can only obtain a penalty reduction. In Italy, however, they can strike a deal concerning prosecution, adjudication and/or the execution of a penalty. Germany used *pentiti* after 1982, but it expired in 1999 and was not renewed due to its irrelevance in praxis. Who is the appropriate authority to authorize these special forms of cooperation with justice? Reporting countries reflect very different options. In France this must be done by a trial judge, while in Belgium and the Netherlands by an investigating judge, in Germany and Italy a PPO decision is sufficient.

#### PART V. TRIAL SETTING (CRIMINAL PROCEEDINGS, SPECIAL PROCEEDINGS)

Q21 *When dealing with serious offences, does your legal system foresee special rules concerning*

- *jurisdiction? If yes, what is the jurisdiction rationae materiae? See Q14.*
- *the organization of the trial, including the setting up of special tribunals? See Q14*
- *the protection of the secrecy of witnesses, victims, judges, etc.? See Q20*
- *evidence and proof at trial? Can shielded or secret evidence be used in ex parte proceedings? Is there a public interest exception to disclosure of evidence and cross-examination? Can evidence in favour of the suspect be deleted in special circumstances? See Q19*
- *the evaluation of evidence?*

Just a remark about classic interrogation and the evaluation of the evidence at trial. All reporting countries have not indicated any substantial changes in this respect, with the exception of the US. The *Moussaoui* case clearly shows how difficult it can be for judges to combine fair trial with classified information, edited summaries and the exclusion of cross-examination. In one case a District Court Judge opted to strike out a part of the indictment related to 9/11, as, in her view, there could be no fair trial under these circumstances, but she was overruled on appeal.

In the reporting countries we did not find any indication of fundamental changes in the evaluation of the evidence by the courts. Of course in some HR decisions of

international courts some evidence must be excluded or cannot be used as the only substantive evidence (see supra).

Q22 *When dealing with serious offences, does your legal system fully provide for*  
 - *the right of the suspect/accused/detained person to an independent and impartial tribunal?*

- *the presumption of innocence at the trial or does it foresee special rules (presumption of liability or accountability, reverse of the burden of proof)? See Q4*

- *the right to be tried without undue delay and the right to have the lawfulness of detention determined as soon as possible (habeas corpus)? See Q11*

- *the maxim in dubio pro reo?*

- *the procedural rights of parties (equality of arms, fair trial)?*

• *the right to a public trial with an audience?;*

• *the right to an oral, fair hearing and adversarial proceedings?*

• *the right to be present at the trial?*

• *the right of the counsel to have access to all criminal case records?*

• *the right to be informed without delay of the offence charged?*

• *the right to full disclosure of the state's case and to adequate time to prepare a defence?*

• *the right to internal (between parties involved) and external publicity of the proceedings?*

• *the right to examine the witnesses against him and to obtain the attendance and examination of witness on his behalf under the same conditions as the witness against him; special measures for new cyber techniques (videoconferencing, etc.); special measures concerning shielded or protected witnesses (undercover agents, agents of intelligence forces)?*

• *the right to have free assistance of an interpreter?*

• *the right not to be a witness in proceedings against oneself?*

• *the right to counsel (mandatory or not?), changes to legal privilege? Free choice or screened or assigned by the state?*

• *the right to remain silent (are there any limitations to the obligation to inform the accused of this right; are there limitations to the right to remain silent)? See Q4*

• *Is it permissible to draw prejudicial conclusions from the fact that the accused refused to testify? See Q4*

Many aspects were already mentioned supra. The most striking thing is that in some reporting countries there are reversed burdens of proof for some procedures, such as confiscation procedures, but also, as in Hungary, for



participation in criminal organizations. The legal presumption of guilt is clearly increasing, but is compensated by the reversed burden of proof.

Many reporting countries indicate exceptions to the notion of a public hearing. In camera proceedings are increasing to protect witnesses, national security, public interest etc. In some reporting countries we even see increasing ex parte proceedings, or in camera proceedings with only pre-selected defence lawyers, screened by the intelligence forces.

#### **PART VI. POST-TRIAL SETTING (CRIMINAL, SPECIAL PROCEEDINGS)**

*Q23 When dealing with terrorism and serious offences, did your legal system modify*

*- the right of a higher court to review the sentence (appeal, cassation, constitutional review)?*

*- the prohibition of double jeopardy, following either an acquittal or finding of guilt and punishment?*

As a rule, reporting countries do not indicate special review procedures for special rules on double jeopardy for serious offences. However, we do see an exception in the US, where a right to appeal is limited in the case of special military commission decisions, both in scope (only testing the consistency of standards and procedures, no determination of the merits) and in application (only for capital cases or where an alien is sentenced to over 10 years' imprisonment).