THE USE OF INTELLIGENCE INFORMATION IN CRIMINAL PROCEDURE: A CHALLENGE TO DEFENCE RIGHTS IN THE EUROPEAN AND THE SPANISH PANORAMA.

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Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty nor Safety[1]

ABSTRACT

Intelligence information that law-enforcement authorities may present as evidence in criminal proceedings is a questionable procedure. Intelligence reports are usually preventive and proactive measures for internal security and their discussion is important, in so far as they may be used as evidence and may have been acquired before the trial and even the prosecution phase. From the standpoint of defence rights, the use of such information undoubtedly calls for a review of criminal procedural principles; the accused and counsel cannot challenge such intelligence reports as the sources are secret and their introduction in a criminal proceeding circumvents the observance of the ordinary rules of criminal procedure. Despite the absolute absence of specific guidelines on national ordinary judicial procedure for the assessment of such intelligence

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[1] Benjamin Franklin, *Pennsylvania Assembly: Reply to the Governor*, November 11, 1755, available at http://franklinpapers.org (last visited: 11 November 2016).

information in Spain, a practical working arrangement has nevertheless evolved in the field. In this paper, the example of the Spanish panorama is described and some thoughts are advanced on an eventual European approach. The concept of intelligence, whether such a concept is clearly identified in legal terms at a European and national level, as well as the practical ramifications of intelligence information used in criminal procedure with its consequences for the accused are all examined in the paper. The legal basis for the submission of such evidence both in Spanish legislation and in the judicial practice of the Spanish Supreme Court are also presented. The challenge is to ensure that the nature of such sensitive information and its assessment as evidence is at all times compatible with the observance of fundamental rights and, most especially, the procedural guarantees of the defendant.

KEYWORDS:

Intelligence information - criminal procedure – evidence – expertise – European Union strategy - fundamental rights - defence

SUMMARY: **1:** Introduction. **2:** The intelligence paradigm at EU level. **3:** National framework and legal regulation: the Spanish perspective. **4:** Functioning of intelligence information in Spanish criminal procedure according to judicial practice. **5:** Concluding remarks.

1. Introduction

At present, there are no general provisions on the use of intelligence information in criminal procedure, but it is in fact commonly used as a sort of evidence worldwide, especially in relation with cases of terrorism. Nevertheless, a fundamental distinction

between intelligence information and evidence must be drawn as their nature and the way they are gathered differ in many respects.[2] Hence, special care must be taken whenever intelligence reports are presented as evidence in criminal proceedings.

Not only is Spain no exception, but it may be one of the countries where such intelligence information has been employed most frequently in criminal procedure due to the conflagration of terrorism; the days of ETA terrorism in the past and nowadays by Islamic Yihadist extremists.[3] Of course, no regulation on the use of intelligence information is foreseen in Spanish criminal procedural legislation, despite considerable amendments to the law on criminal procedure, a legislative act that dates back to 1882.[4] As previously mentioned, intelligence reports are commonly accepted in judicial practice by different judges and courts. In fact, this extensive recourse to intelligence information arises from the global trend towards 'securitization'.[5] In brief, this trend refers to a wider concept of security, in so far as an issue qualified as an existential threat is 'lifted above the normal into the extraordinary'.[6]

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[2] See generally K. Roach, 'The eroding distinction between intelligence and evidence in terrorism investigations', in N. McGarrity, A. Lynch and G. Williams (eds.), *Counter-terrorism and beyond. The culture of Law and Justice after 9/11*, Routledge, London & New York, 2010, pp. 48-68. The author employs the example of a classic Cold War novel written by Graham Greene, *The human factor*, in order to qualify intelligence as 'patchy' and 'circumstancial'.

[3] For example, J.M. Terradillos Basoco, 'Terrorismo yihadista y política criminal del siglo XXI', 2016 *Revista Nuevo Foro Penal*, vol. 12, num. 87, pp. 18-59.

[4] Criminal Procedure Act (*Ley de Enjuiciamiento Criminal*, acronym LECrim), enacted by Royal Decree on September 14, 1882 available at https://www.boe.es/buscar/act.php?id=BOE-A-1882-6036 (last visited: 3 January 2016). An English version is available on payment of 3 Euros at https://tiendaonline.mjusticia.gob.es/Tienda/mostrarDetallePublicaciones.action?idPublicacion=10751 (last visited: 13 December 2016). Although the year 2016 is indicated, it is in fact the original law of Royal Decree of 14 September 1882, which underwent a profound reform in 2015 in Organic Law 5/2015 of 27 April, Organic Law 13/2015 of 5 October and Law 41/2015 of 5 October. See specifically *I Jornada del Boletín del Ministerio de Justicia: 'Las reformas del proceso penal'*, 2016 *Boletín del Ministerio de Justicia*, vol. 70, num. 2186, http://www.mjusticia.es/bmj; also J.J. Muerza Esparza, *Las reformas procesales penales de 2015*, Thomson Reuters & Aranzadi, Cizur Menor, 2016.

[5] On the Copenhagen School theory of 'securitization' in international relations, especially on Barry Buzan and Ole Waever, see M.C. Williams, 'Words, images, enemies: securitization and international politics', 2003 *International Studies Quarterly*, vol. 47, num. 4, pp. 511-531. A theory of (in)securitization is also argued at EU level; see especially E. Guild & S. Carrera, 'Towards an internal (in)security strategy for the EU?', *CEPS Policy brief*, 12 January 2011, available at http://www.ceps.eu/book/towards-internal-insecurity-strategy-eu (last visited: 13 December 2016) on criticism of the EU Internal Security Strategy (ISS) promoted by the Communication from the Commission to the European Parliament and the Council of 22 November 2011 under the title 'The EU Internal Security Strategy in action: five steps towards a more secure Europe', COM (2010) 673 final.

[6] J. Kremer, 'Exception, protection and securitization: security mindsets in Law', in M. Fichera and J. Kremer (eds.), *Law and security in Europe: reconsidering the Security Constitution*, Inersentia, Cambridge – Antwerp – Portland, 2013, pp. 7-38, at p. 19. The author understands securitization as "part two of a political process … through defining the issue as an existential threat one claims that the issue is of such importance, urgency or exceptionality that it

Nowadays, the central debate arises between the importance of internal security and its general relationship with Criminal Law,[7] leading countries to react with very different policy statements. Many detailed examples are found in France, where the idea of a fundamental right to security was at the time enshrined in specific legislation: on programming guidance on safety (21 January 1995), on community safety (15 November 2001) and on internal security (18 March 2003).[8] Nevertheless, all states have adopted various preventive measures for the defence of their internal security and especially in the fight against terrorism and organised crime. The relevant point here is that these preventive or "proactive" measures are enforced *ante-delictum*[9] and may subsequently be employed in criminal procedure.

In short, the concept of 'securitization' has revolutionized the panorama of criminal procedure, in as much as the reports issued in connection with these indiscriminately adopted proactive measures (in the absence of a prosecution, a crime or criminal proceedings) may in due time be recognised as a valid category of procedural evidence. These measures are a consequence of so-called preventive/exceptional

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cannot be dealt with through the normal political and institutional processes so that extraordinary measures are required which go beyond the established rules and procedures".

[7] See especially D. Pulitano, 'Sicurezza e diritto penale', 2009 *Rivista italiana di diritto e procedura penale*, vol. 52, num. 2, pp. 547-568 and K. Nuotio, 'Security and Criminal Law: a difficult relationship', in M. Fichera and J. Kremer (eds.), supra note 6, pp. 197-217, analyzing the concept of security in relation with other concepts such as safety, risk and danger. Also in reference to the concept of security itself M. Fichera, 'Security issues as an existential threat to the community', in M. Fichera and J. Kremer (eds.), supra note 6, pp. 85-111, considering that security is more a 'domestic issue' (p.86).

[8] See extensively M.A. Granger, 'Existe-t-il un "droit fondamental à la sécurité"?', 2009 *Revue de science criminelle et de droit pénal comparé*, num. 2, pp. 273-296. In Spain, J. Leal Medina, 'El derecho a la seguridad colectiva: un derecho fundamental en permanente expansión y progresión', *Diario La Ley*, 21 November 2005, num. 6363, available at http://diariolaley.laley.es

[9] A Latin locution used in this context by J.A.E. Vervaele; see, especially, 'Medidas de investigación de carácter proactivo y uso de información de inteligencia en el proceso penal', in J. Pérez Gil (ed.), *El proceso penal en la sociedad de la información. Las nuevas tecnologías para investigar y probar el delito*, La Ley, Madrid, 2012, pp. 27-85. Also J.A.E. Vervaele, 'Special procedural measures and the protection of human rights. General report', 2009 *Utrecht Law Review*, vol. 5, num. 2, pp. 66-103; this general report was presented to the Third Section of the XVIII International Congress on Criminal Law (Istanbul, 20-27 September 2009). The same expression is contained in the Resolution adopted by the Third Section at an earlier international conference, also published, in 2009, in the *Utrecht Law Review*, vol. 5, num. 2, pp. 104-109.

Criminal Law,[10] also known in criminal scholarship as 'Criminal Law of the enemy' (*Feindstrafrecht*), to use the expression coined by Gunther Jakobs.[11]

This theory, the basis for variations in national Criminal Law, has prompted legislation that shares a common characteristic; the anticipation of risk and, logically, the anticipation of the criminality (*Vorlagerungen*).[12] Its final consequences in the criminal justice system can signal a dangerous shift in the direction of a police state.[13] In concrete, the Criminal Law of the enemy has inspired specific substantive and procedural rules that are enforced in national legislations, in an attempt to guarantee internal security; a flashpoint for this criminal legislation was 2001, following the September 11 terrorist attacks in the USA.[14] Security thereby acquired the urgency of *ultra ratio*[15] over and above the traditional principle in Criminal Law of *ultima ratio*.[16]

In this context, intelligence information is gaining singular importance both in criminal procedure worldwide and in Spain. Law enforcement agents gather information

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[10] For examples of this different terminology in use, see C. Ruga Riva, 'Stato di emergenza e delimitazione territoriale. Verso un nuovo diritto penale dell'eccezione?', 2009 *Rivista italiana de diritto e procedura penale*, vol. 52, num. 3, pp. 1089-113, at p. 1094. Also S. Lorusso, 'Sicurezza pubblica e diritto emergenziale: fascino e insiede dei rimedi processuali', 2010 *Diritto e processo*, num. 3, pp. 269-275. In Spain, J.C. Campo Moreno & J.L. González Cussac, *La generalización del Derecho Penal de la excepción: tendencias legislativas*, Consejo General del Poder Judicial, Madrid, 2007; also more recently M.L. Böhm, 'Justicia preventiva', 2016 *Revista Penal*, num. 37, pp. 46-60.

[11] See G. Jakobs, 'Aux limites de l'orientation par le droit: le droit pénal de l'ennemi', 2009 *Revue de science criminelle et de droit pénal comparé*, num. 1, pp. 7-18. Also in relation with this Criminal Law of the enemy see F. Muñoz Conde, 'Le droit pénal international est-il un 'droit pénal de l'ennemi"?', 2009 *Revue de science criminelle et droit pénal comparé*, num. 1, pp. 19-30 and 'Los orígenes ideológicos del Derecho penal del enemigo', 2010 *Revista Penal*, num. 26, pp. 139-150; it is likely that this expression came out of Professor Jakob's speech in Berlin, in 1999. See extensively M. Cancio Meliá & C. Gómez Jara (eds.), *Derecho penal del enemigo*, 2 vols., Dykinson, Madrid, 2006.

[12] See in Spain for example in Spain A. Peña Cabrera Freyre, 'El Derecho penal del enemigo y su influencia en la legislación penal', 2013 *Jueces para la democracia*, num. 77, pp. 49-72.

[13] See C. Walker, 'Conscripting the public in terrorism policing: towards safer communities or a police state?', 2010 *Criminal Law Review*, num. 6, pp. 441-446. In Spain, E. Pedraz Penalva, 'Actividad policial preprocesal', 2009 *Revista de Derecho Procesal*, pp. 763-888, at p. 790; also E. Pedraz Penalva, 'Notas sobre policía y justicia penal', 2008 *Revista jurídica de Castilla y León*, num. 14, pp. 15-109, at p. 46 for descriptions of 'security police activities'.

[14] See extensively M. Jimeno-Bulnes, 'After September 11th: the fight against terrorism in national and European Law. Substantive and procedural rules: some examples', 2004 *European Law Journal*, vol. 10, num. 2, pp. 235-253, analysing the existing legislation at the time in different countries.

[15] Some scholars have argued that such consideration took place even before; see A.M. Díaz Fernández (ed.), *Cooperación europea en inteligencia. Nuevas preguntas, nuevas respuestas*, Thomson Reuters & Aranzadi, Madrid, 2009, pp. 65 and ff. Others talk of 'Sicherheitvorsorge'; see for example J. Massing, 'Die Ambivalenz von Freiheit und Sicherheit', 2011 *Juristenzeitung*, vol. 66, num. 15-16, pp.753-854, esp. p. 756.

[16] See also the mention to this last principle in the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Regions 'Towards an EU criminal policy: ensuring effective implementation of EU policies through Criminal Law', Brussels, 20.9.2011, COM (2011) 573 final, p. 7. Between scholars see for example R. Lahti, 'Towards a principled European criminal policy: some lessons from the Nordic countries', in J.B. Banach-Gutiérrez and C. Harding (eds.), *EU Criminal Law and policy. Values, principes and methods*, Routledge, Abingdon & New York, 2016, pp. 56-69, esp. pp. 60 and ff in relation to *ultima ratio* principle.

within this preventive or proactive setting to produce intelligence reports; moreover, such practices are today described as 'building information positions', as part of a new approach to intelligence referred to as *Intelligence-Led Policing* (ILP).[17] Nevertheless, the present paper focuses on the analysis of the intelligence concept according to European standards and especially in relation to Spanish criminal procedure; in concrete, the purpose here is to analyze how the application of intelligence information functions in both law and judicial practice. The main challenge here is how to ensure a fair and just trial in compliance with fundamental rights; specifically, the protection of the procedural guarantees of the defendant, as well as other participants in the process, if applicable (victims, witnesses, whistleblowers …).

2. *The intelligence paradigm at the EU level*

From the European perspective, the general rules of judicial cooperation enacted under the principle of mutual recognition should be jointly applied with those based on the principle of the approximation of legislations; both principles now recognised under Article 82 (1) Treaty on the Functioning on the European Union. Such is, for example, the case of Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union[18] and Directive 2012/13/EU of

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[17] For a general definition by L. Bachmaier Winter, see Section III – Criminal procedure: information society and Penal Law. General Report to XIX International Congress of Penal Law 'Information Society and Penal Law' (Río de Janeiro, Brazil, 31 August – 6 September, 2014) available at 2014 *International Review of Penal Law*, num. 1-2, pp. 75-128. Textually, 'Intelligence-led policing can be defined as a conceptual framework of conducting policing, as an information-organizing process that allows law enforcement agencies in their preventive and repressive tasks, particularly state security issues, to fight against the most serious forms of crime, such as terrorism and the severe phenomena of transnational organised crime (TOC)' (p. 84).

[18] OJ L 386, 29.12.2006, p. 89 implemented in Spain by Law 31/2010 enacted on 27 July 2010 through Organic Law 6/2010 (Spanish Official Journal num. 182, 28.7.2010, p. 65570 available at http://www.boe.es/boe/dias/2010/07/28/pdfs/BOE-A-2010-12134.pdf; last visited: 13 December 2016). See prior study on Swedish initiative by G. Vermeulen, T. Vander Beken, L. van Puyenbroeck and S. van Malderen, *Availability of law enforcement information in the European Union. Between mutual recognition and equivalent right of access*, Maklu, Antwerp/Apeldoorn, 2005; in Spain see comments by A. del Moral Torres, 'La cooperación policial en la Unión Europea: propuesta de un modelo europeo de inteligencia criminal', *Análisis del Real Instituto Elcano (ARI)*, 17 March 2010, num. 50, available at http://www.realinstitutoelcano.org/wps/portal/web/rielcano_es/publicaciones/ari (last visited: 13 December 2016).

the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings,[19] both of which require coordination, so that their enforcement is compatible.

In both European instruments, the idea of information is described, but with a very different concept and character. In the first regulation, the concept of information relates to information that law-enforcement authorities collect in criminal investigations in Member States, with the intention of employing it as "evidence before a judicial authority" as described earlier, even when the European rule imposes no such obligation and consent is required by the 'provider' Member State.[20] In the second rule, the concept of information relates to information that is beneficial to the suspects and/or accused persons in criminal proceedings as a procedural safeguard, in order to strengthen their right of defence throughout the criminal procedure; in this case, the concept of information in no way foresees the collection of data that is prejudicial to them but, on the contrary, the right to information that relates "to their rights in criminal proceedings and to the accusation against them".[21] In brief, the first regulation responds to the prosecution and the second to the defence, taking into account the general bipartite structure of criminal procedure and process.

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[19] OJ L 142, 1.6.2012, p. 1, implemented in Spain by Organic Law 5/2015 enacted on 27 April 2015 (Spanish Official Journal num. 101, 28.4.2015, p. 36559 available at https://www.boe.es/diario_boe/txt.php?id=BOE-A-2015-4605; last visited: 14 December 2016). See, for commentary, S. Cras & L. De Matteis, 'The Directive on the right to information: genesis and short description', 2013 *Eucrim*, num. 1, pp. 22-32; specifically, on the Spanish transposition, see V. Faggiani, 'El derecho a la información en los procesos penales en la UE: la Directiva 2012/13/UE, de 22 de mayo de 2012', 2013 *Revista General de Derecho Procesal*, num. 30, http://www.iustel.com

[20] Art. 1(4) Council FWD 2006/960/JHA. See comments on such proposal by A. Nunzi, 'Exchange of information and intelligence among law enforcement authorities: a European perspective', 2007 *International Revue of Penal Law*, vol. 78, num. 1, pp. 143-151, esp. pp.149 and ff. Also in general A. Gutiérrez-Zarza (ed.), *Exchange of information and data protection in cross-border criminal proceedings in Europe*, Springer, Berlin & Heidelberg 2015, esp. pp. 140 and ff commenting on the present rule.

[21] Art. 1 Directive 2012/13/EU. In fact, information on the letter of rights and charges; see for example E. Valentini, 'The 'other rights' and the information about the charge', in C. Arangüena Fanego (ed.), *Procedural safeguards in criminal proceedings throughout the European Union*, Lex Nova, Valladolid, 2077, pp. 375-379 and generally S. Trechsel, *Human rights in criminal proceedings*, OUP, Oxford 2005, esp. p.195 identifying 'accusation' and 'charge' according to *Lutz v. Germany* ECtHR case (1987).

It is obvious here that the first approach has been adopted following the importance attached to internal security within EU borders,[22] especially in the wake of the al-Qaeda suicide plane attacks in New York and Washington DC of September 11, 2011, the repercussions of which will in all probability continue to haunt the USA for a long time to come. The 'War on Terror' and counter-terrorism actions were not only adopted in domestic Spanish Law, but likewise in EU Law, and they have driven European criminal justice policies ever since.[23] Those and other attacks in both the United States and Europe have switched the focus of European strategy from combating homegrown terrorism[24] to combating the external threat of external terrorism. In response, European institutions have promulgated several legal instruments of a substantive and procedural character for their transposition into the legal orders of each Member State. At least in terms of judicial practice, it is obvious that the European Arrest Warrant (EAW) is the star rule in this context, following the implementation of Council Framework Decision 2002/584/JHA of 13 June 2002.[25] The scales of the

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[22] See criticism by H. Labayle, 'Le concept de sécurité dans l'espace de liberté, de sécurité et de justice', in C. Flaesch-Mougin (ed.), *Union européenne et sécurité : aspects internes et externes*, Bruylant, Bruxelles, 2009, pp. 79-90, declaring the inexistance of a concept of internal security in the limits of EU territory. By contrast, European Council promotes the renforcement of the internal security through the implementation of the EU Internal Security Strategy 2015-2020; see European Council meeting (15 December 2016) – Conclusions, EUCO 34/16, CO EUR 10, CONCL 5, available at official website http://register.consilium.europa.eu/

[23] See Cian. C. Murphy, 'Counter-terrorism Law and policy: operationalisation and normalisation of exceptional Law after the 'War on Terror'', in D. Acosta Arcarazo and C.C. Murphy (eds.), *EU Security and Justice Law after Lisbon and Stockholm*, Hart Publishing, Oxford and Portland, 2014, pp. 168-185, esp. p.169. In Spain specifically A. Tinoco Pastrana, 'La lucha contra el terorismo en la Unión Europea desde una perspectiva procesal', 2016 *Araucaria. Revista iberoamericana de Filosofía, Política y Humanidades*, vol. 18, nº 36, pp. 439-463. As has been said, the arrival of jihadist terrorism jointly with the migratory crisis presides today the agenda of Justice and Home Arrairs Council meetings; see A. Gutiérrez Zarza, 'Terrorismo yihadista, crisis migratorias, fronteras, prueba electrónica, encriptado, referéndum y otras palabras clave del espacio LSJ en 2016', *Diario La Ley*, 19 January 2017, num. 8904, available at http://diariolaley.laley.es, p. 3.

[24] See C. Eckes, 'The legal framework of the European Union's counter-terrorist policies: full of good intentions?', in C. Eckes and T. Konstadinides (eds.), *Crime within the area of freedom, security and justice. A European public order*, Cambridge University Press, Cambridge, 2011, pp. 127-158, esp. pp. 132 and ff. Also M. den Boer and F. Goudappel, 'Counter-terrorism in the European Union: legal issues in the post-Lisbon era', in S. Wolff, F.A.N. Goudappel and J.W. de Zwaan (eds.), *Freedom, security and justice after Lisbon and Stockholm*, TMC Asser Press, The Hague, 2011, pp. 173-194, nevertheless declaring that there is not "a single legal definition of terrorism" at EU level (p. 175).

[25] OJ L 190, 8.7.2002, p.1. Generally M. Jimeno-Bulnes, 'The application of the European Arrest Warrant in the European Union. A general assessment', in C. Fijnaut and J. Ouwerkerk (eds.), *The future of police and judicial cooperation in the European Union*, Martinus Nijhoff Publishers, Leiden & Boston, pp. 285-333.

fragile balance between *security* and *justice* (or rights)[26] is certainly leaning in favor of the former; in fact, not long afterwards a further strategy on the promotion of procedural rights in criminal proceedings would be initiated only to end in failure.[27]

It is here in this context of security issues and conter-terrorism strategy that intelligence assumes its main role. In relation with criminal procedure, the investigative phase is increasingly the essential element of criminal proceedings, where corroborating the crime and identifying the criminals justifies the collection of relevant criminal information by appropriate authorities and agencies.[28] So, the idea of intelligence drives a considerable part of European criminal policy. European institutions began the construction of an *EU criminal intelligence model* (ECIM) following the terrorist attacks in London in July 2005; it was promoted by the British Minister of Home Affairs during the EU British Presidency and modelled on the National Intelligence Model of the UK.[29] It is important to stress that a definition of intelligence at EU level, which has up until now been absent in European instruments, is now crucial.[30]

In general terms, the United States provided a broad definition of criminal intelligence, along the lines now foreseen by European institutions,[31] in a document that the US Justice Administration drafted under the title of the 'National Criminal

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[26] See J. Petman, 'Security and rights in the war of terror: on the constitutive insecurity of rules', in M. Fichera and J. Kremer (eds.), supra note 6, pp. 129-177, esp. pp. 151 and ff, analysing both sides of balance in European (ECJ and ECtHR) and national (British) jurisprudence.

[27] Proposal for a Council FWD on certain procedural rights in criminal proceedings throughout the European Union, COM (2004) 328 final. See specifically M. Jimeno-Bulnes, 'The Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union', in E. Guild and F. Geyer (eds.), *Security versus justice? Police and judicial cooperation in the European Union*, Ashgate, Hampshire & Burlington, 2008, pp. 171-202.

[28] See this definition as well as the concept of criminal intelligence in A. Gruszczak, 'The EU Criminal Intelligence Model: problems and issues', in J.B. Banach-Gutiérrez and C. Harding (eds), supra note 16, pp. 149-167, esp. pp.150 and ff.

[29] See again A. Gruszczak, supra note 28, esp. pp.155 and ff.; also extensively A. Gruszczak, *Intelligence security in the European Union. Building a strategic intelligence community*, Palgrave Maacmillan, London, 2016, esp. pp.85 and ff. Also on the topic M. den Boer, 'Counter-terrorism, security and intelligence in the EU: governance and challenges for collection, exchange and analysis', 2015 *Intelligence and national security*, vol. 30, num. 2-3, pp. 402-419.

[30] Best example is the Communication from the Commission to the Council and the European Parliament 'Towards enhancing access to information by law enforcement agencies', Brussels, 16.6.2004, COM (2004) 429 final, p. 5, footnote num. 2, where the only definition of intelligence is as 'criminal intelligence'. See comments by A. Gruszczak, supra note 28, pp.153 and ff.

[31] See previous note supra 30, where intelligence is attached to criminal intelligence.

Intelligence Sharing Plan' (NCISP, 2003).[32] Criminal intelligence is identified here as "Information compiled, analyzed, and/or disseminated in a effort to anticipate, prevent, or monitor criminal activity", while intelligence is equivalent to "the product of systematic gathering, evaluation, and synthesis of raw data on individuals or activities suspected of being, or known to be, criminal in nature".[33]

At the level of the EU, a specific definition of intelligence is included in the aforementioned Council Framework Decision 2006/960/JHA of 18 December 2006, where intelligence is envisaged as two different types of information: "(i) any type of information on data which is held by law enforcement authorities; (ii) any type of information or data which is held by public authorities or by private entities and which is available to law enforcement authorities without the taking of coercive measures...".[34], In general terms and without specific reference to intelligence, it must also be remembered that Article 87 (2) TFEU, enacted following the ratification of the Treaty of Lisbon as part of the policy on police cooperation, foresees the adoption of measures by the European Parliament and the Council. These measures concern "the collection, storage, processing, analysis and exchange of general information", taking into account that the principle that is enforced therein is the principle of operational cooperation according to Article 87 (2) TFEU, although mutual trust is also involved.[35]

It is also interesting to point out that Art. 1 (1) of Framework Decision 2006/960/JHA states that its main purpose is "to establish the rules under which Member States' law enforcement authorities may exchange existing information and

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[32] Available at https://it.ojp.gov/GIST/150/National-Criminal-Intelligence-Sharing-Plan-Version-2-0 (last visited: 22 December 2016). See once again A. Gruszczak, supra note 28, p. 152. The same author provides another definition by scholarship on the topic; see again A. Gruszczak, supra note 29, pp. 39 and ff.
[33] National Criminal Intelligence Sharing Plan, pp. 27 and 28, Appendix A.
[34] Art. 2 (d) Council FWD 2006/960/JHA.
[35] See criticism by C. Perras, 'Transnational policing and its contexts: flexibility and (mis)trust', in S. Hufnagel and C. McCartney (eds.), *Trust in international police and justice cooperation*, Hart Publishing, Oxford and Portland, 2017, pp. 221-240. On the origins of police cooperation see J. García San Pedro, 'La cooperación policial en la Unión Europea', 2006 *Revista de Derecho de la Unión Europea*, n. 10, pp. 201-218; also D. Sulca, 'Intelligence-led use of international forensic exchange channels', in S. Hufnagel and C. McCartney (eds.), supra, pp. 241-254 in relation to international law enforcement cooperation.

intelligence effectively and expeditiously for the purpose of conducting criminal investigations or criminal intelligence operations". Here, a distinction is clearly drawn between the preliminary phase on (police) criminal intelligence and the (procedural) pre-trial investigative phase; which means, according to the Preamble of the same FWD, that intelligence information fulfills a preventive, but not a repressive function in criminal policy. Hence, with greater clarity, Art. 1 (4) of the present Framework Decision "does not impose any obligation on the part of Member States to provide information and intelligence to be used as evidence before a judicial authority nor does it give any right to use such information or intelligence for that purpose"; but such a provision is hardly very exacting in this context, as it contains no prohibition on the Member State providing and/or agreeing to the employment of intelligence information as evidence.[36]

Nevertheless, the question once again is whether intelligence information, even when justified by the fight against terrorism[37] and organised crime throughout the EU, should be incorporated in criminal procedure. Ever since the terrorist attacks of 2001 in New York the traditional borderline between prevention and repression has become increasingly blurred; intelligence and law enforcement agencies now cooperate together with similar methods[38] in pursuit of the criminal throughout the pre-trial investigation in criminal proceedings, where the preconstitution of evidence takes place. But there is a fundamental difference between both actors in a further stage of criminal procedure, i.e. the trial itself, where adversarial confrontation becomes essential:[39] in the first case,

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[36] See specifically J.A.E. Vervaele, supra note 9, at p. 37. In particular, the author criticizes the value of expert evidence that Spanish case-law grants to intelligence reports at p.34.

[37] At present, a new Proposal for a Directive of the European Parliament and of the Council on combating terrorism and replacing Council FWD 2002/475/JHA is under discussion; see the most recent publication of 21 November 2016, num. 14673/16, JHA 972, DROIPEN 188, COPEN 348, CODEC 1701.

[38] See L. Bachmaier Winter, 'Información de inteligencia y proceso penal', in L. Bachmaier Winter (coord.), *Terrorismo, proceso penal y derechos fundamentales*, Marcial Pons, Madrid, 2012, pp. 45-101, esp. p. 56.

[39] For a comparative study of adversarial and non-adversarial criminal proceedings throughout the pre-trial investigation and the trial stages see M. Jimeno-Bulnes, 'American criminal procedure in a European context', 2013, *Cardozo Journal of International and Comparative Law*, vol. 21, num. 2, pp. 409-459, esp. pp. 444 and ff.

information and/or reports that may be used as 'evidence', gathered by the police force, can be challenged by the defence counsel in the courtroom under constitutional and legal rules. In contrast, intelligence agencies normally depend on sources that cannot be revealed in the courtroom and, consequently, challenged by the defence; but, examples of intelligence information presented as evidence in judicial practice are multiplying.[40] It is here that the 'judicialization of intelligence' is a pressing need.[41]

Finally, the Court of Justice of the European Union has also accepted the extreme idea of employing 'secret evidence' in the courtroom linked to intelligence information in the name of 'national security', but at all times with due respect for human rights standards. Among the best examples is the case of *Digital Rights Ireland*, in which a preliminary ruling from the ECtHR was delivered on 8 April 2014 in response to the petition from the Irish High Court under Art. 267 TFEU that had been joined with a request for a ruling from the Constitutional Court of Austria.[42] As is well known, the European Court of Justice annulled Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data. In brief, the ECJ specifically considered that the Directive entailed "a wide-ranging and particularly serious interference" in the fundamental rights enshrined in Articles 7 and 8 of the Charter; the right of respect for private and family life and the right to privacy with regard to the processing of personal data. Although the decision ran into criticism,

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[40] See such comparative view between both types of information in J.M. Freedman, 'Intelligence agencies, law enforcement and the prosecution team', 1998 *Yale Law & Policy Review*, vol. 16, pp. 331-371, at p. 337.

[41] See K. Roach, supra note 2, p. 56. Also K. Roach, 'When secret intelligence becomes evidence: some implications of Khadr and Charkaoui II ', 2009 *Supreme Court Law Review*, vol. 47, pp.-147-208, at p. 147, considering that this is one of the 'major changes affecting intelligence agencies'.

[42] Joined cases C-293/12 and C-594/12 available from the ECJ website (search form) http://curia.europa.eu/jcms/jcms/j_6. See comments by E. Guild & S. Carrera, 'The political and judicial life of metadata: Digital Rights Ireland and the trail of the data retention directive', *CEPS paper in liberty and security*, 29 May 2014, num. 65, available at https://www.ceps.eu/publications/political-and-judicial-life-metadata-digital-rights-ireland-and-trail-data-retention (last visited: 22 December 2016); also E. Colombo, '"Data retention" e Corte di Giustizia: riflessioni a prima lettura sulla declaratoria di invalidità della direttiva', 2014 *Cassazione penale*, vol. 54, num. 7-8, pp. 2705-2713. In general, on the balance between investigation by data mining and the observance of fundamental rights, see R. Sicurella & V. Scalia, 'Data mining and profiling in the area of freedom, security and justice. State of play and new challenges in the balance between security and fundamental rights protection', 2013 *New Journal of European Criminal Law*, vol. 4, num. 4, pp. 409-460.

because of the sparsity of its arguments,[43] the present case has clearly added to the urgency to enforce the new package of proposals launched by the European Commission on data protection that have recently been approved.[44] It should also be remembered than further ECJ case law has been pronounced placing limits on mass surveillance when personal data are involved.[45]

In the following section, the present situation in Spain in this field is discussed along with future proposals that may be applicable.

3. National framework and legal regulation: the Spanish perspective

Despite the strategy on intelligence at EU level and the above-mentioned legal instruments, the Member States of the EU remain the main actors on intelligence as far as they are the "collectors, producers and users of intelligence".[46] It would not be an unfair presumption to say that Spain is one of the most active Member States with regard to the gathering of intelligence information on terrorism and its employment, in

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[43] See E. De Busser, 'Great expectations from the Court of Justice. How the judgments on Google and Data Retention raised more questions than they answered', 2014 *Eucrim*, num. 2, pp. 69-72, at p.72. The lack of guidance in the response of the ECJ to Member state authorities and the EU legislator, so as deal with the new virtual reality, is regrettable in the author's opinion.

[44] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation), OJ L 119, 4.5.2016, p. 1 and Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data, OJ L 119, 4.5.2016, p. 89. See brief comment on initiatives at the time by E. De Busser, 'The data protection gap: from private databases to criminal files', 2013 *Eucrim*, num. 1, pp. 17-22, at p. 21; also G. González Fuster, 'Protección de datos y cooperación policial y judicial en materia penal en la UE', in J. Pérez Gil (ed.), supra note 9, pp. 587-604, at p. 590 and more recently M.A. Catalina Benavente, 'La Directiva Europea (EU) 2016/681, de 27 de abril de 2016, relativa a la utilización de los datos por en la lucha contra el terrorismo y la delincuencia grave', *Diario la Ley*, 12 July 2016, num. 8801, http://diariolaley.laley.es.

[45] See *Schrems*, case C-362/14, available at http://curia.europa.eu/jcms/jcms/j_6, also preliminary ruling promoted by the High Court of Ireland and where the ECJ declared the invalidity of Decision 2000/520/EC of 26 July 2000 on the adequacy of the protection provided by the safe harbour privacy principles, where the Court also stated that "legislation permitting the public authorities to have access on a generalised basis to the content of electronic communications must be regarded as compromissing the essence of the fundamental right to respect for private life, as guaranteed by Article 7 of the Charter" (para. 94 enouncing prior *Digital Rights Ireland* case). Precisely, at the time of writing, another case in relation with interpretation to be given to ECJ ruling on *Digital Rights Ireland* is pending: *Watson*, case C-698/15, preliminary ruling promoted by Court of Appeal (England & Wales), Civil Division. See generally on the topic E. Guild, 'The Lisbon Treaty, the Stockholm Programme and data transfers in the new ASFJ: where are the limits?', in S. Wolff, F. A. N. J. Goudappel and J. W. de Zwaan (eds.), supra note 24, pp. 195-211; in Spain extensively I. Colomer Hernández (dr.) and S. Oubiña Barbolla (coord.), *La transmisión de datos personales en el seno de la cooperación judicial penal y policial en la Unión Europea* (Cizur Menor: Thompson Reuters Aranzadi, 2015).

[46] M. den Boer, supra note 29, p.403.

so far as it has for many years had to fight homegrown terrorism in the form of ETA, before having to combat the open threats and outright attacks by (Al-Qaeda) Islamic Yihadist terrorism.[47] Relevant events include the terrorist attacks on 11 March 2004, in Madrid, as a sequel to those that occurred on 11 September 2001;[48] however, the government of the day initially attributed the attacks to Basque nationalists (ETA), openly contradicting reports transmitted on the media over following days that clearly pointed to Al-Qaeda.[49] In any case and for all brands of terrorism and organized crime, it is of fundamental importance to identify the structure of the terrorist and/or criminal organization, not only when a criminal act has been committed, but beforehand when an organization may be conspiring to commit new terrorist/criminal acts.[50] It is here that intelligence information can play its leading role as the main source of information in the preventive investigation of criminal intent.

Nevertheless, no provision for any general rule may be found in Spanish procedural legislation that contains guidance on how this intelligence information can be used at the judicial stage. In concrete, the Spanish Criminal Procedure Act (1882)[51] includes no rule that refers to intelligence information, in contrast to some other

[47] See analysis of both types of terrorism by Fernando Reinares Nestares, one of the main contributors in the Spanish literature, who also worked as an advisor for the Spanish Minister of Home Affairs on the fight against terrorism in 2004 and 2006. Between his works on the matter see respectively, for example, F. Reinares, *Patriotas de la muerte. Quienes han militado en ETA y por qué*, Taurus, Madrid, 2001 and F. Reinares, 'Yihadismo global y amenaza terrorista: de Al-Qaeda al Estado islámico', 2015 *Revista de Occidente*, num. 406, pp. 5-19.

[48] Specifically F. Reinares, *El nuevo terrorismo islamista. Del 11-S al 11-M*, Temas de Hoy, Madrid, 2004. Known as the 'Atocha massacre', 10 simultaneous explosions on four local network trains travelling to the station of Atocha in Madrid during the morning rush hour (around 7:30 h) killed 193 people and injured 1858. Shortly afterwards, on 14 March, a G5 (France, Germany, Italy, Spain and UK) intelligence service summit was held in Madrid, where it was agreed to set up an information exchange network on international terrorism and an early warning system on the theft of explosives, weapons and substances of any kind that could be used in terrorist attacks; see A.M. Díaz Fernández, supra note 15, pp.114 and ff. A further 'macro-trial' took place after 3 years of pre-trial investigation with 29 accused persons, of whom 18 were convicted; see H. Soleto Muñoz, 'Macrojuicio por terrorismo: problemática procesal del enjuiciamiento de los ataques terroristas de 2004 en Madrid', 2016 *Revista Internacional de Estudios de Derecho Procesal y Arbitraje*, num. 2, available at http://www.riedpa.com

[49] It appears that the president of the government, José María Aznar, informed the main newspapers in Madrid and Barcelona of his conviction that the Basque separatist group ETA was responsible for the 11M terrorist attacks; see for example information provided by newspaper El País at http://politica.elpais.com/politica/2016/03/09/actualidad/1457534124_969445.htlm and http://elpais.com/diario/2004/03/27/espana/1080342027_850215.html (last visited: 3 January 2017). This 'official' information was also transmitted on television news bulletins even though the 'witnesses to the crime' were simultaneously describing the the distinctive 'square scarf' (*kufiya*) worn by the perpetrators, and one of the vehicles used to carry out the attacks was found to contain a cassette recording of Qur'anic verses, detonators, traces of explosives, and cell phones.

[50] See L. Bachmaier Winter, supra note 38, pp. 57-58.

[51] See supra note 4.

national legislations that at least determine the use in judicial process of statements or reports from public authorities. Thus, in Germany, for example, Section 256(1)(a) StPO states that official documents may be presented as evidence and read out aloud during the trial;[52] also, Rule 803 (8) of the Federal Rules of Evidence in the USA lists exceptions to the prohibition of hearsay for 'public records', if –*inter allia*- they set out "a) the office's activities; b) a matter observed while under a legal duty to report".[53] From a legal perspective, there should be no place for the use of intelligence information in the context of criminal procedure in Spain, although in reality the real situation is very different: intelligence information and/or intelligence reports exist and are increasingly used, especially in cases related to terrorism[54] and organised crime.

However, before examining the relevant legal regulations, it would be advisable to define the concept of intelligence information from the Spanish perspective. Academies of Political and Social Sciences in Spain habitually draw a clear distinction between 'information' and 'intelligence', considering that "information is any unprocessed data, while intelligence is the same information after further evaluation in the intelligence cycle; after being evaluated, processed and integrated with other (intelligence) [information]";[55] in this context, intelligence is referred to as 'intelligence work' or 'intelligence services'.[56] Scholars have also distinguished between the

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[52] Applying to those 'statements containing a certificate or an opinion from public authorities'; nevertheless, no qualification of a specific sort of evidence is included here; according to the text, such statements could be considered as expertise or documentary evidence. English version of the *Strafprozeßordnung* is available at http://www.gesetze-im-internet.de/englisch_stpo/index.html (last visited: 3 January 2017).

[53] But in this case, it expressly excludes "in a criminal case, a matter observed by law-enforcement personnel"; hence, public records, used in the absence of first-hand testimony in court, will be considered hearsay. In my opinion, the last condition could also be applied *mutatis mutandis* to exclude the application of the hearsay consideration to public records, when related to "iii) factual findings from a legally authorized investigation" in criminal cases against the government. Federal Rules of Evidence are available, e.g., at http://www.law.cornell.edu/rules/fre (last visited: 3 January 2017).

[54] See specifically M. de Prada Rodriguez & J. Santos Alonso, 'La valoración de la prueba en los delitos de terrorismo: los informes de inteligencia', in J. Pérez Gil (ed.), supra note 9, pp. 87-106 at p. 93.

[55] A.M. Díaz Fernández (ed.), supra note 15, at p. 25. See also A.M. Díaz Fernández, 'La función de los Servicios de Inteligencia', in C. de Cueto & J. Jordán (eds.), *La seguridad en el siglo XXI*, Comares, Granada, 2001, pp. 155-173 and *Los servicios de inteligencia españoles. Desde la guerra civil hasta el 11-M. Historia de una transición*, Alianza Editorial, Madrid, 2005. The author is a recognised expert on the intelligence services in Spain.

[56] See J. Padilla Campos, 'Servicios de inteligencia: secretos e información, tecnología y terrorismo', in J.J. Fernández Rodriguez & D. Sansó-Rubert Pascual (eds.), *Internet: un nuevo horizonte para la seguridad y defensa*,

different functions or even categories of intelligence such as military, security, criminal, and external or foreign intelligence; it is clear that criminal intelligence is given special priority as long as it "engages in the fight against serious and organised crime". This intelligence differs from the others because "it is linked to criminal investigations, which aim to produce evidence that can result in a conviction in a court of law", according to a global definition provided by Björn Müller-Wille.[57] But in fact, any other sort of intelligence that complies with the same requirements should receive a similar assessment in criminal procedure.

In Spain, the law on intelligence provides a concrete definition together with legal regulation of the matter: Law 11/2002, May 6, on regulation of the National Intelligence Centre[58] or (*Centro Nacional de Inteligencia*) CNI. This special public institution was set up for the intelligence services to provide "efficient, specialized and modern Intelligence Services, capable of meeting the new challenges of today's national and international scenario, and governed by the principles of control and full subjection to the legal order" according to the first paragraph of its Exposition of Motives. Moreover, Chap. 1, Sect. 1 describes the general function of the new institution, which is "for providing the Prime Minister and the Government with information analyses, studies or proposals, that allow for the prevention and avoidance of any danger, threat or aggression against the independence or territorial integrity of Spain, its national interests and the stability of its institutions and the rule of law". The following precepts

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Servicio de Publicación e intercambio cientifico, Universidad de Santiago de Compostela, 2010, pp. 93-102, at p. 94, also providing a definition of intelligence and its functions.

[57] B. Müller-Wille, 'For our eyes only? Shaping an intelligence community within the EU', *Institute for Security Studies Occasional Papers*, January 2004, num. 50, p. 10 available at http://www.iss.europa.eu/uploads/media/occ50.pdf (last visited: 3 January 2017), with a similar definition of intelligence: 'processed information for the purpose of assisting the decision-making of its recipient' (p. 9).

[58] Spanish Official Journal num. 109, 7.5.2002, p. 16440. The consolidated version is available at http://www.boe.es/buscar/pdf/2002/BOE-A-2002-8628-consolidado.pdf (last visited: 3 January 2017). The National Intelligence Centre (*Centro Nacional de Inteligencia*) replaced the Superior Centre for Defence Information (*Centro Superior de Información de la Defensa*); it reports to the Ministry of Defence and was created by Royal Decree 1558/1977. Further information on the CNI is available from its website http://www.cni.es. In the literature, see for example A. Gude Fernández, 'Algunos apuntes acerca del Centro Nacional de Inteligencia', in J.J. Fernández Rodriguez & D. Sansó-Rubert Pascual (eds.), supra note 56, pp. 77-88.

enumerate various specific functions[59] together with the activities and the structure of the CNI, as well as important principles, such as full subjection to both the legal order and the rule of law under parliamentary and *a priori* judicial control; the last of which is defined in Organic Law 2/2002, May 6, regulating judicial control over the National Intelligence Centre.[60] Nevertheless, none of this legislation refers to the effect or validity of those intelligence reports and/or information. In all logic, this regulation should form part of ordinary procedural legislation in the context of criminal procedure.

Law 31/2010 of July 27 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union, in transposition of Council Framework Decision 2006/960/JHA of 18 December 2006, is also very relevant to intelligence in Spain.[61] Here the concepts of intelligence and information are equated and, according to Article 1, both services can be delivered by competent security services (law enforcement authorities),[62] for the a) "gathering,

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[59] "a) To collect, to assess and to interpret information and to disseminate the necessary intelligence to protect and to promote the political, economic, industrial, commercial and strategic interests of Spain, both inside and outside the national territory. b) To prevent, to detect and to provide for the neutralisation of the activities of any foreign service, group or person that endangers, threatens or attacks the constitutional order, the rights and freedoms of Spanish citizens, the sovereignty, integrity and security of the State, the stability of its institutions, its national economic interests and the well-being of the population. c) To promote relations of cooperation and collaboration with Intelligence Services of other countries and international organisations in order to meet its objectives more efficiently. d) To obtain, to evaluate and to interpret the traffic of strategic signals in fulfilment of the intelligence objectives assigned to the Service. e) To co-ordinate the activities of the Government institutions that use cypher means or procedures; to guarantee the security of information technology in this field; to report on the co-ordinated collection of cryptological material; and to train its own experts or those of other Government Agencies so as to insure the proper discharge of the functions of the Service. f) To monitor compliance with the regulations on the protection of classified information. g) To guarantee the security and protection of its own facilities, information, material and personnel resources." (Sect. 4).

[60] Available at https://www.cni.es/comun/recursos/descargas/11-2002-INGLES.pdf (in English) (last visited: 2 February 2017). This law amends Act 6/1985, July 1, on the Judiciary, so that competence is given to a specific magistrate of the Supreme Court for CNI activities that require authorization, when such activities affect any of the fundamental rights contained in Arts. 18 (2) and (3) of the Spanish Constitution; these prescriptions refer to the inviolability of the home and secrecy of communications, respectively. A version of the Spanish Constitution (1978) in English is available from the Spanish Constitutional Court at https://www.tribunalconstitucional.es/es/tribunal/normativa/Normativa/ConstitucionINGLES.pdf (last visited: 2 February 2017).

[61] See supra note 18.

[62] According to Art. 3 of Law 31/2010, competent law enforcement authorities shall be "police and customs authorities that are authorized in the Spanish legal order to discover, to prevent and to investigate crimes and criminal activities as well as to exercise authority and to take the appropriate coercive measures...". The First Additional Provision specifically states that the Forces of State Security, Police Forces of the Autonomous Communities and Customs Surveillance Service are competent law enforcement authorities; in Spain, the forces of State security include the National Police and the Civil Guard, both dependent on the Department of Security attached to the Ministry of Home Affairs. Their general regulation is provided by Act 2/1986, of March 13, on the Forces of State Security (Spanish Official Journal num. 63, 14.3.1986, p. 9604, available at http://www.boe.es/buscar/pdf/1986/BOE-A-1986-6859-consolidado.pdf; last visited: 3 January 2017).

processing and analysing information on crimes and criminal activities prior to criminal prosecution by the forces of law and order, in order to establish whether specific criminal acts have been committed or may be committed in the future" under the title of *criminal intelligence operations*; b) "to undertake appropriate measures in order to investigate the facts, suspects and circumstances in relation to one or more specific criminal acts, which have been committed" under the title of *criminal investigations*. In this context, information and/or intelligence is composed of a) "all types of information or data held by the law enforcement authorities" and b) "All types of information or data held by public authorities or private institutions, which may be accessed by law enforcement authorities without having to employ coercive measures defined in accordance with Spanish legislation" (Article 2).

Having defined the concept of intelligence information and its legal regulation from the Spanish perspective, its validity in Spanish criminal procedure should be analysed. In this context, a review of some current judicial practice will undoubtedly prove useful.

4. *Functioning of intelligence information in Spanish criminal procedure according to judicial practice*

In fact, neither current nor draft criminal procedural rules[63] specify concrete criminal causes for the assessment of these intelligence reports. However, as is examined further on, such reports are increasingly cited in Spanish judicial practice. Of

[63] At the time, a Draft Criminal Procedure Code (*Borrador de Código Procesal Penal*) was under discussion, published online on 25 February 2013, and still available from the official website of the Spanish Ministry of Justice: http://www.mjusticia.gob.es/cs/Satellite/es/1215197775106/Medios/1288778173060/Detalle.html (last visited: 2 February 2017). See general comments on this draft and its development by F. Morales Prat, 'El proceso de reforma de la Ley de Enjuiciamiento Criminal: un largo y curvo camino', 2014 *Revista de Derecho y proceso penal*, num. 33, pp. 13-20. Also in general on criminal procedure reform J. Burgos Ladrón de Guevara, 'Amministrazione della giustizia nella Spagna del secolo XXI', 2010 *Archivio nella nuova procedura penale*, num. 4, pp. 390-392.

the few Spanish scholars to have researched the topic of criminal procedure,[64] most argue that, due to the absence of specific categorisation, as regulated in the present Criminal Procedure Act (*Ley de Enjuiciamiento Criminal*, henceforth LECrim), intelligence information should be categorized as another sort of evidence; in concrete, in the form of a specific kind of expertise other than that described under Art. 456 LECrim.[65] It could therefore be referred to as 'police intelligence' and/or even 'intelligence expert evidence'. There are many reasons why this rule will never properly specify the possession of technical knowledge in comparison with civil procedure,[66] which offers a more appropriate categorization; in any case, it looks very likely that possession of specific technical knowledge will be included in future criminal procedure legislation.[67]

In general, the judicial practice of Spanish courts evaluates intelligence information under the same rules as expert evidence and it has even been recognised as a new form of expertise. Nevertheless, there is still some discussion among scholars and practitioners over the case-law on the categorisation of intelligence reports prepared by law enforcement authorities as expert evidence, especially when those reports are from

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[64] See especially R. Castillejo Manzanares, 'La prueba pericial de inteligencia', *Diario La Ley*, 16 December 2011, num. *7756*, available at http://diariolaley.laley.es. In contrast, see criticism in S. Guerrero Palomares, 'La denominada "prueba de inteligencia policial" o "pericial de inteligencia" ', 2011 *Revista Aranzadi de Derecho y proceso penal*, num. 25, pp. 75-91, at p. 82 as well as in F. Gudín Rodriguez-Magariños, 'La presunta prueba policial de inteligencia: análisis de la STS de 22 de mayo de 2009', 2009 *La Ley Penal*, num. 64, available at http://revistas.laley.es. Also opposition as mentioned by J.A.E. Vervaele, supra note 9, at p. 34.

See also, on this topic, the contributions of practitioners, e.g., E. De Llera Suárez-Bárcena, 'La utilización de la información policial y de los servicios de inteligencia como prueba en el proceso penal', *Diario La Ley*, 19 December 2013, num. 8215, http://diariolaley.laley.es as well as J.J. Hernández Domínguez, 'Valor procesal del informe de inteligencia policial', *Diario La Ley*, 21 October 2013, num. 8174, http://diariolaley.laley.es.

[65] Textually, "the Judge shall agree to an expert report when, to understand or appreciate some significant fact or circumstance in the pre-trial proceedings scientific or artistic knowledge is necessary or appropriate". On the concept of pre-trial proceedings or *sumario*, see specifically M. Jimeno-Bulnes, supra note 39, at p. 433.

[66] Art. 335 Civil Procedure Act or *Ley de Enjuiciamiento Civil*, henceforth LEC, which textually prescribes "where scientific, artistic, technical or practical knowledge is necessary to assess relevant facts or circumstances of the matter and to establish their certainty, the parties may bring the reports of experts to the proceedings who possess the corresponding knowledge or request, in the cases foreseen in this law, that a report be issued by an expert appointed by the court". Law 1/2000, of 7 January, on Civil Procedure is available at http://www.boe.es/buscar/pdf/2000/BOE-A-2000-323-consolidado.pdf (last visited: 3 january 2017): an English version may also be purchased from http://www.mjusticia.gob.es/cs/Satellite/Portal/es/servicios-ciudadano/documentacion-publicaciones/publicaciones/traducciones-derecho-espanol (last visited: 3 January 2016).

[67] For example, Art. 391 Draft on the Criminal Procedure Code previously mentioned. See comments on this issue by J. J. Hernández Domínguez, supra note 64, at p. 3.

the police force. That debate has focused on whether intelligence information may be equated with testimonial evidence, rather than expert evidence as some scholars and especially judicial practitioners have argued. It is true that, in both cases, evaluation of the evidence shall be done under the system of free evaluation of evidence outlined in Article 741 LECrim;[68] but, in practice, the burden of proof attributed to expert reports is often considered more relevant than testimony.[69] The matter is usually resolved by assessing the contribution to the proceedings of scientific, artistic and, more properly, expert knowledge.

It should also be taken into account that, in general terms, Spanish criminal procedure currently accepts that the reports presented by the police force under the title of a 'police statement' (*atestado*)[70], following the preliminary criminal investigation of the facts, can in no way constitute documentary evidence. According to Art. 297 LECrim, the police report only serves as a 'crime report'[71] and must be ratified at the trial by its authors, whose declarations shall be evaluated as testimonial evidence. This argument has been extensively corroborated by important constitutional doctrine on numerous occasions since 1980 up until the present.[72] In this context, according to the aforementioned constitutional case-law, pre-trial investigative acts can never on the

[68] Textually, "the court, appraising the evidence given during the trial in good conscience, the reasons put forward for the prosecution and the defence, and the statements by the accused themselves, will pass sentence within the time limit set in this Law". On rules of evidence in Spanish criminal procedure see specifically L. Bachmaier & A. del Moral García, *Criminal Law in Spain*, Kluwer Law International, The Netherlands, 2010, at pp.234 and ff.

[69] See arguments by S. Guerrero Palomares, supra note 64, at p. 84. The author is also a legal practitioner (defence lawyer) and is therefore knowledgeable in this area.

[70] See specific requirements in Arts. 292-294 LECrim joint with Art. 282 LECrim, which detail the steps that the police and civil servants should follow in this preliminary investigation.

[71] On the consequences of crime reports, see criticism by J. Nieva Fenoll, 'El discutido valor probatorio de las diligencias policiales', *Diario La Ley*, 17 September 2007, num. 6780, http://diariolaley.laley.es, at p. 12; also E. Pedraz Penalva, supra note 9, at p. 81 and supra note 8, at p. 261, quoting numerous examples from case-law pronounced by Spanish Constitutional and Supreme Courts. On crime reports extensively J.R. Álvarez Rodriguez, *El atestado policial completo*, Tecnos, Madrid 2009.

[72] See for example judgments of the Spanish Constitutional Court (henceforth SSTC) 80/1986, on June 17, and 80/1991, on April 15, both available, as all others, at http://www.tribunalconstitucional.es. For a review of such case-law F.J. Enériz Olaechea, 'El derecho fundamental a la presunción de inocencia y los atestados policiales en la doctrina constitucional', 2010 *Revista Aranzadi doctrinal*, num. 4, pp. 67-74.

whole constitute evidence, as they must be reproduced at the trial in accordance with the rules for the presentation of evidence in the Criminal Procedure Act.[73]

Another important problem arises in the trial phase when the counsel for the defence challenges either expert or testimonial evidence relating to intelligence information, where general rules on oral criminal proceedings and their notification shall be applied in accordance with Art. 649 LECrim and, especially, Art. 120 Spanish Constitution.[74] If intelligence information is used in evidence, it must be presented with respect for procedural rights and open to adversarial challenge in a public trial;[75] it implies disclosure and cross-examination rights by the defence permitting questioning in the trial phase. Both aspects are also found in European criminal procedures that follow the inquisitorial format, as guaranteed in European and international conventions.[76] Both experts and witnesses may participate in questioning in accordance with Arts. 724 and 707 et seq LECrim with the compulsory presence of the accused and counsel.

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[73] See extensively J. Burgos Ladrón de Guevara, *El valor probatorio de las diligencias sumariales en el proceso penal español*, Civitas, Madrid 1992. According to the author, "the pre-trial investigative acts" (Art. 299 LECrim) are acts of investigation intended to investigate the offense and the guilt of the offender, which do not constitute evidence, since the specific purpose is not the definitive determination of the facts (...) but the preparation of the oral trial, for which they provide the elements that will be examined by both the prosecution and the defence and for the contradictory debate before the judge. However, in no way will that imply, in deliberations over the conviction at which the evidence is directed, that all references to police and pre-trial investigative acts should be denied, if they were practiced in line with the formalities of the Constitution and procedural legislation. When pre-trial investigative acts are impossible or very difficult to replicate in the oral trial, they may lawfully be presented in court as 'early' or pre-constituted evidence, provided that the exercise of the principle of contradiction is fulfilled (*inter alia*, SSTC 80/1986, on 17 June, 82/1988, on 28 April and 137/1988, on 7 July) … Since criminal proceedings are also subject to the principle of the search for material truth, it is necessary to ensure that no data or elements relating to a possible conviction are lost … (STC 201/1989, on 20 November)" (pp. 56-57).

[74] Textually, "(1) Judicial proceedings shall be public, with the exception of those provided for in the laws on procedure; (2) Proceedings shall be predominantly oral, especially in criminal cases". For a general review in English on Spanish criminal procedure see F. Gascón Inchausti and M.L. Villamarín López, 'Criminal procedure in Spain', in R. Vogler and B. Huber (eds.), *Criminal procedure in Europe*, Duncker & Humblot, Berlin, 2008, pp. 541-653, especially on this point p. 592.

[75] See K. Roach, supra note 2, at p. 59. If otherwise, a miscarriage of justice will ensue, because it is relevant evidence; see K. Roach and G. Trotter, 'Miscarriages of justice in the war against terrorism', 2005 *University of Toronto Legal Studies Series*, Research Paper num. 04-05, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=742628 (last visited: 4 January 2017), at p. 23. Specifically M. Langer and K. Roach, 'Rights in the criminal process: a case study of convergence and disclosure rights', M. Tushnet, T. Fleiner and C. Saunders (eds.), *Routledge Handbook of Constitutional Law*, Routledge, Oxford, 2013, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1942423 (last visited: 4 January 2017).

[76] In concrete, Arts. 6 (3) (d) ECHR and 14 (3) (e) ICPPR. See M. Jimeno-Bulnes, supra note 39, at pp. 447-448.

In this context, the categorisation of intelligence as evidence in court has also been criticised in judicial practice, in so far as the principle of contradiction and rules on confrontation during proceedings have not always been observed with particular intelligence reports presented by the police force, when presented as 'secret evidence'.[77] Such unwillingness to disclose intelligence sources to the accused is justified in terms of the protection national security, which is argued to be of overriding importance in relation to fundamental rights.[78] Defence lawyers, especially, have challenged such arguments, when a clear violation of the right to be presumed innocence,[79] that is specifically contemplated as a fundamental right under Art. 24 (2) Spanish Constitution, is apparent from their point of view, in addition to other defence rights to be observed under due process of law.

A similar panorama is visible in the judicial practice of Spanish courts and especially the Supreme Court, which usually accept intelligence reports as admissible evidence.[80] Questions are raised, as already mentioned, over their category amongst the various forms of evidence detailed in the Spanish Criminal Procedure Law: whether expert or testimonial. Indeed, some have argued that a new category of evidence is needed, which appears more in line with the special characteristics of this new technique and would require special enforcement of procedural safeguards. A further question is how this intelligence information may be presented in court, in keeping with the essential principles of due process (contradiction, confrontation, defence …), as well as any discussion over the impartiality of the contents of intelligence reports and their

[77] As argued, "the traditional essence of intelligence has been that it is secret"; see K. Roach, 'Secret evidence and its alternatives', in A. Masferrer (ed.), *Post 9/11 and the state of permanent legal emergency. Security and human rights in countering terrorism*, Springer, Dordrecth, 2012, pp. 179-200, at p. 180.

[78] See criticism by K. Roach, 'Must we trade rights for security? The choice between smart, harsh or proportionate security strategies in Canada and Britain', 2006 *Cardozo Law Review*, vol. 7, pp. 2151-2221; the author employes several examples coming from Canadian and British anti-terrorism law and policy.

[79] See especially S. Guerrero Palomares, supra note 64, at p. 87; the same argument is put forward by law enforcement agencies as well. See the arguments of an inspector of the national police force, J.J. Hernández Domínguez, supra note 61, at pp. 14-15. Also, criticism by R. Sáez Valcarce, 'Juicio penal y excepción. ¿Una involución en el proceso de civilización?', 2007 *Estudios de Derecho Judicial*, num. 128, pp. 51-88, at p. 85.

[80] Only Supreme Court case law will be examined here, although there is obviously jurisprudence on the topic pronounced by the National Court and the Provincial Courts, among others.

authors.[81] Here, the analysis of some case-law appears indispensable, if we are to evaluate the three different positions that the Spanish Supreme Court has successively pronounced on the appraisal of intelligence information from law enforcement bodies as evidence in criminal trials.

At the start of the new Millennium, the Spanish Supreme Court began to attach special importance to police reports that referred to intelligence work, considering that they contributed specific technical knowledge (expertise) to criminal procedure. Its decision implied the use of intelligence information, qualified as expert evidence, in terrorism-related cases. The first judgment in this context was Supreme Court Sentence (hereinafter STS) 2084/2001, on December 13,[82] concerning an explosion at the barracks of the Civil Guard in Llodio (Álava, Basque Country). In resolution of the appeal brought by the defence, the Supreme Court upheld the earlier reasoning of the Criminal Division of the National Court; declaring that reports prepared by members of the Civil Guard (public sector employees) can be considered 'intelligence reports', categorizing their special expertise as '*expert intelligence evidence*': the initial position on the evaluation of intelligence reports advanced by the Spanish Supreme Court.

In this case, the Supreme Court upheld the conclusions of the National Court and for the first time presented an important doctrine on the concept and procedural value of intelligence reports in criminal proceedings. This doctrine advances a new jurisprudential criterion that evaluates police reports prepared by law enforcement authorities as expert intelligence evidence rather than testimonial evidence.[83] On this

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[81] See R. Castillejo Manzanares, note 63, at p. 6. With regard to the impartiality argument, as well as specific Spanish legislation such as Art. 5(1)(b) Act 2/1986, Act 2/1986, March 13, on the Forces of State Security mentioned previously, in which the police force is charged with the observance of the principles of impartiality and neutrality.

[82] Available through the Supreme Court search form at http://www.poderjudicial.es/search/index.jsp (last visited: 20 January 2017).

[83] Textually, "it is a matter of relating various pieces of information, beginning with the knowledge held by certain experts of the Civil Guard, to draw conclusions", in other words, "from all of the information available to them (not only in this case, but taken from a great many police procedures and documentation), they managed to draw certain conclusions, which were then, in turn, applied to concrete actions. It is, therefore, a question of an expert report that consists of relating information, so as to draw certain conclusions; in no case would we be faced with testimonial

point, the Supreme Court highlighted the difference between the concepts of expert and witness;[84] it also justified the need to request expert opinion as a 'means of assistance' when the judge alone is unable to verify the truth of the facts. Lastly, it argued that appropriate requirements have been observed, such as the physical presentation of the reports by experts in tandem with the possibility of the defence contesting the reports (mentioned as a possibility and not employed in the specific case in point).

Another relevant judgment on the topic is STS 786/2003, of May 29, again in relation to ETA terrorism; here the Supreme Court stated the validity of 'police intelligence evidence', as it is increasingly employed in criminal procedure, so that the judge may acquire appropriate technical knowledge according to Article 456 LECrim. In the same case, the expert intelligence evidence is considered as no more than "a variant of the expert evidence referred to in Art. 456 LECrim".[85]

In contrast, later on in STS 1029/2005, on September 26, the Supreme Court changed its criterion declaring that in this case "the proposed expert report was nothing more than a police analysis of the statements produced by the defendants" and provided "neither qualitatively different nor properly specialized knowledge" that the judge might have missed. In short, the reasoning of the Supreme Court, along the same lines as the National Court, considered that the declarations of the Basque police (*Ertzaintza*) during the trial had to be considered *testimonial* and not expert evidence.[86] Besides, in this case, their declarations failed to present sufficient evidence *a quo*, in the opinion of the judge (National Court), to alter the presumption of innocence; a ruling that the

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evidence, but expert evidence, which on the basis of in-depth knowledge of the way certain ETA commandos operate, of their organization,... leads to specific conclusions" (Para. 11. VII).

[84] "The expert, as opposed to the witness, holds objective technical, scientific, artistic and practical knowledge, prior to and unrelated to the proceedings, being for that reason substitutable, and what justifies his intervention is precisely the logic of his science, occupying an active position in relation to the examination of what constitutes the object of the expert opinion. The witness testifies to past events related to the proceedings sensorially perceived by him, being for that reason irreplaceable in the proceedings and adopting a passive stance in so far as he is the object of the cross examination" (Para. 11.VIII).

[85] M. de Prada Rodriguez & J. Santos Alonso, supra note 54, p. 103.

[86] In fact, there is no reference to intelligence information in the entire text.

Supreme Court later upheld on appeal. Also, if the last case is compared with earlier ones, the different burden of proof between expert and testimonial evidence in securing a conviction may be appreciated.[87] It was the second position adopted in Spanish Supreme Court case-law relating to intelligence information evidence.

Since that ruling, the Supreme Court has evaluated police reports as either expert evidence or testimony, on the basis of their contribution to the criminal cause; in the first case, the reference is to 'intelligence information'. In this context, the following SSTS 556/2006, on May 31 and 119/2007, on February 16, also evaluated police reports as testimonial evidence, reproducing arguments included in an earlier judgement STS 1029/2005. As in the previous sentences, it was considered that the police reports, which studied the links of the accused to terrorist groups, could not be qualified as technical knowledge; they only indicated "a larger quantity of information than that possessed by the court" but no 'qualitative' or 'properly specialized' differences were noted, contrary to the concept of expert evidence detailed in Article 456 LECrim. Again, the reference to intelligence is absent in the first case and improperly included in the second, in so much as those particular crime reports did not constitute intelligence information in terms of the existing jurisprudential definition.[88]

But in other case-law such as STS 655/2007, of June 25 and especially STS 783/2007, of October 1, the evaluation of 'police intelligence' as expert or testimonial evidence was unclear; the Supreme Court failed to consider that the difference was relevant, provided that Art. 741 LECrim was in both cases applied, so that the evidence as explained earlier could be freely evaluated by the sentencing court. Initially, the

[87] In relation to the lack of credibility of testimonial declarations see J. Leal Medina, 'El juicio de credibilidad en las declaraciones testificales. Elementos subjetivos y objetivos. Incidencia de la presunción de inocencia en los diferentes tipos de testimonios y problemas más frecuentes que plantea', *Diario La Ley*, 16 April 2013, http://diariolaley.laley.es

[88] See definition provided supra para. 2. In this second case the Supreme Court textually declares that "In this way, the so-called 'intelligence reports', are not expert evidence, but they share the nature of circumstantial evidence, in so far as they contribute knowledgeable information for the Tribunal on certain persons and activities. And this information, if coherent with the result of other means of evidence can determine, in conjunction with them, proof of a fact, provided that this arises from all those elements weighed up by the sentencing court." (Para 5.2.III).

police intelligence report was placed in a *special category* under the title of '*police intelligence evidence*'; in fact, these reports provide technical, scientific, artistic or practical knowledge to those involved in the proceedings, in accordance with Articles 456 LECrim and 335 LEC, and are freely evaluated by the sentencing judge. This case may be seen as the third position advanced by the Spanish Supreme Court, although it is much closer (and even overlaps) the first rather than the second position.

Nevertheless, at the same time, the Supreme Court also recognised the possibility in this case of evaluating this contribution on intelligence by the police force as testimonial or hearsay[89] together with its declaration as 'singular evidence'; yet a further categorisation of evidence[90] is needed as has been argued. Even a higher degree of confusion between this categorisation of intelligence information as testimonial evidence (second position) or special evidence (third position) is added where case STS 783/2007 establishes differences between standard police reports on intelligence and those drafted by official institutions or law enforcement agencies, which should be evaluated as documentary evidence, if uncontested by the parties.

Subsequent case-law pronounced by the Supreme Court since 2009[91] has generally looked favourably on the definition of intelligence information as *expert evidence* (first position) as defined in Art. 456 LECrim. In some cases, it is considered a special sort of expertise in the absence of any specific legal regulation that is evaluated according to the characteristics of this specific form of expert evidence previously

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[89] See on the topic J. Spencer, *Hearsay evidence in criminal proceedings*, 2 ed., Hart Publishing, Oxford, 2014; in Spain J.J. Hurtado Yelo, 'El testigo de referencia y su importancia en el proceso penal', 2011 *Revista Aranzadi doctrinal*, num. 10, pp. 35-48. Also Spanish constitutional jurisprudence has confirmed the validity of hearsay requiring the observance of procedural guarantees, especially since STC 217/1989, on December 21; see L.M. Bujosa Vadell, 'Pruebas de referencia y garantías procesales', *Diario La Ley*, 15 November 2007, num. 6821, http://diariolaley.laley.es

[90] Textually, "this is unique evidence that is used in some complex processes, where special skills are needed, that do not respond to the usual parameters of conventional expert evidence" (Para. 4.VI.1º).

[91] SSTS 352/2009, on March 31st; 480/2009, on May 22th; 985/2009, on October 10 … The second case was a famous case in Spain (the *EKIN* case) in which several Basque companies linked to the terrorist organization ETA were convicted.

described in STS 783/2007, although with a specific definition.[92] Other judgments still express doubt over the nature of this intelligence information, considering that it is of a mixed nature somewhere between expertise and testimony (third position), although the greater proximity to the former appears obvious. The question concerning the impartiality of the police force and/or law enforcement agents that draft these intelligence reports is also favourably resolved.[93] On occasions, disagreement between various magistrates on the bench over the evaluation of intelligence evidence has resulted in dissenting opinions, contrary to the majority judgment.[94]

In summary, although the Supreme Court still evaluates these questions on a case-by-case basis and regardless of whether the so-called police intelligence reports do in fact constitute expert intelligence evidence within the definition of intelligence provided in prior case-law,[95] it is clear that this new method of expert evidence is gaining greater acceptance in the courtroom. In this context, it appears as though the third position maintained by Supreme Court case-law in its above-mentioned judgment STS 783/2007 has predominated in subsequent case-law[96] favourable to different forms

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[92] See specifically STS 290/2010, on March 31st, in which the Supreme Court declared that intelligence evidence and/or reports are "a means of evidence not provided for by law, the authors of these reports being experts in this kind of information who assist the Tribunal, by providing interpretive elements on objective data that are included in the case, the important point being whether the conclusions they draw are rational and may by assumed by the Tribunal, rationally expounded and contested during the proceedings" (Para. 10.2.IV). This definition has been used in subsequent case-law.

[93] In relation to both questions, see STS 156/2011, on March 21, concerning the *Kalashov* case, where a definition of intelligence reports is also provided: "intelligence reports are merely the conclusions of experts at which the relevant intelligence services arrive, in view of the study of certain data and clues under analysis and the interrelationships that may be appreciated, and which in view of the new forms of organized crime organized as has been said on the basis of clandestinity and the suppression of all evidence, appear as an instrument of evaluation that are as important as they are necessary for the Courts." (Para. VI-I *in fine*).

[94] Here, the best example is STS 1097/2011, October 25, in which magistrate Perfecto Andrés Ibañez presented his dissenting opinion, solely in relation to the burden of proof attributed to expert intelligence evidence; he criticized its consideration as expert evidence, at least in relation to that particular criminal cause.

[95] See for example STS 263/2012, on March 28, on the use of the earlier definition in STS 290/2010; but here, the cassation appeal was upheld due to the lack of reasoning in the police intelligence report.

[96] At the time of writing, the most recent case on the topic is STS 14/2017, on January 11, also in relation to ETA terrorism in which case-law advanced in STS 783/2007 was applied. In short, it contained the following declarations: "1) This is *unique evidence* that is used in some complex processes, where special knowledge is needed, which does not fit the common parameters of the most conventional expertise; 2) Consequently, it does not fit the formats designed in the Criminal Procedure Act; notwithstanding which, nothing prevents its use in criminal proceedings when such knowledge is needed, as made clear in the repeated case law of this Court; 3) Although it is evidence that shares the nature of expertise and testimony, it is, of course, closer to expertise, as the authors provide their own knowledge and expertise for the valuation of certain documents or strategies; 4) In any case, the assessment of such

of categorization of such evidence, despite the absence of regulation of this new form of expertise. In fact, there is at present little discussion on the topic in judicial practice, suggesting that reliance on this new form of evidence, supported in the case law of the Supreme Court, is set to continue for some time to come.

But an explicit provision in the Criminal Procedure Act would also be desirable, which up until today has yet to appear, despite several amendments over recent years.[97] Such specific provision appears more essential when a new form of evidence (even when close to expertise) is appreciated and defended by judicial practice and scholarship, taking into account the fundamental rights that are at stake. Until that time, with the law as it stands and the refinements of case-law, in the absence of compliance with the principles of contradiction and defence, such intelligence reports should have no more probative value than a 'complementary or coadjuvate' one to evidence that is deemed admissible.[98]

5. *Concluding remarks*

In view of all of the above, there is no current procedural regulation in Spain on intelligence, despite its recognition in specific national legislation. Nevertheless, judicial practice commonly makes use of intelligence information as a sort of new expert evidence that provides the required technical knowledge that the sentencing judge and/or court may need. However, further legal regulation in ordinary criminal procedure legislation is certainly a *desideratum* among scholars –myself included-, in order to specify the characteristics, the requirements and the effect of this new kind of expertise. It might now be appropriate, in as much as new police investigative methods have recently been included in the Spanish Criminal Procedure Act (1882), especially in

reports is free, so that the judge *a quo* can analyze them rationally and freely, without thereby being considered as documents for cassational purposes." (Para. 1.3.IV).

[97] See supra note 4.

[98] L. Bachmaier Winter, supra note 38, at p. 87.

the field of new technologies,[99] although any provisions on this point have yet to be foreseen.

Obviously, as has been stated, the major risk here is a probable collision between intelligence information and/or reports and fundamental rights. In terms of criminal procedure, the observance of such fundamental rights especially presupposes the protection of the principle of contradiction (or confrontation)[100], jointly with the enforcement of procedural guarantees, and other defence rights. Otherwise, the right to a fair trial as described in international and European regulations[101] as well as in specific parts of the Spanish constitution[102] will be threatened.

One debate on the European agenda concerns the possibility of certain member state legislations accepting secret evidence in criminal procedure, with judicial authorisation, without the defendant being granted access to the information, if so

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[99] See Organic Law 13/2015 of 5 October, modifying the Criminal Procedure Act, in order to strengthen the procedural safeguards and the regulation of technological investigative measures; in Book II related to Pre-trial investigation the amendment introduces Title VIII under the name 'Of the investigative measures limiting the rights recognized in Article 18 of the Constitution'. The evaluation of these new police investigative methods contemplated here as 'preconstituted evidence' may take place at a later stage, such as the 'Interception of (telephonic and) telematic communications' (Chapter V), the 'Collection and recording of conversations and images using electronic devices' (Chapter VI), the 'Use of technical devices for tracking, tracing and image capture' (Chapter VII), 'Inspecting mass storage devices' (Chapter VIII), and 'Remote records on computer equipment' (Chapter IX). N. Cabezudo Rodriguez, 'Ciberdelincuencia e investigación criminal. Las nuevas medidas de investigación tecnológica en la Ley de Enjuiciamiento Criminal (Ley Orgánica 13/2015, de 5 de octubre, de modificación de las garantías procesales y la regulación de las medidas de investigación tecnológica', *I Jornada del Boletín del Ministerio de Justicia: 'Las reformas del proceso penal'*, supra note num. 4, pp. 5-57; also in relation with some of these new investigative methods, J. Delgado Martín, 'Investigación del entorno virtual: el registro de dispositivos digitales tras la reforma por Ley 13/2015', *Diario la Ley*, 2 February 2016, num. 8693, http://diariolaley.laley.es as well as, recently, L. Bachmaier Winter, 'Registro remoto de equipos informáticos y principio de proporcionalidad', 2017 *Boletín del Ministerio de Justicia*, vol. 76, num. 2195, http://www.mjusticia.es/bmj

[100] In fact, the principle of contradiction in Civil Law systems is equivalent to the confrontation clause existing in Common Law systems. For a comparison between both, see classic scholarship in US such as D.A. Murray, 'A survey of criminal procedure in Spain and some comparisons with criminal procedure in United States', 1964 *Notre Dame Law Review*, vol. 40, pp.7-56.

[101] Arts. 6 ECHR, 47 CFREU, 14 ICCPR, 11 UDHR … See for example A. Doobay, 'The right to a fair trial in light of the recent ECtHR and CJEU case-law', 2013 *ERA Forum*, num. 14, pp. 251-262; also J. Hogdson, 'EU Criminal justice: the challenge of due process rights within a framework of mutual recognition', 2011 *North Carolina Journal of International Law & Commercial Regulation*, vol. 37, num. 2, pp. 308-320, discussing fairness in judicial proceedings and the European meaning of 'due process of law'. Lastly, on the concept of fairness in general terms, H. Jung, 'Fairness: Wirksame Verteidigung', 2013 *Goltdammer's Archiv für Strafrecht*, vol. 160, num. 2, pp. 90-98.

[102] Art. 24 Spanish Constitution, textually: "(1) All persons have the right to obtain effective protection from the judges and the courts in the exercise of their rights and legitimate interests, and in no case may there be a lack of defence. (2) Likewise, all have the right to the ordinary judge predetermined by law; to defence and assistance by a lawyer; to be informed of the charges brought against them; to a public trial without undue delays and with full guarantees; to the use of evidence appropriate to their defence; not to make self-incriminating statements; not to plead guilty; and to be presumed innocent". This rule is probably the most frequently cited in defence appeals to the Constitutional Court in Spain. Among others, see extensively J. Picó i Junoy, *Garantías constitucionales del proceso*, Bosch, Barcelona, 2011; from another perspective A.M. Lorca Navarrete, 'El denominado "proceso justo"', 2013 *Revista Vasca de Derecho Procesal y Arbitraje*, vol. 25, num. 1, pp. 35-47.

requested by the government. The best example is the recent regulation in the UK with the adoption in 2013 of a new provision with the title of 'Closed material procedure' (CMP), as part of the Justice and Security Act.[103] The Court of Justice of the European Union has expressed concern on the topic in relation to the use of secret materials in the case of *ZZ v. Secretary of State for the Home Department*, of June 4, 2013.[104] Another case is also pending before the European Court of Human Rights (ECtHR)[105] and previous case-law by same European Court has been pronounced *mutatis mutandis*.[106] Fortunately, it is not the case in Spain at the moment; hopefully, no similar provision will be enforced in relation to expert evidence in any further regulations.

Finally, some recommendations on 'best practice' in the context of intelligence information may be added, as examples to consider in future legal regulation on this topic in Spain. These recommendations cover the most complex questions to have arisen in the discussion in Spanish academia in relation to intelligence evidence and its

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[103] Available at http://www.legislation.gov.uk/ukpga/2013/18/part/2/crossheading/closed-material-procedure-general/enacted (last visited: 20 January 2017). See comments by J. Jackson, 'Justice, security and the right to a fair trial: is the use of secret evidence even fair?', 2013 *Public Law*, num. 4, pp. 720-736; also G. Martin & R. Scott Bray, 'Discolouring democracy? Policing, sensitive evidence and contentious deaths in the United Kingdom', 2013 *Journal of Law and Society*, vol. 40, num. 4, pp. 624-656. Also, in general, M. Engelhart, 'The secret services influence on criminal proceedings', in M. Wade & A. Maljevic (eds.), *A war of terror? The European stance on a new threat. Changing laws and human rights implications*, Springer, Berlin, 2010, pp. 505-547.

[104] Case *ZZ v. Secretary of State of the Home Department*, C-300/11, not yet completed. The ECJ concluded that the national court with jurisdiction is required "to ensure that failure by the competent national authority to disclose to the person concerned, precisely and in full, the grounds on which a decision taken … and to disclose the related evidence to him is limited to that which is strictly necessary, and that he is informed, in any event of the essence of those grounds in a manner which takes due account of the necessary confidentiality of the evidence". See also paras. 57-68. Judgment resolving the preliminary ruling promoted by the Court of Appeal (England and Wales, Civil Division) in relation with the decision refusing admission in UK of a EU citizen on public security grounds; a prior appeal took place before the Special Immigration Appeals Commission (SIAC), where the Secretary of State invoked the confidentiality of material and its treatment as 'closed material'. See comments by N. De Boer, 'Secret evidence and due process rights under EU law: ZZ: Case C-300/11, ZZ v. Secretary of State for the Home Department. Judgment of the Court (Grand Chamber) of 4 June 2013', 2014 *Common Market Law Review*, vol. 51, num. 4, pp.1235-1262.

[105] *Gulamhussein and Tariq v. the UK*, applications nos 46538/11 and 3960/12. At present, the ECtHR has stated the facts and posed the relevant questions to the parties concerned, according to common procedure; see information available at the ECtHR website http://hudoc.echr.coe.int. In both cases, the proceedings were held before administrative British authorities (in concrete, Security Vetting Appeal Panel or SVAP) and information inaccessible to both the applicants and their solicitors was used.

[106] *A. and others v. UK*, judgment pronounced on February 19, 2009, application num. 3455/05, where the ECtHR stated that "the use of closed material gave rise to a breach of Article 6" (Para. 231 *in fine*). Here, the national proceeding also took place in UK before the Special Immigration Appeals Commission (SIAC), the applicants claiming the legality of the derogation carried out by UK of Art. 5 (1) ECHR under the Anti-Terrorism, Crime and Security Act (ATCSA) 2001. See on the topic M. Jimeno-Bulnes, 'After September 11: the fight against terrorism in national and European Law. Substantive and procedural rules: some examples', supra note 14, at p. 241.

use in criminal proceedings.[107] The special categorization of this new expert evidence acquired by intelligence reports as recognized in the majority of Supreme Court case-law according to the exposed third position is presumed; but, of course, useful proposals might also cover alternative categories for a definition of this specific form of evidence. The relevant question here is whether it may be evaluated as incriminating evidence.

1) The concept of such intelligence work and/or special technical knowledge needs to be clarified, so as to distinguish between everyday police reports, as explained in Supreme Court case-law. Moreover, the enumeration of the specific crimes and/or offenses where such intelligence work should be allowed would also be of use.[108]
2) The impartiality of such intelligence information and its authors should be guaranteed, in view of the previous organic legislation in Spain and the case-law that has been presented. Here the motive is to clarify the difference between intelligence work and standard police reports contained in an investigative dossier.[109]
3) The requirements and the characteristics of such intelligence reports should be regulated with due care, so that they are based on reliable sources of information. Also, the legality of these intelligence reports should be ensured according to the exclusionary rule (*prueba ilícita*).[110]
4) Last but not least, and perhaps the most important recommendation of all: to guarantee the enforcement of the contradiction and/or confrontation principles in criminal procedure and, especially, throughout the oral phase of the proceedings (trial). In this context, it is indispensable to guarantee that the defence lawyer has access to this intelligence evidence as with all other

[107] See especially scholarship quoted in note 64.
[108] See S. Guerrero Palomares, supra note 64, at p. 81-83.
[109] See R. Castillejo Manzanares, supra note 64, at p. 6.
[110] See E. De Llera Suárez-Bárcena, supra note 64, at p. 7.

types of evidence, avoiding recourse to closed materials. The use of intelligence information, as with any other evidence (including expert opinion), should add technical knowledge to the criminal cause, but should never *substitute* judicial criteria.[111]

[111] See F. Gudín Rodriguez-Magariños, supra note 64, at pp. 9 and 11 with reference to the principle of 'immediacy' (*inmediación*). The author is very critical on this question in general, declaring that it is impossible for the defence lawyer to contradict the intelligence report, which in most cases substitutes the judicial criterion; as he points out, the defence can hardly possess a 'counter-police' report.