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COMPATIBLE OR INCOMPATIBLE?

INTELLIGENCE AND HUMAN RIGHTS IN TERRORIST TRIALS

*Quirine Eijkman & Bibi van Ginkel**

Abstract

This article focuses on the special criminal procedures for the use of intelligence in terrorist trials in Canada, France, the Netherlands and the United Kingdom. Since 9/11 and the terror attacks in London and Madrid, gathering intelligence as well as the prosecution of suspects of terrorist crimes have become strategic tools in countering terrorism. By reviewing the special procedures for the use of intelligence, their compatibility with human rights standards, including the right to fair trial, is discussed. Concerns include the extent to which disclosure is made possible and to whom. The differences in criminal procedures for the use of intelligence in terrorist trials also raises questions if intelligence origins from a third state, in which different regulations with regard to disclosure of information apply.

Introduction

In countering terrorism, both gathering intelligence as well as the prosecution of suspects of terrorist crimes are vital tools. Last year's discovery of terror plots in the United States of America¹, Yemen² and Belgium³ underlines that information-sharing between security and intelligence services and law enforcement agencies is of the utmost strategic importance, not only because it ensures the protection of democratic societies against threats to national security, including terror attacks, but also because the prosecution of suspects of terrorist crimes delegitimizes their cause. Criminal trials have performative

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¹ On November 26, 2010, a Somali teenager was arrested after undercover operations by the FBI discovered that the young man was plotting to bomb a Christmas tree-lighting ceremony in Portland. See: 'Feds Arrest Somali Teen in Oregon Bomb Plot', CBS News, 27 November 2010. Available at: <http://www.cbsnews.com/stories/2010/11/27/national/main7093701.shtml>.

² On October 29, 2010, two packages of plastic explosives and a detonating device were found on two cargo aircraft after close operations between the intelligence agencies of the U.S., the U.K. and Yemen. See The Guardian (2010).

³ On November 23, 2010, three Moroccan-Dutch terrorist suspects were arrested in Amsterdam. In Belgium, Germany and Austria another seven suspects were taken into custody. These arrests were made after close collaboration between intelligence agencies and law enforcement authorities in the aforementioned countries. BBC News (2010), 'Police arrest 10 over Belgian 'Islamist terror plot'', BBC News, 23 November 2010. Available at: <http://www.bbc.co.uk/news/world-europe-11820008>.

power⁴ in the sense that the state, through the public prosecutor, sends a message that the threat of terrorism is being dealt with, while concurrently human rights, such as the right to a fair trial, are respected. Furthermore, as the right to a fair trial⁵ is the cornerstone of the rule of law and democratic society, it is crucial that – terror – suspects are presumed innocent and tried publicly within a reasonable time by independent and impartial judges or juries. The criminal prosecution of terrorist crimes is an important counter-terrorism measure. Yet, because terror cases are often triggered by intelligence or this type of information is part of the evidence, there are human rights concerns in relation to its admissibility in ordinary criminal proceedings.⁶ Traditionally, a distinction exists between collecting intelligence for national security purposes and gathering evidence for criminal investigations, as they serve different purposes. This distinction also translates into the allocation of powers to law enforcement officials and the specific powers allotted to the intelligence services. For the latter, it is crucial that the sources of the intelligence are kept secret, whereas the fair trial principle demands that during a criminal trial, the public prosecutor and defence counsel enjoy equal access to the evidence. However, in specific circumstances, such as the prosecution of terrorist crimes, these two worlds meet and intelligence information is shared. The circumstances as well as the requirements that apply to these particular cases should be clearly formulated in the law. In order to guarantee the right to a fair trial as laid down in several human rights treaties, checks and balances should be in place.⁷ A number of Western democracies have struggled with designing (special) procedures that allow for the use of intelligence information in criminal trials and henceforth fulfil the aforementioned criteria.

In this article, we discuss some of the special procedures that allow the use of intelligence information in terrorist trials. We elaborate on the key question concerning the usage of intelligence in criminal cases: Is the use of intelligence information in terrorist trials compatible with human rights both in theory and in practice? We focus on four case studies, namely the special procedures in the Netherlands, Canada, France and the United Kingdom.

I. Two Worlds Apart? Intelligence Gathering and Criminal Investigation

Intelligence services and law enforcement agencies both need information to prepare their case files.⁸ However, their files serve very distinct purposes. Law

⁴ Netherlands Institute for Advanced Study in the Humanities and Social Sciences (2010/2011), 'Nucleus: Terrorists on Trial. The Court Room as a Stage in the Struggle for Publicity, Public Support and Legitimacy'. Available at: <http://www.nias.knaw.nl/Pages/NIA/24/759.bGFuZz1FTkc.html>.

⁵ European Convention on Human Rights, article 6.

⁶ N. Schrijver & L. van den Herik, 'Counter-terrorism strategies, human rights and international law: meeting the challenges', *Final Report Poelgeest Seminar* 2010. The Hague: Grotius Centre for International legal Studies.

⁷ European Convention on Human Rights, Article 6; International Covenant on Civil and Political Rights, article 14.

⁸ For more information see: J.E.B. Coster van Voorhout, 'Intelligence as Legal Evidence, Comparative criminal research into the viability of the proposed Dutch scheme of shielded

enforcement agencies, as well as the public prosecutor, carry out investigations in order to gather evidence to build a criminal case. In order to convict a suspect, criminal accountability needs to be established. Simultaneously, there is the presumption of innocence until proven guilty according to the law.⁹ Ultimately, they need to be able to present evidence before the court where, because of the fair trial principle, all sources should be known to both parties. The powers granted to the authorities in criminal investigations are laid down in procedural laws. These powers include, but are not limited to, the hearing of witness testimony, interrogation powers as well as collecting evidence (personal, digital, forensic, phone-tapping, etc.). The manner in which pre-trial detention and criminal investigations are conducted should be in conformity with international human rights standards, in particular the right to a fair trial.

On the other hand, the focus of the intelligence services is predominantly directed towards gathering information on, and analysing aspects of, possible threats to national security. This involves a lack of transparency, as a substantial part of the activities of intelligence and security services concerns covert operations and the intelligence sources are protected. Powers, although extensive, are not unlimited, and are clearly and exhaustively defined in national laws. These powers may include the gathering of privacy-sensitive information and sometimes profiling, detention and interrogation.

II. The Use of Intelligence Information in Criminal Court Cases

In exceptional circumstances, intelligence is forwarded to and acted upon by law enforcement agencies; it may for instance trigger a criminal investigation or be used as 'secret' evidence in court.¹⁰ The former occurs when gathered intelligence is used to tip-off the police to initiate an investigation. For example, in the foiled terrorist plot in the abovementioned Belgian case, intelligence services had informed the police about a suspected threat. However, the information that is initially shared is often limited and generally not used as evidence in the criminal case. The information shared will be examined by law enforcement agencies in order to establish whether it is sufficient to give rise to a reasonable suspicion, in which case it will trigger a criminal investigation during which the information may be used as evidence in the indictment.

The use of intelligence as 'secret' evidence in criminal investigations is relevant for the prosecution of terrorism suspects. Intelligence as legal evidence in general implies that sources and modus operandi are kept secret for state security purposes. In order to use intelligence in criminal court cases, witnesses

intelligence witnesses in England and Wales, and legislative compliance with Article 6(3) ECHR', *Utrecht Law Review* 2005-2, No. 2, pp. 119-144; J. Vervaele, 'Terrorism and Information Sharing Between Intelligence and Law Enforcement Communities in the US and the Netherlands: emergency criminal law?', *Utrecht Law Review* 2005- 1, No.1, pp. 1-27.

⁹ European Convention on Human Rights, article 6.

¹⁰ D. van der Bel, A.M. Van Hoorn & J. J. T. M. Pieters, *Informatie en Opsporing. Handboek informatieverwerking, -verwerking en -verstrekking ten behoeve van de opsporingspraktijk*, Zeist: Uitgeverij Kerckebosch 2009.

tend to be heard anonymously. In absolute terms, this is incompatible with the fundamental right to a fair trial, which holds that “everyone is entitled to a fair and public hearing” and “equality of arms” and further requires that the hearing needs to be conducted by a “competent, independent and impartial” judge or jury.¹¹

The Eminent Jurists Panel, in its report on Terrorism, Counter-terrorism and Human Rights, concludes that the use of intelligence “by its very nature, poses particular problems for the principle of fair trial”. This is particularly the case since “some states have amended the regulations governing legal or administrative procedures to broaden the permissible grounds for non-disclosure of materials to suspects; and suspects are given limited opportunities to test the veracity of the information upon which their arrest, detention, or subsequent charges rest.”¹²

In criminal trials, information may, subject to particular criteria, be legitimately withheld in order to protect national security. However, tensions could arise because of the effect on the right to fair trial. This may be resolved with the practical guidance of international law. This was apparent in the case *Wassink v. the Netherlands*, during which the European Court of Human Rights (ECtHR) ruled that information may be withheld in criminal procedures if particular conditions are met.¹³

III. The International Legal Framework

Following the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR), it is possible to limit particular human rights in the interest of national security and public order. These include the right to freedom of expression and assembly and association. However, such exceptions do not entail derogation of the right to a fair trial. Thus, when intelligence is being used in criminal trials such as the Dutch Piranha case,¹⁴ questions emerge concerning fundamental rights. Safeguards against arbitrary or unlawful government conduct are the right to a fair trial, equality of arms before the courts, and the right to privacy. These minimum standards are enshrined in several human rights treaties and ensure that procedural requirements are met. The United Nations Human Rights Committee concluded in its General Comment that even in emergency

¹¹ International Covenant on Civil and Political Rights, Article 14.

¹² The Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, *Assessing Damage, Urging Action*, Geneva: International Commission of Jurists 2009.

¹³ European Court on Human Rights 27 september 1990, A/185-A) p. 11(*Wassink v. Netherlands*).

¹⁴ Judgement No.: AZ3589, District Court of Rotterdam, 10/600052-05, 10/600108-05, 10/600134-05, 10/600109-05, 10/600122-05, 10/600023-06, 10/600100-06, 1 December 2006/ Judgement No: BF3987, Court of Appeal of The Hague, no. 2200734906, 2 October 2008/ Judgement No: BF5225, Court of Appeal of The Hague, no. 2200735006, 2 October 2008/ Judgement No.: BF4814, Court of Appeal of The Hague, no. 2200735106, 2 October 2008/ Judgement No.: BF5180, Court of Appeal of The Hague, no.2200738406, 2 October 2008.

situations one cannot diverge from fair trial standards.¹⁵ The - potential - competing values of security versus human rights need to be balanced by independent safeguards.

The principle of fair trial is laid down in Article 10 of the Universal Declaration of Human Rights (UDHR), Article 8 of the ECHR and in Articles 47 and 48 of the Charter of Fundamental Rights of the European Union (EU). The ICCPR addresses the requirements of fair trial in Article 14. These include the right of an individual to be informed of the measures taken; to know the case against him or her; the right to be heard within a reasonable amount of time; the right to a fair and public hearing by a competent and independent review mechanism; the right to counsel with respect to all proceedings; and the right to have his or her conviction and sentence reviewed by a higher tribunal according to the law.¹⁶ Furthermore, the EU Charter under Articles 7 and 8 recognises the right to privacy and data protection and the ICCPR prohibits member states from violating privacy violations under Article 17. It also requires the protection of persons by law against arbitrary or unlawful interference with their privacy, family, home or correspondence.¹⁷ If a person is under surveillance or personal data is collected, this needs to be authorised by law. The legislation concerning the limitation of privacy must be just, predictable and reasonable and needs a precise description of the circumstances in which the interference is permitted.¹⁸

The Council of Europe has established guidelines with regard to human rights and the fight against terrorism. According to these guidelines, personal data may be collected and processed by any competent authority in the field of state security, even though it might interfere with the right to private life.¹⁹ The Council also demands that measures that are used in the fight against terrorism that interfere with privacy, such as body searches, bugging, telephone tapping, the surveillance of personal correspondence and the use of undercover agents, must be provided for by law. Furthermore, it must be possible to challenge the lawfulness of these measures before a court.

IV. Introducing Four Case Studies

A number of Western states have implemented special procedures to use intelligence information in criminal trials related to terrorism. These are presumed to be compatible with human rights both in law and in practice. The special procedures introduced in the Netherlands, Canada, France and the

¹⁵ Human Rights Committee.

¹⁶ Office of the United Nations High Commissioner for Human Rights (2008), 'Human Rights, Terrorism and Counter Terrorism', Fact sheet No. 32. Geneva: OHCHR.

¹⁷ *Ibid.*

¹⁸ Human Rights Committee (1978), 'Views on Communication', *Mauritian women v. Mauritius* No. 35/1978 9 April 1981.

¹⁹ Governed by appropriate provisions of domestic law; proportional; subject to supervision by an external independent authority.

United Kingdom serve as case studies in this section. Furthermore, the discussion focuses both on their effectiveness and whether they indeed guarantee the right to a fair trial.

IV.1 The Netherlands

Traditionally, there is a strict separation between the intelligence and security services and the public prosecutor's office, who each work under their own legal regime. One important feature is the obligation on the intelligence and security services to protect their sources, working methods and current knowledge. During trial, on the other hand, it is the task of the public prosecutor and the judge to protect the elementary guarantees of a criminal procedure, namely to review the accuracy of information serving as evidence. Despite the watertight separation between the tasks, powers and responsibilities of the organisations which are involved in countering terrorism, within the statutory framework it is possible to have –if necessary and expedient– an intensive information flow between them. Information that is relevant for the investigation and prosecution of terrorist crimes can at the discretion of the Dutch General Intelligence and Security Service (AIVD) be provided to the Netherlands Public Prosecutor Service via an official written report (*Ambtsbericht*). The National Public Prosecutor on Counter-Terrorism analyses all the relevant information, which can be used to initiate an investigation or as evidence in court. This is an obligation for the public prosecutor, who is responsible for the particular case. According to the interpretation of the Dutch Supreme Court and a ruling of the European Court of Human Rights,²⁰ the commencement of a criminal investigation must be based on a reasonable suspicion of guilt of a particular criminal offence or, in case of terrorism, an indication.

In order to use the information that is collected by the intelligence and security services²¹ as evidence in criminal trials, the Dutch legislature initiated the 'Act on Shielded Witnesses'²² (*Wet Afgeschermde Getuigen*; also translated as the Witness Identity Protection Act) in September 2006. This procedure, *ex parte* and *in camera*, was implemented to provide for the hearing of a shielded witness in case disclosure of the identity of the witness could endanger the witness or national security. The Act implements substantive reforms. Intelligence information may now be admitted in an official written AIVD-

²⁰ Human Rights Committee (2001), General Comment 29, States of Emergency (article 4), U.N. Doc. CCPR/C/21/Rev.1/Add.11.

²¹ The primary intelligence and security services in the Netherlands are the General Intelligence and Security Service (*Algemene Inlichtingen en Veiligheidsdienst*: AIVD), the Military Intelligence and Security Service (*Militaire Inlichtingen en Veiligheidsdienst*: MIVD), and the Regional Intelligence Services of the police force (RID). The powers of the intelligence and security services are geared towards gathering information relating to national security. They provide information about possible threats and risks relating to state security to other bodies such as the police, which in turn take security measures.

²² Act of 28 September 2006 (Stb. 2006, 460). Important changes in the Code of criminal procedure: Article 136d C.C.r.P.; Article 226m C.C.r.P.

report²³ and examined through the hearing of witnesses by a 'special' examining magistrate (*Rechter-Commissaris*). Subsequently, the last hindrance to use intelligence information in criminal trials was dissolved.²⁴

The examining magistrate has the power to decide whether, in the interest of national security, particular information must remain secret and whether the witness should be shielded. This is done in the pre-trial phase by a special section of the Rotterdam District Court. If possible, whilst attempting to assess the value of the intelligence, the trial participants may be present, while the witness is shielded (in camera, but not *ex parte*). However, the most common procedure is to hand in a list of questions for the witness to the special examining magistrate. This can be done by counsel representing the suspect and the trial judge, for whom the hearing is shielded. The report of the hearing will only be submitted to the parties with the consent of the shielded witness.²⁵ Important to note is that Article 344a Code of Criminal Procedure stipulates that someone can never be convicted solely on evidence adduced by anonymous sources. This is a crucial concern in relation to the Act: AIVD officers will hardly ever be able to produce any extra information that supports the official written report that is submitted as evidence. So far, the Act on Shielded Witness has not been used in the Netherlands.²⁶ With regard to verifiable information, such as reports from phone- and email-taps, recordings of confidential communications by means of technical equipment, and video-tapes of surveillance, there are fewer concerns to submit this information as evidence in terrorist trials.

The AIVD's power is checked and balanced by internal rules, guidelines and procedures and is under the direct scrutiny of the House of Representatives. There are also several external bodies that provide oversight, namely the Intelligence and Security Services Supervisory Committee (Commissie van Toezicht betreffende de Inlichtingen en Veiligheidsdiensten: CTIVD), the Netherlands Court of Audit and the National Ombudsman.

One can discern a number of human rights concerns in relation to the Dutch procedure to use intelligence information in criminal trials related to terrorism.²⁷ The trial judge is hardly able to assess the reliability of the official

²³ An official written report contains testimonies by officials and informants.

²⁴ M.A.H. van der Woude, *Wetgeving in een Veiligheidscultuur. Totstandkoming van antiterrorismewetgeving in Nederland gezien vanuit maatschappelijke en (rechts)politieke context*, The Hague: Boom Juridische Uitgevers 2010.

²⁵ J.A.E. Vervaele, 'Terrorism and Information Sharing Between Intelligence and Law Enforcement Communities in the US and the Netherlands: emergency criminal law?'. *Utrecht Law Review* 2005-1, No.1, pp. 1-27.

²⁶ M.A.H. van der Woude (2010), *Wetgeving in een Veiligheidscultuur. Totstandkoming van antiterrorismewetgeving in Nederland gezien vanuit maatschappelijke en (rechts)politieke context*, The Hague: Boom Juridische Uitgevers 2010.

²⁷ M. Alink, Q. Eijkman & K. Freeke, 'AIVD-informatie als bewijs in het strafproces. Een Straatsburgs perspectief', in: P.D. Duyx & P.D.J. van Zeven (eds.), *Via Straatsburg (Myjerbundel)*, Nijmegen: Wolf Legal Publishers 2004, pp. 155-79; Council of Europe, 'Report by the

written reports. Both the judge and the defence counsel need to rely completely on the special examining magistrate. Furthermore, secret information may not have been collected by Dutch intelligence and security services themselves, but by foreign intelligence and security services (international information sharing). In any case, the application of the Act limits the right to a fair trial. The defence council does not have the opportunity to know who collected the evidence and also lacks the possibility to question the witness (even if this was the case, they may never relate to the identity of the witness). Subsequently, some statements are off-limits. For example, questions concerning where the witness was at a certain time cannot be put forward. Henceforth, a situation could occur in which the accused cannot prove his innocence with an alibi or in any other way discuss the competence of the witness. Additionally, the intelligence official who was questioned as a witness has a decisive say in whether or not the report of the examining magistrate will become part of the case file.

IV.2 Canada

In Canada, the Canadian Security Intelligence Service (CSIS) are accountable to both the Security Intelligence Review Committee (SIRC) and the Inspector General. The latter is an internal body that reports to the Canadian Minister of Public Safety, whereas the former, an external body, does so directly to Parliament. (Non-)Disclosure of secret information falls under the Canada Evidence Act (CEA) and applies to all cases in which sensitive information is used.²⁸ This act sets out the pre-trial, trial and appellate procedures to be applied where there is a possibility that disclosing information will damage international relations, national defence or national security. Any participant or official who is aware of the – soon to be – disclosed sensitive information has to inform the Attorney General for Canada. The Attorney General or the Federal Court can determine whether the information can be disclosed. If the judge determines that one of these situations might occur upon disclosure, the judge will balance the competing public interests in disclosure and non-disclosure. Upon disclosure, the judge has the option to place particular conditions.

An important feature in the Canadian counter-terrorism framework is Immigration Law (CIL). Any Canadian suspected of terrorist crimes is charged and the evidence is disclosed during trial. However, when a suspect is not a Canadian citizen, and if security risks relate to this particular person, a removal request will be issued in the form of a security certificate. According to the CIL, security certificates under the Immigration and Refugee Protection Act (IRPA) are issued by the Minister of Immigration and the Minister of Public Safety and reviewed by the Federal Court of Canada. The request is made after the government balances the risk to the suspect against the risk that the subject poses to Canada's national security. The Federal Court has to contemplate the

Commissioner for Human Rights, Thomas Hammerberg, on his visit to the Netherlands, CommDH (2009) 2', 11 March 2009.

²⁸ The Canada Evidence Act, Section 38.

public interest in disclosure against non-disclosure. Furthermore, the appellant only receives a summary of the secret information produced by the government, which limits the defendant's ability to contest the evidence.

The Supreme Court concluded in the case of *Charkaoui v. Canada*²⁹ that a mere summary of the secret information is incompatible with the right to a fair trial. This is because the defendant is not fully aware of the case against him or her. In order to meet fair trial standards the Supreme Court proposed an alternative: a special advocate system, which is also used in the United Kingdom and New Zealand. Subsequently, the special advocate model was implemented by the Canadian legislature under Bill C-3. Special advocates are counsel appointed by the Court to protect the interests of defendant, who is subject to a security certificate and, simultaneously, to ensure the confidentiality of the information, which could harm national security or endanger the safety of a person when disclosed.³⁰ They have security clearance to access information that may harm national security or endanger a person's safety, but operate independently from the government. Every person that is subject to a security certificate will have access to a special advocate. There are now 23 specially trained, security cleared special advocates appointed by the Minister of Justice under immigration and refugee protection law, from all regions of Canada. The special advocate has the ability to communicate with the person whose name is mentioned on the security certificate. Based on a summary, he or she will discuss the matter with the subject, in order to prepare for the closed court proceedings. It is up to the judge to decide whether the special advocate may communicate with the subject after reviewing the information. Special advocates will not be in a counsel-client relationship with the individual named in the certificate.³¹ Difficulties are that once the secret information is seen, the special advocate cannot communicate with other special advocates or counsel for the named person unless authorised by the judge. Special advocates could however play a role in negotiating with the government and formulating agreed statements of fact. Special advocates could also negotiate the release of some information or agree that the claim of secrecy is warranted.

Nevertheless, there are a number of human rights concerns with the current system in Canada.³² After receiving a security certificate, a subject may be detained indefinitely, without charge. The evidence remains secret, which means that the defendant does not have the opportunity to know who collected the evidence against him or her. Therefore, the fair trial principle that

²⁹ Supreme Court of Canada, *Charkaoui v. Canada*, 2007 SCC 9, 1 S.C.R. 350.

³⁰ C. Forcese & L. Waldman, 'Seeking Justice in an Unfair Process. Lessons from Canada, the United Kingdom, and New Zealand on the Use of 'Special Advocates' in National Security Proceedings', Ottawa: The Canadian Centre for Intelligence and Security Studies 2007.

³¹ Canadian Department of Justice, 'Backgrounder Bill C-3 and Special Advocates' 2008. At: http://www.justice.gc.ca/eng/news-nouv/nr-cp/2007/doc_32198.html

³¹ Institute for Research on Public Policy, 'Protecting Security and Human Rights: The Case of Migration in Canada', Ottawa 2007.

³² Institute for Research on Public Policy (2007).

requires that sources are known to both parties is limited. Furthermore, with this procedure it is very well possible for immigrants to be deported to countries where they would be at risk of torture. Currently, three high-profile cases are being dealt with concerning the deportation of immigrants who are considered to pose an extreme risk to Canadian national security.³³ These cases are being dealt with by special advocates.

IV.3 France

Compared to the Netherlands and Canada, the counter-terrorism laws in France did not dramatically change after 9/11. French legislation had already developed during the late 1980s and early 1990s. Subsequently, only modest legal reform, partly based on European counter-terrorism measures, was implemented.³⁴ Also, the emphasis on combating Jihadi terrorism and international cooperation increased.³⁵ French intelligence and secrete services³⁶ mainly fall under the executive branch. Judicial investigations into criminal offences are initiated by the public prosecutor office. At its own discretion, the public prosecutor asks an investigating judge (*juge d'instruction*) to direct the investigation. This judge will first examine the state's case against the defendant and then decides to order a release without charge or a formal investigation (*mettre en examen*). In order to assist the investigating judge with the investigation, -judicial- police officers are assigned. During this pre-trial criminal investigation, the investigating judge seeks to uncover, with the help of special investigative techniques, both incriminating and exculpatory evidence. These include wiretaps, warrants and orders to appear as a witness. After this pre-trial criminal investigation, the investigating judge may recommend that the suspect be taken into pre-trial detention (*detention provisoire*). After this recommendation to the so-called liberty and custody judge (*juge des libertés et de la detention*), the prosecutor could decide to represent the state's interest before the liberty and custody judge, who is independent from the investigating judge.³⁷

The French procedure in the investigation phase is written and secret but only with respect to the general public and the media. It is fully adversarial at the early stages of the proceedings. Once the formal investigation has been notified, the suspect has full access to the case file through his or her counsel. A

³³ *Harkat v. Canada* (Minister of Citizenship and Immigration) (F.C.), 2006 FC 628, [2007] 1 F.C.R. 321 *Almrei v. Canada* (Minister of Citizenship and Immigration), 2005 FC 1645, [2006] 2 F.C.R. D-14, *Charkaoui v. Canada* (Minister of Citizenship and Immigration), 2007 FCA 80, [2007] 3 F.C.R. D8.

³⁴ 'Law on the Fights Against Terrorism and on Various Dispositions Concerning Security and Border Control' (Loi 2006-64).

³⁵ Transnational Terrorism, Security & the Rule of Law (2008), 'Case Study: France. Citizens and Governance in a Knowledge-Based Society', The Hague

³⁶ The primary French intelligence agencies are the Central Directorate of Interior Intelligence (Direction Centrale du Renseignement Intérieur, DCRI) and the General Directorate for External Security (Direction Générale de la Sécurité Extérieure, DSGE).

³⁷ Human Rights Watch (2008), *Preempting Justice: Counterterrorism Laws and Procedures in France*, Ney York: Human Rights Watch report, pp. 7-8.

copy of the case file is delivered to the counsel on the first appearance of the suspect. All the evidence has to be submitted and discussed before court during the trial. The investigating magistrate does not have a security clearance; he or she is thus not authorised to have direct access to classified information. Moreover, unauthorised access to classified information is constitutive of a criminal offence. The access of the investigating judge to classified documents is controlled by an independent authority (Consultative Commission for National Defence Secrets). The judge may refer to this Commission with a request for a partial or complete declassification of documents. Once a specific document is declassified, either totally or partially, it is transmitted to the investigating judge and added to the case file. From that stage onward, the information is protected only by the confidentiality of the investigation, but is known to the defendant and his counsel and could be released publicly during the trial. In case of a violation of the right to a fair trial, as well as respect for human dignity or for physical and mental integrity and the right to privacy, the evidence can be dismissed during either the investigation or the trial phase.

The investigating judge is given significant authority in terrorism cases. This is based on the notion that all possible evidence on terrorist networks and their crimes will lead to the closure of the case.³⁸ Consequently, the intelligence and security services and investigating judges have a close relationship and almost all terrorism-related court cases have used information gathered by the intelligence and security services. Investigating judges can deny requests for investigative steps in the course of a judicial investigation. For example, in the case of Christian Ganczarski,³⁹ only the request for an inquiry commission into Saudi Arabia was accepted. The other twenty-three requests were denied by the investigating judge on the grounds that there was a risk that the information would be used to pressure others involved. These decisions can in general be appealed by the counsel in the court of appeal.

Human rights concerns include that there is only a small group of judges and public prosecutors who are fully aware of the types of techniques, information and assessments that are used. This interconnectedness between the secret and intelligence services and the investigating judges may lead to their independence being compromised.⁴⁰ The defence counsel does not have the right to cross-examine protected witnesses and agents from the secret and intelligence services with protected identities. The latter are not obliged to reveal their sources. However, information based on non-identified sources has no value, unless it is corroborated by the investigation and if the manner in which the intelligence was initially obtained does not breach international human rights law such as the ECHR.

³⁸ *Idem* 36, p. 10.

³⁹ European Commission for Democracy through Law/Venice Commission (2007), 'Report on the Democratic Oversight of the Security Services', CDL-AD(2007)016, Strasbourg, 11 June 2007, par. 213.

⁴⁰ European Commission for Democracy through Law (Venice Commission 2007), paragraph 213.

IV.4 The United Kingdom

The United Kingdom (UK) is a pioneer with regard to counter-terrorism legislation. The legislative response, among others the Terrorist Act 2000, had been initiated because of the terrorist crimes of the Irish Republican Army, Sinn Fein and the Ulster Freedom Fighters⁴¹. They concern a substantial number of prohibitions of terrorism and terrorist-related crimes.⁴² As in the Canadian case, the UK implemented a system of special advocates in order to use intelligence information in criminal trials.

The UK, like Canada and several other Western democracies such as the Netherlands, also relies on immigration law as a means to detain potential terrorists.⁴³ The procedure governing the special advocates was implemented in 1996, following the conclusion of the ECtHR in *Chahal v. UK*.⁴⁴ The UK system prior to 1996 consisted of a personal executive decision of the Home Secretary to deport an individual on national security grounds. This decision was then reviewed by a panel that made recommendations on whether the removal order should stand.⁴⁵ The ECtHR concluded that the UK system was in violation of the ECHR, since the information was kept secret and it denied all means for lawyers of the appellant to challenge the secret information on which the decision was based. The decision of the ECtHR resulted in the Special Immigration Appeals Commission Act of 1997. With regard to the implementation of this Act, a Special Immigration Appeals Commission (SIAC) was created, as well as a superior court of record sitting in panels comprising a High Court judge, an immigration adjudicator and a lay member with security and intelligence expertise.⁴⁶ Since the appellant and lawyers are excluded from the Special Immigration Appeals Commission, the SIAC Act authorises the appointment of a special advocate, as a representative of the interests of the appellant. When information is withheld from the appellant on national security grounds, the special advocate is appointed by the UK Attorney General. The special advocate may not communicate with the appellant once he or she has received the secret information.

Special advocates are employed in all proceedings that implicate national security concerns. These include the listing of banned terrorist organisations

⁴¹ G. Bennet, 'Legislative Responses to Terrorism: A View from Britain', *The Penn State Law Review* 2005-109 No. 4, pp. 947-966.

⁴² Terrorism Act, 2000, c. 11 (U.K.).

⁴³ K. Roach, *Must we trade rights for security? The choice between smart, harsh or proportionate security strategies in Canada and Britain*, Toronto: University of Toronto 2006.

⁴⁴ European Court of Human Rights, *Chahal v. The United Kingdom*, 70/1995; 22414/93; (1996) 23 EHRR 413; [1996] ECHR 54.

⁴⁵ C. Forcese & L. Waldman, *Seeking Justice in an Unfair Process. Lessons from Canada, the United Kingdom, and New Zealand on the Use of 'Special Advocates' in National Security Proceedings*, Ottawa: Study commissioned by the Canadian Centre for Intelligence and Security Studies, 2007, p. 20.

⁴⁶ *Ibid.*

under the Terrorism Act 2000,⁴⁷ the exclusion of individuals from accessing dangerous substances under the Anti-terrorism, Crime and Security Act 2001,⁴⁸ the denying of security clearance to individuals,⁴⁹ criminal cases, planning inquiries, race relations and parole proceedings.⁵⁰

The use of secret evidence in UK courts has increasingly grown during the past decade and this causes several human rights concerns. The Joint Committee on Human Rights concluded in their sixteenth report on Counter-Terrorism Policy and Human Rights that the UK's use of secret evidence and special advocates needs an "urgent and comprehensive review ... in all contexts in which they are used".⁵¹ Since special advocates are not allowed to communicate with the appellant after having received the classified information – with the exception of a very limited number of cases⁵² – evidence will remain unclear for the appellant. This is incompatible with both Common Law and Article 6 ECHR that guarantees the right to a fair hearing.⁵³

Conclusion

By using intelligence information in terrorist trials, there is a risk that human rights, principally the right to a fair trial, are breached. This is because of the limited opportunity for terror suspects to review and question the evidence upon which their arrest, detention or subsequent charges are based. Subsequently, questions arise whether not only the use of intelligence information in terrorist trials is compatible with human rights, but also if they constitute accountable counter-terrorism measures. The Eminent Jurist Panel, for instance, concluded that states should take steps to ensure that the work of security and intelligence services is fully compliant with human rights law, that the powers of security, intelligence and law enforcement services should be separate and the limitations to the disclosure of information in criminal trials should be lawful, necessary and proportionate as well as applied non-discriminatory.⁵⁴

⁴⁷ A special advocate may be appointed to represent the interests of the banned organization to the Proscribed Organisations Appeal Commission (POAC).

⁴⁸ A special advocate may be appointed to represent the interests of the appellant to the Pathogens Access Appeals Commission (PAAC).

⁴⁹ A special advocate may be appointed to represent the interests of the appellant to the Security Vetting Appeals Panel.

⁵⁰ C. Forcese & L. Waldman, 'Seeking Justice in an Unfair Process. Lessons from Canada, the United Kingdom, and New Zealand on the Use of 'Special Advocates' in National Security Proceedings'. Ottawa: The Canadian Centre for Intelligence and Security Studies 2007, pp. 23-24.

⁵¹ Joint Committee on Human Rights. Counter-Terrorism Policy and Human Rights (Seventeenth Report): Bringing Human Rights Back In. Sixteenth Report of Session 2009–10, p. 5.

⁵² House of Commons Constitutional Affairs Comm., The Operation of the Special Immigration Appeals Commissions (SIAC) and the Use of Special Advocates, 2005-6, H.C. 232-1, § 27-30.

⁵³ Joint Committee on Human Rights. Counter-Terrorism Policy and Human Rights (Seventeenth Report): Bringing Human Rights Back In. Sixteenth Report of Session 2009–10, p. 23.

⁵⁴ The Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, *Assessing Damage, Urging Action*. Geneva: International Commission of Jurists 2009.

The special criminal procedures for the use of intelligence in terrorist trials in Canada, France, the Netherlands and the United Kingdom all meet some of the aforementioned human rights criteria. They are all lawful and to some extent necessary to counter real terrorist threats. Yet, their proportionality and non-discriminatory application could be questioned by the defence counsel and the public at large. Furthermore, even though the four procedures have similarities they show substantive differences in the way intelligence information is submitted during trial, and the extent to which disclosure is made possible, and to whom. These differences raise distinct concerns in relation to checks and balances. For example, when intelligence information originates from a third state, is it submitted and to whom? In theory in the Canadian and the English legal systems the special advocates and in the French and Dutch legal system the examining magistrate counter-balance the limitations to the right to full disclosure of intelligence information, but in practise the fairness of terrorist trials and the sense of justice might be compromised. Henceforth the right to a fair trial is under threat when intelligence information is used in terrorist trials.