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Session IV – Special Investigation Techniques - Turning Intelligence into Evidence

Broad views expressed in presentations:

For effective counter-terrorism, there is a need for quality intelligence. This intelligence can and should be used in criminal prosecution only if the principles of fair trial are respected.

Special mechanisms should be set up to respect fair trial, but also respect the confidential character of intelligence. This follows from the different purposes served by the intelligence services versus the prosecution authorities. The first need confidentiality, while the second need transparency.

At present, two broad trends can be observed: (i) more efforts to support the use of intelligence with potentially lower thresholds in oversight and/or internal controls and (ii) a trend towards an anticipatory approach of criminal prosecution (proactive investigations).

As a consequence, there is a convergence of intelligence and criminal investigation techniques. However, there are risks associated with bringing together intelligence services and prosecution. Prosecutors need to find ways to include the intelligence correctly, especially where it is to be an important part of the evidence.

How to use intelligence in court cases in full respect of human rights, and in particular of fair trial practices will remain a constant challenge.

Practices highlighted during the Conference:

A prosecutor can issue a formal request for information to the intelligence services. However, the use of intelligence as evidence provides better results when the public prosecutor is updated constantly on all on-going procedures in counter-terrorism by the intelligence and law enforcement agencies. To this end, law enforcement and intelligence agencies need clear and thorough legal provisions, particularly a legal obligation to share information with the prosecutor's office.

Intelligence products should be used as evidence only as long as authorized by the code of criminal procedure and/or validated by the prosecutor. And, this is valid in courts only when the legal requirements for gathering that information are fulfilled.

There are some exceptions to take into account, particularly when national security interest must be protected.

In some countries, law enforcement agencies perform, at the same time, the role of both intelligence services and judicial police. They make the intelligence available to the prosecutor when there are indications that a serious crime is committed or is about to be committed. Sometimes the intelligence information needs to be de-classified, before being transmitted to the prosecutor.

However, the prosecutor may not always have access to the whole relevant intelligence, but only to the final report related to the crime/individual suspects. Once the investigation is open and the law enforcement investigates the case using special investigation techniques, a strict judicial control is in place.

In this context, there are some good practices, mentioned in previous meetings organized by the UN Counter-Terrorism Executive Directorate (CTED) that are applicable here: specialization of judges (this makes relationship with other judges easier), centralization (one central agency that handles all counter-terrorism cases); liaisons between intelligence agencies and prosecution services (systems that help to build trust). Other good practices are the physical protection of sources, the hearings closed to the public (to protect sources) or some substitutes to full disclosure.

Challenges identified:

The biggest challenge is turning intelligence into evidence that is admitted in courts. In common law countries it is even more difficult than in civil law countries

There is a need to clarify what "special investigation techniques" are. There is no internationally agreed definition of SIT. Different legal systems and cultures contribute to a diversified situation.

There is the issue of resources; law enforcement and intelligence agencies do not have unlimited resources. They have to match their ability to process data with their capacities to collect information. They need to be able to process the ever larger amounts of information available on the Internet.

Intelligence agencies work much on open sources in their investigation. However, the minute that the open source technique leads to an individual, judicial control is applicable, as human rights are at stake.

Law enforcement and intelligence are not the only agencies to provide intelligence. The intelligence community is made up of other institutions and organizations, including the business community. It is a challenge at times for the prosecution to establish a link with the various institutions.

Different roles and rules (among national institutions, but also among different countries) governing collection of information and producing intelligence complicate the panorama.

There is an issue on how and when it is possible to rely on foreign intelligence as valid evidence; this is to be added to the difficulties in assessing reliability of information. What are the prerequisites for the intelligence obtained in one country to be validly used in courts in other countries?

Another challenge is the tendency in all countries to unnecessarily over-classify some information. Since de-classification is more complicated than classification, countries should consider changing these practices that constitute an obstacle to sharing intelligence.

There are issues related to the protection of the anonymity of the source; this is linked also to the capacity to protect witnesses.

Recommendations:

To provide forums for the sharing of good practices, lessons learned and challenges.

To broaden the number and the type of institutions that could provide intelligence valid to be used in courts (to bring more players into the intelligence room).

To improve the admissibility of intelligence as evidence. To this end, it was recommended to adapt the methods of intelligence gathering and production to the requirements of the respective national codes of penal procedure, and/or to change the laws related to gathering intelligence and admissible evidence in order to facilitate admissibility in courts.

To further standardize and harmonize the methods of intelligence collection and transformation of such intelligence into evidence.

Whereas CoE CM Recommendation (2005)¹⁰ refers only to criminal investigations, there is a need to define more specifically the dividing line between pure intelligence for State security and intelligence that could be used in criminal investigations.