

RESEARCH PAPER

Intelligence as legal *evidence*

Comparative criminal research into the viability of the proposed Dutch scheme of shielded intelligence witnesses in England and Wales, and legislative compliance with Article 6 (3) (d) ECHR

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1. Introduction

The Dutch intelligence and security service AIVD¹ provides the police with intelligence in an official written report (*Ambtsbericht*).² Such a report could state, for example, that a young man, let us say: M., might be planning a terrorist attack to be carried out in Rotterdam next month. It would appear necessary that M.'s confidential communications be recorded by means of a technical device as referred to under Article 126l of the Dutch Criminal Procedural Code (CPC). In the Netherlands, a wiretap may only be used after the examining magistrate – who is under a statutory duty to do so – has verified whether the legal prerequisites for such an intrusive measure have been met. In order to be able to arrive at such a judgment, he may order witnesses to provide testimony. In this hypothetical case, the magistrate requests an AIVD officer to testify. The officer is heard anonymously; as a ‘shielded witness’, *ex parte*³ and *in camera*.⁴ The defence and the prosecution are therefore absent from this pre-trial hearing, which is also closed to the public. The officer testifies that M. will attend a soccer game in Rotterdam next month. He further states that ‘soccer game’ is well-known code language for ‘terrorist attack’.

The following questions arise. How will the examining magistrate determine the probative value of the officer’s testimony? What if the defence could have straightforwardly produced the

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1 The Dutch General Intelligence and Security Service (AIVD) may gather intelligence to protect national security (defensive task) and gather intelligence abroad (offensive task) (*Wet op de inlichtingen- en veiligheidsdiensten (Wiv)*, 2002 *Staatsblad*, 148 23). The officers of the services have *no* competence to investigate criminal offences (Article 9 Wiv).

2 The AIVD can provide the police and/or the public prosecution with an *Ambtsbericht* for the investigation and prosecution of criminal offences (Article 38 Wiv).

3 Lat. ‘decision (...) by a judge without requiring all of the parties (...) to be present’. Legal Encyclopedia, Thomson and Gale, 1998.

4 Lat. ‘In chambers; in private. A judicial proceeding is said to be heard *in camera* (...) when all spectators are excluded from the courtroom.’ *Ibid.*

defendant's ticket to a soccer game in Rotterdam?⁵ And what will happen during the trial phase, when, in principle, the transcript of the witness testimony and the *Ambtsbericht* might even constitute sufficient evidence to convict M.?⁶

This is a hypothetical case, but it could actually occur once the new '*Act on shielded witnesses*'⁷ enters into force. Intelligence officers⁸ of the Dutch intelligence services, the AIVD and the MIVD,⁹ will then be allowed to provide evidence during the pre-trial phase to the examining magistrate. The defence will generally not be present at this *in camera* hearing, and will not be able to examine the witness. The defendant will commonly remain unaware of the evidence held against him. However, both the *Ambtsbericht* and the transcript of the witness testimony may subsequently be used as *evidence*.¹⁰

1.1. Question of law

The Netherlands appears to be a pioneer country when it comes to finding ways to use the intelligence gathered by intelligence services as legal *evidence*.¹¹ It is one of the few countries of the EU where this topic has been the focus of political scrutiny by the government and Parliament since the beginning of the 1990s.¹² However, it is likely that many countries, particularly those in the EU, will follow the Dutch example. Because of the far-reaching implications of this legal construction, it is examined whether this system could be viable in the current English and Welsh¹³ criminal procedural framework. The United Kingdom (UK)¹⁴ has experienced a long and worrying streak of domestic, Irish and international terrorism.¹⁵ It has struggled with striking the right legal balance for at least 50 years. Moreover, it has experienced the downside of anti-terror legislation and wrongful criminal convictions of alleged terrorists.¹⁶ As a result, several safeguards were installed in English criminal procedure to prevent further errors of justice. As the Netherlands generally lacks this experience,¹⁷ this thought experiment of comparing with the English situation certainly appears worthwhile. This contribution also examines whether the new Dutch legal construction complies with the fair trial rights as set out in Article 6 of the European Convention on Human Rights (ECHR), in particular Article 6(3)(d) ECHR (right to confrontation). It gives an example of the requirements for fair-trial compliance

5 Inspired by B. Böhler, *Crisis in de Rechtstaat*, Amsterdam 2004, pp. 240-255.

6 The Dutch evidentiary system acknowledges as evidence observations by the judge, testimony of the accused, witness testimony, expert testimony, and written documents (339 CPC). The procedure is predominantly written. Trial judges examine the file in advance and also examine it at trial. The *negative-lawful evidence system* requires at minimum two independent sources of evidence, with only one exception: the legal transcript of the criminal investigator (Article 334(2) 2 CPC). It is to be expected that the transcript and the *Ambtsbericht* may not be used 'solely or to a decisive extent' (Chapter 5). Moreover, the Dutch *unus testis, nullus testis* rule prohibits considering *one* testimony as sufficient evidence.

7 *Kamerstukken II* 2003-2004, 29 743, no. 1; *Kamerstukken II* 2003-2004, 29 743, no. 2; *Kamerstukken II* 2003-2004, 29 743, no. 3; *Kamerstukken II* 2003-2004, 29 743, no. 4, *Wet afgeschermdde getuigen*.

8 Intelligence officer's protection under Articles 226g - 226m CPC (threatened witness).

9 The MIVD is the *Military Intelligence and Security Service* (Wiv).

10 The House of Representatives, *Tweede Kamer*, approved the Act on 24 May 2005. The Senate, *Eerste Kamer*, adopted it on 26 September 2006. It will enter into force on 1 November 2006.

11 See Chapter 2 providing two examples of the shift in criminal law towards proactive law enforcement and use of intelligence in the criminal procedure.

12 L. van Wifferen, 'Het gebruik van AIVD-informatie in het strafproces', 2004 *Justitiële Verkenningen*, no. 3, pp. 139-140 and L. van Wifferen, 'Intelligence in het strafproces', 2003 *Nederlands Juristenblad*, no. 12. As early as 1992, the Minister of Justice sent a Note to Parliament addressing the question whether BVD (now: AIVD) intelligence could become legal evidence, *Kamerstukken II* 1991-92, 22 463, no. 4.

13 Hereinafter usually called, with due apologies to Welsh readers, 'England'.

14 The United Kingdom comprises England, Scotland, Wales, and Northern Ireland.

15 C. Walker, 'Terrorism and Criminal Justice: Past, present and future', 2004 *Criminal Law Review, Supplement for the 50th anniversary*, pp. 311-327. Colonial terrorism in Palestine, Kenya, Malaysia, Cyprus and Aden. Domestic terrorism has only resulted from the Irish question, for instance Bloody Sunday 1972, but also the bombings in Guildford, Birmingham and Omagh.

16 *E.g.*, Guildford Four, Cardiff Three, Judith Ward, Taylor sisters, Stefan Kiszko, Birmingham Six, Bridgewater Four, and Ballymurphy Six.

17 *E.g.* Moluccan hijackings of trains in 1975 and 1977. Also R. Janse, 'Fighting terrorism in the Netherlands; a historical perspective', 2005 *Utrecht Law Review*, no. 1, pp. 55-67.

of intelligence as *evidence* in general, and more specifically for the determination whether a trial *as a whole* can be *fair* when the rights of the defence, particularly the minimum right to confrontation,¹⁸ are restricted on the basis of a ‘public interest’, such as witness protection and/or national security.¹⁹ Finally, as the ‘shielded intelligence witness’ can be considered exemplary of a current shift in criminal law, this issue is also touched upon briefly, albeit only by way of illustration.

1.2. Outline

This contribution will continue by giving examples of the current shift in criminal law. Next, Chapter 3 discusses the Dutch Act in detail. This is followed by an examination of the viability of the legal construction in English criminal procedure. The penultimate Chapter studies legislative compliance with fair trial rights ex Article 6 ECHR, with emphasis on the right to confrontation. In Chapter 6 some conclusions are drawn.

2. Current shift in criminal law

Criminal anti-terror legislation has become predominantly directed at the prevention of terrorist acts,²⁰ amongst other things by means of the *proactive* use of intelligence in enforcement. This trend is noticeable in the EU and the US, but may even have set in world wide.²¹ Both intelligence-led enforcement aimed at interrupting the activities of alleged perpetrators, and the *ex ante* use of information to start investigations or collect evidence, have roots in the fight against organized crime. This currently extends the possibilities for gathering material and its subsequent use in terrorism cases, or possibly even in *all* criminal cases. Former strict divisions between police and intelligence officers’ tasks and competences, as well as supervision over how these are carried out have been reduced considerably.

Currently, States aim at a three-fold use of intelligence in (i) criminal investigation and/or (ii) the pre-trial phase. Although it seems to be commonly accepted that intelligence services tip off law enforcement agencies to pursue criminal investigation, the extent to which intelligence meets the standard of *reasonable suspicion*²² for judicial authorization of powers such as arrest, detention and searches as well as to initiate the prosecution, is not fully decided yet. Lastly, the use of intelligence (iii) as *evidence* is pursued. This is particularly interesting for States in terrorist cases, but inherently paradoxical as well. This paradox of secret information in a trial that generally should be open and public is the leading idea throughout this article.

Two developments that substantiate the claim that a shift has taken place are outlined below.

18 *Adolf v. Austria*, Commission Report 1983, Series B No. 43, para. 64.

19 S. Maffei, *The Right to confrontation in criminal proceedings-Absent, Anonymous and Vulnerable Witnesses*, Groningen 2006, pp. 3-95.

20 Some argue that current terrorism is particularly different from older forms because it is predominantly Western-oriented and carried out by religious fundamentalists, or even Muslim extremists. W. Laqueur, *The new terrorism*, Oxford 1999, B.J. Barber, *Jihad vs McWorld*, New York 2001, E. Muller, ‘Modern terrorisme en moderne terrorismebestrijding’, in: E. van Dongen *et al.* (eds.), *Terrorismebestrijding met mensenrechten*, Leiden 2005 and C. Whittaker, *Terrorists and Terrorism; in the contemporary world*, London 2004.

21 ‘Intelligence is the collecting and processing of that information about foreign countries and their agents which is needed by a government for its foreign policy and for national security, the conduct of non-attributable activities abroad to facilitate the implementation of foreign policy, and the protection of both process and product, as well as persons and organizations concerned with these, against unauthorized disclosure.’ M.T. Bimfort, ‘A Definition of Intelligence’, 1958 *Studies in Intelligence*, Fall, p. 78. Declassified. Supplemented with: ‘information about citizens and residents who are allegedly involved in serious crime’.

22 The Netherlands: *redelijk vermoeden*, US: *probable cause*.

2.1. The Hague Programme

In the EU, this use of intelligence is partially encouraged by the Hague Programme²³ that aims at strengthening freedom, security and justice in the EU.²⁴ This Programme²⁵ endeavours to create an interlinked common security area. Not only judicial cooperation is encouraged, but also information sharing and the free flow of information between domestic and EU law enforcement agencies. However, the Act obviously goes beyond this Programme, also because it introduces the ‘shielded intelligence witness’ before this has been thoroughly examined at EU level. Additionally, it enables non-domestic intelligence to be used as evidence, including not only intelligence from other EU countries, but also from Europol and outer-EU intelligence.²⁶

2.2. US use of intelligence in the criminal procedure

A similar use of intelligence is noticeable in the US. However, in the US, the division between intelligence and criminal enforcement has never been as strict as in Europe.²⁷ Both intelligence and criminal investigations are generally deployed as preventive counter-terrorism strategies. Nevertheless, information was generally not shared; not internally in the intelligence community and not externally with law enforcement agencies. So-called Chinese walls existed, in particular after Watergate, and these were respected quite rigidly.²⁸ Concurrently, however, ways were sought to use certain secret procedures in criminal cases, such as obtaining warrants for electronic surveillance, physical searches, pen registers and trap and trace devices from the secret Foreign Intelligence Surveillance Act²⁹ (FISA) Court.³⁰

After 9/11, preventive or proactive enforcement in terrorism investigations once again gained momentum,³¹ as provisions which had been rejected earlier were adopted in the USA Patriot Act after all.³² This Act increased the information flow between the law enforcement agencies and the intelligence community,³³ and widened the possibilities for the use of secret procedures and intelligence – generally as classified evidence³⁴ – in criminal cases.³⁵ As regular powers of investigation were expanded considerably, the basis for such powers was also broadened.³⁶ Moreover, defence rights may now be restricted considerably on the basis of national security. Nevertheless, the judiciary still sets strict requirements for these restrictions and the due process

23 The European Council and the Commission adopted the Hague Action Plan on 2/3 June 2005.

24 Adopted on 4 November 2004. It sets the objectives to be implemented in the area of freedom, security and justice in the period 2005-2010.

25 Also 2002/584/JHA: Council Framework Decision of June 13 2002 on the European arrest warrant and the surrender procedures between Member States. *Statements: OJ L* 190, 18.7.2002. pp. 0001-0020.

26 Presidency Conclusions: Brussels, 4/5 November 2004, 14292/1/04 REV 1, p. 12.

27 *E.g.* World Trade Centre Bombing, Landmarks Plot, Manila Airlines Plot, Khobar Towers Bombing, East Africa Embassy Bombings, Millennium Plot, and U.S.S. Cole Bombing.

28 J.A.E. Vervaele, ‘The anti-terrorist legislation in the US; inter arma silent leges?’, 2005 *European Journal of Crime, Criminal Law and Criminal Justice*, no. 2, pp. 201-254.

29 Court rules on www.uscourts.gov/rules/FISC_Final_Rules_Feb_2006.pdf

30 FISA intelligence may be used in criminal proceedings after authorisation by the AG. Memorandum 2005 of Attorney General John Ashcroft has now been approved by the FISA Review Court. www.whitehouse.gov/news/releases/2004/08/20040827-4.html. Final report of the National Commission on Terrorist Attacks upon the United States (‘9/11 Commission’).

31 Proclamation no. 7463, 66 Fed. Reg. 48,199 (14 September 2001).

32 P.T. Jaeger, ‘The impact of the USA Patriot Act on collection and analysis of personal information under the Foreign Intelligence Surveillance Act’, 2003 *Government Information Quarterly*, no. 20, p. 297.

33 By an amendment to the Federal Rules of Criminal Procedure, Section 203 USA Patriot Act.

34 ‘Secret evidence in the War on Terror’, 2005 *Harvard Law Review*, no. 6, pp. 1962-1984. Care is required. T.L. Conn, ‘The use of secret evidence by governmental lawyers: balancing defendants’ rights with national security concerns’, 2004-2005 *Cleveland State Law Review*, vol. 52, p. 571.

35 Rule 15 (b)) 50 U.S.C. 1801 *et seq.*

36 Section 215. In addition, under specific circumstances the President may authorize surveillance without a court order. *In re Sealed Case*, 02-001, a 7-0 decision.

principle was considerably reinforced.³⁷ The case of Moussaoui³⁸ is a good example, although his guilty plea prevents us from ever knowing the outcome of this case had there been a verdict, in particular in the light of the Supreme Court's³⁹ rejection of the direct questioning of witnesses. Nonetheless, specific investigative powers *require* judicial authorization, and classified evidence is generally *scrutinized by judges*.⁴⁰

In conclusion, both these examples raise questions concerning the legal construction elaborated below.

3. Intelligence in Dutch criminal procedure

The Dutch Act was drafted so as to widen the possible use in criminal procedure of intelligence gathered by the two intelligence services.⁴¹ Its aim is twofold: (i) to enable the proactive use of intelligence and (ii) to enable the use of intelligence as *evidence* contained in the *Ambtsbericht* which is examined by means of the shielded witness regime. Generally speaking, the use of intelligence as evidence cannot be considered to be a recent development in the Netherlands. *Criminal intelligence* provided by the police and its intelligence units may in principle apply measures that are as intrusive as those used by the intelligence services. These have been used for at least ten years already.⁴² Moreover, intelligence supplied by the services was already used in the investigations into the alleged terrorist group, the *Hofstadgroep*, which was widely held responsible for the murder of Theo van Gogh, a well-known Dutch film maker and columnist.⁴³ Nevertheless, the legislature found it necessary to intervene by means of the '*Act on shielded witnesses*'.

This Chapter outlines the Act's contemporary legal context and gives a detailed description of its provisions. Next, criticism and an alternative are provided.

3.1. Legal context of 'Act on shielded witnesses'

As the Dutch intelligence apparatus and criminal investigators are traditionally kept strictly separate⁴⁴ to demonstrate adherence to the principle of the rule of law⁴⁵ it is possible for parallel investigations to occur; the AIVD and MIVD may *not* however participate and/or cooperate in law enforcement activities – unlike in the US. However, the Dutch police work proactively and intelligence is used in the criminal procedure.

37 Amendment VI.

38 *USA v. Zacarias Moussaoui*, No. 03-4162. Dissenting: Judge Widener, Judge Wilkinson, joined by Judge Niemeyer, and Judge Luttig.

39 www.news.findlaw.com/hdocs/docs/moussaoui/usmouss21005cert.pdf

40 This is further complicated by the fact that most suspects of terrorism offences have been removed from the ordinary criminal law proceedings and transferred to proceedings before military commissions. However, it is questionable whether these will have jurisdiction (548 US *Hamdan v. Rumsfeld* (2006)).

41 Recently the Dutch anti-terrorism agency (*Nationaal Coördinator Terrorismedbestrijding* (NCTb)) was criticized for acting like a third intelligence service. 'Veiligheidsdiensten verstoren elkaar', *NRC Handelsblad*, 26 July 2006.

42 M. Stratum, 'Criminele inlichtingen en het recht op kennisneming', 2001 *Delikt en Delinkwent*, pp. 174-191.

43 While some argue that the Dutch experience cannot be compared to recent international terrorist attacks (on New York, London and Madrid), because it concerned a targeted and personally directed murder rather than indiscriminate killing, others consider it to be the first example of *Jihadist* terrorism. A. Olgun, 'Dit proces is een klassieke hekzenjacht', *NRC Handelsblad*, 7 January 2006, p. 35, R. Hollak and J. Mat, 'Trouble in Paradise', *Financial Times*, 4 December 2004, 'Flammen in Multikulti-Land', *Hamburger Abendblatt*, 11 November 2004, 'Haines raciales en terre de tolérances', *Le Temps*, 22 March 2005.

44 Intelligence services used to provide information for governments' policy drafting only. G. Treverton, *Reshaping national intelligence for an age of information*, Cambridge 2003, G.G. de Valk, *Dutch intelligence*, University of Groningen 2005, and M.M. Lowenthal, *Intelligence: From Secrets to Policy* (Second Edition), CQ Press, Washington D.C. 2003.

45 C. Fijnaut, 'Inlichtingendiensten in Europa en Amerika; de heroriëntatie sinds de val van de Muur en 11 september 2000', in: *Inlichtingendiensten, Justitiële Verkenningen*, WODC, 3, 2004.

3.1.1. *The Dutch intelligence services AIVD and MIVD*

By law, the intelligence services are *not* allowed to investigate criminal offences.⁴⁶ This is especially reasonable because they may make use of highly intrusive investigating powers *without* prior judicial authorization.⁴⁷ For example, they may use special powers such as surveillance, the deployment of agents and infiltrators, searches of closed spaces and objects, opening of letters, wire-tapping, and the recording of non-cable communication. Although the consent of the Minister of the Interior and Kingdom Affairs is required for more intrusive measures, the internal consent of the Head of the AIVD or – when mandated – of others, is generally sufficient to deploy these measures.⁴⁸

Supervision of the intelligence services, both internally and externally, is loose. The Minister and the AIVD do inform the Commission for Intelligence and Security Services of the Second Chamber extensively, but this Commission generally has insufficient capacity to check the AIVD's use of its powers.⁴⁹ It only examines a small number of cases. Other organs can only examine the AIVD's functioning *ex post*. For instance, the Dutch Chamber of Audit, which has general competence to fully monitor the organization and the functioning of the AIVD, may only do so when secret expenses were made.

3.1.2. *Dutch proactive intrusive police measures and criminal intelligence*

It is especially surprising that the Act aims to increase the use of intelligence in the criminal procedure, because (i) the Dutch police may already use intrusive measures proactively in its criminal investigation, and (ii) *criminal intelligence* is already used in the procedure, even as *evidence*.

3.1.2.1. *Intrusive criminal investigative measures*

The police may use intrusive criminal investigative measures, generally after *mandatory* judicial examination,⁵⁰ and they can use these proactively in '*exploratory investigations*'. Particularly invasive powers, such as telephone tapping and bugging, *require* judicial authorization from the examining magistrate. However, the police are allowed to use these when examining *the commissioning or planning* of serious crimes by certain groups within society.

The procedures for judicial authorization have now been codified. This happened after an inquiry into the disbanding of a special police force responsible for covert drugs operations. The 2000 Special Investigative Police Powers Act⁵¹ which was enacted upon the recommendation of the inquiry commission set up to investigate the drugs operations (also known as the 'Van Traa' Commission) aims to prevent abuses in the future by codifying judicial authorization. Systematic observation, requiring telecommunications data; intercepting telecommunications (wiretapping); intercepting confidential communications (bugging), and entering an enclosed space have now all been laid down. The same is true for the 'undercover powers' of infiltration, buying illegal goods or substances, and providing illegal services. The rules for the systematic gathering of intelligence, the buying of illegal goods or substances, and the provision of illegal services by

46 Article 9 Wiv.

47 Articles 19 to 33 Wiv considerably extended the AIVD's competences.

48 Article 19 in conjunction with Article 1 (c) Wiv.

49 *AIVD in verandering 2004, Commissie Bestuurlijke Evaluatie*, Ministerie van Justitie, The Hague 2004.

50 Tapping is only allowed when authorized by the examining magistrate and infiltration requires the approval of a central examination commission. Permission from the Council of Procurators General and the Minister of Justice makes it possible when the investigation so requires to postpone the mandatory confiscation of illegal goods or substances constituting risks to public health or public safety.

51 The Special Investigative Police Powers Act (*Wet bijzondere opsporingsbevoegdheden* (wet BOB)), 1 February 2000.

means of civilians (informers), have also been included in the Act,⁵² as have the rules on civilian infiltration.⁵³

Another judicial check concerning the use of these powers has been built into the examination at trial. The report of deployed powers and the *modus operandi* must be incorporated into the *trial dossier* which is subsequently examined by the court. In principle, therefore, all special investigative measures *must* be accounted for in court.

3.1.2.2. Criminal intelligence used to tip off and prosecute

The special units of the Dutch police (*criminele inlichtingen eenheden*, CIEs) may gather *criminal intelligence*.⁵⁴ They provide information concerning serious and organized crime. All separate regional police departments have CIEs, but similar units also exist at the national level, for instance, the National Criminal Investigation Department (*Dienst Nationale Recherche*), the military police (*Koninklijke Marechaussee*), the Governmental Investigation Department (*Rijksrecherche*), and the Revenue Department (*FIOD-ECD*).

The CIE report may be used as a tip-off for criminal investigation, and may give rise to a *reasonable suspicion* necessary to start a prosecution⁵⁵ when indicating a particular person and when substantiated by facts and circumstances. The threatened witness regime that makes it possible for witnesses to be heard anonymously or through other less far-reaching protective measures is also available to informers of the CIE. In the Netherlands, a victims or witnesses protection programme is in place to protect vulnerable and intimidated witnesses, but it is not used as often as the procedural safeguards.⁵⁶ Anonymity has already been allowed on several occasions and found lawful, even for undercover police officers.⁵⁷ However, the CIE report has *no* probative value and may *not* be adduced as evidence at trial.⁵⁸

3.1.2.3. Criminal intelligence as evidence

Although the CIE report may *not* be used as evidence, it has become customary that the Head of the regional CIE testifies. The Head is directly responsible for the police officer in question, and may comment on the CIE report. His testimony serves as *evidence*. He may *not* answer any questions that might reveal the source or its identity, even where informers are concerned.⁵⁹ The Court may require the defence not to ask any questions that might reasonably endanger proper investigations.⁶⁰ Nevertheless, when asked to disclose the methods of the CIE and/or the identity of informers, the prosecutor (who must act like a magistrate by not taking sides and is specifi-

52 The use of civilians in infiltration operations is presumably prohibited, although the Act does not expressly state this. On www.wodc.nl/onderzoeken

53 Dutch legal terminology distinguishes between civilian informers and civilian infiltrators (infiltrating being a more far-reaching activity than informing), rather than using one single category of participating informers.

54 The strict CIE rules are set out in *Wet Politierregisters* and *CIE-regeling* (*Staatscourant* 12 October 2000, no. 198, p. 142).

55 Article 27 CPC.

56 The protection of threatened witnesses was first addressed by the courts (HR 2 July 1990, *NJ* 1991, 130), and subsequently laid down and extended in the Witness Protection Act (*Wet getuigenbescherming*, Wet van 11 November 1993, *Staatsblad* 603) after the ECHR judgment in *Kostovski v. the Netherlands*, 20 November 1989, ECHR 20. Also A. Beijer, *Bedreigde getuigen in het strafproces; Een rechtsvergelijkende studie naar de bescherming van getuigen in het Nederlandse, Duitse en Amerikaanse recht* (diss. Utrecht), Deventer 1997.

57 HR 8 September 1998, *NJ* 1998, 879, HR 2 March 1982, *NJ* 1982, 460, HR 5 October 1982, *NJ* 1983, 297, HR 5 December 2000, *NJ* 2001, 206 (*Orion*), Hof Amsterdam 16 February 2001, *Nieuwsbrief strafrecht* 2001, 079 (*Bayrakdar*), Hof Amsterdam 31 January 2002, *Nieuwsbrief strafrecht* 2002, 81. In the case of informers: HR 19 January 1999, *NJ* 1999, 253, HR 25 June 2002, *NJ* 2002, 518 (*Ros*), HR 16 September 2003, *Nieuwsbrief strafrecht* 2003, 358, Hof Den Bosch 14 June 2000, *Nieuwsbrief strafrecht* 2001, 036, Hof Arnhem 25 September 2002, *Nieuwsbrief strafrecht* 2002, 290 and Hof Leeuwarden 4 February 2003, *Nieuwsbrief strafrecht* 2003, 119 (*Ros*).

58 At www.om.nl/bob/docs/35.htm

59 HR 5 October 1982, *NJ* 1983, 297 and HR 2 March 1982, *NJ* 1982, 460.

60 Article 293 CPC.

cally trained to be a neutral) when he considers disclosure impossible can *only* declare himself⁶¹ barred (*niet-ontvankelijk*) and thereby end the prosecution; he cannot circumvent this.

3.1.2.4. Information sharing between the AIVD/MIVD and the police/prosecution

Information sharing is a one-way street. The AIVD *may* provide information to the police through an *Ambtsbericht* so as to provide a lead in a case, but is *not* obliged to inform the police and the prosecution both. Vice versa, the police and the prosecution have a *duty* to inform the services where relevant,⁶² even though they themselves cannot even simply request information from the services.⁶³ Although police officers perform tasks for the AIVD,⁶⁴ the police are not allowed to use their criminal investigative powers in their performance, or to share information with the CIE database. This leads to the use of intelligence in the criminal procedure as discussed below.

3.1.3. Current use of intelligence as evidence

The courts used to be extremely cautious in regarding AIVD intelligence as legal *evidence* so as not to cause *unfair trials*.⁶⁵ On 25 April 2003, the Hague Court of Appeal stated, that ‘If the trial is to be fair, (...) the court (...) at some point will have to consider carefully to what extent this information may be regarded as legal evidence’.⁶⁶ In a comparable case of 5 June 2003, the Rotterdam District Court even considered that ‘the court cannot find any support in the law for a different way of reasoning, which would stipulate that as the seriousness of the offence of which the suspect has been accused increases, the evidence collected for the purpose of proving the offence needs to meet fewer requirements’. In this latter case the evidence in question was excluded and the suspected terrorist was acquitted. The Hague Court of Appeal then argued that the principle of good faith⁶⁷ applied – unless in the case of manifest doubt (concerning (gross) violations of human rights) – and that courts therefore should *not* perform any in-depth examinations of intelligence.

Nevertheless, the Supreme Court has recently changed course in the application of the use-of-intelligence-as-evidence paradigm. It decided that intelligence may serve as *evidence*⁶⁸ provided that there is *no* rule prohibiting such use of intelligence. This means that the Supreme Court has reversed the important legal principle that in order to use items or information as *evidence*, a legal basis has to *exist*, considering that it now holds that no legal basis may exist prohibiting such use. Instead of identifying a legal rule that enables the use of intelligence as *evidence*, it only refers to a duty of the courts to investigate, on a case-to-case basis, whether intelligence may be adduced as *evidence*, notwithstanding that this investigation may only be limited, and that it must fulfil the fair trial requirements ex Article 6 ECHR. Specifically, the defence must have had an

61 Where the text refers to the male gender, the female gender is also implied, where appropriate.

62 Article 17 Wiv and Article 15(2) of the Police Files Act (*Wet op de politieregisters*).

63 J.A.E. Vervaele, ‘Terrorism and information sharing between the intelligence and law enforcement communities in the US and the Netherlands: emergency criminal law?’, 2005 *Utrecht Law Review*, no. 1, pp. 1-27.

64 Article 60 in conjunction with 9 Wiv.

65 G.J.M. Corstens, *Het Nederlandse Strafproces*, Arnhem 2005, pp. 316, 662, 668-669.

66 *LJN* no. AF7798, case no. 2200076103 under 2.6.

67 The legislator adopted this principle as formulated by the Hague Court of Appeal’s as the basis for the legislative proposal. It also underlies the European arrest warrant and extradition procedures, and exempts the courts from thoroughly testing the gathering of intelligence by the services.

68 *LJN-AV4122*, *LJN-AV4144* and *LJN-AV4149*. Although in an earlier decision on 18 December 2002 it was concluded that intelligence gathered by the former intelligence service BVD (now: AIVD) could *not* be used as the exclusive basis for determining reasonable suspicion and that the legal basis for prosecution as a suspect was therefore lacking (*LJN* no. AF2141, case no. 10/150080/0), courts later decided otherwise in comparable cases (*LJN* no. AF2579, case no. 10/000109-02. and *LJN* no. AF3039, case no. 1000013402.). Also established in *LJN* no. AP2058, case no. 2200071403.

opportunity to adequately challenge the possible unlawfulness or unreliability of the intelligence. The Supreme Court did *not*, however, confirm the principle of good faith. This is reasonable, because the information in question is not gathered under the rules for criminal investigation and even more so because the source is generally unavailable, and supervision of Dutch intelligence services is not at all tight.

Specific attention was given to the nature of the intelligence. In the three cases described, data resulting from telephone tapping were used as *evidence*. As the data were also presented to the defence, it was considered unnecessary to provide a legal basis for these taps (*bijzondere lasten*), and for other tapped telephone conversations and the personal details of the owners of the numbers telephoned. Finally, it was considered that the hearing of witnesses, namely the Head of the AIVD and the National Public Prosecutor for Terrorism, compensated for any infractions of defence rights. The Court might here already have anticipated the prospective legal rules, *i.e.* the ‘*Act on shielded witnesses*’ which is discussed below.⁶⁹

3.1.4. Act on shielded witnesses

The Act is *not* restricted to use in terrorism cases, but may be used in *all* criminal cases. Although the construction has given rise to much debate,⁷⁰ the Senate has nevertheless recently adopted the Act.

Its character is threefold: (1) in order to protect national security, the examining magistrate may legitimately withhold certain data from the public domain.⁷¹ This means that this specific information is *not* disclosed to participants in the criminal process or to the public. Not even the trial judges receive all the information available, because they are only presented with the written transcript of the intelligence officer’s testimony, because (2) the intelligence officer may be heard as a shielded witness by the examining magistrate in the specialized court in Rotterdam,⁷² as a rule *in camera* and *ex parte*. This may even result in anonymous testimony. No recourse is open to the decision to grant anonymity. Parties cannot appeal to the Court of Appeal or to the Supreme Court.⁷³ During the hearing, the officer may elaborate on the contents of the *Ambtsbericht*. The examining magistrate acts as a single judge, but is restricted in his examination because of the officer’s duty of secrecy. Moreover, the officer in question has to consent⁷⁴ to the fact that a written transcript of his/ testimony is provided to both the defence and the prosecution before it may be adduced as *evidence*.⁷⁵ As written hearsay evidence – known as *de auditu* evidence – is allowed in the Netherlands, the transcript is permitted as *evidence*, but *only* if the witness was heard according to the procedure and the indicted fact is a serious offence. Lastly, (3) an amendment to the law of evidence has made it possible for every document which is produced by public authorities and the civil service – provided that it concerns topics that fall within the scope of their duties – to be adduced as *evidence*, even if another public authority than the intelligence service or a foreign authority which is not an intelligence service drafted the

69 Para. 4.2. of LJN-AV4149.

70 *Kamerstukken II* 2003–2004, 29 743, no. 2, *Kamerstukken II* 2004–2005, 29 743, the Heads of the public prosecution office at www.om.nl/files, T. Prakken, ‘Naar een cyclopisch (straf)recht’, 2004 *Nederlands Juristenblad*, no. 45, Y. Buruma and E.R. Muller, ‘Wet Terroristische Misdrijven in perspectief’, 2003 *Nederlands Juristenblad*, no. 41, Y. Buruma, ‘De bedreigde getuige ter terechtzitting’, 1999 *Ars Aequi*, no. 9, pp. 662–667. www.nctb.nl/terrorismebestrijding/wet_en_regelgeving/nationaal/wetsvoorstel_afgeschermd_getuigen, and www.hom.nl/publicaties/rechtsbescherming_op_de_helling.pdf

71 Amendment to Article 187d CPC.

72 Articles 226g–226m CPC, 178a *Kamerstukken I* 2004–2005, 29 743, A1.

73 Article 226b CPC.

74 Article 178a (3) CPC.

75 Article 226a–f CPC.

document in question. Thus, the document can constitute legal proof, even though it is *not* intended to be used as evidence of any fact.⁷⁶

3.2. Three restrictions of fundamental criminal procedural rights

Three restrictions of fundamental criminal procedural rights follow from legal doctrine. These are discussed separately below.

3.2.1. Restriction of internal publicity

The new legal construction conflicts with the principle of *internal publicity*. This principle implies full disclosure of the file before and at trial, given that all relevant information gathered during the investigation must be disclosed to all participants. However, the prosecution, the defence, the suspect/accused and the trial judges will *not* have access to *all* evidence, as they only receive a transcript.⁷⁷ This is complicated even further by the fact that the submission of the transcript depends on the prior consent of the officer heard. This conflicts with the rule that decisions to include evidence in the file are usually made by the examining magistrate, not by a non-judicial entity. However, equality of arms in the application of this principle is guaranteed, because all parties are presented with the exact same evidence at trial. Nonetheless, *internal publicity* is not an absolute principle, and may legitimately be restricted where strictly necessary and when national security, protection of the witness or of his/her family, or future methods of investigation so require. The fight against terrorism may certainly be considered a reason for such a restriction. However, lack of disclosure may also impact defence rights and may not unduly do so, as discussed below.⁷⁸

3.2.2. Restriction of defence rights

The regime diverges from five of the six components of the ultimate fair testimony collection, namely ‘the confrontational paradigm’.⁷⁹ This paradigm encompasses testimony collected when (1) a witness, whose real identity is known to the accused, gives evidence (2) in open court, (3) while facing the trier of fact – in this construction particularly also the judges who determine guilt or innocence – and (4) while under an obligation to tell the truth, (5) with the defence having the possibility to challenge any statements made (6) by means of contemporaneous adverse-questioning. Out of these six elements, in general, only the obligation to tell the truth appears not to have been restricted.⁸⁰ This impacts both defence rights and imposes restrictions on the court’s determination of the probative value of the evidence (3.2.3).

Defence rights are amongst others the actual opportunity to challenge the case, the equality of arms, the right to examine or have witnesses examined – also depending on access to the file – and an adversarial trial. Four elements of the Act restrict these rights: (a) the officer has to provide evidence while under a duty of secrecy,⁸¹ (b) the examining magistrate can *de facto* only apply a test of reasonableness as to the witness’s credibility, (c) the defence will not be able to properly confront the State’s witness and raise doubts concerning his credibility, and (d) the

76 Article 344 (1)(3) CPC.

77 T. Prakken, ‘Interne Openbaarheid in het Strafproces: een bedreigd goed’, 1995 *Nederlands Juristenblad*, no. 40, pp. 1451-1458.

78 The withholding of information by the prosecution from the defence is contrary to the UN Guidelines on the Role of Prosecutors and the UN Basic Principles on the Role of Lawyers.

79 Maffei, *supra* note 19, pp. 3-95.

80 Although possible perjury might have other legal implications, because of the officer’s duty of secrecy; an interesting topic for further research.

81 Article 6 (AIVD) and 7 (MIVD) Wiv.

defence will not be able to test the factual accuracy of the testimony, due to the general lack of confrontation.

As the defence remains unaware of the identity of the adverse witness, and cannot observe his demeanour or perform oral adverse-questioning in the presence of the accused, the defence is restricted in its efforts to challenge the case. The examining magistrate, who generally has to act as if he were acting for both parties, could, in principle, compensate for this. He must provide a counterbalance to these restrictions, now that the parties will generally be absent during the pre-trial hearing, and that answers to questions submitted by the defence in writing beforehand may be restricted, and because the defence cannot confront the witness or alter the line of questioning during examination. However, the examining magistrate cannot fully examine the witness either, given that the officer's duty of secrecy precludes him from answering any questions besides questions concerning (i) being an intelligence officer, and (ii) his willingness to testify.

However, defence rights may be legitimately restricted when necessary because of the above-mentioned reasons. The subsequent adversarial trial – adversarial, because all parties will generally be present – and the active examination by the judicial authorities of the information (in the case of the examining magistrate) or evidence (in the case of the trial court) may provide a general counterbalance to these restrictions of fundamental procedural rights, as will be discussed below.

3.2.3. Restriction of the judge's determination of the probative value of the evidence

The extent to which judges can examine the evidence and determine its probative value is crucial in a regime that imposes such restrictions as mentioned above. However, the examining magistrate is unable properly to examine the evidence given by the shielded intelligence witness, as he lacks knowledge concerning the accused like his defence counsel – who will generally be absent – and the officer is testifying under a duty of secrecy. This is complicated further by the *in camera* nature of the hearing, which prohibits 'social control' of the trial.

Moreover, the court is unable to fully examine the reliability of the witness's testimony and the *Ambtsbericht* and cannot fully examine the witness's credibility either. It is not competent to overrule the decision of the examining magistrate to hear the officer as a shielded witness – not even when he is heard anonymously. Questioning of the witness may not be repeated by the court. In addition, although the examining magistrate *must* provide express reasoning for his decision to grant shielded witness status, this reasoning cannot concern the information relied upon as this has to be kept out of the public domain. Here again, therefore, the court is unable to investigate.

As a preliminary conclusion, therefore, it can be said that the '*Act on shielded witnesses*' may in itself lead to *unfair trials*, because the balancing exercise is heavily burdened by the restriction of the principle of *internal publicity*, and the significant derogations from the principles on the collection of evidence included in the ultimately fair 'confrontational paradigm'.

3.3. Criticism of and an alternative for the '*Act on shielded witnesses*'

It remains to be seen whether courts will ever convict on the basis of the transcript and the *Ambtsbericht* as *evidence*. Courts have a two-fold task. Whereas they have to assess the risk that the accused may learn of highly sensitive and actionable information that he or his defence lawyer may then easily disseminate to others, the court is also responsible for the protection of the criminal justice system, also in this specific case. The court may reasonably exclude the evidence because of the above-mentioned possible violations of fundamental fair trial rights. Such a decision was taken in a threatened witnesses case where the court found that the rights

of the defence had been unduly restricted.⁸² It is at least presumed that courts will not convict an accused solely or to a decisive extent on the basis of evidence collected as described.⁸³

The use of intelligence as *evidence* is remarkable compared to the use that may be made of *criminal intelligence*. There are good reasons why the prosecution may only use criminal intelligence as information that may lead to criminal investigations or as *evidence* when accounted for by the Head of the CIE. *Criminal intelligence* may thus give rise to *reasonable suspicion* even where its reliability has not been assessed, but it may *not* be used as *evidence* when unaccounted for by a witness, possibly the informer or the Head. The Supreme Court has found this double check a necessary compensatory measure. It is incomprehensible that the procedure for CIE Heads has not been reproduced in the Act. Where necessary, questions that would disclose the identity or reveal the method deployed could be restricted in the same way as has been done for criminal intelligence. Moreover, defence counsel could be allowed to be present at the hearing, if only to represent the client, perhaps without full disclosure of all information to the suspect. This would at least provide for a means to confront the State's witness. As the original data on which the *Ambtsbericht* is based are mostly unavailable given the fact that the source cannot be identified and there is hardly any supervision of the Dutch intelligence services, in addition to the fact that intelligence – including foreign intelligence – may be gathered in breach of valued human rights, the question arises whether the *trial court* should not at least be able to examine the intelligence in-depth.

The experience with hearing anonymous witnesses⁸⁴ and the abuse of powers that came to light in the Netherlands in the 1990s clearly indicate that a procedure under which intelligence may serve as *evidence* must be as thorough and as open as possible. It must balance the necessary protective measures available for the intelligence officer, national security and future investigation on the one hand with fundamental criminal procedural rights on the other, which may never be unduly violated.

4. Intelligence in English criminal procedure

Trials that have resulted from terrorist acts in the UK, such as those involving the Irish Republican Army (IRA)⁸⁵ and the Lockerbie case,⁸⁶ provide a useful insight into the functioning of the criminal process for trying (suspected) terrorists. As the new anti-terrorism legislation in the UK differs substantially from the previous anti-terrorism legislation,⁸⁷ both history and the current laws are able to provide a framework for critical examination of the '*Act on shielded witnesses*'.

82 HR 20 April 1999, *NJ* 1999, 677.

83 See also Chapter 5.

84 These hearings were restructured following amongst others *Kostovski* as will be further elaborated in Chapter 5.

85 'Regional Notations: Northern Ireland', 1996 Peacekeeping & International Relations, no. 2, pp. 1187-3485 and B. Swier, 'Nieuwe 'miscarriages of justice' in Engeland door beperking interne openbaarheid?', 1999 *Delikt en Delinkwent*, no. 7, pp. 627-644.

86 The High Court of Justiciary (Proceedings in the Netherlands) (United Nations) Order 1998, Statutory Instrument 1998 No. 2251, Article 14(1), (2), available at www.hmso.gov.uk. R. Black, 'Lockerbie: a satisfactory process but a flawed result', 2004 *Case Western Reserve Journal of International Law*, no. 2-3, pp. 443-451, F. Davidson, 'Lockerbie and Scots Law', 2001 *Leiden Journal of International Law*, no. 14, pp. 171-197, J.B. Knowles, 'The Lockerbie Judgments: A Short Analysis', 2004 *Case Western Reserve Journal of International Law*, no. 2-3, pp. 473-485.

87 Walker, *supra* note 15, pp. 311-327 and J. Spencer, 'England', in: J. van der Hulst, *ECHR and Criminal Proceedings, the impact of the European Convention on Human Rights on Criminal Proceedings in the European Union*, Criminal Law Section, Erasmus University, Rotterdam 2001.

This Chapter examines whether written transcripts of pre-trial testimony given by intelligence officers, even anonymous testimony, may be adduced as *evidence* under current English criminal procedural laws.

This thought experiment will be carried out addressing all procedural and evidentiary issues.

4.1. Transcripts of witness testimony by intelligence officers during the ‘pre-trial phase’ may be adduced as evidence

Both the possibility of testimony given during the pre-trial hearing and the transcript therefore when adduced as *evidence* touch upon an important concept in English criminal law: the hearsay rule at trial. This rule prohibits evidence from being taken before the hearing in court. It was developed, amongst others, to protect the suspect from anonymous accusation by the State. Under this rule, witnesses are obliged to give oral testimony *in court*. The observance of the demeanour of the witness is considered crucial in order to establish the witness’s credibility, reliability of his testimony, and probative value of the evidence.

There are, however, some – although very few – exceptions to this rule. These concern evidence given by persons who will be unavailable to testify at trial and evidence by persons who do not wish to appear in court out of fear for their life or freedom. Such witnesses can be interviewed beforehand and their statements may replace in-court testimony. The interview is video-recorded and shown at trial as the witness’s evidence-in-chief. Witnesses may also be cross-examined before trial, with a video recording of the cross-examination shown at trial. In this way, even though the law allows for vulnerable or intimidated witnesses to be heard out of court, the right of the defence to cross-examine is still safeguarded under certain circumstances.⁸⁸

4.1.1. Pre-trial phase

The possibility of pre-trial hearing was extended considerably under recent anti-terror legislation. Under section 16 of the Terrorism Act 2006, preparatory hearings, which already existed under section 29 of the Criminal Prosecution and Investigation Act 1996 (CPIA),⁸⁹ became *mandatory* in terrorist cases in two particular circumstances. The first, set out in a new subsection 1B, is where at least one person in the case is charged with a terrorism offence. The second, set out in a new subsection 1C, is where at least one person involved in the case is charged with an offence that carries a penalty of a maximum of at least 10 years’ imprisonment and it appears to the judge that the conduct in respect of that offence has a terrorist connection.

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, as will be discussed below.

4.1.2. Cross-examination by Special Advocates

In England, Special Advocates handle 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. They

88 The Youth Justice and Criminal Evidence Act 1999 has amongst other things provided a statutory basis for the pre-trial hearing of vulnerable or intimidated witnesses.

89 Previously, preparatory hearings were used in cases of such complexity, or in trials likely to be of such length, that substantial benefits were likely to come from a hearing before the jury was sworn. A similar power to order preparatory hearings in cases of serious or complex fraud is set out in section 7 of the Criminal Justice Act 1987.

were first used before the Special Immigration Appeals Commission (SIAC)⁹⁰ in November 1996 in response to the ECtHR decision in *Chahal v. United Kingdom*, where the Court recommended this system, inspired by the system in place in Canada.⁹¹

The Special Advocates cross-examine the witnesses and generally assist the court to test the strength of the State's case. Both the appellant and his legal representatives are *absent* during trial. Next, the material is analyzed by *a court or equivalent body* at an *in camera* adversarial hearing. In preliminary or separate Public Interest Immunity hearings (discussed below), the Advocate may represent the defence on the issue, but may *not* disclose the nature of the information to the defendant or his ordinary legal representatives.

4.1.3. Non-disclosure and Public Interest Immunity

When intelligence officers operate as witnesses in these preparatory hearings, their testimony and the 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 (SHIC) 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 current law⁹² in 1996 and exists in the case-law⁹³ demands that the prosecution must in principle disclose *all* information to the defence, it will presumably make a Public Interest Immunity claim (PII) when it seeks to use intelligence in the criminal proceedings.

4.1.3.1. Disclosure rule and disclosure system

This disclosure rule was established to guarantee the equality of arms between the police/Crown Prosecution Service (CPS) and the defence/accused. The regime also serves to prevent miscarriages of justice.⁹⁴ In particular, 'evidence used to prove the Crown's case must be disclosed to the individual',⁹⁵ irrespective of whether this material substantiates the case of the prosecution or whether it is exculpatory 'unused' material.⁹⁶

The system consists of three stages:⁹⁷ primary prosecution disclosure, defence disclosure and secondary prosecution disclosure. All stages require the prosecution to disclose material which might reasonably be expected to assist the accused in his/ defence, even when it was not placed on the disclosure schedule. This also accounts for any material that could reasonably be considered capable of undermining the prosecution's case against the accused.

90 SIAC was created under the Special Immigration Appeals Commission Act 1997, which operation was amended by the Anti-terrorism, Crime and Security Act 2001 and more recently by the Prevention of Terrorism Act 2005 (part 2). It has jurisdiction over appeals under the Immigration Act, *i.e.* exclusion cases, deportation, and bail of persons in detention. It has a general duty to ensure that information is *not* disclosed contrary to a number of interests, *e.g.* national security, the international relations of the UK or the detection and prevention of crime (section 4, under (1), Statutory Instrument 2003 No. 1034, the SIAC (Procedure) Rules 2003).

91 *Chahal v. United Kingdom* (1996) 23 EHRR, paras. 130-131 and para. 141.

92 The Criminal Procedure and Investigations Act 1996 as amended (CPIA), the Code of Practice, issued under section 23 of the CPIA, Parts 25-28 of the Criminal Procedure Rules 2005 and the CPIA (Defence Disclosure Time Limits) Regulations 1997 issued under section 12 of the Act.

93 *R v. Ward* (1993) 1 WLR 619; *R v. Davis* (1993) 1 WLR 613; *R v. Keane* (1994) 2 All ER 478, *R v. DPP, ex parte Lee* (1999) 2 All ER 737. Additionally, the Attorney General has issued Guidelines on Disclosure, which build on the existing law. In addition, it has been specified in a CPS and Police Services manual.

94 In 1993 the Royal Commission on Criminal Justice (the Runciman Commission) recommended disclosure as a rule in order to prevent miscarriages of justice.

95 *R v. Chaplin*, (1995) 1 SCR 727.

96 Definition: 'material that may be relevant to the investigation that has been retained but does not form part of the case for the prosecution against the accused.' On www.cps.gov.uk/documents

97 Where the investigation began on or after 4 April 2005, the CPIA, as amended by the CJA 2003, applies.

Under current anti-terror legislation, after primary prosecution disclosure, where the prosecutor has provided initial disclosure, or purported to do so, the accused must serve a defence statement on the prosecutor and the court. Defence disclosure is supposed to assist in the management of the trial by helping to identify the issues in dispute.⁹⁸ It should also aid the prosecutor to identify any material that should be disclosed. Moreover, it prompts reasonable lines of enquiry whether incriminating or exculpatory. After defence disclosure, the prosecutor must consider whether to disclose material which might reasonably be expected to assist the accused in his defence as described in the defence statement.⁹⁹ The CPS may apply to the judge for a PII claim if disclosure would cause real damage to national security, for instance, by compromising the identity of an agent or a sensitive investigative technique. However, the CPS may *not* decide not to disclose *ex officio*, as will be discussed below.

4.1.3.2. Public Interest Immunity

PII is a principle of law which enables the courts to reconcile the conflict which sometimes arises between two public interests: the fair administration of justice with the fullest possible access to all relevant material for the courts and the need to maintain the confidentiality of information, disclosure of which would be damaging to the public interest. The law accepts that a court is no longer bound to accept an assertion of PII made by a Minister of the Crown, but may exercise independent judgment of what the public interest requires (*Conway v. Rimmer*).¹⁰⁰

In deciding whether a PII claim is appropriate, the Home Secretary carries out a careful balancing exercise between these competing public interests. To this end, he takes account of detailed advice from the prosecuting counsel on the relevance of the material to the issues in the case. If he considers that the balance comes down in favour of non-disclosure, a claim for PII will be made through a certificate signed by the Home Secretary.¹⁰¹ Even third parties may make a claim in some circumstances.¹⁰² Nevertheless, the *court* ultimately decides what material should be withheld on the basis of PII. The court may determine this in an *intra parte* hearing, an *ex parte* application with notice to the defence or an *ex parte* application without notice to the defence. The court has to balance several interests.¹⁰³ The court should take into account the degree to which the material assists the defence (*Ward*)¹⁰⁴ and the ‘substantial harm’ disclosure might cause. Thus, the Court has to balance the public interest of a fair trial and the public interest of national security (*Governor of Brixton Prison Ex parte Osman*).¹⁰⁵ The claim for disclosure will be strong when personal liberty is at issue. It will be especially strong when it might assist the defence and in particular, when it might prove the accused’s innocence or prevent a miscarriage of justice. Such material may relate solely to the witness’s credibility, as was held in *Higgins*¹⁰⁶ and *Brushett*.¹⁰⁷

98 The provisions of the defence disclosure duty were said to have been established to prevent an overload of defence statements that are ‘general and unspecified allegations and then seek far-reaching disclosure in the hope that material may turn up to make them good.’ *R v. H and C* (2004) UKHL 3). However, there is no empirical evidence to support such a deterrence or surplus.

99 Section 7 CPIA.

100 *Conway v. Rimmer* (1986) AC 910

101 An interesting example in the case *R v. M.D. Shayler*: ‘I am her Majesty’s Secretary of State for the Home Department. I make this Certificate to assist the Court in determining the prosecution’s application that any part of the trial process which touches, or purports to touch, whether directly or indirectly, upon any sensitive operation technique of the security and intelligence services, and in particular upon their sources of information, including the identity of any officer, contact or agent be held *in camera*.’

102 Section 16 CPIA.

103 In pre-April 1997 investigation, in which case the common law test of materiality under *R v. Keane* will apply *R v. Keane* (1994) 99 CAR 10).

104 *R v. Ward* (1993) 1 Weekly Law Reports 619, 647, *per* Glidewell L.J.

105 *Governor of Brixton Prison Ex p. Osman* [1991] 1 W.L.R. 281, 288.

106 *R v. Higgins* (1996) 1 F.L.R. 137.

107 *R v. Brushett* (2001) Crim. L.R. 471.

The House of Lords in *R v. H and C* put together a regime for this balancing exercise.¹⁰⁸ Amongst other things, the court must consider the material that the prosecution seeks to withhold in detail (*R v. K*),¹⁰⁹ it may consider full or partial disclosure, may allow a certain amount of editing and summarization – provided the documents are in each instance approved by the court – and may consider the appointment of a Special Advocate. Additionally, in its decision, the court has to make specific reference to the material that the prosecution seeks to withhold, the facts of the case, and the defence as disclosed. Moreover, this determination is an ongoing process, *i.e.* open to continuous review by the court as the trial unfolds.

Although, in criminal proceedings the presumption of disclosure is favoured, some material may *not* be disclosed, in particular ‘if such disclosure would be prejudicial to the State or public services’.¹¹⁰ The rules on non-disclosure have been extended considerably. Confidentiality might be a public interest in itself for informers (*R v. Turner*).¹¹¹ Immunity now covers such material as social services files, hospital records (including tapes of interviews with patients), and the pro-forma initial report of an investigation sent by the police to the CPS.

In principle, the content and even existence of intelligence will *not* be disclosed to the defence. Therefore, presumably, counsel for the defence will never be able to seek further details or appeal against non-disclosure under the procedure, and will generally not be aware of the existence of the information. In addition, the intelligence officers’ pre-trial testimony will presumably be withheld from the defence by means of a PII claim. The court thus has to consider whether to disclose the information or not, taking into consideration the inequality of arms and the possible resulting inadequate means for defence. Nevertheless, it is up to the courts – not to the intelligence services or the government – to ultimately decide what must be disclosed.

4.1.4. Secret intelligence and mandatory judicial examination

Reasoning by analogy, where judicial hearings take place *ex parte* and *in camera*, judicial examination is presumably mandatory in England. This has been held on appeal from decisions to implement control orders¹¹² (both higher level, *e.g.* house arrest and lower level, *e.g.* electronic tagging) issued by the Home Secretary on the basis of secret intelligence advice. The Joint Committee stated that ‘(...) we find it difficult to see how a procedure in which a person can be deprived of his liberty without having any opportunity to rebut the basis of the allegations against them, can be said to be compatible with the right to a fair trial in Article 6(1), the equality of arms inherent in that guarantee, the right of access to a court to contest the lawfulness of their detention in Article 5(4), the presumption of innocence in Article 6(2), the right to examine witnesses in Article 6(3)’.¹¹³ Moreover, in the first – and to date, last – case concerning the imposition of a control order on a British citizen referred to as *M.B.*, a High Court judge ruled that it was incompatible with the ECHR.¹¹⁴

108 *R v. H and C* (2004) UKHL 3

109 *R v. K* (DT) 97 Cr.App.R 342

110 Common law rule which was later laid down in section 21(2) CPIA 1996.

111 *R v. Turner* (1995) 2 Cr.App. R 94

112 2005 Prevention of Terrorism Act.

113 Para. 76, in Lord Thomas of Gresford 15 Feb 2006: Column 1218 -1222, Lords Hansard, on www.publications.parliament.uk. Nineteenth report.

114 *R v. M.B.*, Judgment of 12 April 2006.

4.1.5. Exclusionary rules

The above-mentioned judicial examination can also consist of exclusionary decisions on first-hand written hearsay evidence and the court's discretion to exclude evidence. Both are considered separately below.

4.1.5.1. First hand written hearsay evidence

Pre-trial witness testimony by intelligence officers will presumably constitute first-hand written hearsay evidence. Such evidence should in principle be excluded, because '(...) the main, if not the sole, reason why hearsay is inferior to non-hearsay is that it is not tested by cross-examination'.¹¹⁵ This rule against hearsay, which was retained in the Criminal Justice Act 2003 (CJA), may be departed from in exceptional cases.¹¹⁶ In general, exceptions to the prohibition of first-hand hearsay apply to vulnerable and intimidated witnesses.¹¹⁷ This is also true for first-hand written hearsay where the declarant is unavailable.¹¹⁸ One example is a case where the accused was considered to have deprived himself of the right to cross-examine, because he intimidated the two key witnesses *R v. Sellick and Sellick*.¹¹⁹ The Court of Appeal found circumstances counterbalancing the accused's lack of opportunity at any stage to question a witness whose testimony later proved the sole decisive evidence: (i) it decided that the evidence of the witnesses was credible, (ii) it concluded that the credibility of the witnesses was challenged, (iii) the trial judge gave clear indications as regards the witness's credibility and the shortcomings of hearsay evidence compared to oral evidence, (iv) it decided that regard should be had to the fact that the accused was to a large extent the author of his own inability to cross-examine witnesses against him, (v) regard should also be had to the rights of victims and their families, and lastly (v), if there were a rule that said that an accused could not be considered to be enjoying a fair trial because the main evidence against him constituted hearsay evidence, this would lead to greater intimidation of witnesses. However, hearsay evidence from unidentified persons was also acknowledged. In the civil case *Solon South West Housing Association v. James*¹²⁰ it was decided that although 'hearsay evidence by itself would best be characterised as 'poor quality' (...) it is acceptable as part of a claimant's case which involved other original evidence, consistent with the hearsay accounts'.

Interpretation of the hearsay rule and exceptions to the rule indicate that the written transcripts of the pre-trial witness testimony of intelligence officers may presumably formally *not* be used as *evidence*. However, the court could accept such transcripts in the case of vulnerable or intimidated witnesses. Furthermore, the civil case cited above when read in conjunction with *R v. Teper*¹²¹ opens up the possibility that hearsay evidence by an intelligence officer that thereafter goes 'missing' is delivered by the police officer in court. Nevertheless, the role of the court remains important. 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.¹²² This means that transcripts will *not* be admitted

115 Law Commission No. 245, para. 3.37, in: B. Fitzpatrick, *Tinkering or transformation? Proposals and principles in the White Paper, 'Justice for All'*. On webjcli.ncl.ac.uk/2002/issue5

116 Section 114 CJA.

117 By Section 23 (1) of the Criminal Justice Act 1988. Under the law previously in force, the court had to exercise judicial discretion based on the interest of justice under either section 25 or 26 CJA 1988 before admitting hearsay evidence.

118 Section 116 CJA.

119 *R v. Sellick and Sellick* (2005) EWCA Crim 651.

120 *Solon South West Housing Association v. James* (2005) HLR 24.

121 *R v. Teper* [1952] 2 All ER 447.

122 Section 26 CJA.

unless it is in the interests of justice to admit them. Additionally, the judge will presumably have to examine the reliability of the evidence, the credibility of the witness and the probative value of the evidence.

4.1.5.2. Exclusionary discretion

The pre-trial testimony may, in principle, be admitted in court when it is found relevant. However, the court has the discretionary power to exclude evidence under common law and section 78 of the Police And Criminal Evidence (PACE) Act 1984. The court's discretion to exclude evidence on the basis of fairness is a long-standing judicial power that has its roots in common law. In part, it is still a common law discretion, but it has been more or less – but not altogether – overtaken by section 78 PACE. However, in theory, both section 78(1) of PACE and the common law discretion to exclude prosecution evidence will apply. In practice, however, these discretions will add nothing, as they are both concerned with fairness to the accused. It would be illogical for a judge to first decide that it was in the interests of justice to admit evidence but that in fact to do so would have such an adverse effect on the fairness of the proceedings that this same evidence ought to be excluded.

Thus, it is unlikely that a court which first admits the evidence, will later exclude it. Once, therefore, written transcripts of pre-trial testimony are admitted, they will generally *not* be excluded at a later stage.

4.1.6. Anonymous testimony at trial

As the pre-trial phase is an exception in England, the rules on anonymous evidence at trial are an important reference. This is a last resort in England. Recourse is more often had to extra-procedural protective measures, including the provision of a new identity. Nevertheless, in exceptional criminal cases, witnesses may be permitted to testify anonymously.¹²³ In *R v. Taylor* the Court of Appeal set out some guidelines to assist courts in cases where the name of a witness is withheld and in *R v. Cooper and Schaub* the Court of Appeal made a similar ruling with regard to the use of screens.¹²⁴

The CPS considers evidence given behind a screen acceptable where intelligence officers are concerned, and this might even include anonymity. Nevertheless, it is likely that this will only be allowed if the court is satisfied that testimony delivered in this way will not affect the witness's truthfulness in the case, and it will therefore presumably allow cross-examination to take place. Moreover, it has been accepted in England that even if the evidence from anonymous witnesses might have been decisive in the case, this does *not* render the conviction unsafe.¹²⁵

4.2. Conclusion: The shielded intelligence witness in English criminal procedure

England and Wales have *no* formal way in which the evidence of witnesses can be taken ahead of trial and at trial there is a general rule against hearsay evidence. Therefore, it may be concluded that in England and Wales, intelligence officers may in principle *not* give evidence in the pre-trial phase as suggested by the Dutch legislature, although examples such as the preparatory hearing do exist.

On the other hand, it should be noted that English criminal procedure also makes important exceptions to the general rule against hearsay evidence, which provide for admissibility of

123 *R (Al-Fawwaz) v. Governor of Brixton Prison* (2002) 1 AC 556, *R (D) v. Camberwell Green Youth Court* (2005) 1 WLR 393.

124 *R v. Taylor and Crabb* (1995) Crim.L.R. 253; *Cooper and Schaub* (1994) Crim.L.R. 531.

125 *R v. Davis* (Iain); *R v. Ellis and others* (2006) EWCA Crim 1155.

previous statements of witnesses who later prove unable to produce the evidence orally at trial. However, these measures are in place for vulnerable and intimidated witnesses and will therefore presumably *not* apply to intelligence officers. When it is allowed, such evidence will at least be open to cross-examination, possibly performed by a Special Advocate. This compensatory measure is important, because it could possibly prevent a situation as outlined in the introduction, where documentary evidence could easily have invalidated the accusation.

Moreover, the court has to decide upon the admissibility of evidence in jury trials. In short, the general rule is that all evidence that is relevant is admissible. However, this rule is subject to certain exceptions, known as exclusionary rules. The main exclusionary rules of importance for the issue under examination are those concerning hearsay statements, public interest and the discretion of the court to exclude evidence. As has been discussed above, (highly) sensitive evidence like intelligence may be excluded from the disclosure duty under Public Interest Immunity. This, however, is a decision to be taken by the court, not by the intelligence officer. However, in the light of the important impact of intelligence on the criminal investigation, the legitimate and generally accepted non-disclosure to the defence of evidence obtained through police methods and informers, and in particular the fact that the trial court can treat as evidence of a person's involvement with a terrorist organization the opinion of a police officer who can thereby ensure that his informer remains completely anonymous, it can be argued that intelligence might possibly be used as *evidence* in this way. An important element remains, however, that such testimony would be open to cross-examination, albeit in a more restricted way so as not to disclose the protected identity or method(s).

5. Compliance with Article 6 ECHR of the 'Act on shielded witnesses'

Although the fight against terrorism may require emergency criminal law,¹²⁶ States must also recognize every citizen's right to a fair trial. This means that the use of intelligence in the criminal process¹²⁷ should in any case *not* lead to any violations of this right. This implies that 'a person accused of terrorist activities has the right to a fair hearing, within a reasonable time, by an independent, impartial tribunal established by law'¹²⁸ and that the presumption of innocence must not only be applied by the courts, but by all public authorities.¹²⁹ Although restrictions of criminal procedural rights that are strictly necessary as required in a democratic society may be legitimate in the fight against terrorism, the outcome of the balancing exercise must be that a fair trial *as a whole* is preserved and from the very start of a criminal investigation to the final stage of sentencing. The right of confrontation (Article 6 (3) (d) ECHR) plays a determining role in this.

126 This research paper does *not* deal with the substitution of ordinary courts by special emergency or military tribunals with competence over offences committed by civilians. Cf. S. Stavros, 'The right to a fair trial in emergency situations', 1992 *International and Comparative Law Quarterly*, no. 2, pp. 343-365. *Lawless v. Ireland* (Ser. A, no.3), *Ireland v. United Kingdom* (Ser. B, p. 124.) and *Klass v. Germany* (Ser. A, no. 28, para. 49).

127 IX of *Guidelines on human rights and the fight against Terrorism*, Directorate General of Human Rights, December 2002, and text of reference.

128 This includes three elements: (i) the manner of appointment of its members and their term of office must be fair, (ii) the existence of safeguards against outside pressures and the question whether it presents an appearance of independence are compulsory (*e.g. Findlay v. The England and Wales*, 25 February 1997, Reports 1997-I, p. 281, para. 37.) and (iii) impartiality of the tribunal. Both subjectively and objectively, the personal conviction of a particular judge in a given case and guarantees offered to exclude any legitimate doubt in this respect. *Mutatis mutandis, Gautrin and Others v. France*, 20 May 1998, Reports 1998-III, pp. 1030-1031, para. 58; *Hauschildt v. Denmark*, 24 May 1989, Series A no. 154, p. 21, para. 48; *Thogeir Thogeirson*, p. 23, para. 51; *Pullar v. the England and Wales*, 10 June 1996, Reports 1996-III, p. 794, para. 38, and *Incal v. Turkey*, 9 June 1998, paras. 65, 70-72.

129 *Allenet de Ribemont v. France*, 10 February 1995, para. 41.

This contribution will now go on to discuss several important political decisions of the Council of Europe (CoE), followed by a discussion of the fair trial-compliance of the ‘*Act on shielded witnesses*’.

5.1. Political decisions on human rights and the fight against terrorism

The ‘Guidelines on Human Rights and the Fight against Terrorism’¹³⁰ of the Committee of Ministers of the CoE contains both the obligation on the part of States to protect everyone against terrorism and a minimum standard of human rights. Some requirements were specified in two recommendations of April 2005: the protection of witnesses¹³¹ and collaborators of justice¹³² and special investigation techniques.^{133, 134}

Member States are recommended to provide for appropriate legislative and practical measures to ensure that witnesses and collaborators of justice may testify freely and without being subjected to intimidation. States may use ‘pre-trial statements given before a judicial authority as evidence in court when it is not possible for witnesses to appear before the court or when appearing in court might result in great and actual danger to the life and security of witnesses, their relatives or other persons close to them’. The rights of the defence and the protection of witnesses, collaborators of justice and people close to them, should be realized where necessary before, during and after the trial. In particular, due care should be given to the rights of the defence and the right of free assessment of evidence by the court.

Any decision to grant a witness anonymity must be made in accordance with domestic law and European human rights law. Where available, anonymity must be an exceptional measure, and criminal procedural law must provide a verification procedure. The alleged need for anonymity, the witness’s credibility and the origin of his knowledge must be open to challenge. Anonymity *must* only be granted in cases where the witness is *not* able to appear or where he fears for his life or freedom. Moreover, when anonymity is granted, ‘parties must have, or have had, the chance to participate in the examination and interrogate and/or cross-examine the witness and to discuss the content of the statement during the procedure’. Finally, courts *must* assess the evidence.

Secondly, in principle, *evidence* gained through special investigation techniques may *only* be used to the extent that is (a) necessary in a democratic society and (b) appropriate for efficient criminal investigation and prosecution – when subsequently permitted before courts. However, procedural rules governing the production and admissibility of such evidence *must* safeguard the rights of the accused to a fair trial.

Finally, while in principle all evidence should be produced in the presence of the accused at an adversarial public hearing, with a view to adversarial argument, the fight against terrorism may justify certain restrictions of these rights of the defence. The Committee repeats that according to ECtHR rulings ‘the use of anonymous witnesses to found a conviction on is not always incompatible with the Convention’.¹³⁵ This anonymous witness may be an official, such as an

130 *Guidelines*, *supra* note 127.

131 Witness: ‘any person who possesses information relevant to criminal proceedings about which he/she has given and/or is able to give testimony (irrespective of his/her status and of the direct or indirect, oral or written form of the testimony, in accordance with national law), who is not included in the definition of “collaborator of justice”’ (Appendix to Rec (2005)9).

132 Collaborator of justice: ‘any person who faces criminal charges, or has been convicted of taking part in a criminal association or other criminal organisation of any kind, or in offences of organised crime, but who agrees to co-operate with criminal justice authorities, particularly by giving testimony about a criminal association or organisation, or about any offence connected with organised crime or other serious crimes.’ *Ibid.*

133 www.coe.int Special Investigation Techniques Rec(2005)10.

134 *Ibid.*, Witness Protection Rec(2005)9.

135 *Doorson v. the Netherlands*, 26 March 1996, Reports of Judgments and Decisions 1996-II, para. 69.

agent deployed in undercover activities, where it is necessary to protect him or his family, and/or where it is necessary in order not to impair his usefulness for future operations.¹³⁶ This construction can only be extended to the fight against terrorism when ‘strictly proportionate to purpose, and compensatory measures to protect the interests of the accused (...) have been taken so as to maintain the fairness of the proceedings and to ensure that procedural rights are not drained of their substance’. Non-disclosure of certain evidence *must* be counterbalanced by the procedures followed by the judicial authorities. These procedures must be as adversarial as possible and must preserve ‘equality of arms’, and the courts *must* assess the evidence.¹³⁷ These three elements provide an interesting political background to and guidelines for the following comparative examination into fair trial-compliance of the construction under discussion.

5.2. The shielded intelligence witness within the ECHR fair trial framework

Article 6 ECHR provides a detailed right to a fair trial, including the right to a public hearing before an independent and impartial tribunal within reasonable time, the presumption of innocence, and other minimum rights, such as adequate time and facilities to prepare a defence, access to legal representation, the ability to examine witnesses, and free assistance of an interpreter. The ECtHR does *not* determine which evidence is allowed or not, because States maintain a margin of appreciation in drafting their laws of evidence.¹³⁸ Thus, *national courts* must decide whether it is necessary or advisable to hear a witness¹³⁹ and under which regime as well as assess the evidence before them.¹⁴⁰ Therefore, the ECHR does *not* rule on whether statements of witnesses were properly admitted as evidence. However, the rulings on the use of pre-trial statements and anonymous testimony provide insight into the degree of derogation from the ‘confrontational paradigm’¹⁴¹ possible, namely that it does *not* impact the fairness of the trial *as a whole*.

Whilst anonymous witness testimony to found a conviction on is *not* in all circumstances *incompatible* with the Convention,¹⁴² it is nonetheless only allowed ‘in exceptional circumstances’, provided the *unusual difficulties* that the defence faces are sufficiently counterbalanced by the procedures followed by the judicial authorities. This includes testing the anonymous witness’s reliability,¹⁴³ and the conviction is *not* based either solely or to a decisive extent on anonymous statements.¹⁴⁴ Legitimate grounds for protective measures for witnesses may be national security, the need to protect witnesses at risk of reprisals and/or to keep secret methods of investigating crime.

Four criteria for protective measures for witnesses that are *mutually conditioning* factors can be found in the case-law: (i) protective measures may only be used when ‘strictly necessary’, and any restriction must be counterbalanced by the judicial procedure followed, (ii) the defence must

136 *Doorson*, *supra* note 135, paras. 69-70. *Van Mechelen v. the Netherlands*, 23 April 1997, *Reports* 1997-III, para. 57.

137 *Rowe and Davies v. the United Kingdom*, 16 February 2000, paras. 60-62, *Brandstetter v. Austria* 28 August 1991, Series A no. 211, paras. 66, 67, *Edwards v. the United Kingdom*, 16 December 1992, Series A no. 247-B, para. 34 and 36, *Doorson*, *supra* note 135, para. 70, *Van Mechelen*, *supra* note 136, para. 54 and 58.

138 *Handyside v. The United Kingdom*, 7 December 1976, Series A no. 24, p. 23, para 48.

139 *Bricmont v. Belgium*, 7 July 1989, Series A no. 158, p. 31, para. 89, and *S.N. v. Sweden*, 2 July 2002, ECHR 2002-V, para. 44.

140 *Unterpertinger v. Austria*, 24 November 1986, Series A no. 110, para. 33 and *Barberà, Messegué and Jabardo v. Spain*, 6 December 1988, Series A no. 146, para 6.

141 Maffei, *supra* note 19, B. de Smet, *Internationale samenwerking in strafzaken tussen Angelsaksische en continentale landen: een studie over breuken tussen accusatoire en inquisitoire processtelsels bij de uitlevering, kleine rechtshulp en ovedracht van strafvervolgning*, Antwerpen 1999 and C. Joubert, *Judicial control of foreign evidence in comparative perspective*, Amsterdam 2005.

142 *Doorson*, *supra* note 135, para. 69 and *Van Mechelen*, *supra* note 136, para. 52.

143 *Kostovski v. the Netherlands*, 20 November 1989, Series A no. 166, para. 42.

144 *Van Mechelen*, *supra* note 136, paras. 54-55.

have had an opportunity to test the witness's reliability, (iii) the trier of fact must have had an opportunity to assess the witness's credibility, and (iv) the accused may not be convicted 'solely or to a decisive extent' on this evidence. The criteria are addressed separately below.

5.2.1. *Shielded intelligence officer in abstracto 'strictly necessary'?*

The use of this regime for intelligence officers might in itself not be 'strictly necessary' (*Van Mechelen and Lüdi, mutatis mutandi Doorson*).¹⁴⁵ This threshold implies that *no* other measure – such as a disguise or voice distortion – can suffice. Proportionality is not determining,¹⁴⁶ the court's decision¹⁴⁷ as to whether the compelling reasons adduced are reasonable¹⁴⁸ in the case in question and justify anonymity is.¹⁴⁹

The tasks of the police officers and their close ties with the prosecution were determining factors for ruling that anonymity was not 'strictly necessary'. Intelligence officers and the prosecution can be said to have an equivalent relationship which may even grow closer under the current anti-terror legislation, especially as intelligence officers also owe a general duty of obedience to the State's executive authorities. Moreover, the determination of whether anonymous status should be granted is complicated by the officer's duty of secrecy. Although the officer is a professional, and generally will not pose a risk due to a personal interest in getting the accused convicted or for plotting against the accused, the procedure should nevertheless always impose certain checks and balances. This reasoning has given rise to the criteria described above under (i).

5.2.2. *Defence's opportunity to test witness's reliability*

Whilst every use of shielded and anonymous witness testimony restricts fundamental defence rights, three aspects which mutually affect each other and that are inherent to this construction increase restrictions even further: (a) the general non-disclosure of intelligence and information concerning the officer's identity, (b) the duty of secrecy, and (c) the mandatory consent of the officer before the transcript is submitted to the defence.

Commonly, the basis for the testimony – the intelligence – and information concerning the officer's identity will remain undisclosed, even though information, whether incriminating (*Jespers*¹⁵⁰ and *Rowe*¹⁵¹) or exculpatory and not relied upon by the prosecution (*Bendenoun*),¹⁵² which has *not* been disclosed to the defence or has not been disclosed in a timely manner (*Dowsett*)¹⁵³ may cause *unfair trials*, because the defence cannot rely on it for questioning the need for the protective measure or for challenging the case,¹⁵⁴ and is unable to test the witness's reliability or to cast doubt on his credibility by adjusting its questioning to the answers provided.¹⁵⁵

Because disclosure is *not* an absolute right,¹⁵⁶ *national courts* have to decide whether or not to disclose the evidence (*Rowe*)¹⁵⁷ on the basis of a balancing exercise in which the interest of

145 *Lüdi v. Switzerland*, 15 June 1992, Series A no. 238, p. 21.

146 *Rowe and Davies*, *supra* note 137, para. 61.

147 *Van Mechelen*, *supra* note 136, para. 62-65, *Doorson*, *supra* note 135, paras. 25, 28, 34, 71, 73 and 76, *Dowsett v. the United Kingdom*, 24 June 2003, ECHR 314, para. 50.

148 *Krasniki v. the Czech Republic*, 28 February 2006, ECHR 176, paras. 80-83.

149 *Teixeira de Castro v. Portugal*, 9 June 1998, ECHR 52, para. 36.

150 *Jespers v. Belgium* (1981) 27 DR 61, paras. 55-57.

151 *Edwards*, *supra* note 137, para. 34.

152 *Bendenoun v. France* (1994) 18 EHRR 54, para. 52.

153 *Dowsett*, *supra* note 147, paras 47-50.

154 *Brandstetter v. Austria*, 28 August 1991, Series A no. 211, paras. 66-67 and *Foucher v. France*, 18 March 1997, 25 EHRR 234, para. 36.

155 *Doorson*, *supra* note 135, para. 59.

156 *Doorson*, *supra* note 135, para. 70 and *Rowe and Davies*, *supra* note 137, paras. 60-62.

157 *Rowe and Davies*, *supra* note 137, paras. 60-62.

national security is weighed against the rights of the accused, preferably with special counsel reviewing undisclosed material as an additional safeguard.¹⁵⁸ However, in the construction under discussion, disclosure relies on the mandatory consent of the officer, and neither defence counsel, nor special counsel plays a role.

Non-disclosure also affects the defence right of confrontation, which is also a right that can be determined by performing a balancing exercise. The interests of the defence may be balanced ‘against those of witnesses or victims called to testify’ (*Doorson*)¹⁵⁹ as these interests are also inherent to a fair trial and lack of confrontation may be justified when the accused has been the cause of the fact that this right is not operated.¹⁶⁰ However, fair trial also requires that the defence is given an adequate and proper opportunity to confront adverse witnesses,¹⁶¹ either during the testimony or at a later stage.¹⁶² Although the defence can generally pose written questions through the examining magistrate, this still gives the defence the disadvantage of not being able to observe the witness’s demeanour.¹⁶³ Possible remedies are the possibility of asking additional questions through a sound link (*Kok*),¹⁶⁴ a hearing at trial making use of screens to shield the witness from the accused, but enabling visibility for the court and for the representatives of both parties and giving the defence the opportunity to confront the witness (*A.M.*),¹⁶⁵ or removing the accused from the courtroom while the defence confronts the witness (*Kurup*).¹⁶⁶ These remedies are however, not provided in the Act.

Nonetheless, the procedures followed by the judicial authorities might counterbalance these significant restrictions of the right of the defence to test the witness’s reliability,¹⁶⁷ as will be discussed below.

5.2.3. *Triers of fact’s opportunity to assess the witness’s credibility*

In this procedure, there are two triers of fact. During the pre-trial hearing the examining magistrate has the opportunity to assess the witness’s credibility. At trial, the three-judge panel has to rule on the admissibility of evidence and matters related to the law. The panel has to examine the evidence and based on this has to decide upon the accused’s guilt or innocence.

Anonymous witness testimony *must* have been taken by a judge who (a) is aware of the identity of the witness, (b) expresses in the official record of the hearing his reasoned opinion about the reliability of the witness and the reasons for the witness’s wish to remain anonymous and (c) provides the defence with some opportunity to put questions or have questions put to the witness (*Kostovski*¹⁶⁸ and *Visser*¹⁶⁹). Although the examining magistrate is aware of the intelligence officer’s identity (*Baegen*),¹⁷⁰ the other two criteria pose important difficulties.

The officer is restricted by his duty of secrecy, while ordinarily a witness may *not* refuse to answer questions that are *not* aimed at clearly establishing his identity.¹⁷¹ Additionally, the

158 *Fitt v. the United Kingdom*, ECHR 2000-II, paras. 30-33 and *Dowsett*, *supra* note 147, para. 51.

159 *Doorson*, *supra* note 135, para. 70.

160 *Lucà v. Italy*, 27 February 2001, ECHR 124, paras. 38-45.

161 *Delta v. France*, 19 December 1990, Series A no. 191-A, para. 37.

162 *Van Mechelen*, *supra* note 136, para. 51, *Lüdi*, *supra* note 145, para. 49, *P.S. v. Germany*, 20 December 2001, ECHR 884, para. 21.

163 *Kostovski*, *supra* note 143, para. 42 *in fine* and *Windisch v. Austria*, 27 September 1990, (1990) ECHR 23, para. 29.

164 *Kok v. the Netherlands*, ECHR 4 July 2000, *NJ* 2001, 401, para. 55.

165 *X. v. the United Kingdom*, 2 December 1992, ECHR CD 113.

166 *Kurup v. Denmark*, 10 July 1985, 8 EHRR 93.

167 *Kostovski*, *supra* note 143, para. 72.

168 *Ibid.*

169 *Visser v. the Netherlands*, 14 February 2002, ECHR 108, paras 43-52.

170 *Baegen v. the Netherlands*, 27 October 1995, ECHR 44, paras, 18-22.

171 *Windisch*, *supra* note 163, para. 31.

examining magistrate is not allowed to give a fully reasoned opinion, as all information which the officer is not at liberty to disclose must remain secret.¹⁷²

The trial judges' assessment of the witness's credibility is significantly restricted by having to rely exclusively on the transcript. The judges are thus unable to observe the demeanour of the witness under questioning and to form their own impression of credibility (*Bocos-Cuesta*).¹⁷³ Nonetheless, equality of arms appears to be preserved *mutatis mutandi*, because a judge may *not* rely on material that is *not* disclosed to the defence (*Edwards*),¹⁷⁴ and the officer is at least questioned by a judge (*P.S.*)¹⁷⁵ in an adversarial trial, because all the parties are present. This touches upon the last criterion.

5.2.4. Conviction may not rely 'solely or to a decisive extent' on anonymous witness evidence

The trial judges have to (a) decide whether to include the evidence, (b) determine the probative value of the – possibly anonymous – witness testimony, and finally (c) arrive at a verdict, while providing reasoning as to the evidence relied upon.

The decision whether to include evidence or not, depends on a thorough examination of the evidence available. Therefore, while it may be justified that the officer is heard under this regime, it does not automatically follow that the evidence should be admitted without any confrontation between the trial judges and the accused¹⁷⁶ having taken place and without its reasoned and cautious use.¹⁷⁷ The trial judges must decide upon admissibility of the evidence after verifying that the far-reaching restrictions of the rights of the defence have been compensated for by the judicial procedure followed and in awareness of the fact that unlawfully gathered intelligence may frustrate a fair trial from the outset.¹⁷⁸ Next, they have to decide on the probative value of the transcript of testimony delivered by a witness whom they have not been able to observe and will not be able to observe.

It is certain that the court cannot rely on anonymous statements *solely* (*Windisch*¹⁷⁹ and *Saïdi*¹⁸⁰) *or to a decisive extent* to base the conviction of an accused on.¹⁸¹ This is a general claim; there are no compensatory measures that would allow deviation (*Doorson*).¹⁸² In several cases this threshold has even been heightened: conviction may not be based on such evidence *to a decisive extent* (*Kostovski*),¹⁸³ *mainly* (*Unterpertinger*¹⁸⁴ and *Isgro*¹⁸⁵), or where it *played a part* (*Lüdi*),¹⁸⁶ or may not be *in any respect decisive* (*Visser*¹⁸⁷ and *Kok*¹⁸⁸). The implication of this may therefore be that while authorities may be fully justified to hear the intelligence officer under this regime, this may not produce sufficient evidence to base a conviction on (*Birutis*).¹⁸⁹

172 *Van Mechelen*, *supra* note 136, para. 47.

173 *Bocos-Cuesta v. The Netherlands*, 10 November 2005, application no. 54789/00, para. 71-74.

174 *Rowe and Davies*, *supra* note 137, paras. 60-62.

175 *P.S. v. Germany*, *supra* note 162, paras. 21-31.

176 *Lüdi*, *supra* note 145, paras. 42-50.

177 *Kostovski*, *supra* note 143, paras. 44-45.

178 *Teixeira*, *supra* note 149, para. 34.

179 *Windisch*, *supra* note 163, para. 31.

180 *Saïdi v. France*, 20 September 1993, Series A no. 261-C, para. 2.

181 The decisions discussed in subsection 4.1.6 thus also appear to be non-compliant. *Delta*, *supra* note 161, para. 37, *Asch v. Austria*, 26 April 1991, Series A no. 203, para. 28, *Artner v. Austria*, 28 August 1992, Series A no. 242-A, paras. 22-24, and *Saïdi*, *supra* note 180, para. 44.

182 *Doorson*, *supra* note 135, para. 69.

183 *Kostovski*, *supra* note 143, para. 44.

184 *Unterpertinger*, *supra* note 140, para. 33.

185 *Isgro v. Italy*, 19 February 1991, appl. no. 11339/85, paras 35-37.

186 *Lüdi*, *supra* note 145, para. 49.

187 *Visser*, *supra* note 169, para. 46.

188 *Kok v. the Netherlands*, no. 43149/98, ECHR 2000-VI.

189 *Birutis v. Lithuania*, 28 March 2002, appl. nos. 47698/99 and 48115/99, paras. 30-35.

5.3. Conclusions on ECHR compliance of the shielded intelligence witness regime

Although the use of pre-trial statements and anonymous witness testimony may *not* be *incompatible* with the ECHR¹⁹⁰ as such, this construction will presumably result in a *violation* of fair-trial rights ex Article 6 ECHR, particularly because the criteria are *per se* significantly restricted and their mutually conditioning nature even increases restrictions. Whilst it is recognized that the right balance has to be struck between legitimate national security concerns and witness protection on the one hand, and the protection of fair trial rights on the other, the regime in question cannot stand up to the test. The *ex parte* and *in camera* procedure before the examining magistrate, who is restricted in his/ examination by the officer's duty of secrecy, and reliance upon the transcript as evidence while the trial judges are unable to examine the witness, amount to a significant derogation from fundamental trial rights. The regime does *not* impose the proper checks and balances to compensate these significant restrictions that are inherent to the shielded intelligence witness regime.

6. Conclusion

While many States are trying to find ways to use intelligence as *evidence* in the criminal procedure, the Dutch construction of shielded intelligence witnesses marks a fair-trial boundary that *no* State must cross. It appears both unviable in the current legal framework of England and Wales, and *not* fair trial-compliant. However, this regime is apparently supported by the Dutch Supreme Court, which has found a legal basis for the admissibility of such testimony in the lack of a prohibition to use it as *evidence*.

The careful balance struck in England and Wales for the use of intelligence in terrorist cases provides an important threshold. This intelligence may also be protected as sensitive information in the interest of national security and can also be kept undisclosed. Nevertheless, the Special Advocate regime is a compensatory means. Although this regime does have a downside where both disclosure and the representation of the accused are concerned, there is at least a lawyer present to confront the officer. This may even be the case in the 'pre-trial phase', because current terrorism legislation appears to allow the use of *evidence* that was taken before trial. If the Special Advocate regime is not used, then at least the Head of the intelligence service should account for the intelligence. Nonetheless, the English and Welsh disclosure regime shows that the courts, as opposed to the intelligence services and the government, should ultimately decide what material must be disclosed. It is recommended that all States take this judicial assessment as a starting point.

This is particularly so given that the legal construction under discussion will presumably not comply with all fair trial rights provided in Article 6 ECHR. At least the following three criteria: (i) that protective measures have only been used when 'strictly necessary' (ii) that the defence has had the opportunity to test the witness's reliability, and (iii) that the triers of fact have had the opportunity to assess the witness's credibility, appear not to be fully met. In particular, it can be doubted whether the witness's reliability and credibility can be tested sufficiently. Although the examining magistrate examines the evidence, the general lack of in-court confrontation by the defence taken together with the fact that the trial judges are unable to examine the intelligence officer if necessary, may by definition result in *unfair trials*. It may reasonably be said that this procedure – especially when the intelligence officers are heard anonymously – brings back the

190 Doorson, *supra* note 153, para. 69.

situation prior to *Kostovski* and thus violates important criminal procedural rights. This is also underlined by its non-compliance with the recommendations of the Committee of Ministers of the Council of Europe, that states that pre-trial statements may be used, but only ‘(...)if the parties have, or have had, the chance to participate in the examination and interrogate and/or cross-examine the witness and to discuss the content of the statement during the procedure’. In particular, because these procedures must be as adversarial as possible and must preserve ‘equality of arms’, and the courts *must* determine the probative value of the evidence and assess it.

Although it may be necessary to take measures, even highly restrictive ones, to protect witnesses who are involved in the fight against terrorism, these measures may not erode important criminal procedural rights, especially when they are not confined to terrorism cases. The example set out in the introduction, where M. was understandably but falsely suspected of preparing a terrorist attack in Rotterdam, should wake States up to the fact that some legal constructions may result in the conviction of innocent persons – in this case: alleged terrorists – due to a lack of checks and balances built into the procedure.