Expert Meeting Paper

Compatible or Incompatible? Intelligence and Human Rights in Terrorist Trials

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On 3 March 2011, ICCT – The Hague organised an Expert Meeting on the use of intelligence in terrorist trials. The Expert Meeting focused on the special procedures of Canada, France, the Netherlands and the United Kingdom for the use of intelligence in terrorism-related court cases, examining their effectiveness and compatibility with human rights standards. This Expert Meeting Paper is a further adaptation of the Discussion Paper that was used as basis for debate during the Meeting and includes a number of the conclusions and recommendations that resulted from the session.

Introduction

In countering terrorism, both gathering intelligence as well as the prosecution of suspects of terrorist crimes are considered vital tools. The recent discovery of terror plots in the United States of America[1], Yemen[2] and Belgium[3] underlines that information sharing between security and intelligence services and law enforcement agencies is of the utmost strategic importance. Not only because it ensures the protection of democratic societies against threats to national security, including terror attacks, but also because the prosecution of suspects of terrorist crimes delegitimises their cause. Criminal trials have performative power[4] in the sense that the state, through the public prosecutor, sends a message that the threat of terrorism is being dealt with, while concurrently human rights, such as the right to a fair trial, are respected. Furthermore, as the right to a fair trial[5] is the cornerstone of the rule of law and democratic society, it is crucial that – terror – suspects are presumed innocent and tried publicly within a reasonable time by independent and impartial judges or juries. The criminal prosecution of terrorist crimes is an important counter-terrorism measure. Yet, because terror cases are often triggered by intelligence or this type of information is part of the evidence, there are human rights concerns in relation to its admissibility in ordinary criminal proceedings.[6]

Traditionally, a distinction exists between collecting intelligence for national security purposes and gathering evidence for criminal investigations, as they both serve a different purpose. This distinction also translates into the allocation of powers to law enforcement officials and the specific powers allotted to the intelligence services. For the latter, it is crucial that the sources of the intelligence are kept secret, whereas the fair trial principle

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[1] On November 26, 2010, a Somali teenager was arrested after undercover operations by the FBI discovered that the young man was plotting to bomb a Christmas tree-lighting ceremony in Portland. See CBS News (2010)
[2] On October 29, 2010, two packages of plastic explosives and a detonating device were found on two cargo aircraft after close operations between the intelligence agencies of the U.S., the U.K. and Yemen. See The Guardian (2010)
[3] On November 23, 2010, three Moroccan-Dutch terrorist suspects were arrested in Amsterdam. In Belgium, Germany and Austria another seven suspects were taken into custody. These arrests were made after close collaboration between intelligence agencies and law enforcement authorities in the aforementioned countries. See BBC News (2010)

[4] Netherlands Institute for Advanced Study in the Humanities and Social Sciences (2010/2011)
[5] European Convention on Human Rights, article 6
[6] Schrijver & van den Herik (2010)

demands that during a criminal court case, the public prosecutor and defence counsel enjoy equal access to the evidence. However, in specific circumstances, such as the prosecution of terrorist crimes, these two worlds meet and intelligence information is shared. The circumstances as well as the requirements that apply to these particular cases should be clearly formulated in the law. In order to guarantee the right to a fair trial as laid down in several human rights conventions, checks and balances should be in place.[7] A number of Western democracies have struggled with designing (special) procedures that allow for the use of intelligence information in criminal court cases and fulfil the aforementioned criteria.

In this paper, it is our objective to discuss some of these special procedures that allow the use of intelligence information in cases against suspects of terrorist crimes. We will elaborate on the key questions concerning the usage of intelligence in court: *Is the use of intelligence information in criminal court cases compatible with human rights both in law and in practice?* We will focus on four case studies, namely the special procedures in the Netherlands, Canada, France and the United Kingdom.

Two worlds apart? Intelligence gathering and criminal investigation

Intelligence services and law enforcement agencies both need information to prepare their case files.[8] However, their files serve very distinct purposes. Law enforcement agencies, as well as the public prosecutor, carry out investigations in order to gather evidence to build a criminal case. In order to convict a suspect, criminal accountability needs to be established. Simultaneously, there is the presumption of innocence until proven guilty according to the law.[9] Ultimately, they need to be able to present evidence before the court, where, because of the fair trial principle, all sources should be known to both parties. The powers granted to the authorities to fulfil their tasks in criminal investigations are laid down in procedural legislation. These powers include, but are not limited to, the hearing of witness testimony, interrogation powers as well as collecting evidence (personal, digital, forensic, phone-tapping, etc.). The manner in which pre-trial detention and criminal investigations have been conducted should be in conformity with international human rights standards, in particular the right to a fair trial.

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

The use of intelligence information in criminal court cases

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

The use of intelligence as 'secret' evidence in criminal investigations is especially relevant in the prosecution of terrorism suspects. Intelligence information as legal evidence in general implies that sources and modus operandi are kept secret for state security purposes. In order to use intelligence information in criminal court cases, witnesses tend to be heard anonymously. In absolute terms, this is incompatible with the fundamental right to a fair trial, which holds that 'everyone is entitled to a fair and public hearing' and 'equality of arms' and further requires that the

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

[8] For more information see Coster van Voorhout (2005) and Vervaele (2005)

[9] European Convention on Human Rights, article 6

[10] Bel, Van Hoorn & Pieters (2009)

hearing needs to be conducted by a 'competent, independent and impartial' judge or jury.[11]

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

In criminal cases, information may, subject to particular criteria, be legitimately withheld in order to protect national security. However, under these circumstances tensions may arise between the principle of fair trial and the protection of secrecy. These tensions can be resolved with the practical guidance of international law. This was apparent in the case *Wassink v. the Netherlands*, during which the European Court of Human Rights (ECtHR) ruled that information may be withheld in criminal procedures if certain conditions are met.[13]

The international legal framework

Following the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR), it is possible to limit certain human rights in the interest of national security and public order, such as the right to freedom of expression or assembly and association. However, such exceptions are not included so as to derogate from the rights that guarantee a fair trial. Thus, when intelligence is being used in criminal court cases such as the Dutch Piranha case,[14] questions emerge concerning fundamental democratic values and freedoms. Safeguards against arbitrary or unlawful government conduct can be found in principles such as the right to a fair trial, equality of arms before the courts and tribunals, and the right to privacy. These minimum standards are enshrined in several human rights treaties and ensure that procedural means are met. The United Nations Human Rights Committee explained in its General Comment that even in emergency situations one cannot diverge from fundamental fair trial requirements.[15] The competing values of security versus liberty rights thus need to be balanced by independent safeguards.

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

The Council of Europe has established guidelines with regard to human rights and the fight against terrorism. According to these guidelines, personal data may be collected and processed by any competent authority in the field of state security, even though it might interfere with the right to

[11] International Covenant on Civil and Political Rights, Article 14
[12] The Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights (2009)
[13] European Court on Human Rights, Judgement of 27 September 1990, Wassink v. Netherlands
[14] Judgement No.: AZ3589, District Court of Rotterdam, 10/600052-05, 10/600108-05, 10/600134-05, 10/600109-05, 10/600122-05, 10/600023-06, 10/600100-06, 1 December 2006/ Judgement No: BF3987, Court of Appeal of The Hague, no. 2200734906, 2 October 2008/ Judgement No: BF5225, Court of Appeal of The Hague, no. 2200735006, 2 October 2008/ Judgement No.: BF4814, Court of Appeal of The Hague, no. 2200735106, 2 October 2008/ Judgement No.: BF5180, Court of Appeal of The Hague, no.2200738406, 2 October 2008
[15] Human Rights Committee
[16] United Nations
[17] *Ibid*
[18] Human Rights Committee (1978)

private life.[19] The Council also demands that measures that are used in the fight against terrorism that interfere with privacy, such as body searches, bugging, telephone tapping, the surveillance of personal correspondence and the use of undercover agents, must be provided for by law. Furthermore, it must be possible to challenge the lawfulness of these measures before a court.

Introducing four case studies

A number of Western states have implemented special procedures to use intelligence information in criminal court cases related to terrorism, which are presumed to be compatible with human rights both in law and practice. The special procedures introduced in the Netherlands, Canada, France and the United Kingdom will be used as case studies. Discussion will focus both on their effectiveness and whether they indeed guarantee the right to a fair trial.

The Netherlands

Traditionally, there is a strict separation between the work of the security services and the prosecutor, who each work under their own legal regime. One important feature is the obligation on the Security Services to protect its sources, working methods and current knowledge level. During the court case, on the other hand, it is the task of the prosecutor and the judge to protect the elementary guarantees of a criminal procedure, namely to review the accuracy of information serving as evidence. Despite the watertight separation between the tasks, powers and responsibilities of the organisations which are involved in combating ideological crimes, within the statutory framework it is possible to have – if necessary and expedient – an intensive information flow between the various organisation. Information that can be relevant for the investigation and prosecution of criminal offences can – at the discretion of the Dutch General Intelligence and Security Service (AIVD –be provided by the AIVD to the Public Prosecutor's office via an official written report. The National Public Prosecutor analyses all the relevant information, which may be used to initiate an investigation or as legal evidence. This is not merely a power, but an obligation for the prosecutor. According to the interpretation of the Dutch Supreme Court and a ruling of the European Court of Human Rights (ECtHR, 16 October 2001, *O'Hara v. UK*), the start of a criminal investigation must be based on a reasonable suspicion of guilt of some offence or on indications of a terrorist offence.

In order to use the information that is gathered by the Dutch intelligence and security services[20] as evidence in criminal courts, the Dutch government implemented the 'Act on Shielded Witnesses'[21] (*Wet Afgeschermde Getuigen*; also translated as the Witness Identity Protection Act) in September 2006. This procedure, *ex parte* and *in camera*, is introduced to provide for the hearing of a shielded witness in case disclosure of the identity of the witness could endanger the witness or national security. The Act implements two major changes. Firstly, intelligence information admitted in an official written report (*Ambtsbericht*)[22] provided by the AIVD may now be examined through hearing witnesses by an examining magistrate (*Rechter-Commissaris*). Secondly, the last impediments to use intelligence information in criminal court cases are now dissolved completely.[23]

The examining magistrate has the power to decide whether, in the interest of national security, particular information must remain secret and whether the witness needs to be shielded. This is done in the pre-trial phase by a special section of the Rotterdam District Court. If possible, whilst attempting to assess the value of the intelligence, the parties to the proceedings may be present, while the witness is shielded (in camera, but not *ex parte*). However, the most common procedure is to hand in a list of questions for the witness to the examining magistrate. This can be done by lawyers representing the accused and the trial judge, from whom the hearing is shielded. The report of the hearing will only be submitted to the parties to the proceedings with the consent of the shielded witness.[24] Important to note is that Article 344a

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

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

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

[22] An official written report contains testimonies by officials and informants

[23] Van der Woude (2010)

[24] Vervaele (2005)

Code of criminal procedure stipulates that someone can never be convicted solely on evidence adduced by anonymous sources. This is a crucial problem for the Act, since AIVD officers will hardly ever be able to produce any extra information that may support the official written report in order to provide for sufficient evidence. So far, the Act on Shielded Witness has not been used in the Netherlands.[25] With regard to verifiable information, such as reports from phone- and email-taps, recordings of confidential communications by means of technical equipment, and video-taps of surveillance, there will be less of a problem to turn this information into evidence.

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

One can discern a number of human rights concerns in relation to this special procedure.[26] The trial judge is hardly able to assess the reliability of the official written reports. Both he and the defence need to rely completely on the examining magistrate. Furthermore, it may the case that the secret information might not have been collected by Dutch intelligence and security services, but by foreign intelligence and security services (international information sharing). In any case, the application of the Act limits the right to a fair trial. The defence does not have the opportunity to know who collected the evidence against the suspect and also lacks the possibility to question the witness (even if questions are asked, they may never relate to the identity of the witness). This means that some statements cannot be discussed. Questions concerning where the witness was at what time and what place cannot be put forward. As a consequence, a situation can occur in which the accused cannot prove his innocence with an alibi or cannot in any other way discuss the competence of the witness. Additionally, the questioned intelligence official has a decisive say in whether the report of the examining magistrate will become part of the case file or not.

[25] Van der Woude (2010), p. 367
[26] Alink, Eijkman & Freeke (2004); Council of Europe (2009)

Canada

In Canada, the Canadian Security Intelligence Service (CSIS) is reviewed by both the Security Intelligence Review Committee (SIRC) and the Inspector General. The latter is an internal body that reports to the Canadian Minister of Public Safety; the former is an external body that reports directly to Parliament. (Non-) Disclosure of secret information falls under the Canada Evidence Act (CEA) and applies to all cases in which sensitive information is used.[27] This act sets out the pre-trial, trial and appellate procedures to be applied where there is a possibility that disclosing information will damage international relations, national defence or national security. Any participant or official who is aware of the – soon to be – disclosed sensitive information has to inform the Attorney General for Canada. The Attorney General or the Federal Court can determine whether the information can be disclosed. If the judge determines that one of these situations might occur upon disclosure, the judge will balance the competing public interests in disclosure and non-disclosure. The judge has the option to place conditions upon disclosure.

An important feature in the Canadian counter-terrorism framework is the Canadian Immigration Law (CIL). Any Canadian citizen suspected of terrorism-related charges will be arrested and charged and the evidence will be disclosed in a criminal court where the subject may be prosecuted. However, when a suspect is not a Canadian citizen, and where concerns about the security risks concerning that subject are severe, a removal request will be issued in the form of a security certificate. According to the CIL, security certificates under the Immigration and Refugee Protection Act (IRPA) may be issued by the Minister of Immigration and the Minister of Public Safety and will be reviewed by the Federal Court of Canada. The request is made after the government balances the risk to the suspect and the risk that the subject poses to Canada's national security. The Federal Court has to contemplate the public interest in disclosure against non-disclosure. The appellant will only receive a summary of the secret information produced by the government, which limits the defendant's ability to contest the information that is being held against him.

The Supreme Court concluded in the case of *Charkaoui v. Canada*[28] that a mere summary of the secret information is incompatible with the right to

[27] The Canada Evidence Act, Section 38
[28] Charkaoui v. Canada, 2007 SCC 9

a fair trial, since the defendant cannot know the case against him or her. The Supreme Court suggested a special advocate system as an alternative model, a system that is also used in the United Kingdom and New Zealand, in order to meet the requirements of the right to a fair trial. The special advocate model was implemented by the Canadian government under Bill C-3. Special advocates are lawyers who are independent from the government and are appointed by the Court to protect the interests of defendants who are subject to a security certificate and, at the same time, to ensure the confidentiality of information which would harm national security or endanger the safety of a person, whenever the information is disclosed.[29] They have security clearance to access information that may harm national security or endanger a person's safety. Every person that is subject to a security certificate will be able to have access to a special advocate. There are now 23 specially trained, security cleared Special Advocates appointed by the Minister of Justice under the immigration and refugee protection legislation, from all regions of Canada. The special advocate has the ability to communicate with the person whose name is mentioned on the security certificate. Based on a summary, he will discuss the matter with the subject, in order to prepare for the closed court proceedings. It is up to the judge to decide whether the special advocate may communicate with the subject after reviewing the information. Special advocates will not be in a lawyer-client relationship with the person named in the certificate.[30] Difficulties are that once the secret information is seen, the Special Advocate cannot communicate with other Special Advocates or counsel for the named person unless authorised by the judge. Special Advocates could however play a role in negotiating with the government and formulating agreed statements of fact. Special Advocates could also negotiate the release of some information or agree that the claim of secrecy is warranted.

Nevertheless, there are a number of human rights-related issues with the current system in Canada that require further examination.[31] After receiving a security certificate, a subject may be detained indefinitely, without charge. The evidence remains secret, which means that the defendant does not have the opportunity to know who collected the evidence against him or her. The fair trial principle that requires that sources are known to both parties is thus also limited. Furthermore, with this procedure it is very well possible for immigrants to be deported to countries that are known to use torture. At the moment, three high-profile cases are being dealt with in Canada concerning the deportation of immigrants who are considered to pose an extreme risk to national security.[32] These cases are being dealt with by special advocates.

France

Compared to the Netherlands and Canada, the counter-terrorist legislation in France did not dramatically change after 9/11. The French legislation had already been developed in the late 1980s and early 1990s and has seen only a few changes in recent years.[33] As a result, the emphasis on combating Islamist terrorism post-9/11 increased and the international cooperation in and the Europeanisation of counter-terrorism have been furthered.[34] French intelligence and secrete services[35] fall mainly under the executive branch of state power. Judicial investigations into criminal offences are commenced by the Office of the Public Prosecutor. At its own discretion, the Public Prosecutor will ask an investigating judge (*juge d'instruction*) to direct the investigation. This specialist first examines the state's case against the defendant. The judge can either decide to order a release without charge, or to order a formal investigation (*mettre en examen*). In order to help the investigating judge with his or her investigation, police officers are assigned to him or her for that purpose. During this pre-trial criminal investigation, the assumed impartial investigating judge seeks to uncover both incriminating and exculpatory evidence, with the help of special investigative steps. These are techniques such as wire taps, warrants and orders to appear as a witness. After this pre-trial criminal investigation, the investigating judge may recommend to the liberty and custody judge that the suspect needs to be taken into pre-trial detention (*detention provisoire*). After this

[29] Forcese & Waldman (2007)
[30] Department of Justice Canada (2008)
[31] Institute for Research on Public Policy (2007)

[32] *Harkat v. Canada* (Minister of Citizenship and Immigration) (F.C.), 2006 FC 628, [2007] 1 F.C.R. 321 *Almrei v. Canada* (Minister of Citizenship and Immigration), 2005 FC 1645, [2006] 2 F.C.R. D-14, *Charkaoui v. Canada* (Minister of Citizenship and Immigration), 2007 FCA 80, [2007] 3 F.C.R. D8
[33] 'Law on the Fights Against Terrorism and on Various Dispositions Concerning Security and Border Control' (Loi 2006-64)
[34] Transnational Terrorism, Security & the Rule of Law (2008)
[35] The primary French intelligence agencies are the Central Directorate of Interior Intelligence (Direction Centrale du Renseignement Intérieur, DCRI) and the General Directorate for External Security (Direction Générale de la Sécurité Extérieure, DSGE)

recommendation, the prosecutor may decide to represent the state's interest before the liberty and custody judge (*juge des libertés et de la détention*), who is independent from the investigating judge.[36]

The French procedure in the investigation phase is written and secret but only with respect to the general public and the media. It is fully adversarial at the early stages of the proceedings. Once the formal investigation has been notified, the person has full access to the case file through her counsel. A copy of the case file is delivered to the counsel on the first appearance of the suspect. All the evidence has to be submitted and discussed before court during the trial. The investigating magistrate does not have a security clearance; he is thus not authorised to have direct access to classified information. Unauthorised access to classified information is moreover constitutive of a criminal offence. The access of the investigating judge to classified documents is controlled by an independent authority (Consultative Commission for National Defence Secret). The judge may refer to this Commission with a request for partial or total declassification of documents. Once a specific document is declassified, either totally or partially, it is transmitted to the investigating judge and added to the case file. From that stage onward, the information is protected only by the secret of the investigation, but is known to the defendant and his counsel and may be made public during the trial. In case of a violation of the main principles of fair trial, as well as the respect for human dignity, the respect for physical and mental integrity, and the respect for privacy, the means of proof will be dismissed during the investigation phase, or will not be examined by the court.

The investigating judge is given significant authority in terrorism cases, based on the notion that all possible evidence on the terrorist network and the crimes involved will lead to the closure of the case.[37] As a consequence, the intelligence services and investigating judges have a close working relationship and almost all terrorism-related court cases have used information gathered by the intelligence services. Investigating judges can deny requests for investigative steps in the course of a judicial investigation. For example, in the case of Christian Ganczarski,[38] only the request for an inquiry commission into Saudi Arabia was accepted. The other twenty three requests were denied by the investigating judge on the grounds that there was a risk that the information would be used to pressure others involved in the case. These decisions can in general be referred to the court of appeal by the counsel.

Concerns with regard to human rights originate from the fact that there is only a small group of judges and prosecutors who are fully aware of the types of techniques, information and assessments that are used. This interconnectedness between the intelligence services and the investigating judges may lead to their independence being compromised.[39] Defence lawyers do have the right to cross-examine protected witnesses and agents from the intelligence services with protected identities. The latter are not obliged to reveal their sources, however. On the other hand, information based on non-identified sources has no value at all, unless it is corroborated by the investigation and unless the way the intelligence was initially obtained is not constitutive of a breach of international human rights law such as the ECHR.

United Kingdom

The United Kingdom (UK) is a pioneer with regard to anti-terrorist legislation, which was already implemented by to the Terrorist Act 2000. This legislative response was initiated because of the terrorist acts performed by the Irish Republican Army, Sinn Fein and the Ulster Freedom Fighters,[40] and concerns a substantial number of prohibitions of terrorism and terrorist-related crimes.[41] As in the Canadian case, the UK implemented a system of Special Advocates in order to use intelligence information in criminal court cases.

The UK, like Canada, relies on immigration law as a means to detain suspected terrorists.[42] The procedure governing the Special Advocates was implemented in 1996 in the UK, following the conclusion of the ECtHR in *Chahal v. UK*.[43] The UK system prior to 1996 existed of a personal executive decision of the Home Secretary to deport an individual on national security grounds. This

[36] Human Rights Watch (2008), pp. 7-8
[37] Human Rights Watch (2008), p. 10
[38] Ganczarski is a German who is suspected of involvement in a suicide attack on a synagogue in Tunisia that killed 21 people (his lawyer spoke of a "disguised extradition" from Saudi Arabia in June 2003)
[39] European Commission for Democracy through Law (Venice Commission 2007), paragraph 213
[40] Bennet, G. 2005. Legislative Responses to Terrorism: A View from Britain. *The Penn State Law Review*. Pp. 947-966. Vol. 109, No. 4
[41] Terrorism Act, 2000, c. 11 (U.K.)
[42] Roach, K. 2006. *Must we trade rights for security? The choice between smart, harsh or proportionate security strategies in Canada and Britain.* Toronto: University of Toronto
[43] European Court of Human Rights, *Chahal v. The United Kingdom,* 70/1995; 22414/93; (1996) 23 EHRR 413; [1996] ECHR 54

decision was then reviewed by a panel who made recommendations on whether the removal order should stand.[44] The ECtHR concluded that the UK system was in violation with the ECHR, since the information is kept secret and it denied all means for lawyers of the appellant to challenge the secret information on which the decision was based. The decision of the ECtHR resulted in the Special Immigration Appeals Commission Act of 1997. With regard to the implementation of this Act, a Special Immigration Appeals Commission (SIAC) was created, as well as a superior court of record sitting in panels comprising a High Court judge, an immigration adjudicator and a lay member with security and intelligence expertise.[45] Since the appellant and lawyers are excluded from the Special Immigration Appeals Commission, the SIAC Act authorises the appointment of a Special Advocate, as a representative of the interests of the appellant. The Special Advocate is appointed by the UK Attorney General when information is withheld from the appellant on national security grounds. The Special Advocate may not communicate with the appellant once he or she has received the secret information.

Special Advocates are employed in all proceedings that implicate national security concerns. These include the listing of banned terrorist organisations under the Terrorism Act 2000,[46] the exclusion of individuals from access dangerous substances under the Anti-terrorism, Crime and Security Act 2001,[47] the denying of security clearance to individuals,[48] criminal cases, planning inquiries, race relations and parole proceedings.[49]

The use of secret evidence in the UK courts has increasingly grown in the past decade, which has led to various human rights concerns. The Joint Committee on Human Rights concluded in their sixteenth report on Counter-Terrorism Policy and Human Rights that the UK's use of secret evidence and special advocates needs an 'urgent and comprehensive review .... in all contexts in which they are used'.[50] Since Special Advocates are not allowed to communicate with the appellant after having received the classified information – with the exception of a very limited number of cases[51] – evidence will remain unclear for the appellant. This is incompatible with both Common Law and Article 6 ECHR that guarantees the right to a fair hearing.[52]

Concluding remarks

By using intelligence information in the prosecution of terrorists, there is a risk that human rights, principally the right to a fair trial, are breached. This could occur because of the limited opportunities for suspects to review and question evidence upon which their arrest, detention or subsequent charges rest.

Two years ago, the Eminent Jurist Panel of the International Commission of Jurists released a report entitled "Assessing Damage, Urging Action", in which it deals with the debate on accountable national security policies.[53] In the chapter on the impact of terrorism and counter-terrorism on the criminal justice system, it deals particularly with the principle of an independent and impartial judiciary, and with the question what constitutes a fair trial. The Eminent Jurist Panel concluded *inter alia* that states should take steps to ensure that the work of intelligence agencies is fully compliant with human rights law, and that the powers of intelligence and law enforcement should be separated and intelligence agencies should not in principle have the power to arrest, detain and interrogate.

The special procedures implemented in the Dutch, Canadian, British and French legal systems all serve the same purpose: they try to facilitate the use of intelligence information in terrorist trials. But

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

[45] *Ibid*

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

[47] A special advocate may be appointed to represent the interests of the appellant to the Pathogens Access Appeals Commission (PAAC)

[48] A special advocate may be appointed to represent the interests of the appellant to the Security Vetting Appeals Panel

[49] Forcese C. & L. Waldman (2007). *Seeking Justice in an Unfair Process. Lessons from Canada, the United Kingdom, and New Zealand on the Use of 'Special Advocates' in National Security Proceedings*. Study commissioned by the Canadian Centre for Intelligence and Security Studies, Ottawa, pp.23-24

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

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

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

[53] The Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights (2009)

a key question still remains: how compatible are these special procedures with human rights and how effective are they in practice?

During the Expert Meeting, it became clear that four different systems that all fulfil the above mentioned requirements nevertheless show major differences in the way intelligence information is introduced in the criminal procedure, and the extent to which disclosure is made possible, and to who. These differences in procedures might raise questions when intelligence information origins from a third state, in which different regulations with regard to disclosure of information apply. The exchange of information and the accountability that arises from this fact will be a topic of further research and debate for ICCT – The Hague later this year.

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