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Opinion on the status of illegally obtained evidence in criminal procedures in the Member States of the European Union.

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The **EU Network of Independent Experts on Fundamental Rights** has been set up by the European Commission (DG Justice and Home Affairs), upon request of the European Parliament. Since 2002, it monitors the situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights.

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Introduction

The present opinion reflects the results of a consultation within the EU Network of Independent Experts on Fundamental Rights. In the Report on the situation of fundamental rights in the Member States and the EU in 2003 (March 2003), the question of the status of illegally obtained evidence could be analyzed only superficially, and with respect only of two Member States – Belgium and the Netherlands – on which comments were made on that question. Furthermore, the Green Paper from the Commission on "Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union" published by the Commission on 19 February 2003[1] did not cover that question (see para. 2.6. of the Green Paper), although the Commission did launch a consultation on that topic. For both these reasons, and also because of the complexity of the topic, it was felt useful to initiate a comparative exercise on the question of the status of illegally obtained evidence in criminal proceedings. The Members of the EU Network of Independent Experts on Fundamental Rights were asked to

> "describe the status of evidence presented to the criminal court, when the evidence has been obtained in violation of the requirements of private life : may this evidence be used as a basis for a criminal conviction, or is this possible only under certain conditions (e.g. when there is other, corroborating evidence), aside from the fact that it must be subject to the contradiction between parties ?"

Another, closely related question posed to the Independent Experts related to the situation where the evidence was obtained, per hypothesis in violation of the right to respect of private life of the defendant party, by a private person, either the victim of the offence or any third person. The Independent Experts were asked :

> "when the violation of the right to respect for private life has been committed by private persons, rather than agents of the State (for instance the police), do the same rules apply on the admissibility of the evidence ?"

Answers were received from the Independent Experts of the Network monitoring fundamental rights in Austria, Belgium, Cyprus, Denmark, Spain, Finland, Germany, Greece, Ireland, Italy, Luxemburg, Malta, the Netherlands, Portugal, Sweden and the United Kingdom[2]. The state of the law in France is described on the basis of other sources, as the competent Independent Expert was not in a position to offer an answer. **Seventeen States** are thus covered by this survey.

[1] COM(2003) 75 final.

[2] The EU Network of of Independent Experts on Fundamental Rights now comprises experts covering all the 25 Member States of the EU (current members or acceding States). However, as this comparison is a follow-up to the Report on the situation of fundamental rights in the EU in 2002, which was limited to the 15 current Member States, the experts covering the new Member States were not associated to this comparison. Cyprus and Malta are the exception.

The legal Framework

The use of illegally obtained evidence in the criminal trial

The European Court of Human Rights has adopted the position that the use of illegally obtained evidence, particularly evidence obtained in violation of Article 8 ECHR which guarantees the right to respect for private life, does not necessarily lead to unfair proceedings[3]. The position of the Court is that it should normally be left to national courts to decide on the admissibility of evidence, which is a matter essentially left to the regulation of national law[4]. In *P.G. and J.H. v. the United Kingdom*, the Court says, in its judgment of 25 September 2001[5] :

It is not the role of the Court to determine, as a matter of principle, whether particular types of evidence – for example, unlawfully obtained evidence – may be admissible or, indeed, whether the applicant was guilty or not. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the alleged "unlawfulness" in question and, where violation of another Convention right is concerned, the nature of the violation found.

Therefore, the fairness of a trial is not necessarily corroded by the use of illegally obtained evidence, for instance of evidence obtained in violation of the right to respect for private life of the individual concerned. Whether or not Article 6(1) ECHR is violated will depend on whether the evidence could be contradicted in trial, whether it was the only evidence on which a conviction was based, or whether, because of the way the evidence was collected – for instance by inducing a person to make certain statements or to commit certain offences which would not have been committed but for the active role played by the public authorities – it should be considered to violate the right not to contribute to one's own incrimination (the right to remain silent) or to be akin to provocation to commit an offence.

In general, national rules of criminal procedure are more protective of the accused than is required by Article 6(1) of the European Convention on Human Rights in this respect. Indeed, in only seven States (Austria, Denmark, Finland, France, Germany[6], Sweden and the United Kingdom) is evidence obtained in violation of the right to respect for private life[7] in principle admissible in criminal proceedings ("group A"). In the ten other States surveyed such evidence normally will not be admissible (Belgium, Cyprus, Spain, Greece[8], Ireland[9], Italy, Luxembourg, Malta, the Netherlands,

[3] The leading cases in this respect are Eur. Ct. HR, *Schenk v. Switzerland* judgment of 12 July 1988, Series A no. 140, and Eur. Ct. HR (3d sect.), *Khan v. the United Kingdom* (Appl. N° 35394/97), ECHR 2000-V, judgment of 12 May 2000. *Schenk* related to a violation of domestic law in the collection of evidence; *Khan* is the first case where the Court addressed the question whether evidence obtained in violation of a right recognized under the Convention nevertheless could be used in a criminal trial, without this entailing a violation of Article 6(1) ECHR. See also, e.g., Eur. Ct. HR (1st sect.), *D. Parris v. Cyprus* (Appl. N°56354/00), decision of 4 July 2002 (inadmissibility).

[4] Eur. Ct. HR, *Schenk v. Switzerland* judgment of 12 July 1988, Series A no. 140, §§ 45 (unlawful recording of conversations used as evidence) ; Eur. Ct. HR, *Teixeira de Castro v. Portugal* judgment of 9 June 1998, *Reports* 1998-IV, § 34 (use of undercover agents).

[5] Eur. Ct. HR (3d sect.), *P.G. and J.H. v. the United Kingdom* (Appl. 44787/98) judgment of 25 September 2001, § 76.

[6] The classification of Germany in this group is made because of the courts' practice. Normally problems arise only in crimes of considerable importance. In those cases in general the courts decide evidence as admissible - except there was a grave violation of the right to respect for private life.

[7] These States remain bound, in any case, by Article 15 of the Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishments (CAT) of 10 December 1984, which prohibits the use in a criminal trial against the person having been subjected to torture of evidence obtained by means of torture. All the Member States of the European Union, including its new members, are parties to that Convention.

[8] The classification of Greece in this group of States is justified by the insertion of Art. 19(3) in the Constitution in 2001, as this provision excludes reliance on evidence obtained in violation of the secrecy of communications, of the right to respect for private or family life or for the home. However, in the legislation or case-law applicable to criminal or civil proceedings, exceptions to this rule of absolute exclusion remain, for instance if the evidence may serve to convict for a very serious

Portugal) ("group B"). However, such a division of the States surveyed in two groups would be misleading, for two reasons.

First, in most cases, there are exceptions to the rule, whether of admissibility or of inadmissibility of evidence obtained in violation of the right to respect for private life. In all of the seven States from "group A" (although this is less explicit in Austria), the evidence presented to the judge will be evaluated according to a balancing process, in which the gravity of the violation committed in the collection of the evidence, the impact the violation may have on the reliability of the evidence, or the place of that evidence – whether it is central or more peripheral to establishing the liability of the accused – all may play a role. Such a balancing process, in which the illegality through which an element of evidence was obtained will be simply one aspect of a general appreciation of fairness of the trial, is in fact what Article 6(1) ECHR minimally requires. In the United Kingdom, the rule is codified in Section 78(1) of the Police and Criminal Evidence Act 1984, which states that

In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

and which the European Court of Human Rights has found compatible in principle in principle with the requirements of Article 6(1) ECHR in the *Khan* and *P.G. and J.H.* cases, mentioned above. This process of weighing the evidence presented could take into account, as one of its factors, the dissuasive virtue of a rule according to which, at least when it is obtained for the purpose of proving that an offence has occurred, illegally obtained evidence should be either outright rejected, or at least treated with suspicion and should never constitute the sole evidence on which a finding of liability is based. Article 15 of the 1984 UN Convention against Torture is based on the idea that one way to discourage torture by public agents is to have an exclusionary rule dismissing in advance as invalid any evidence obtained through torture. As noted by some dissenting members from the European Court of Human Rights[10], the same reasoning could apply to evidence obtained in violation of the right to respect of private life or of other fundamental rights. A process in which the judge freely evaluates the weight of the evidence presented to him or her, could without any difficulty include that concern in explaining that a lesser value will be attached to evidence obtained illegally, even more so if it is obtained in violation of a fundamental right of the individual concerned such as the right to respect for private life[11].

Second, it would be mistaken to consider that the status of illegally obtained evidence in States from "group B" – where such evidence is in principle excluded – is necessarily beneficial to the accused. Even illegally obtained evidence may sometimes be useful to prove someone innocent from the offence for which he/she is accused. In Denmark, where courts are in principle at liberty to evaluate the evidence presented, it is nevertheless admitted that they should accept evidence which is favorable to the defendant. The same concern has led a number of States from "group B" to create an exception to the principle of the inadmissibility of illegally obtained evidence[12].

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crime or to safeguard a very important interest. The question whether such exceptions are compatible with the new Art. 19(3) of the Constitution is not yet settled definitively.

[9] In Ireland, although evidence obtained in violation of the law will normally be evaluated according to the discretion of the judge, evidence obtained in violation of constitutional rights will normally be excluded. The latter rule will on occasion be difficult to rely upon because of the unclear scope of the constitutional right to privacy in Ireland.

[10] See the dissents by judge Loucaides in *Khan v. the United Kingdom*, cited above, and of judge Tulkens in *P.G. and J.H. v. the United Kingdom*, cited above.

[11] In Denmark, the same result is achieved where the courts consider that they should either disregard, or at least attach less weight to, evidence whcn it has been collected by the police in deliberate violation of the law.

[12] This has been the case, most spectacularly, in Belgium, where a judgment of the constitutional court (Cour d'Arbitrage) imposed that solution, reasoning that an absolute exclusion of eivdence considered illegal could constitute a disproportionate restriction on the rights of defence of the accused. In Greece, there is some authority behind the idea that such an exception crafted the new Art. 19(3) of the Constitution (inserted in 2001), would not be in violation of that provision.

Use of evidence illegally obtained by private persons

Whether they leave it to the judge to evaluate the weight of the evidence put forward, whichever irregularities may have affected the gathering of that evidence, or whether they impose in principle the exclusion of illegally obtained evidence in general – or, more specifically, the exclusion of evidence obtained in violation of the right to respect for private life –, the rules which regulate the admissibility of evidence in each State may offer varying solutions according to the author of the alleged illegality. Where the violation has been committed by a public agent, for instance a police officer, the exclusion of that evidence will serve to discourage any further violations, and in that respect may constitute an effective deterrent for over-zealous inquirers. The same reasoning would apply where the violation was committed by a private party, but upon the suggestion, with the help or the active involvement of a public agent. Moreover, the exclusion of evidence thus obtained by inquirers will limit the risk from basing a conviction on unreliable evidence : where the inquirers have manifestly breached the law for the sake of obtaining evidence incriminating a person, there is a suspicion that the evidence may have been distorted in the process, selectively gathered or presented, or even outright fabricated. This last argument, however, also should lead to consider with the same suspicion evidence collected by private persons, where they have denunciated the offence, for instance because they are victims of the offence and seek reparation, or because, for whatever reason, they consider they should supplement the public authorities in combating certain criminal forms of conduct. On the other hand, where certain facts have been uncovered in the course of a violation of the right to respect for private life, but where the violation was not purposively committed to prove the existence of a criminal conduct, but was simply the consequence of an indiscretion of a private person vis-à-vis another, these arguments do not apply, or do not apply with the same force.

The European Court of Human Rights has stated, in a number of different contexts, that Article 8 ECHR, which guarantees the right to respect for private life, also imposes on the authorities the adoption of reasonable measures to ensure an effective protection of that right in private relationships – the individual must be protected from infringements by other individuals –. However, in the field we are concerned with in this opinion – the collection of evidence for the purpose of a criminal trial –, the Court has considered that only where the alleged violation of Article 8 ECHR has been committed by State agents may it be said that there is an "interference by a public authority", justifying the application of Article 8(2) ECHR and the imposition of its requirement that the interference be in accordance with the law, and necessary for the fulfilment of a limited number of legitimate aims which this provision lists exhaustively[13].

[13] This, in particular, has been the position of the Court in the judgment of 8 April 2003 in the case of *M.M. v. the Netherlands* (Appl. N°39339/98), which the Dutch government requested to be referred to the Grand Chamber of the Court. The Court concluded in this case that Article 8 ECHR had been violated. It considered that the case "is characterised by the police setting up a private individual to collect evidence in a criminal case", and that to accept the argument of the defending government that the private person (a woman complaining of harassment by the lawyer defending her husband, and who had taped the phone calls of the alleged harasser after being provided with the necessary material and advice by the police) "would be tantamount to allowing investigating authorities to evade their responsibilities under the Convention by the use of private agents" (§ 40). The Court also cites an earlier case, *A. v. France* (judgment of 23 November 1993, Series A n° 277-B), in which a police superintendent to whom a person has reported a conspiracy to commit murder had made available his office, his telephone, and his tape recorder, to ensure that the informer would call the applicant A. and thus gather evidence of the criminal intentions of A. The Court considered there that "the public authorities were involved to such an extent that the State's responsibility under the Convention was engaged" (§ 36).

The status of the illegally obtained evidence in the Member States of the European Union

Austria

The use of illegally obtained evidence in the criminal trial

In Austria, criminal law does not generally know such rule as "the fruit of the poisonous tree doctrine", which taints all evidence discovered due to information found through illegal or unconstitutional means and thus makes it impossible to introduce in court proceedings. Rather, criminal procedure is governed by the principles of establishment of the truth and freedom of evidence, which means that there is not only no legal obstacle to the admission of evidence offered to the court but even an obligation to accept such an offer by a party. So the idea behind is that once evidence is on the table it should be used whatever its origin; if laws were violated in order to gain the evidence, this should be a question of its own and prosecuted separately. While this is describing the rule, some important exceptions have gradually been established for certain cases.

a) The first modern regulation to that end is section 98(4) of the Tax and Revenue Offences Act (Finanzstrafgesetz) which was introduced in 1985[14] and grants procedural protection to suspects with respect to a restricted number of unlawful methods of obtaining evidence (illegally obtained testimony, illegal confiscation of evidence, violations of the right not to incriminate oneself).

b) In two amendments to the Code on Criminal Procedure (Strafprozessordnung) in 1993 and 1997, which empowered the investigating judge under special conditions and upon consent of a panel of fellow judges ("Ratskammer") to order the technical surveillance of a certain telephone connection or certain premises including the making of records (bugging) so as to better combat criminal organisations, safeguards were built in to prevent misuse of information collected in violation of the law. According to sections 149c(3) and 149h(2) of the Code, evidence from a surveillance must not be used in court or administrative proceedings if the surveillance itself was not lawful and second, any evidence gained by chance on a criminal offence different from that which initially gave rise to the surveillance may only be used if the bugging would have been also lawful for that offence.

c) Journalists are specially protected under section 31 of the Media Act (Mediengesetz) which stipulates that the right not to disclose their informers must not be circumvented by any means of technical surveillance.[15]

However, not giving a suspect the statement of his rights when arrested does not taint a confession given in a police interrogation.[16] Also, irrespective of the personal responsibility of the police officers involved, the evidence gained during an illegal search of a private home or person would appear to be as good as any other.

Use of evidence illegally obtained by private persons

With respect to the use of evidence that was illegally obtained by private persons, there are currently no legal obstacles to be found. In a criminal case that was decided by the Supreme Court[17], a person accused of defamation and insult illegally recorded conversations of the private complainant in order to defend himself against the allegations and requested the tape to be admitted evidence. While the lower courts rejected the evidence for its doubtful origin, the Supreme Court, referring to the *Schenk*

[14] Federal Law Gazette (BGBl.) No. 571/1985.
[15] Federal Law Gazette (BGBl.) No. 314/1981 as amended by No. I 105/1997.
[16] OGH, 14 Os 130/97, judgement of 11 November 1997.
[17] OGH, 15 Os 3/92-8, judgement of 2 July 1992.

judgement[18] given by the European Court of Human Rights, ruled that the European Convention did not prevent the use of illegally obtained evidence, especially as the admission of the tapes for the defence of the suspect appeared to be imperative in the interest of fair proceedings.

Belgique

L'utilisation dans le cadre de poursuites pénales de la preuve illégalement recueillie

En droit belge, le principe est celui de la liberté de la preuve pénale[19] : explicitement formulée à l'article 342 du Code d'instruction criminelle qui régit la procédure portée devant la cour d'assises, la règle s'applique devant toutes les juridictions pénales ; elle implique que le juge pénal devra apprécier la valeur de toute preuve portée devant lui, sans limitation quant au type de preuve dont il s'agit[20].

La règle dite de l'exclusion des preuves irrégulièrement obtenues constitue une exception à ce principe de liberté[21]. Selon un arrêt de la Cour de cassation du 4 janvier 1994 – mais cet arrêt ne fait que confirmer une règle bien établie depuis 1923 –: "Le juge ne peut déclarer établie une infraction, si la preuve en a été obtenue à la suite d'un fait punissable ou d'une autre manière irrégulière, soit de la part de l'autorité chargée de la recherche, de la constatation ou des poursuites en matière d'infraction, soit de la part du dénonciateur de l'infraction; dans ce cas, le juge pénal ne peut déclarer établi le fait mis à charge du prévenu, sauf si la preuve de l'infraction est apportée par d'autres éléments de preuve qui ne se déduisent ni directement ni indirectement de la preuve obtenue irrégulièrement"[22]. Il appartient donc au juge de vérifier que la preuve de l'infraction a été régulièrement établie, ce qui suppose que les autorités chargées de l'enquête ne dissimulent pas au magistrat les circonstances dans lesquelles tel indice a été recueilli, empêchant ainsi le magistrat d'exercer son contrôle[23].

Devra en particulier être exclue la preuve recueillie en violation du droit au respect de la vie privée ou du droit de chacun à ne pas contribuer à sa propre incrimination, c'est-à-dire du "droit au silence" reconnu à l'accusé en matière pénale. L'on notera que le droit au silence exclut non seulement l'aveu donné sous la menace de sanctions pénales, mais également le recours à des techniques qui, telles la narco-analyse ou l'hypnose, privent l'accusé de la maîtrise des informations qu'il peut livrer à l'extérieur.

La preuve illégalement recueillie doit être écartée des débats. Elle ne peut servir à fonder une condamnation pénale. Cependant, cela n'exclut pas que le juge pénal prononce une telle condamnation, après avoir constaté que les éléments constitutifs de l'infraction sont réunis, sur la base d'autres éléments de preuve, non viciés par l'irrégularité qui a été constatée, et pour autant que ces éléments aient bien été soumis à la libre discussion des parties, ainsi que le requiert le principe du contradictoire. Selon la Cour de cassation de Belgique, l'illégalité qui vicie un élément de preuve ne porte atteinte de manière irréparable au droit de la défense et au droit à un procès équitable que "lorsque la confusion entre les actes d'instruction et la preuve illégale est telle que les actes

[18] ECtHR, *Schenk v. Switzerland*, judgement of 12 July 1988.
[19] Voy. par ex. Cass., 6 mai 1946, Pas., I, p. 171; Cass., 13 septembre 1965, Pas., 1966, I, p. 59; Cass., 27 novembre 1979, Pas., 1980, I, p. 388.
[20] L'article 154 du Code d'instruction criminelle ne propose qu'une énumération, non limitative, des modalités de preuve de l'infraction pénale.
[21] Pour des présentations générales, voy. H.-D. Bosly et D. Vandermeersch, Droit de la procédure pénale, 2ième éd., La Charte, 2001, pp. 919-926; A. De Nauw, "Les règles d'exclusion relatives à la preuve en procédure pénale belge", *Rev. dr. pén. crim.*, 1990, p. 714; Ph. Traest, "De rol van de particulier in het bewijsrecht in strafzaken : naar een relativering van de uitsluiting van onrechtmatig verkregen bewijs ?", *Liber amicorum Jean du Jardin*, Antwerpen, Kluwer, 2001, p. 61.
[22] Cass., 4 janvier 1994, *Rev. dr. pén. crim.,* 1994, p. 80, concl. de l'Avocat général J. du Jardin. Beaucoup d'autres arrêts vont dans le même sens, par ex. Cass., 13 mai 1986, *Rev. dr. pén. crim.*, 1986, p. 905, concl. de l'Av. gén. J. du Jardin; Cass., 17 janvier 1990, Pas., 1990, I, n° 311 et 17 avril 1991, *Rev. dr. pén. crim.*., 1992, 94, note Ch. De Valkeneer, "De l'illégalité commise par un tiers dans l'administration de la preuve", p. 104.
[23] Mons (ch. mises en acc.), 19 novembre 1998, *Rev. dr. pén. crim*., 1999, p. 239, note J. Sace, *J.T.*, 1999, p. 66, note O. Klees et D. Vandermeersch.

d'instruction se trouvent entachés de la même illégalité et que tant l'instruction que l'action publique sont fondées sur celle-ci"[24].

Jusqu'à l'adoption d'une loi du 4 juillet 2001 complétant le Code d'instruction criminelle, la jurisprudence admettait que, malgré le principe de l'exclusion des preuves illégalement recueillies, le prévenu pouvait néanmoins utiliser pour sa défense les pièces écartées des débats, qui continuaient de figurer matériellement dans le dossier[25]. La loi du 4 juillet 2001 a complété les articles 131 § 2 et 235bis § 6 du Code d'instruction criminelle en précisant, à l'encontre de cette jurisprudence, que "Les pièces déposées au greffe ne peuvent pas être consultées, et ne peuvent pas être utilisées dans la procédure pénale". Dans un arrêt n°86/2002 du 8 mai 2002, la Cour d'arbitrage a considéré que l'interdiction absolue et générale pour le prévenu d'utiliser des pièces annulées par une juridiction d'instruction, "même lorsqu'elles contiennent des éléments qui peuvent être indispensables à la défense d'une partie", aboutit à une violation des principes constitutionnels d'égalité et de non-discrimination, "lus à la lumière du principe général du droit relatif au respect des droits de la défense". Les adjonctions précitées faites par la loi du 4 juillet 2001 au Code d'instruction criminelle ont donc été annulées. Selon la jurisprudence postérieure de la Cour de cassation, il s'impose néanmoins au juge de déterminer la mesure dans laquelle le respect dû aux droits de la défense requiert la possibilité pour une partie d'utiliser des pièces écartées des débats, en veillant aux droits des autres parties : si le droit de la défense ne saurait être nié, comme il pourrait l'être si l'exclusion des pièces était complète même lorsqu'elles peuvent servir la défense de l'accusé, ce droit n'est pas non plus absolu, mais doit être mis en balance avec les droits des autres parties à la procédure pénale[26].

La preuve illégalement recueillie par une personne privée

Bien qu'en principe, l'exclusion de la preuve irrégulière soit exclue, la Cour de cassation de Belgique admet, depuis des arrêts de 1990 et 1991, que de telles preuves peuvent être produites en justice lorsque, d'une part, les agents de l'autorité n'ont eux-mêmes commis aucune irrégularité et lorsque, d'autre part, il n'existe aucun lien entre l'irrégularité commise par un tiers et la communication de la preuve aux enquêteurs[27]. Dès lors, "la circonstance que le dénonciateur d'une infraction en a eu connaissance en raison d'une illégalité n'affecte pas la régularité de la preuve obtenue ultérieurement sans illégalité"[28]. Si le juge doit en effet écarter la preuve de l'infraction lorsque cette preuve "a été obtenue illégalement soit par les autorités en charge de l'enquête, des constatations ou des poursuites, soit par le dénonciateur de cette infraction, par un fait punissable ou d'une autre manière"[29], en revanche peut être produite en justice la preuve qui est issue d'une illégalité pourvu que cette illégalité n'ait pas été commise, par l'autorité ou par le dénonciateur, en vue d'établir l'infraction, mais a été le fait d'un tiers et est ensuite tombée régulièrement entre les mains du dénonciation ou de l'autorité.

Dans un arrêt du 27 juin 2003, la cour d'appel de Liège résume cet enseignement en soulignant que "le juge ne peut déclarer une infraction établie si la preuve en a été obtenue à la suite d'un fait punissable ou d'une autre manière irrégulière, soit de la part de l'autorité chargée de la recherche, de la constatation ou des poursuites en matière d'infraction, soit de la part du dénonciateur de l'infraction"; mais que "toutefois, le juge peut refuser d'écarter une preuve recueillie à la suite d'un acte illicite lorsque le tiers, par l'intermédiaire de qui cette preuve parvient aux enquêteurs, est lui-même étranger à tout acte illicite"[30].

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[24] Cass., 14 décembre 1999, *Pas.,* 1999, I, n° 678.
[25] Cass., 20 janvier 1999, *Pas.,* 1999, I, n°31.
[26] Cass., 18 février 2003, *e.c. Vercauteren* (P.02.0913.N). Sur ces développements récents, voy. J. du Jardin, "Le droit de défense dans la jurisprudence de la Cour de cassation (1990-2003)", *J.T.*, 2003, p. 609.
[27] Cass., 17 janvier 1990, Arr. Cass., 1989-1990, n°310; R.W., 1990-1991, p. 463, note L. Huybrechts. Egalement Cass., 17 avril 1991, Pas., 1991, I, p. 736; R.W., 1991-1992, p. 403, note A. Vandeplas. Ces références et les autres références de ce paragraphe sont empruntées à O. Leroux et Y. Poullet, "En marge de l'affaire Gaia : de la recevabilité de la preuve pénale et du respect de la vie privée", *R.G.D.C.*, 2003.
[28] Cass., 30 mai 1995, J.L.M.B., 1998, p. 488, note F. Kuty.
[29] Cass., 27 février 2002, http://www.cass.be.
[30] Liège(6ième ch.), 27 juin 2003, *e. c. Ministère public et autres c. De Craene et autres (affaire "GAIA")*, n° 528/03. L'attendu est en réalité superflu dans le raisonnement de la cour d'appel. Celle-ci considère, dans cette affaire où était en

Cyprus

The use of illegally obtained evidence in the criminal trial

The Evidence Law in Cyprus of 1946 embodied the Law and Regulations applicable in England before 5 November1914 [Ο Περί Αποδείξεως Νόμος, Κεφ. 9].

Evidence obtained in violation of the requirements of private life are not admissible by the Courts in Cyprus. As stated in the *Georgiades* case [Αστυνομία v. Γεωργιάδης (1983) 2 CLR 33] by the Supreme Court Judge Pikis, evidence obtained in violation of the rights and liberties safeguarded by the Constitution are not admissible in any case. The Police is not allowed under any circumstances to violate the basic rights of the private life of an individual.

Due to the fact that human rights are incorporated in the Constitution any evidence obtained in violation of these fundamental rights is inadmissible, a position different from that taken by the English Courts before the enactment of the Human Rights Act of 1998 in England.

The Evidence Law in Cyprus is under scrutiny at this moment since it has not been accustomed with the requirements of modern life, creating a vacuum in the legal system by failing to take into account social, technological and scientific development. A Bill for Amending the Evidence Law on Hearsay, allowing for its admissibility as evidence [Νόμος που επιτρέπει την αποδοχή εξ ακοής μαρτυρίας και ρυθμίζει συναφή με το δίκαιο της απόδειξης θέματα], will be presented to the full House in the immediate future, forming an important revision of the existing Law.

Denmark

The use of illegally obtained evidence in the criminal trial

In Denmark, unlawfully obtained evidence in criminal proceedings is primarily regulated in the Danish Administration of Justice Act. According to Paragraph 746, section 1, in the Danish Administration of Justice Act, the court settles disputes as to the legality of police investigative measures as well as to the rights of the accused and the defence counsel, including requests from the counsel of the accused for the undertaking of additional investigative measures. The decision is, upon request, issued in the form of a court order. Furthermore, it is stated in Section 2 that if the judge becomes aware that a measure, which has been undertaken by the police, and which requires approval by the court, has not been brought before the court before the expiration of the given time limit, the judge decides, after soliciting a statement from the police, whether the measure shall be upheld or rescinded.

However, it is uncertain whether the judge is competent to exclude unlawfully obtained evidence in criminal cases if neither the defence counsel nor the prosecutor have requested an exclusion of the evidence.

According to judicial practice, the courts increasingly tend to disregard unlawfully obtained evidence in criminal cases. The following may be concluded about the situations in which the courts exclude or admit unlawfully obtained evidence:

a) The evidence must be excluded if the disregarding of the rules has reduced the reliability of the evidence to a not insignificant extent. If, conversely, the improper actions are of a formal nature in

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cause la recevabilité d'images vidéo produites par des associations de défense des droits des animaux, qui avaient filmé à leur insu des auteurs d'actes dénoncés comme violant des réglementations relatives à la protection et au bien-être des animaux, qu'il n'a pas été porté atteinte au droit au respect de la vie privée des personnes poursuivies dans ce cadre, dès lors qu'elles ont été filmées dans un lieu accessible au public où les prévenus pouvaient être vus de tous.

the sense that they have not affected the reliability of the evidence, the court will as a main rule allow the evidence to be used. In particular, if the evidence is decisive for the outcome of the case, could have been lawfully obtained, and the offence with which the defendant is charged is a serious one.

b) Although the improper actions have not reduced the reliability of the evidence to any appreciable extent, the evidence will be excluded if the police have deliberately disregarded the rules about the gathering of evidence in order to obtain evidence, which could not have been lawfully obtained.

c) If the unlawful gathering of evidence has involved infringement of a very important protected interest, the evidence thereby obtained will be excluded, even if the reliability of the evidence is not affected. An example of such an important protected interest is the privilege against self-incrimination.

d) Finally, if the unlawfully obtained evidence is favourable to the defendant, the evidence must as a main rule be admitted.

Use of evidence illegally obtained by private persons

Regarding cases in which the violation of the right to respect for private life has been committed by private persons, the courts seems to be more willing to accept the unlawfully obtained evidence. However, if the unlawful gathering of evidence has involved infringement of a very important protected interest, the evidence thereby obtained will probably be excluded. This could apply to situations where the employees are under video-surveillance in the workplace without any notice thereof. But even in such a case the exclusion rule does not apply without exceptions. If the evidence is vital for the conviction, and the offence with which the defendant is charged is a serious one, it may induce the courts to admit the evidence.

Finland

The use of illegally obtained evidence in the criminal trial

Written Finnish law is silent on the status of evidence when the evidence has been obtained in violation of the requirements of private life. There is a lack of written legal provisions which might generally define the status of various types of evidence. Finnish law also lacks an exclusionary rule : a written provision which would set a prohibition to exploit certain kind of evidence. There is no express provision even on the use of information obtained under torture although it is, as such, clearly illegal and punishable in Finland to obtain evidence under torture.[31]

The state of Finnish law regarding the use of statement obtained under torture as evidence was described in report by Finland to the Committee against torture monitoring the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment as follows in 1999 :

58. Concerning the use of a statement obtained under torture as evidence, as stated earlier, it is illegal and punishable in Finland to obtain evidence under torture. Our system of evidence is, however, strongly based on the principle of the free weighing of evidence and the legislation does not include any provisions expressly disallowing the use of evidence obtained through prohibited means. A crime possibly related to the obtaining of evidence or an act resulting in private-law liability for damages is handled as a separate legal issue. Therefore, there is no express provision even on the use of information obtained under torture. The inadmissibility of such information is, however, self-evident in judicial practice. It is also clear that in the weighing of evidence, information obtained under torture does not constitute proof.

[31] 3rd periodic report by Finland , CAT/C/44/Add.6 (1999).

Instead, the traditional doctrine has been that all evidence may be considered admissible. It is up to a court to decide to what extent, if any, certain evidence can be taken into account by the court when reaching its decision (*vapaan todistelun periaate*, the principle of free evaluation of evidence). The principle is also illustrated by Section 2 of Chapter 17 of the Code of Judicial Procedure (Act No 571 of 1948) which stipulates as follows: "(1) After having carefully evaluated all the facts that have been presented, the court shall decide what is to be regarded as the truth in the case."

On the other hand, the right to privacy features as a constitutional right in Finnish law. Section 10 of the Finnish Constitution guarantees the right to privacy as follows:

"Everyone's private life, honour and the sanctity of the home are guaranteed. More detailed provisions on the protection of personal data are laid down by an Act. The secrecy of correspondence, telephony and other confidential communications is inviolable."

The right to privacy is not an absolute right. Paragraph 3 of Section 10 defines the limits on the right of privacy on grounds of, inter alia, the investigation of crime in the following way.

"Measures encroaching on the sanctity of the home, and which are necessary for the purpose of guaranteeing basic rights and liberties or for the investigation of crime, may be laid down by an Act. In addition, provisions concerning limitations of the secrecy of communications which are necessary in the investigation of crimes that jeopardise the security of the individual or society or the sanctity of the home, at trials and security checks, as well as during the deprivation of liberty may be laid down by an Act."

The more detailed provisions on limitations of the secrecy of communications or measures encroaching on the sanctity of the home can be found from the *Coercive Measures Act* (Pakkokeinolaki, Act No 450 of 1987). What is common to the provisions of the Coercive Act is that they set conditions for measures involving house search, wiretapping and the like measures by the police. In other words, private persons are not allowed to take advantage of these measures. However, it is not prohibited under Finnish law that individuals e.g. tape-record their own telephone conversations or allow the use of their telecommunication information. Therefore, if someone records his/her telephone conversation, this act does not, for that individual, constitute an act prohibited by Finnish law. Such a telephone conversation can also be presented as evidence to the criminal court.

As a rule, the information obtained by telecommunications interception or technical listening must be destroyed or, if this is not possible, the information shall be erased from the recording if the information does not pertain to an offence or if it pertains to an offence other than that for which the authorisation was granted or the decision made. However, the recording may be retained and the information entered into the files of the criminal investigation authority – and presumably be used as an evidence if the court so allows–, if the information pertains to an offence in whose investigation the use of telecommunications interception or technical listening is legal, or if the information is required for the prevention of an offence referred to in chapter 15, section 10 of the Penal Code (Failure to report a serious offence) (For the use of extraneous information see Chapter 5 a, Section 13 of the Coercive Measures Act).

Notwithstanding the protection thus afforded to the right to respect of private life, the prevailing doctrine still is that all evidence may be regarded as admissible by the court. In principle, this also applies in cases in which the evidence has been obtained illegally, e.g. in violation of the requirements of private life. If such evidence is presented to the criminal court, it is up to the court to determine to what extent, if any, it can be taken into account in the determination of the facts of the case. Therefore, the admissibility and status of the unlawfully obtained evidence may vary in concrete cases. In general terms, the final decision-making involves the weighing of various reasons for and against the admissibility of the evidence – and so that this weighing process is open to the influence of such considerations as the seriousness of the case before the court, the seriousness of the violation of the

requirements of private life and whether the violation of private life is committed by private persons or agents of the state.

It is a different thing that a crime possibly related to the obtaining of evidence or an act resulting in private-law liability for damages is handled as a separate legal issue. If someone, e.g. the police or a private person, has obtained the evidence in violation of private life, this can be punishable under the law. The Penal Code of Finland recognizes such offences as offences against privacy (Chapter 24 of the Penal Code), data and communication offences (Chapter 38 of the Penal Code) and offences in public office (Chapter 40 of the Penal Code).[32]

However, the validity of the traditional doctrine has recently been questioned.[33] The critique is that the traditional approach is not necessarily in harmony with the requirements stemming from the rule of law and constitutional and human rights, notably principles of legality and fair trial. Therefore, this "new approach" heavily underscores the necessity of taking into account constitutional and human rights in the determination of the admissibility and status of evidence. The admissibility and status of evidence should be assessed in light of the general requirements for limitations on constitutional rights, especially the requirement of proportionality.[34] The new approach also seems to advocate the need to adopt sufficiently clear and precise written legal rules to which judges should adhere to when seeking to resolve the admissibility and status of evidence.[35]

In practical terms, this new approach does not necessarily lead to results entirely different from those under the "traditional approach". However, the most obvious difference would be that it might contribute to the emergence of a much more coherent and consistent practice of resolving questions about the admissibility and status of evidence with reference to constitutional and human rights.

France

Le principe est celui de la liberté de la preuve en matière pénale. L'article 427 du Code de procédure pénale prévoit que : "Hors les cas où la loi en dispose autrement, les infractions peuvent être établies par tout moyen de preuve et le juge décide d'après son intime conviction. Le juge ne peut fonder sa décision que sur des preuves qui lui sont apportées au cours des débats et contradictoirement discutées devant lui". Dès lors, il n'est pas permis au juge d'écarter tel élément de preuve uniquement au motif qu'elle aurait été irrégulièrement obtenue, pourvu que cet élément ait pu faire l'objet d'un débat contradictoire devant le juge quant à sa valeur probante[36]. Cette règle vaut, notamment, lorsque la partie civile poursuivante a recueilli un élément de preuve de manière illicite, par exemple en violation de la protection de la vie privée que garantit l'article 9 du Code civil ou en commettant l'infraction d'atteinte à l'intimité de la vie privée d'autrui que prévoit l'article 226-1 du Code pénal. Par contre, la jurisprudence considère que la règle de la libre appréciation des preuves portées devant le juge afin qu'il se forge son intime conviction ne va pas jusqu'à permettre de prendre appui sur des actes policiers ou judiciaires qui sont réglementés. Ainsi, ne saurait être admis l'enregistrement effectué de manière clandestine, par un policier agissant dans l'exercice de ses fonctions, des propos qui lui sont tenus, fût-ce spontanément, par une personne suspecte, la jurisprudence considérant que pareil procédé élude les règles de procédure et compromet les droits de la défense[37].

[32] *See also the judgment of the Finnish Supreme Court KKO 2000:12.*
[33] See especially *Pasi Pölönen*, Henkilötodistelu rikosprosessissa, Lakimiesyhdistyksen 2003, pp. 324-326.
[34] For criteria for the limitation of constitutional rights, see Veli-Pekka Viljanen, Perusoikeuksien rajoitusedellytykset. Werner Söderström Lakitieto Oy 2001, especially 363-375 (English summary).
[35] The introduction of such rules may also be justifiable in light of the judgment of the European Court of Human Rights in the case of *M.M. v. the Netherlands*, underscoring the importance to fulfil the requirement "in accordance with the law" under Article 8 of the ECHR.
[36] Voy. Cass. (crim.*),* 30 mars 1999, *Bull* n° 59 ("la circonstance que des documents ou des enregistrements remis par une partie ou un témoin aient été obtenus par des procédés déloyaux ne permet pas au juge d'instruction de refuser de les joindre à la procédure dès lors qu'ils ne constituent que des moyens de preuve qui peuvent être discutés contradictoirement").
[37] Cass. (crim.), 16 décembre 1997*, Bull n° 42.*

Germany

According to the German *Strafprozessordnung* (Code of Criminal Procedure) the criminal court has to reject an application to take evidence if the taking of such evidence is inadmissible (section 244 § 3). Neither is the court allowed to utilize judicial evidence in hand if the taking of evidence is inadmissible (section 245 § 1). It does not matter if one of the participants opposes this exclusion. Prohibitions for taking evidence and excluding rules result from the Code of Criminal Procedure as well as immediately from the Constitution (*Grundgesetz*).

Section 136a Code of Criminal Procedure for instance stipulates that in the preliminary inquiry the accused's freedom to make up his mind and to manifest his will shall not be impaired by ill-treatment, induced fatigue etc. This shall apply irrespective of the accused's consent. Statements which were obtained in breach of this prohibition shall not be used, even if the accused agrees to their use. This rule shall apply *mutatis mutandis* to the examination of a witness and of an expert (sections 69 § 3, 72).

For secret tape recordings by private persons the criminal courts found a two-tiered solution. Here in principle no utilization is possible without consent of the person concerned. But only the "absolutely inviolable sphere of private life" is recognized an absolute protection. In most cases the circumstances will play a decisive role. It depends as well on whether it is a case of heavy or light criminality. Similar rules apply for the utilization of private diary entries.

In 1996 the Federal Court of Justice ruled on a case which was similar to the judgment of the ECtHR of 8 April 2003 delivered in the case of *M.M.v. Netherlands*. The court decided that the personal information obtained by a telephone call which was secretly eavesdropped may be utilized if it is necessary to clear up a crime of considerable importance and if the investigation of the facts by other corroborating methods of investigation would be considerable less successful or substantial more difficult.

Concerning evidence which was collected by creating an interference with fundamental rights, whether or not the evidence will be admissible will depend on whether the interference has some base in a special law, rescuing it from inadmissibility. For instance, according to section 161 § 2 information obtained out of a home by technical means may be used for reasons of evidence only under special, strictly defined, conditions. The admissibility of interference with telecommunication and of other measures implemented without the knowledge of the person concerned for reasons of prosecution, and the utilization of personal data obtained by such use of technical means is ruled in detail by sections 100a to 100d Code of Criminal Procedure and in the Act to Article 10 Basic Law.

In this matter an important principle of data protection remains applicable, according to which the personal information admissibly obtained on a special legal base may be utilized for other purposes or objects - i. e. for other criminal proceedings - only in restricted circumstances and provided a regulation provides expressly for that possibility.

Grèce

Régime juridique des preuves recueillies en violation des règles relatives à la protection de la vie privée.

a) En droit grec, le régime juridique des preuves recueillies en violation des règles relatives à la protection de la vie privée est fixé, en premier lieu, par la Constitution. Le paragraphe 3 de l'article 19 de la Constitution, adopté lors de la révision constitutionnelle de 2001 prévoit que "l'utilisation des preuves obtenues en violation du présent article [protection de secret de la correspondance et des communications en général], ainsi que des articles 9 [protection de la vie privée, de la vie familiale et

du domicile] et 9A [protection des données personnelles] est prohibée". Il est généralement admis que cette interdiction est directement et immédiatement applicable et qu'elle couvre toutes les procédures judiciaires et administratives, même en l'absence de normes législatives la concrétisant. Par conséquent, les preuves recueillies en violation des règles protégeant la vie privée doivent être écartées comme irrecevables[38], sous peine de nullité absolue de la procédure pénale en cas d'utilisation par le juge[39]. Ceci est valable quel que soit l'auteur de la violation (une autorité publique ou une personne privée). Cependant, une partie de la doctrine soutient que ladite disposition constitutionnelle n'interdit pas, dans certains cas, l'utilisation de preuves illégalement obtenues pour établir l'innocence de l'accusé[40].

En vertu de l'art. 19 par. 1 de la Constitution, "la loi fixe les garanties sous lesquelles l'autorité judiciaire n'est pas liée par le secret pour des raisons de sécurité nationale ou en vue de la constatation de délits particulièrement graves". A l'évidence, les preuves obtenues conformément à ladite restriction apportée au droit au secret de la communication et à la procédure fixée par la législation y relative, ne sont pas "illégales" et leur utilisation devant le juge pénal n'est pas interdite par le nouveau par. 3 de l'art. 19[41].

Prise compte des preuves recueillies par le moyen d'actes punissables par la loi pour la déclaration de culpabilité

b) L'art. 177 par. 2 du Code de procédure pénale dispose que les preuves recueillies par le moyen d'actes punissables par la loi ne sont pas prises en compte pour la déclaration de culpabilité, l'imposition de la peine ou l'adoption de mesures de coercition. Cette disposition n'exclut pas, *a contrario*, que lesdites preuves puissent être utilisées pour innocenter l'accusé. Cependant, selon la même disposition, pareilles preuves peuvent être prises en considération, suite à une décision du tribunal dûment motivée sur ce point, lorsqu'il s'agit de crimes passibles de la réclusion à la vie[42]. Dans ce cas de figure, des preuves illégalement recueillies sont recevables même si elles vont à l'encontre de l'accusé. Evidemment, les autres principes découlant du droit à un procès équitable (droits de la défense, principe du contradictoire, etc.) restent applicables. La jurisprudence ne s'est pas encore prononcée sur la constitutionnalité de cette disposition, suite à l'adoption de l'art. 19 par. 3 de la Constitution.

Les atteintes à la vie privée commises par les personnes privées

c) L'art. 370A du Code pénal punit l'interception illicite de correspondances téléphoniques ou de communications orales ou l'enregistrement illicite d'images (par. 1 et 2), ainsi que l'utilisation des informations et des enregistrements obtenus par ces moyens (par. 3). Cette disposition couvre également les atteintes à la vie privée commises par des personnes privées. Selon le par. 4 dudit article (tel qu'amendé par l'art. 6 par. 8 de la loi no 3090/2002, visant, suite à la révision constitutionnelle, à limiter les cas dans lesquels la violation du secret de la correspondance téléphonique et des conversations orales n'est pas punie), l'utilisation d'informations ou d'enregistrements obtenus

[38] Voir les ordonnances 83-84/2003 du Procureur de Thessalonique, *Poinika Xronika*, 2003, p. 274.
[39] Voir Aristotelis Charalambakis, La punissabilité des écoutes téléphoniques et le statut, du point de vue procédural, de leur produit, *Nomiko Vima*, 6/2002, pp. 1061-1072, p. 1072.
[40] Voir Julia Iliopoulou-Stranga, "L'utilisation des moyens de preuve illégalement obtenus pour innocenter l'accusé après la révision (2001) de la Constitution", *Poinikos Logos 6/2002*, pp. 2175-2220. Voir également les ordonnances précitées du Procureur de Thessalonique, ainsi que l'arrêt no 1351/1997 de la Cour de cassation, rendu avant la révision de la Constitution.
[41] La loi 2225/1994 précise que le contenu de la correspondance ou de la communication obtenu suite à la levée du secret ne peut pas être utilisé ou pris en considération, sous peine de nullité, comme moyen de preuve à une procédure autre que celle pour laquelle le secret a été levé, dans un but différent de celui fixé par la décision autorisant la levée du secret. Cependant, l'autorité compétente pour lever le secret peut autoriser, par décision dûment motivée, l'utilisation ou la prise en considération des éléments de preuve susmentionnés, notamment lorsqu'il s'agit de la défense de l'accusé dans un procès pénal pour crime ou délit. Ajoutons encore que la loi 3115/2003, récemment adoptée, punit la violation du secret des communications et institue une Autorité indépendante pour la sauvegarde du secret des communications, mais ne contient pas de règles concernant l'utilisation des preuves ainsi recueillies.
[42] Signalons que l'Autorité indépendante pour la protection des données personnelles, dans son Avis 83/2002, a proposé la suppression de cette exception.

illégalement (c'est-à-dire en violation des paragraphes 1 et 2) n'est pas punissable lorsqu'elle a été faite devant une autorité judiciaire ou d'investigation pour la sauvegarde d'un intérêt légitime qui ne pouvait pas être sauvegardé d'une autre manière[43]. Ce motif d'exonération ne concerne pas l'auteur ou l'instigateur, mais seulement les tiers[44] et, selon une partie de la doctrine, ne lève pas la sanction de nullité frappant les preuves obtenues en violation de l'art. 19 par. 3 de la Constitution[45]. Cependant, certains arrêts, rendus avant la révision de la Constitution, semblent admettre que des preuves, illégalement obtenues mais couvertes par le par. 4 de l'art. 370A du Code pénal, sont recevables[46].

L'irrecevabilité des preuves illégalement obtenues et son exception

d) L'irrecevabilité des preuves illégalement obtenues a été affirmée, à plusieurs reprises, par la jurisprudence[47]. Cependant, la Cour de cassation a jugé, dans une affaire civile, qu'une exception à la règle constitutionnelle de l'interdiction de preuves illégales pourrait être admise uniquement lorsqu'il s'agit de protéger des intérêts supérieurs reconnus par la Constitution, comme le droit à la vie[48]. Cette jurisprudence pourrait s'appliquer également au pénal, dans des cas exceptionnels (comme, par exemple, l'établissement de l'innocence de l'accusé). Les tribunaux n'ont pas encore eu l'occasion d'interpréter le nouvel art. 19 par. 3 de la Constitution. On peut, néanmoins, citer une décision de la Cour de cassation qui a interprété de manière restrictive la notion de "vie privée" pour affirmer la recevabilité, en tant que preuves, de vidéocassettes contenant des images prises par une caméra cachée[49].

Ireland

The use of illegally obtained evidence in the criminal trial

The Irish law on criminal evidence distinguishes between evidence that has been illegally obtained and evidence that has been obtained in breach of a person's constitutional rights. If a dispute as to admissibility arises – whether on the basis of the ordinary law or the 1937 Constitution – the decision on admissibility is made by the trial judge, in the absence of the jury, following what is called a "trial within a trial".

Illegally obtained evidence may be admitted in evidence but this is a matter of discretion left to the judge. Evidence obtained in breach of a constitutional right (such as the unspecified constitutional right to privacy) is excluded unless there are extraordinary excusing circumstances justifying its admission into evidence (*People (D.P.P.) v. Kenny v. D.P.P.* [1990] ILRM 569). In some cases the courts have embarked upon a consideration of whether the alleged constitutional breach was "deliberate and conscious" and have admitted unconstitutionally obtained evidence when the violation was inadvertent. Notwithstanding that the general rule is one of exclusion.

There is a peculiar problem for a person who alleges that evidence has been obtained in breach of the right to privacy under Irish law. The constitutional right to privacy in Ireland is one of the unenumerated or unspecified constitutional rights declared to exist by the judiciary since the seminal case of *Ryan v. Attorney General* [1965] IR 294. According to this decision the personal rights

[43] Il est à noter que l'Autorité indépendante pour la protection des données personnelles, dans son Avis 83/2002 précité, a proposé le remplacement de ce paragraphe par une disposition interdisant expressément l'utilisation des preuves produites en violation des paragraphes 1 et 2 de l'article 370A.
[44] Cour de cassation, arrêt no 1709/1995.
[45] Voir Julia Iliopoulou-Stranga, "L'utilisation des moyens de preuve illégalement obtenus pour innocenter l'accusé après la révision (2001) de la Constitution", op. cit., p. 2198.
[46] Cour de cassation, arrêts nos 1060/1997, 1351/1997.
[47] Voir, parmi d'autres, Cour de cassation, arrêts nos 589/1994, 215/2000.
[48] Cour de cassation, arrêt no 1/2001.
[49] Décision no 1317/2001 de la Cour de cassation, citée in: Julia Iliopoulou-Stranga, L'utilisation…, op. cit. (note 7), p. 2200.

protected by the Constitution are not confined to those specified in the text of the Constitution which, although listed in Article 40.3, are not listed exhaustively.

The constitutional right to privacy has been used to strike down legislation that effectively forbade the use of medical contraceptives within marriage (*McGee v. Attorney General* [1974] IR 284); and to provide the basis for an award of damages in a case involving the tapping of journalists' telephones by the Government (*Kennedy & Arnold v. Attorney General* [1987] 587). It was also asserted in a case attacking the constitutionality of 19th century legislation that criminalised certain form of homosexual behaviour but this argument was not successful (*Norris v. Attorney General* [1984] IR 36). It is obvious, therefore, that although privacy is recognised as a constitutional right the precise parameters of that right remain unclear in the absence of legislation dealing comprehensively with privacy issues. This lack of clarity has been criticised by the Law Reform Commission as recently as 1998.

In the context of criminal proceedings where a violation of privacy is alleged it would be significant whether this violation was classified as a statutory breach or an infringement of a constitutional right. In the case of the former there is a stronger chance of the evidence thus obtained being admitted into evidence; in the case of the latter it would be unlikely to be admitted unless extraordinary excusing circumstances for the violation were established by the prosecution. The difficulty for a person making an argument for exclusion on the basis of the Constitution is the vagueness of the right under that instrument. (This vagueness may well involve a violation of Article 8 ECHR but that matter has not been dealt with definitively by the Irish or European courts). On the basis of established case law it is clear that evidence obtained in breach of other constitutional rights (such as inviolability of the dwelling) is a better basis upon which to seek exclusion of evidence.

Use of evidence illegally obtained by private persons

In practice it may be even more difficult to assert the constitutional right to privacy against a private party and therefore more likely that statutory protection will be availed in any attempt to exclude evidence gathered by such a party. This may be a somewhat theoretical distinction as most evidence gathering is carried out by the police force in criminal cases. The most effective way to exclude evidence gathered by a private party would be to establish that it was gathered in breach of both statutory and constitutional rights including, for example, the unspecified right to privacy but also the specified constitutional recognition of the inviolability of the dwelling.

Italie

L'article 191 du code de procédure pénale régit l'admissibilité des preuves dans le procès pénal italien. Aux termes de cette disposition,

> « 1. Les preuves recueillies en violation des interdictions prévues par la loi ne peuvent pas être utilisées. 2. L'impossibilité d'utilisation peut être vérifiée, même d'office, en tout état et instance du procès. »

En ce qui concerne les écoutes de conversations ou de communications, l'article 271 du code de procédure pénale prévoit que :

> « 1. Les résultats des écoutes ne peuvent pas être utilisés si les écoutes ont été réalisées en dehors des cas autorisés par la loi ou si les dispositions des articles 267 [définissant les conditions et formes de l'autorisation] et 268, paragraphes 1 et 3 [modalités d'exécution des opérations] n'ont pas été respectés. 2. Les écoutes des conversations ou des communications des personnes indiquées à l'article 200, paragraphe 1 [personnes liées par le secret professionnel], ne peuvent pas être utilisées si elles ont pour objet des faits connus en raison de leur ministère, office ou profession, sauf si les mêmes personnes ont témoigné sur ces faits ou s'ils les ont diffusé d'une autre manière. 3. Dans tout état et instance du procès, le juge dispose que la documentation des écoutes prévues par les paragraphes 1 et 2 soit détruite, sauf si elle constitue l'objet du délit. »

Selon l'article 267 du code de procédure pénale, les écoutes doivent être autorisées par le juge des enquêtes préliminaires. Seulement dans des cas urgents, le ministère public peut disposer lui-même de l'exécution des écoutes. Toutefois, le juge doit valider le décret du ministère public dans un délai de 48 heures. Conformément à l'article 268 du code de procédure pénale, les écoutes peuvent être réalisées seulement à travers les installations présentes dans les bureaux du Parquet ou, dans des cas exceptionnels, à travers des installations du service public ou de la police judiciaire. S'il s'agit d'écoutes de communications par le moyen informatique, les opérations peuvent être également menées en utilisant des installations privées.

Luxembourg

L'utilisation dans le cadre de poursuites pénales de la preuve illégalement recueillie

Une preuve recueillie en violation des règles relatives à la protection de la vie privée est écartée par la jurisprudence comme étant irrecevable[50]. Il résulte de la jurisprudence luxembourgeoise que l'irrégularité peut avoir pour origine une violation de la Convention européenne des droits de l'homme. Et la personne à l'origine de cette violation peut même être une personne privée. D'après un arrêt de la Cour d'appel du 10 juillet 1992, des enregistrements vidéo et par bandes magnétiques réalisés par un employeur privé à l'insu d'une des ses employées sur son lieu de travail, doivent être écartés. En l'espèce, la Cour a écarté les preuves destinées à convaincre l'employée de vol domestique, mais obtenues en violation de l'article 8 de la Convention[51]. La jurisprudence luxembourgeoise a tendance à appliquer la Convention directement entre personnes privées.

Une preuve irrégulière, voire illégale alors qu'elle a été recueillie en violation de la Convention européenne des droits de l'homme, est irrecevable et elle est écartée des débats. La jurisprudence luxembourgeoise constante applique cette règle, même si la preuve est irrégulière seulement au regard des principes généraux de droit[52]. Il va sans dire qu'en vertu du principe de la liberté des preuves en matière pénale, une condamnation peut se baser sur d'autres éléments de preuve du dossier[53].

Malta

The Criminal Code[54] requires the production of the fullest and most satisfactory evidence available[55]. However, it establishes that "the testimony of one witness if believed by those who have to judge of the fact shall be sufficient to constitute proof thereof, in as full and ample a manner as if the fact had been proved by two or more witnesses."[56] Corroboration and evidence given by more than one persons is according to the Criminal Code only required for the crimes of calumnious accusation, perjury or false wearing and for a crime against the safety of the Government. Consequently, the prosecution's case may be presented upon uncorroborated evidence and the proof brought by one person may lead to a conviction if the testimony of that witness is believed by those giving judgment of the fact. The latter may be either the Judge, where the accused chooses to be judged by the Criminal Court as presided by a Judge alone, or the magistrate, where the offence falls within the competence of the Court of Magistrates, or the jury, where the accused opts for trial by jury.

[50] D. Spielmann et A. Spielmann, *Droit pénal général luxembourgeois*, Bruxelles, Bruylant, 2002, pp. 169 et suiv..
[51] C.S.J. (appel corr.), 10 juillet 1992, *Ann. Conv*., 1992, 461. Voy. aussi, en matière civile, l'irrecevabilité d'une preuve obtenue en violation de l'article 8 de la Convention, Trib. arr. Luxembourg, 6 avril 2000, *Rev. trim. dr. h.,* 2000, 860, note D. Spielmann : "Effet horizontal de la Convention européenne des droits de l'homme et preuve civile".
[52] Par exemple, a ainsi été écartée une preuve obtenue dans une affaire pénale par une personne privée, citante directe, par un subterfuge, voire une astuce (Trib. arr. Luxembourg, (corr.), 15 février 1995, n° 354/95, non publié, confirmé par C.S.J. (appel corr.), 14 novembre 1995, n° 491/95 V, non publié).
[53] D. Spielmann et A. Spielmann, op. cit., pp. 160 et suiv..
[54] Chapter 9 of the Laws of Malta.
[55] Section 638 (1) of Chapter 9 of the Laws of Malta.
[56] Section 638 (2) of Chapter 9 of the Laws of Malta.

However, this is not to say that in practice a conviction is delivered simply on the basis of the evidence of one person when this is not then corroborated at least by the circumstances if not by other witnesses, since as stated above the law requires the production of the fullest and most satisfactory proof and a case must be proved beyond reasonable doubt. The law simply does not exclude the conviction of a person on the evidence of one witness alone.

In practice, evidence obtained in violation of the right to respect for private life may have been so obtained by public officers, including police officers or by private individuals. The former are regulated by the Security Services Act[57] which establishes the procedure and the framework within which evidence through surveillance or interception of communications is collected. There does not seem to be a duty of the prosecution to declare how evidence produced before a court against an accused has been obtained. In fact, the Criminal Code and the Security Services Act do not require such a duty. This leaves it up to the defence counsel to consider whether the evidence being adduced has been lawfully obtained or not.

However, where the defence counsel thinks that evidence produced has been obtained in violation of the right to respect for private life, he is precluded from establishing this before the Court judging the accused. In virtue of Section 18 of the Security Services Act it is prohibited to show that evidence has been obtained under a warrant that has been issued or is to be issued under the Security Services Act or to show that that evidence has been obtained by a person who has himself acted in violation of the provisions of the Security Services Act. Section 18(5) furthermore provides that despite any provision found in any other law, all courts are prohibited from issuing any warrant or other order restraining a person or authority from exercising any powers conferred by this Act.

It seems that the law does not distinguish between that evidence obtained by public officers or by private persons and both are given the same standing in criminal proceedings. The only difference is that a person who intercepts or interferes with communications without authorisation under the Security Services Act or consent of the subject may be accused of an offence under the same Act. This offence covers only interception of communications and does not cover any other method such as surveillance that may lead to a violation of private life.

The Netherlands

Article 8 ECHR is considered to have direct effect in the Dutch legal order. Where a rule of domestic law is found to be incompatible with, for instance, Article 8 ECHR, the latter provision will take precedence (see Article 93-94 *Grondwet* [Constitution]). The *Wetboek van Strafvordering* [Code on Criminal Procedure, CCP] moreover sets rules for a number of situations where privacy may be interfered with, such as telephone tapping. Whether the use of these powers amount to a *violation* of the right to respect for private life, within the meaning of Article 8 para. 2 ECHR, will depend on the circumstances of the case. Since there is a legal basis for the interference (e.g., Article 126m CCP) and a legitimate aim (the prevention of crime), the key question in each case will be whether the measure was "necessary in a democratic society". If this question is answered in the affirmative, no violation of privacy has occurred and there is no objection to the use of evidence which has been obtained accordingly.

If there *is*, however, a violation of private life, Article 359a CCP, as interpreted in practice, provides for the following responses:

(1) reparation of the breach, if possible;
(2) inadmissibility of the prosecution (if it turns out that the police has misinformed the court about the methods used to obtain evidence or has grossly violated the suspect's rights);

[57] Chapter 391 of the Laws of Malta.

(3) exclusion of evidence;
(4) reduction of the sentence;
(5) a mere statement that mistakes have been made, without a reaction such as mentioned under (2) to (4).

Under Dutch law, acts by which private individuals violate privacy are not attributed to the public authorities, and hence cannot amount "an interference by any public authority is permitted in the exercise of the right to respect for private life", within the meaning of Article 8 ECHR. The ruling of the *Hoge Raad* [Supreme Court] in the very case of *M.M.* (mentioned in the Synthesis above) illustrates this:

> "6.2.2. It is ... correctly assumed in the grounds of appeal on points of law that no interference by any public authority is permitted in the exercise of the right to 'respect for his private life and his correspondence' guaranteed by Article 8 § 1 of the Convention unless, and to the extent, provided for by law.
> 6.3.1. What is decisive in the instant case is therefore the answer to the question whether, noting the part played by the police in the recording of the telephone conversations that S. has had with the suspect, there has been an interference by the police in the exercise of the right of the accused to 'respect for his private life and his correspondence'.
> 6.3.2. Against the background of the facts and circumstances ... the finding of the Court of Appeal that the police has not acted in such a directive manner – in which finding the Court of Appeal apparently had in mind the entire part played by the police in the recording of the telephone conversations by S. – that there has been an interference by any public authority within the meaning of Article 8 § 2 of the Convention is not incomprehensible, and furthermore it does not reflect an incorrect understanding of the law, in particular, not as regards the contents of that provision of the Convention ...

Evidence which is thus obtained may be used in criminal proceedings.

Portugal

The Portuguese Constitution

1. Art. 32º, No.8 of the Constitution of the Republic of Portugal determines that : "evidences obtained by means of (…) the abusive invasion of private life (…), as regards correspondence or telecommunications, are considered null and void"[58]. The Code of Criminal Procedure (CPP) (Art. 126º, No. 3), for its part, determines that any evidence obtained by means of interference in private life, correspondence or telecommunications without the consent of the person concerned, are also deemed null and void. That is to say, proofs thus obtained may not be used in legal proceedings ; nor may they serve as grounds for a decision. This is the case when evidences have been obtained by agents of public control or by individuals acting in collaboration with them and under their guidance, and also when evidences have been obtained exclusively by private individuals.[59]

The violation of telecommunications

2. The violation of telecommunications also constitutes an offence under Art. 194º, Nos 2 and 3 of the Criminal Code. Whomever interferes without consent in the contents of telecommunications and gains knowledge from them is punishable with a prison sentence of up to 1 year or by fine of up to 240 days. It is irrelevant whether the conversation is about private or intimate matters. In fact, this law aims to

[58] Under Art. 26º, No. 1 of the Constitution, "the rights (…) over one's image and words, and the right to respect for private and family life (…) against any form of discrimination are recognized to everyone". While, in the case of the rights over one's image, the aim is to prohibit someone from photographing someone else and exhibiting the portrait without the consent of that person, in the case of the rights over one's words, unauthorized recordings are prohibited. These rights are autonomous, and distinctly protected, in the Constitution.
[59] In this sense, COSTA ANDRADE, *Sobre as proibições de prova em processo penal*, Coimbra: Coimbra Editora, 1992, pp. 196-8.

protect privacy in the formal sense, and is indifferent to the contents of the telecommunications; what is punishable is the "transgression of a physical barrier".[60] It is not considered illegal conduct when both interlocutors give their consent for the conversation to be recorded. In addition, it is considered that "the agencies of criminal prosecution (the police and legal authorities) may not invoke the right of necessity in order to obtain evidences at the expense of the invasion of correspondence and telecommunications, beyond the limits expressly defined by the law of penal procedure".[61]

The criminal code and illicit recordings

3. Art. 199º, No. 1 of the Criminal Code incriminates illicit recordings as a violation of the rights to one's words[62]. The aim of the offence is to protect the "right of each person to decide freely if and who may record their words, as well as, after the recording, if the recording may be heard and by whom."[63] For this purpose, the recording of any words spoken is punishable, irrespective of whether their content falls or not within the ambit of the respect for private life. The only situation when this prohibition does not apply is in those cases in which the words are destined for the public. However, this does not mean that all words spoken in a public place may be included in this category; the holder may not wish to maintain them confidential, but nevertheless may not want them to be recorded. Only with the prior consent of the person may recording proceed. It is considered that "the prosecution of (repressive) ends immanent in the criminal process, principally the discovery of truth, does not legitimize the unauthorized production – by the individual or by a public authority – of a recording (…), just as it does not legitimize its unauthorized use or appreciation in the penal process".[64]

Phone Tapping

4. Phone-tapping may constitute a means of obtaining evidences within the strict limits of Arts. 187º and following of CPP. These provisions state that phone tapping may be ordered or authorized by the judge in the case of crimes punishable by a prison sentence of more than three years, or for crimes relating to the trafficking of drugs, arms, explosive materials or the equivalents; smuggling; crimes of libel, threat, coercion, the invasion of private life and disturbance of the peace, when committed by means of telephone. In these cases, phone tapping may only be used when "there are reasons to believe that the use of it will be revealed to be of great interest for the discovery of the truth or for proof" (Art. 187º, No. 1). Nevertheless, the interception of communications between the defendant and his attorney is prohibited, except in cases where there are grounds to believe that this constitutes the object or element of crime (No. 3). A transcription of the recording, together with the recorded tapes (or equivalent) is handed to the judge who ordered or authorized the investigation (cf. Art. 188º). Material that is considered relevant is attached to the case file and all the rest is destroyed. All parties in the process are subject to secrecy. This regime is equally applicable to conversations held by means other than by telephone; for example, by electronic mail or any other form of transmission of data by telemetric means (Art. 190º).

[60] COSTA ANDRADE, annotation to Art. 194 of CP, *in Comentário Conimbricense do Código Penal*, dir. J. Figueiredo Dias, Vol. I, Coimbra: Coimbra Editora, 1999, p. 754.
[61] *Idem*, p. 767.
[62] "Whosoever without consent: *a)* records the words spoken by another person that are not destined for the public, even if they were directed to it; or *b)* makes use of or permits the use of the recordings referred to in the previous point, even if they were illicitly produced; is punishable with a prison sentence of up to 1 year or a fine of up to 240 days".
[63] COSTA ANDRADE, *ob e loc cit*, p. 821.
[64] *Idem*, p. 838.

Espagne

L'utilisation dans le cadre de poursuites pénales de la preuve illégalement recueillie

La Loi Organique 6/1985, du 1er. Juillet, du Pouvoir Judiciaire, dispose que "Les preuves obtenues, directe ou indirectement, en violation des droits ou libertés fondamentales, ne pourront produire des effets juridiques" (art. 11.1).

Le Tribunal Constitutionnel, ultime interprète de la Constitution, a adopté la théorie de la nullité des preuves obtenues illicitement : les preuves obtenues en violation des droits fondamentaux, la vie privée y comprise, seront irrecevables. Les preuves dérivées de celles qu'on été obtenues en violation des droits fondamentaux sont frappées de la même sanction d'irrecevabilité. Pratiquement toute la jurisprudence constitutionnelle adopte cette position de principe. Parmi les exemples récents, on peut signaler les arrêts 123/2002 (du 20 mai 2002), 167/2002 (du 18 septembre 2002) ou 205/2002 (du 11 novembre 2002), décisions qui concernent toutes différents aspects du droit au respect de la vie privée.

Cela dit, le Tribunal Constitutionnel n'écarte pas radicalement que des effets juridiques puissent être reconnus aux preuves présentant des problèmes de licité par rapport au respect des droits fondamentaux, notamment le droit au respect de la vie privée, le droit au respect du domicile et le droit au secret des communications. En particulier, l'existence de preuves irrégulièrement obtenues ou dérivées de preuves irrégulièrement obtenues, n'exclut pas qu'une décision de culpabilité pénale soit prononcée, pourvu que la condamnation ne se fonde pas exclusivement sur ces preuves mais soit corroborée par d'autres éléments de preuves, quant à eux réguliers.

Sweden

According to the Swedish Code of Judicial Procedure (*Rättegångsbalken*, SFS 1942:740) Chapter 35 Section 1 the court shall, after evaluating everything that has occurred in accordance with the dictates of its conscience, determine what has been proved in the case. The provision contains the principle of free sifting of evidence (*fri bevisprövning*), which entails free submission of evidence (*fri bevisföring*) and free valuation of evidence (fri bevisvärdering).

There are some exemptions from the principle of free sifting of evidence. The court shall, for example, reject a proof if it finds that a circumstance that a party offers to prove is without any significance in the case, or if an item of evidence offered is unnecessary or evidently should be of no effect. The court may also reject an item of evidence offered if the evidence can be presented in another way with considerably less trouble or costs.[65]

In other words, the principal rule entails that any proof, without limitations, can be presented before the court and the court is not bound by any regulations when determining the value of the item of evidence. The Swedish legal system does not prescribe that it is forbidden to present an item of evidence which the party has got hold of while breaking the law. Neither is the court prevented from ascribing such a proof a great value.[66]

In one judgement of the Swedish Supreme Court[67], the question was raised whether it is allowed to present a blood sample drawn by a laboratory assistant, who was not entitled to draw the sample, to prove that a person has been driving under the influence of alcohol. Indeed, according to the Code of Judicial Procedure (*Rättegångsbalken*) Chapter 28 Section 13 only a physician or an accredited nurse may collect such a blood sample. The Instrument of Government (*Regeringsforme,* SFS 1998:1437)

[65] The Code of Judicial Procedure Chapter 35 Section 7.
[66] NJA 1986 p. 489 and *Thomas Ahlstrand*, Till frågan om fri bevisprövning och bevisförbud, Svensk juristtidning, SvJT 2002, pp. 545-548.
[67] NJA 1986 p. 489.

Chapter 2 Section 6 guarantees that every citizen shall be protected in his or her relations with the public institutions against any physical violation. This right may be restricted in an act of law and the provision concerning blood samples is an example of such a restriction.[68]

The Supreme Court considered that : "The fact that the blood sample was drawn by a laboratory assistant does not imply such a divergence from the Code of Judicial Procedure that it can be seen as a violation of the Instrument of Government Chapter 2 Section 6. Neither has any of the Swedish fundamental principle of law been set aside in a way that prevents the submission of the blood sample."[69] This formulation raises the question whether it implies that an item of evidence can be neglected by the court because of a grave violation of a right guaranteed in the Instrument of Government.[70]

One specific question is that of the status of "surplus information". When using coercive measures, for example, wire-tapping, information which is not related to the crime can be collected. The use of such "surplus" information is not currently regulated in Swedish law. Up to now the prevailing point of view has been that it is permitted to use and present surplus information as evidence in judicial proceedings. That opinion follows from the principle of free sifting of evidence and the obligation of the police to investigate and prevent crimes.[71] Nevertheless, the Council on Legislation (Lagrådet) has recently expressed the view that introducing a specific regulation on the using of surplus information in Swedish law is required in order to comply with the obligations under Article 8 of the European Convention on Human Rights.[72] On behalf of the Ministry of Justice a future regulation on the use of surplus information has been envisaged. According to the inquiry, presented in March 2003, surplus information shall be available as evidence on the condition that imprisonment for at least one year is prescribed for the crime and that it can be assumed that the court will not only lay a fine on the defendant.[73] The Government, has not yet presented any Government Bill on the issue of the use of surplus information.

United kingdom

The status of evidence obtained in violation of the requirements of private life will generally be determined by the Police and Criminal Evidence Act 1978, s 78(1) which provides that a 'court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it'. The reliance on this test in a number of cases has been upheld by the European Court of Human Rights[74]. The rule in the 1978 Act does not distinguish between the source of the evidence and so the fact that the interference with the right to respect for private life had been perpetrated by private persons rather than State agents would not be relevant unless in the particular factual situation this could be seen as somehow affecting the fairness of the proceedings. However, courts in the United Kingdom are required by the Human Rights Act 1998 to take into account the case law of the European Court of Human Rights and they are thus likely to follow its assessment as to whether the status of a person obtaining evidence could have a bearing on whether its use in a trial would be unfair.

[68] The Instrument of Government Chapter 2 Section 12.
[69] NJA 1986, p. 492.
[70] *Lars Heuman*, Bevisförbud.En undersökning av möjligheterna att avvisa oegentligt åtkommen bevisning i brottmålsrättegång, Juridisk tidskrift 1998-99, pp. 228-233.
[71] Ds 2003:13 Överskottsinformation p. 38 and Thomas Ahlstrand, Svensk juristtidning 2002 pp. 545-548.
[72] Ds 2003:13 p. 55.
[73] Ds 2003:13 p. 11.
[74] Eur. Ct. HR, *Khan v United Kingdom*, judgment of 12 May 2000, *P. G. and J. H. v United Kingdom*, judgment of 25 September 2001 and *Chalkley v United Kingdom*, admissibility decision of 26 September 2002.