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# REFORM OF WITNESS INTERROGATION RULES IN GEORGIA



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PART I – COMPARATIVE STUDY ON REFORM OF WITNESS  
INTERROGATION IN GEORGIA

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# INTRODUCTION

The rights of witnesses in criminal justice have been very seriously neglected in the development of international human rights law. Neither the European Convention on Human Rights (ECHR, 1950) nor the International Covenant on Civil and Political Rights (ICCPR, 1976) refer to the rights of either witnesses or victims of crime at all. The only reference to witnesses in the ECHR, for example, is in connection with the defendant's right to examine them,<sup>1</sup> which appears, like most other defendant's rights, to apply from the beginning of the proceedings.<sup>2</sup> Some progress has been made, however, in relation to three special categories of witnesses. Witnesses who were also victims of crime were given extensive consideration as a result of the expansion of scholarship in the area of victim's rights in the 1970s.<sup>3</sup> By 1985 the United Nations was ready to promulgate its *Declaration of Basic Principles for Justice for Victims of Crime and Abuse of Power* and in the same year the Council of Europe published its Recommendation 85(11) *On the Position of the Victim in the Framework of Criminal Law and Procedure*, which proposed a range of measures concerned with information, practical assistance and confrontation. Secondly, vulnerable witnesses have received some international attention, for example, in the 1997, Recommendation 97(13) of the Council of Europe on the *Intimidation of Witnesses and Rights of the Defence*, which provided specific proposals to protect vulnerable witnesses from "the intimidation of face to face confrontation". These principles have been reflected in domestic legislation in many countries.<sup>4</sup> Finally, the protection of witnesses in international justice has also been the focus of considerable interest and in March 2010, this was identified as a priority area for the International Criminal Court.<sup>5</sup>

With the exception of the three categories of witness referred to above, the general position of the witness in domestic proceedings has been largely ignored in both the scholarly literature and in international jurisprudence. This is unfortunate, since in many countries witnesses have been subjected to systematic intimidation and bullying as well as lengthy incarceration and denial of their rights. The compulsory requirement for witnesses to attend for examination at a police station (as opposed to a trial court) is a legacy of the authoritarian practices of the 1808 Napoleonic *Code d'Instruction Criminelle*,<sup>6</sup> which were subsequently adopted in Soviet criminal procedure.<sup>7</sup> The disadvantages of this approach in contemporary criminal justice are obvious. Not only does witness compulsion offer the potential for the distortion of testimony and for inappropriate pressure to be brought to bear on witnesses but it also serves to alienate communities from the police. Fear of arrest as a witness is unlikely to encourage a citizen to co-operate with the authorities and it undermines the essential community engagement and support on which an effective

1. Art. 6(3)(d) provides for the right of a defendant "to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him". Interestingly, this is the only explicit reference to the principle of equality of arms in the Convention.

2. *Imbrosia v Switzerland*, 24th November 1993, No. 13972/88, §36.

3. Concern was first expressed in Von Hentig's seminal 1948 study *Von Hentig, H. (1948). The Criminal & his Victim: Studies in the Sociobiology of Crime*. New Haven, Yale University Press.

4. Hoyle, C. and L. Ullrich (2014). "New Court, New Justice?: The Evolution of 'Justice for Victims' at Domestic Courts and at the International Criminal Court." *Journal of International Criminal Justice* 12: 681-703.

5. Eikel, M. (2012). "Witness Protection Measures at the International Criminal Court: Legal Framework and Emerging Practice." *Criminal Law Forum* 23(1-3): 97-133.; Plevin, A. (2014). "Beyond a 'Victims' Right': Truth-Finding Power and Procedure at the ICC." *Ibid.* 25(3-4): 441-464.

6. Vogler, R. K. (2005). *A World View of Criminal Justice*. Aldershot, Ashgate., p.42-56.

7. *Ibid.* pp.81-86.

police service depends.<sup>8</sup> Witness compulsion, of its nature discretionary, is also likely to be exercised in a way which is discriminatory and is feared with good reason by ethnic minorities. It is also a clear affront to the principles of adversariality and equality of arms which Georgia has worked so hard to implement in recent criminal justice legislation.

The 1998 Georgian Criminal Procedure Code (CPC) as amended, required witnesses to appear upon the summons of an inquirer, investigator, procurator or court and to give truthful testimony with regard to the facts known to them and to answer the questions put to them. Failure to do so could result in the witness being compelled to attend and the imposition of a fine.<sup>9</sup> This provision, which was derived largely from the All Soviet Model Code of 1963, had been a matter of a major concern for a long time, largely because it enabled the investigation agencies to deny a “prospective witness” who was nevertheless under suspicion, the right of silence which they would otherwise have enjoyed. Therefore, one of the twelve crucial objectives in the “List of Reform Objectives” set out in the 2005 *Strategy of the Reform of the Criminal Legislation of Georgia*<sup>10</sup> was a requirement for “making the testimony of witnesses voluntary in the pre-trial stage of investigation”.<sup>11</sup> This was repeated in item 12 of the “List of Innovations” of the 2007 Criminal Procedure Code Draft.

The new Code enacted in 2009 prohibited the compulsory questioning of witnesses in the pre-trial phase, except in a judicial setting. Article 49, which set out the rights and obligations of the witness, referred only to the duty “to appear upon the summons of the court”. It envisaged the possibility of witnesses testifying before a magistrate in the pre-trial where, for example, there was a real threat to their life or health or the witness was leaving Georgia for a long period of time.<sup>12</sup> The drafters of the 2009 Code clearly intended that the only way to obtain information from a witness before the trial started (except by way of witness deposition before a magistrate) was through a voluntary interview.

It is unfortunate, therefore, that this important provision, which was one of the central features of the 2009 reform, has not yet been brought into force. Transitional procedures under Art. 332 of the new Georgian CPC have been adopted by the Georgian Parliament to delay implementation, most recently until the end of 2015. These delays have been the subject of criticism both inside Georgia and from the international community. For example, whilst Thomas Hammarberg, the European Union Special Adviser on Constitutional and Legal Reform and Human Rights in Georgia, has noted the very significant progress in criminal justice reform made in Georgia since 2005, he has nevertheless called for more “steps to facilitate genuine adversarial proceedings, to decrease the use of custodial measures ...”<sup>13</sup> In particular he expressed concerns about “questionable methods of investigation” and

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8. Reiner, R. (2010). *The Politics of the Police*. London, Sage.

9. Arts.93-94, Georgia Criminal Procedure Code (as amended and supplemented on 24 February 2004). Arts 295-308 set out the detailed procedure for the summoning and hearing of witnesses.

10. Paper Produced by the Working Group Established by the Presidential Decree No. 914 of 19 October 2004, Tbilisi, p.3.

11. Objective 8.

12. Article 114.

13. Hammarberg, T. (2013). *Georgia in Transition. Report on the Human Rights Dimension: Background, Steps Taken and Remaining Challenges. Assessment and Recommendations* by Thomas Hammarberg in his Capacity as EU Special Adviser on Constitutional and Legal Reform and Human Rights in Georgia. Strasbourg, European Union, p.11.

“pressure on apprehended persons to confess a crime or incriminate someone else”.<sup>14</sup> In January 2014 Nils Muižnieks, the Council of Europe Commissioner for Human Rights, visited Georgia and noted with dismay that the Georgian Parliament had decided to postpone the adoption of the witness compulsion amendments:

“At present, individuals are obliged to appear before law enforcement bodies if they are summoned as witnesses to give testimony during any stage of an investigation, before the case goes to court. This practice has long been criticised by NGOs, which have argued that it favours undue pressure or intimidation of witnesses by law enforcement bodies –in some cases leading to witnesses changing their testimony – and undermines the principle of equality of arms between the prosecution and the defence. The postponement of the new rules provoked a negative reaction by civil society organisations, the Georgian Bar Association and opposition MPs.”<sup>15</sup>

The Speaker of the Georgian Parliament indicated to Commissioner Muižnieks that the postponement of the new rules was necessary because the criminal justice system was not yet ready to cope with such a change.<sup>16</sup> It was also suggested in the Government of Georgia’s Explanatory Report, that almost no other countries have abandoned the use of compulsion against witnesses as proposed by Georgia. The comparative data set out in this Expertise indicates that neither of these propositions has any basis in fact. Most European nations and all those within the common law world, rely on the voluntary attendance of witnesses, without in any way diminishing the effectiveness of investigation and prosecution. Even states such as France, which have traditionally reserved the right to use force against unwilling witnesses, are rapidly abandoning their commitment to this form of compulsion and in 2011 this country enacted a provision requiring that witnesses should be interviewed “without being subjected to any physical compulsion whatsoever.”<sup>17</sup> The “material witness” provisions, which have long disfigured United States procedure, survived a challenge in the Supreme Court in 2011 but are not extensively used and are coming under increasing pressure for abolition. Georgia would not be alone in abandoning witness compulsion but on the contrary would be aligning herself with the majority of democratic states.

For the purposes of this review “interrogation” refers to a procedure under which the witness is obliged by law to attend for questioning and is compelled to answer the questions put to him or her, under oath or otherwise. The record of such an interrogation normally forms part of the official case file. An “interview” on the other hand, is an informal or voluntary conversation between the police, investigator or prosecutor and the witness. It may or may not be recorded and does not necessarily form part of the official collection of evidence.

The choice of countries for this brief survey has been made with the intention of demonstrating the range of different approaches to the problem of the reluctant witness.

14. *Ibid.*, p.20.

15. Council of Europe (2014). Report by Nils Muižnieks, Commissioner for Human Rights of the Council of Europe, Following his Visit to Georgia, from 20 to 25 January 2014. Strasbourg, Council of Europe., pp.8-9.

16. *Ibid.*

17. See below.



England and Wales has been chosen to represent the normal practices of common law countries, where witnesses are under no form of compulsion. Similar protections for witnesses could be found in the criminal procedures of Scotland, Ireland, Australia and elsewhere. The United States has been chosen to demonstrate an unusual departure from this tradition, which has caused deep disquiet, particularly amongst immigrant and ethnic minority populations and which serves as a reminder of the dangers of even very limited forms of witness compulsion. Canada has avoided such difficulties by preserving the usual common law rules. France, on the other hand, represents the rapidly dwindling number of European states which retain the right to compel the attendance of witnesses but it is clear that, even in this jurisdiction, the Napoleonic heartland of the practice, compulsion is in full retreat. The more normal European practice is represented by the approach adopted by Germany and the Netherlands, both of which restrict the compulsion of witnesses to attendance at court and not at the police station.

The countervailing tendency to the authoritarian Napoleonic and Soviet practices of witness compulsion is represented by the “No Witness, No Justice” movement, which seeks to recognise and respect the vital contribution of witnesses to the effective administration of criminal justice. In this approach, which has been adopted by jurisdictions as diverse as Croatia<sup>18</sup> and the Barbados,<sup>19</sup> witnesses are given support and advice and treated with the respect which is due to a citizen giving voluntary support to the criminal justice process. It is a philosophy which is also well represented in the Rome Statute of the International Criminal Court which made it the responsibility of the Court’s Registry to establish a Victims and Witnesses Unit<sup>20</sup> and which set out the Court’s responsibilities to ensure the protection of victims and witnesses and to facilitate their participation in proceedings.<sup>21</sup> It is submitted that the evidence presented here demonstrates very clearly that the co-operation of witnesses and an effective and functioning criminal justice process is much better secured by strategies of this nature rather than by the use of force.

## THE POSITION OF THE PROSECUTION WITNESS IN ENGLAND AND WALES

The police in England and Wales have never had the power in peacetime to arrest, detain or to compel witnesses. The current arrest provisions for England and Wales are set out in Section 24 of the Police and Criminal Evidence Act 1984<sup>22</sup> which now provides that a police constable’s powers of arrest without a warrant extend only and exclusively to those individuals suspected on reasonable grounds of having committed or attempted to commit a criminal offence or offences. Guidance on practice is given by Code G, which is published under the Act.<sup>23</sup> The essential principle is that a police officer with reasonable grounds for suspecting that an offence has been committed, may arrest without a warrant anyone whom he or she has reasonable grounds to suspect of being guilty of it. In addition, the constable must have reasonable grounds for believing that it is necessary to arrest the

18. <http://www.hrundp.org/content/croatia/en/home/ourwork/crisispreventionandrecovery/successstories/WitnessSupport.html>

19. See, eg <http://barbados.usembassy.gov/ev06292012a.html>

20. Article 43 and Chapter 2.

21. Article 68 and Chapter 4. See Eikel, *op cit*.

22. As substituted by s.110 of the Serious Organised Crime and Police Act 2005.

23. [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/117583/pace-code-g-2012.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117583/pace-code-g-2012.pdf)

person in question. The potential grounds for such a belief include, for example, where the name and address of the person in question needs to be ascertained<sup>24</sup> or to allow the prompt and effective investigation of the offence, or to prevent any prosecution for the offence from being hindered by the disappearance of the person in question etc.<sup>25</sup> As a matter of principle, therefore, it can never be necessary to arrest a person unless there are reasonable grounds to do so and this could not be the case for a mere witness.

The participation of witnesses and their attendance at police stations is therefore entirely voluntary. This is normally the case for court hearings too. Witnesses can, however, be required to attend court for the trial if they are served with a witness summons (on behalf of either the prosecution or the defence). At the request of the parties, the lower courts (magistrates' courts) have the power to require by summons the attendance of a witness to give evidence or to produce in evidence a document or thing, or in some circumstances to issue a warrant for the witness' arrest.<sup>26</sup> Similar powers are exercised by the higher courts (crown courts).<sup>27</sup> The procedure for the issue of witness summonses is set out in the Criminal Procedure Rules. These require that a party who wishes the court to issue a witness summons, warrant or order, must apply as soon as practicable after becoming aware of the grounds for doing so. The party applying must identify the proposed witness and explain what evidence they are able to provide, why it is likely to be material evidence, and why it would be in the interests of justice to issue a summons, order or warrant.<sup>28</sup> A witness who fails to comply with a witness summons can be arrested and brought to court.

In 1999 the National Audit Office issued a monitoring Report<sup>29</sup> indicating that prosecution witnesses frequently failed to attend at trial, with the result that large numbers of proceedings had to be adjourned or abandoned. It was argued that the system of relying on the voluntary participation of witnesses was not working. In response to this Report, the government established the "No Witness, No Justice" pilot project. This involved a much more intensive commitment by the police and the Crown Prosecution Service to the support of witnesses.<sup>30</sup> The pilot developed techniques for assisting witnesses through the entire process, including advice and counselling, pre-trial familiarisation visits to courts and assistance with travel and child-care. Under the Domestic Violence, Crime and Victims Act 2004 a national Commissioner for Witnesses and Victims was to be appointed and from the same year, "Witness Care Units" were developed on the basis of the existing Witness Warning Units, to provide more comprehensive support to witnesses. These units are a single point of contact for witnesses, staffed by dedicated witness care officers who are available "to guide and support individuals through the criminal justice process and to co-ordinate support and services as well as informing them of the case outcome or trial result, thanking them for their contribution to the case and offering post case support from the relevant support agency".<sup>31</sup> Despite early problems with training and staff turn-over,

24. Ss.24(5)(a) and (b) of PACE.

25. Ss.24(5)(e) and (f) of PACE. All these provisions are elaborated in paragraph 2.9 of the Code G.

26. S.97 of the Magistrates' Courts Act 1980 and paragraph 4 of Schedule 3 to the Crime and Disorder Act 1998.

27. Ss.2, 2D, 3 and 4 of the Criminal Procedure (Attendance of Witnesses) Act 1965.

28. Criminal Procedure Rules, 2014 Restatement, Paragraph 28(3).

29. Comptroller and Auditor General (1999). *Criminal Justice. Working Together*. London, National Audit Office.

30. Sanders, A., R. Young, et al. (2010). *Criminal Justice*. Oxford, Oxford University Press. pp.484-5.

31. See [http://www.cps.gov.uk/news/fact\\_sheets/witness\\_care\\_units/](http://www.cps.gov.uk/news/fact_sheets/witness_care_units/)

assessments of the project by an independent consultancy in 2004 demonstrated that the reform was beginning to have an impact.<sup>32</sup> By 2006 the Law Officer's Department noted that the witness attendance rate at trials had increased by 5.5 percentage points and discontinued trials due to witness failure to attend had decreased by nearly 20%.<sup>33</sup> One of the other important outcomes of this approach was the creation of the "Witness Charter" which is published and regularly updated by the Ministry of Justice.<sup>34</sup> This Charter sets out the standards of care which witnesses can expect throughout the criminal justice process. The first standard, addressed to all witnesses is that "you will be treated with dignity and respect at all times by each of the service providers you have contact with in the criminal justice system". The second standard sets out the conditions under which a witness decides to visit the police station, saying:

"If you report a crime or other incident, the police will need to ensure that they:

- understand what you are telling them and that you understand what they are telling you;
- explain how they are going to deal with the matter; give an indication as to how long this will take; and
- give you a reference or crime number and details of a person to contact for further enquiries."

The third standard explains the conditions for making a statement, emphasising that the police will decide whether to ask the witness to provide a statement and become a prosecution witness and emphasising that whereas making a statement is voluntary, it may lead to an obligation to attend court to give evidence. Police officers must also conduct a "witness needs assessment" to determine the specific requirements of the witness, such as special measures for vulnerable witnesses or witness protection. All prosecution witnesses must be referred to a Witness Care Unit. As a result, by 2010, more than 150 joint police-CPS Witness Care Units were supporting over 400,000 witnesses annually. <sup>35</sup>In 2013, the Crime Survey Report for England and Wales concluded a 2 year analysis of public perceptions about the treatment of victims and witnesses in the criminal justice system and found a relatively high level of agreement with the proposition that the views of victims and witnesses were taken into account but less agreement with the idea that appropriate support was provided.<sup>36</sup>

It is clear from these outcomes that the policies adopted since 2000 to provide support, care and guidance for prosecution witnesses, whilst not addressing all the weaknesses in the system, has nevertheless vindicated the voluntary approach towards witness participation which has traditionally been adopted in England and Wales. There is no evidence whatsoever that the police encounter any more serious problems with reluctant witnesses than their colleagues in jurisdictions where compulsion is available. At the same time, the advantages in terms of the relationship of the police with the communities which they serve, are considerable.

32. Avail Consulting (2004). No Witness - No Justice. National Victim and Witness Care Project. Interim Evaluation Report, December (2004).

33. The Law Officer's Department. Departmental Report 2006. [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/272283/6821.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/272283/6821.pdf)

34. Ministry of Justice (2013). The Witness Charter. Standards of Care for Witnesses in the Criminal Justice System. London, HMSO.

35. Joyce, P (2013). Criminal Justice. An Introduction. London, Routledge., p.133.

36. Ministry of Justice (2013). Support for Victims: Findings from the Crime Survey for England and Wales. London, HMSO.

# ENGLAND AND WALES: COMPARATIVE QUESTIONNAIRE

## 1. When does the witness interrogation/interview takes place?

Formal interrogation of witnesses (examination and cross-examination) takes place in public in open court. Witnesses can be compelled to attend the trial court but not elsewhere. The Crown Prosecution Service and the police have no power to interrogate witnesses outside court and can interview them only with their consent. Equally, they have no powers to compel their co-operation with the investigation.

## 2. What is the probative value of witness interrogation/interview protocols?

Since neither the Crown Prosecution Service nor the police have the power to conduct a formal interrogation, no such witness interrogation protocol exists. However, when the police informally interview a potential witness, the statement is recorded on a standard form, to be signed by the witness, containing the following undertaking: “this statement (consisting of..... pages each signed by me) is true to the best of my knowledge and belief and I make it knowing that, if it is tendered in evidence, I shall be liable to prosecution if I have wilfully stated anything in it which I know to be false, or do not believe to be true.” The purpose of this witness statement is merely to assist the Crown Prosecution Service in the presentation of their case in court and in itself has no evidentiary weight. A copy must be served on the defence. Evidence only has any evidentiary value when it is given orally in court and subject to cross examination. However, uncontentious evidence can be agreed by the defence and the statement will then be read out from the witness statement in court under the provisions of s.9 of the Criminal Justice Act 1967<sup>37</sup> in the absence of the witness. In these circumstances the witness is bound by the undertaking given above. Equally, where the witness dies or becomes incapacitated before the trial, or is intimidated from attending, his or her witness statement can be read to the court under the provisions of the Criminal Justice Act 2003.<sup>38</sup>

## 3. Who conducts witness interrogation? Can the witness be interrogated only before the judge? Can the witness be interrogated in camera by the prosecutor, investigator? What is the procedure for witness interrogation? What is the procedure for subpoena-ing the witness to the prosecutor and to the court?

As indicated above, interrogation takes place only by examination and cross-examination by counsel in open court before the magistrates or District Judge (summary trial) or judge and jury (trial on indictment). Although, in general, the witness cannot be interrogated in camera by anyone, there are very limited exceptions for very young or vulnerable witnesses subject to “special measures” who may be examined and cross examined before the trial on video.<sup>39</sup> Similar provisions apply for witnesses who are likely to die before the trial.

The procedure for ensuring the attendance of witnesses at trial is set out above.

37. See Criminal Procedure Rules, op cit, Paragraph 27.2.

38. Under ss, 116(2) and subject to certain safeguards. See *R v Homcastle & Others* [2009] UKSC 14.

39. S.27, Chapter 1 of Part 2 of the Youth Justice and Criminal Evidence Act 1999.

4. If the prosecutor/investigator can interrogate the witness, can the content of the interrogation change afterwards during the court hearing? If yes, what are the consequences (e.g. contempt of court, criminal offense)?

Neither the Crown Prosecution Service nor the police can interrogate the witness (see above).

5. If the prosecutor/investigator can interrogate the witness, how is “equality of arms” achieved? Can the defence also interrogate the witness in camera? Or can they be present during the prosecutor’s/investigator’s interrogation? What is the justification for interfering with the principle of “equality of arms”. Does the defence receive any compensation for this interference?

Neither the Crown Prosecution Service nor the police can interrogate the witness (see above).

6. If the prosecutor/investigator can interrogate the witness in camera, what are the safeguards for the witness which ensure that the testimony is voluntary and to prevent any form of coercion? If the witness refuses to appear before the prosecutor, what are the measures which can be used against him or her?

Neither the Crown Prosecution Service nor the police can interrogate the witness in camera or otherwise (see above).

7. If the prosecutor/investigator cannot interrogate the witness (and are able only to interview them) how can they take the case to court (this includes all the stages of judicial review of investigation and also main court hearing)? How can the prosecutor be guaranteed that the witness will not change the content of the witness interview?

The case is proved in court by the prosecution calling their witnesses and presenting other evidence. There is no judicial involvement in the preparation of the prosecution case other than a pre-trial review to ensure that the parties are ready for trial. The attendance of witnesses at court can be compelled by the summons procedure (see above). If the witness departs significantly from the account given in the informal witness statement and in a way which tends to undermine the prosecution case, prosecuting counsel can ask the permission of the court to treat the witness as a “hostile witness”. In these circumstances the prosecutor is enabled to ask leading questions of the witness, including asking him or her to account for the change in their evidence. A witness who intentionally misleads the court can be charged with perjury.

8. Can the witness be interrogated during the pre-trial stage of criminal proceedings? If yes, what are the grounds for interrogation? What are the procedures? Can the witness be interrogated during the pre-trial stage before the judge without the presence of the other party?

Neither the Crown Prosecution Service nor the police can interrogate the witness (see above).

9. When the country has the jury trial system, is it possible for the witness to be interrogated in camera by the prosecutor/investigator? What is the procedure on witness interrogation in jury trial?

Neither the Crown Prosecution Service nor the police can interrogate the witness in camera or otherwise (see above). The procedure for witness interrogation in a jury trial is exactly the same as the procedure in other cases (see above).

# THE POSITION OF THE PROSECUTION WITNESS IN THE UNITED STATES OF AMERICA

Freedom from unlawful arrest is a Constitutionally protected right in the United States. Under the Fourth Amendment to the United States' Constitution, "(t)he right of the people to be secure in their persons, houses, papers, and effects ... against unrea-sonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized". "Probable cause" in this context refers to "the facts and circumstances" within an arresting officer's knowledge "and of which they had reasonably trustworthy information" which would lead a prudent person to believe that the arrested person had committed or was committing a crime.<sup>40</sup> In other words, arrest and detention is possible only for individuals against whom such probable case arises.

It would seem therefore, on the face of it, that the police in the United States are prohibited by the Fourth Amendment from arresting or detaining mere witnesses against whom no such probable cause of the commission of crime exists. Although this is self-evidently correct, there is, however, one important exception. Under the "material witness" provisions which are to be found in both the Federal jurisdiction and in most State jurisdictions<sup>41</sup> the police can arrest anyone who they have probable cause to believe possesses information material to the investigation of a crime, provided that his or her statements or behaviour make it "reasonably unlikely" that he or she will appear at the suspect's trial. It must be emphasised that although the power to arrest a material witness in these circumstances is usually a matter for the police, any subsequent detention must be authorised by a judge.

This seemingly anomalous power has arisen by a circuitous route. Clearly no court can function effectively without the inherent power (usually exercised in the United States through the subpoena procedure) to compel the attendance of reluctant witnesses. However, it was held in the cases of *Bacon v United States*<sup>42</sup> and *United States v Feingold*<sup>43</sup> that the Federal Government also had the power to arrest and detain material witnesses, in the absence of any subpoena, and this could be inferred from s.3149 of the Bail Reform Act of 1966 and rule 46(b) of the Federal Rules of Criminal Procedure. Section 3144 of the United States Code, enacted in 1984, made this clear:

## "Release or detention of a material witness

If it appears from an affidavit filed by a party that the testimony of a person is material in a criminal proceeding, and if it is shown that it may become impracticable to secure the presence of the person by subpoena, a judicial officer may order the arrest of the person and treat the person in accordance with the provisions of section 3142 of this title. No material witness may be detained because of inability to comply with any condition of release if the testimony of such witness can adequately be secured by deposition, and if further detention is not necessary to prevent a failure of justice. Release of a material

40. *Beck v. Ohio*, 379 U.S. 89, 91 (1964).

41. Carlson, R. L. and M. S. Voelpel (1980). "Material Witness and Material Injustice." *Washington University Law Quarterly* 58(1): 1-53., p.3.

42. 449 F.2d 933 (9th Cir. 1971).

43. 416 F. Supp.627 (E.D.N.Y.) 1976.

witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure.”<sup>44</sup>

The material witness procedure can be illustrated by the case of *Stone v. Holzberger*<sup>45</sup> where a woman who was having a personal relationship with a homicide suspect arranged to meet the County Sheriff for an informal conversation. She refused to give a statement and when she tried to leave, she was arrested by the Sheriff on the grounds that she had material evidence about the murder and the whereabouts of the suspect. Whilst the arrest might have been lawful, her subsequent detention by the police for six days before she was produced to a competent judicial authority was held to be a clear violation of her Fourth Amendment Rights. Moreover, material witnesses in this position are entitled to a number of due process protections. They must be given notice of the basis on which their detention is sought and they must be offered the assistance of counsel.<sup>46</sup> They have a right to be heard and to call evidence in relation to all relevant issues, for example as to whether they will attend court if released and whether other measures, less intrusive than custody, would secure their attendance.<sup>47</sup> If the court decides to incarcerate a material witness, it must provide a written statement explaining the reasons for detention<sup>48</sup> and direct that the witness be held in a detention centre separate from individuals awaiting or serving sentences.<sup>49</sup> A material witness cannot be detained longer or in harsher circumstances than the exigencies of the situation absolutely require and must not be prevented from communicating or conferring with other persons.<sup>50</sup> A material witness is also entitled to a “witness fee” for every day that he or she is held in custody.<sup>51</sup> However, the procedural protections available to an arrested material witness are significantly less favourable than those available to an arrested suspect in that there is no “*Miranda*”<sup>52</sup> requirement to communicate the right to remain silent or to have the assistance of counsel. Equally, the existence of the process rights referred to above does not imply that the detention hearing must take on the formal aspects of a trial, with the calling of witnesses and full cross-examination. The trial court retains the discretion to limit the form and manner of proof as appropriate to the individual case.<sup>53</sup>

The two essential elements which must be established in order to secure the detention of a material witness are that he or she must be able to give “material evidence” and that his or her statements or behaviour make it “reasonably unlikely” that he or she will appear at the suspect’s trial. “Material evidence” in this context implies evidence which will have a “natural tendency to influence, or is capable of influencing, the decision of the decision-making body to which it was addressed.”<sup>54</sup> The question of “reasonable

44. 18 U.S. Code § 3142 - Release or Detention of a Defendant Pending Trial

45. 807 F. Supp. 1325 (S.D. Ohio 1992).

46. *In re Francisco M.*, 86 Cal. App. 4th 1061, 103 Cal. Rptr. 2d 794 (2d Dist. 2001).

47. *Ibid.*

48. 18 U.S. Code § 3142 (a).

49. *Ibid.*, (i).

50. *State v. Susan*, 152 Wash. 365, 278 P. 149 (1929).

51. 28 U.S. Code § 1821.

52. *Miranda v. Arizona*, 384 U.S. 436 (1966).

53. *In re Francisco*, *op cit.*

54. *Neder v. United States*, 527 U.S. 1, 16 (1999). See Studnicki, S. M. and J. P. Apol (2002). “Witness Detention and Intimidation: The History and Future of Material Witness Law.” *St John’s Law Review* 76(3): 483-533., pp.479-99.



unlikelihood” to attend is a matter of fact for the court<sup>55</sup> but in *Broadway v State*<sup>56</sup> it was held that the demeanour of a witness who was angry about her arrest and treatment did not necessarily imply that she didn’t intend to appear in court. It must be stressed that, in contrast to the current Georgian procedure, the United States’ material witness provisions are intended to secure the attendance of the witness to testify at court and not for interrogation (although this may take place). United States’ experience with the “third degree” in the 1930s has blunted any appetite for forced testimony.<sup>57</sup>

The power to arrest and remand material witnesses was originally developed in the nineteenth century on the basis of the well-established procedure for binding-over witnesses to attend trial.<sup>58</sup> Research suggests that the powers were used in New York mainly against immigrants<sup>59</sup> and that the increasing professionalization of the police and policing methods led to ever larger numbers being incarcerated. Not only did the practice present the unappealing spectacle of the innocent victims or witnesses of crime being locked up while the alleged perpetrators enjoyed the right to bail, but it was particularly offensive to the new constituency of immigrant voters who were generally the targets of this procedure. In 1855 a Committee of Enquiry asserted that it was an ancient relic of a dark age of barbarism that “citizens charged with no crime and suspected of none, whose only misfortune is that they have witnessed by accident or necessity, the commission of a crime by another, should be arrested, and, unless able to procure bail, incarcerated in a loathsome jail.”<sup>60</sup> The police discovered that the public were becoming increasingly reluctant to report crime to them or to co-operate in investigations, for fear of arrest. As a result, they themselves petitioned for the abolition of the New York statute, which was finally repealed in 1883.<sup>61</sup>

However, Material Witness powers remained in force at the Federal level and in many other States and continued to be used at times of crisis<sup>62</sup> and chiefly against immigrant populations. In 2000, for example, 94 percent of the 4,168 Federal material witness arrests were made by the Immigration and Naturalization Service and less than 2 percent were citizens.<sup>63</sup> This tendency was to become particularly marked in the aftermath of the 2001 attack on the World Trade Centre when the procedure was overtly manipulated to enable the arrest of suspected persons as “material witnesses” in a clear attempt to evade the due process requirements and time limits applicable to the arrest of suspects.<sup>64</sup> According to Human Rights Watch, about 70 individuals were detained in this way:

55. *Ibid.*, pp.499-522.

56. 202 Md. App. 464, 32 A.3d 1076 (2011).

57. See Leo, R. (2004). “The Third Degree and the Origins of Psychological Interrogation in the United States.” *Interrogations, Confessions, and Entrapment. Perspectives in Law & Psychology* 20: 37-84, Leo, R. (2008). *Police Interrogation and American Justice*. Cambridge, Harvard University Press. But see concerns expressed over allegations of forced confession from the Guantanamo Bay detainees, eg. Stover, E. and L. Fletcher (2009). *Guantánamo and Its Aftermath: US Detention and Interrogation Practices and their Impact on Former Detainees*. Berkeley, Human Rights Center.

58. Oliver, W. M. (2005). “The Rise and Fall of Material Witness Detention in Nineteenth Century New York.” *New York University Journal of Law & Liberty* 1(2): 727-781., p.731-2.

59. *Ibid.*, p.770.

60. *Ibid.*, p.745.

61. *Ibid.*, pp.780-2

62. Ramsey, C. B. (2008). “In the Sweat Box: A Historical Perspective on the Detention of Material Witnesses.” *Ohio State Journal of Criminal Law* 6(1): 681-709.

63. Human Rights Watch (2005) *Witness to Abuse. Human Rights Abuses under the Material Witness Law since September 11*. Human Rights Watch, June 2005 Vol. 17, No. 2, p.14. By way of perspective and in relation to Federal proceedings only, United States magistrate judges conducted 4882 material witness hearings in FY2004; 4070 in FY2003; 2961 in FY2002; 3344 in FY2001; and 3603 in FY2000. See CRS Report for Congress (2005). *Arrest and Detention of Material Witnesses: Federal Law In Brief and Section 12 of the USA PATRIOT and Terrorism Prevention Reauthorization Act (H.R. 3199)*, Fn.19.

64. *Ibid.*, Parker, B. A. (2009). “Abuse of the Material Witness: Suspects Detained as Witnesses in Violation of the Fourth Amendment.” *Rutgers Law Record* 36: 22-314, Cochran, D. Q. (2010). “Material Witness Detention in a Post-9/11 World: Mission Creep or Fresh Start.” *George Mason Law Review* 18(1): 1-41.

“U.S. Department of Justice has deliberately used the (material witness) law for a very different purpose: to secure the indefinite incarceration of those it has wanted to investigate as possible terrorist suspects. It has used the law to cast men into prison without any showing of probable cause that they had committed crimes.”<sup>65</sup>

Such individuals were often held in solitary confinement in high-security facilities and frequently taken to court to testify in shackles.<sup>66</sup> A challenge to the use of the Material Witness provisions for these purposes was launched by Abudullah al-Kidd, a prominent, American-born football player who had converted to Islam and travelled to Saudi Arabia. He claimed that, as an arrested material witness, he was denied access to a lawyer, shackled, and strip-searched during two weeks of imprisonment, which was followed by 13 months of supervised release. Notwithstanding this, he was never actually called as a witness or charged. His claim that the Material Witness procedures were being used to evade his Fourth Amendment rights as a suspect was rejected by the Supreme Court on the somewhat disingenuous grounds that the suspicion that a person had committed an offence should not be a bar to their arrest as a material witness!<sup>67</sup>

The existence of the Material Witness provisions in the United States has been the subject of a sustained and concerted attack by both civil libertarians and those concerned for the integrity of the evidence gathering process. It has been forcefully argued that the mere existence of a threat of detention as a material witness has a corrupting effect on independent evidence and represents a standing invitation to police misconduct and the coercion of witnesses.<sup>68</sup> According to one scholar, “(i)f not unconstitutional, these aspects of current law most certainly are socially undesirable and legally unsound”<sup>69</sup>, whereas another has asserted that it is inevitable that in certain circumstances “material witness laws have an unfair impact, and the continued use of these laws is unnecessary.”<sup>70</sup> In view of these controversies and notwithstanding the relatively restrained use of such potentially draconian powers in the United States, it is not suggested that “material witness detention” represents a model for countries concerned about the potential for the abuse of police powers.

There is one further power to interrogate witnesses which is unique to the United States, which is the only common law nation not to have abolished the “Grand Jury”. Grand Juries have the power to compel the attendance of witnesses by subpoena to enable the District Attorney to interrogate them in the absence of the judge or the defence attorney but in the presence of a jury of between 16–23 members.<sup>71</sup> Proceedings are secret and the rules of evidence are relaxed in order to allow witnesses to speak with greater freedom. The aim of the Grand Jury is to facilitate investigation and to test the sufficiency of a

65. Human Rights watch, op cit. p.1.

66. *Ibid.*, p.3.

67. Ashcroft v. al-Kidd, 563 U.S.(2011). See, eg Oliver, W. M. (2011). “Material Witness Detentions after al-Kidd.” *Kentucky Law Journal* 100: 293–338, Cone, C. (2012). “Text and Pretext: The Future of Material Witness Detention After Ashcroft v. Al-Kidd.” *American university Law Review* 62(2): 333–381.

68. Sheridan, K. (2010). “Excluding Coerced Witness Testimony to Protect a Criminal Defendant’s Right to Due Process of Law and Adequately Deter Police Misconduct.” *Fordham Urban Law Journal* 38: 1221–1266., pp.1247–56.

69. Carlson, op cit, pp.40–1.

70. Studnicki, S. M. (1993). “Material Witness Detention: Justice Served or Denied.” *Wayne Law Review* 40: 1533–1568., p.533.

71. Federal Rules of Criminal Procedure. Rule 6.

case on a “probable cause” standard. It is for the jury to declare whether or not there is a “true bill” and therefore to determine if the prosecution can go forward to trial. Grand Jury proceedings are increasingly rare and are available when “the public interest so requires”<sup>72</sup> in only half of State jurisdictions and only “grudgingly tolerated” in the Federal system.<sup>73</sup> By way of alternative, some States use a preliminary hearing process in which evidence given by witnesses can be tested by cross-examination before a judge but not a jury.

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72. *Ibid.*

73. Fairfax Jr, R. A. (2010). “Grand Jury Innovation: Toward a Functional Makeover of the Ancient Bulwark of Liberty.” *William & Mary Bill of Rights Journal* 19(2): 339-368.

# UNITED STATES OF AMERICA: COMPARATIVE QUESTIONNAIRE

## 1. When does the witness interrogation/interview takes place?

Formal interrogation of witnesses (examination and cross-examination) takes place in public in open court. Witnesses can be compelled to attend the trial court and may be held under the “material witness” procedures described above to ensure their attendance at trial, but not otherwise. They cannot be compelled to attend a police interrogation but can attend voluntarily for interview. The police and the District Attorneys have no power to interrogate witnesses outside court and can interview them only with their consent. Equally, they have no powers (other than the “material witness and the Grand Jury provisions referred to above) to compel their co-operation with the investigation.

## 2. What is the probative value of witness interrogation/interview protocols?

Since neither the police nor the District Attorneys have the power to conduct a formal interrogation, except in the rare circumstances of a Grand Jury hearing, where proceedings are in any event, secret, no such witness interrogation protocol exists.

## 3. Who conducts the witness interrogation? Can the witness be interrogated only before the judge? Can the witness be interrogated in camera by the prosecutor, investigator? What is the procedure for witness interrogation? What is the procedure for subpoena-ing the witness to the prosecutor and/or to the court?

With the narrow exception of Grand Jury proceedings (see above) the witness can be interrogated only before the judge in court. The in camera procedure before a Grand Jury is described above and witnesses can be summoned to appear at both the Grand jury and the trial court by subpoena.

## 4. If the prosecutor/investigator can interrogate the witness, can the content of the interrogation change afterwards during the court hearing? If yes, what are the consequences (e.g. contempt of court, criminal offense)?

Since Grand Jury proceedings are secret and no judge is present, it is not always easy for the defence to know if witness evidence has changed.<sup>74</sup> However, if a record is kept (which is not always the case) it is in theory possible for a prosecution witness to be impeached on the basis of his prior inconsistent statements before the grand jury.<sup>75</sup>

## 5. If the prosecutor/investigator can interrogate the witness, how is “equality of arms” achieved? Can the defence also interrogate the witness in camera? Or can they be present during the prosecutor’s/investigator’s interrogation? What is the justification for interfering with the principle of “equality of arms”. Does the defence receive any compensation for this interference?

There is no “equality of arms” in the Grand Jury procedure since the participation of the defence is excluded. The procedure is justified as a filter which is intended to prevent the prosecution of unmeritorious cases without exposing the defendant to the rigour of a trial or damage to reputation. There is no compensation for the defence.

<sup>74</sup> Since the Jencks Act, 18 U.S.C. § 3500 in 1957, the defence have been entitled to transcripts of the evidence of prosecution witnesses in some circumstances.

<sup>75</sup> United States v. Cramer, 447 F.2d 210 (2d Cir. 1971).

6. If the prosecutor/investigator can interrogate the witness in camera, what are the safeguards for the witness which ensure that the testimony is voluntary and to prevent any form of coercion? If the witness refuses to appear before the prosecutor, what are the measures which can be used against him or her?

Normally, neither the police nor the District Attorney can interrogate the witness (see above). In Grand Jury proceedings, evidence is heard before a jury and is secret. Witnesses cannot be required to appear before a District Attorney.

7. If the prosecutor/investigator cannot interrogate the witness (and are able only to interview them) how can they take the case to court (this includes all the stages of judicial review of investigation and also main court hearing)? How can the prosecutor be guaranteed that the witness will not change the content of the witness interview?

The case is proved in court by the prosecution calling their witnesses and presenting other evidence. The prosecution evidence may have been reviewed previously before a Grand Jury or at a preliminary hearing (see above). If the witness departs significantly from the account given in the informal witness statement and in a way which tends to undermine the prosecution case, prosecuting counsel can ask the permission of the court to treat the witness as an “adverse witness” or an “unfavorable witness”. In these circumstances the prosecutor is enabled to ask leading questions of the witness, including asking him or her to account for the change in their evidence. A witness who intentionally misleads the court can be charged with perjury.

8. Can the witness be interrogated during the pre-trial stage of criminal proceedings? If yes, what are the grounds for interrogation? What are the procedures? Can the witness be interrogated during the pre-trial stage before the judge without the presence of the other party?

The witness can be interrogated during the pre-trial stage of criminal proceedings but only during the Grand jury and preliminary hearing procedures described above. There are very limited exceptions for vulnerable witnesses subject to “special measures” who may in some States be examined and cross examined before the trial on video. Similar provisions apply for witnesses who are likely to die before the trial.

9. When the country has the jury trial system, is it possible for the witness to be interrogated in camera by the prosecutor/investigator? What is the procedure on witness interrogation in jury trial?

Yes, but only by the District Attorney and only during the Grand jury and preliminary hearing procedures described above. The procedure on witness interrogation in a jury trial is exactly the same as at a bench trial. Witness evidence is examined in chief by the party calling the witness and then cross-examined.

## THE POSITION OF THE PROSECUTION WITNESS IN CANADA

The Canadian police have a common law right to detain people for the purposes of investigation only where the investigation which they are conducting is based on a "reasonable suspicion that the particular individual is implicated in the criminal activity under investigation".<sup>76</sup> Article 495(2) of the Criminal Procedure Code also permits the arrest of a person who has committed an indictable offence or who, on reasonable grounds, the officer believes has committed or is about to commit an indictable offence. The arrest must also be necessary, having regard to the need to establish the identity of the person, to secure or preserve evidence, or to prevent the continuation or repetition of the offence or the commission of another.<sup>77</sup> Persons who are witnesses only can therefore never be arrested and their attendance at the police station and their participation in an investigation, as in other common law countries, is purely voluntary. This principle is reinforced by s.9 of the Canadian Charter of Rights and Freedoms ("the Charter") which was enacted in 1982<sup>78</sup> and which holds that "(e)veryone has the right not to be arbitrarily detained or imprisoned".

Witnesses may, however be compelled to attend at a preliminary inquiry<sup>79</sup> before a judge at the Provincial Court. This will take place when the defendant is facing a serious (indictable) offence and where either the Crown Attorney or the defence have requested it.<sup>80</sup> The preliminary inquiry is intended as a filtering process to ensure that unmeritorious cases don't go to trial and "to protect the accused from a needless, and indeed, improper, exposure to public trial where the enforcement agency is not in possession of evidence to warrant the continuation of the process."<sup>81</sup> The prosecution witnesses can be required to give oral evidence in open court and be examined and cross-examined in the usual way and a record of their evidence is taken.<sup>82</sup> Before any witness is heard, however, either the Crown Attorney or the defence can request an order that the evidence taken at the inquiry shall not be published in any document or broadcast or transmitted in any way before the accused is either discharged or the trial concluded.<sup>83</sup>

The judge in the preliminary inquiry has extensive powers to compel the cooperation of witnesses. For example, in the case of witnesses who refuses, without reasonable excuse, to be sworn, to answer any questions, to produce a document when requested, or to sign the deposition, the hearing can be adjourned and the person concerned imprisoned in the meanwhile for up to eight days.<sup>84</sup> If the judge decides that the prosecution have made out a prima facie case and the defendant must stand trial, the witness depositions are sent with the other documents to the trial court.<sup>85</sup> The judge can also order a witness to enter

76. R. v. Mann, 2004 SCC 52, [2004] 3 S.C.R. 59. A mere "hunch" is never sufficient, *ibid.*, paras 34-35.

77. Art. 495(2) Criminal Procedure Code 1985 RSC. All references in this section are to the 1985 RSC, unless otherwise indicated.

78. Constitution Act 1982, See eg Roach, K. (1999). "The Effects of the Canadian Charter of Rights on Criminal Justice." *Israel Law Review* 33: 607-637.

79. See PART XVIII, Procedure On Preliminary Inquiry. Also Webster, C. M. and H. H. Bebbington (2013). "Why Re-open the Debate on the Preliminary Inquiry? Some Preliminary Empirical Observations." *Canadian Journal of Criminology and Criminal Justice* 55(4): 513-531.

80. Art. 536(4).

81. *Skogman v. The Queen*, [1984] 2 SCR 93 at p. 105.

82. Art. 540(1). See R. v. M. (P) (2007), 222 C.C.C. (3d) 393.

83. Art. 539(1).

84. Renewable for a further eight days; see Art.545(1) and (2).

85. Art. 551.

into a recognizance (bond) to give evidence at the trial of the accused and to comply with any reasonable conditions set out in the recognizance, in order to secure their attendance.<sup>86</sup>

Any witness who is likely to give “material evidence” at any court proceeding and is unlikely to attend voluntarily or is evading service of a *subpoena*, can be forced to attend by *subpoena*.<sup>87</sup> Witnesses who fail to attend in breach of an order can be arrested.<sup>88</sup> Where a witness is too unwell to attend or is unable to travel to court for any other “good and sufficient cause”, their evidence can be taken by a specially appointed Commissioner<sup>89</sup> or they can testify by video link.<sup>90</sup> Video testimony can also be given by under-age witnesses or one suffering from a mental disability which prevents them from doing so in person at court.<sup>91</sup> In some circumstances, they can be allowed to testify outside the court room or behind a screen.<sup>92</sup> The examination of the prosecution witnesses at trials takes place in the same way as at the preliminary hearing.

If a witness commits perjury, they can be punished by imprisonment for up to a maximum of 14 years.<sup>93</sup> However, witnesses do have some protections and s.13 of the Charter provides that “a witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings”. Equally, in cross-examination it is prohibited for counsel to unnecessarily repeat questions,<sup>94</sup> to question solely to harass or embarrass the witness<sup>95</sup> or to intentionally insult or abuse a witness.<sup>96</sup>

Most courts in Canada now have “Victim-Witness Assistance Programs” (VWAPS) that can provide assistance and advice to witnesses although the service is strongly orientated towards victims of crime. Nevertheless, VWAPS can help with written correspondence with the Crown Attorney about specific case concerns and provide additional court preparation and orientation as well as accompaniment to court, help with expenses and referral to community agencies.

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86. Art. 550(1).

87. Art. 698(1).

88. Arts. 704-5.

89. Arts. 708-11.

90. Art. 714(1).

91. Art. 715(1) & (2).

92. Art.486(2).

93. Art.132.

94. R. v. Bourassa (1991), 67 CCC (3d) 143 (QCCA).

95. R. v. Logiaccio (1984), 11 CCC (3d) 374 (ONCA).

96. R. v. Ma, Ho and Lai (1978), 44 C.C.C. (2d) 537.

## CANADA: COMPARATIVE QUESTIONNAIRE

### 1. When does the witness interrogation/interview takes place?

Formal interrogation of witnesses (examination and cross-examination) takes place in public in open court. Witnesses can be compelled to attend the preliminary inquiry and the trial court (see above). They cannot be compelled to attend a police interrogation but may attend voluntarily for interview. The police and the Crown Attorneys have no power to interrogate witnesses outside court and can interview them only with their consent. Equally, they have no powers to compel their co-operation with the investigation.

### 2. What is the probative value of witness interrogation/interview protocols?

Neither the police nor the Crown Attorneys have the power to conduct a formal interrogation and therefore no such witness interrogation protocol exists. The only possible exception is the use of witness depositions taken before a judge during the preliminary inquiry. However, these are used to establish a prima facie case justifying a trial and are not part of the proof of the case in the trial court. They may, however, be used to impeach the credibility of a witness who changes his or her testimony (see below).

### 3. Who conducts the witness interrogation? Can the witness be interrogated only before the judge? Can the witness be interrogated in camera by the prosecutor, investigator? What is the procedure for witness interrogation? What is the procedure for subpoena-ing the witness to the prosecutor and/or to the court?

Witnesses can be interrogated only before the judge in court and never, in camera or otherwise by the prosecutor or investigator. Witnesses are summoned to appear at the preliminary inquiry or at the trial court by subpoena (see above).

### 4. If the prosecutor/investigator can interrogate the witness, can the content of the interrogation change afterwards during the court hearing? If yes, what are the consequences (e.g. contempt of court, criminal offense)?

Neither the Crown Attorney nor the police can interrogate the witness except in a court hearing.

### 5. If the prosecutor/investigator can interrogate the witness, how is “equality of arms” achieved? Can the defence also interrogate the witness in camera? Or can they be present during the prosecutor’s/investigator’s interrogation? What is the justification for interfering with the principle of “equality of arms”. Does the defence receive any compensation for this interference?

Neither the Crown Attorney nor the police can interrogate the witness, in camera or otherwise.

### 6. If the prosecutor/investigator can interrogate the witness in camera, what are the safeguards for the witness which ensure that the testimony is voluntary and to prevent



any form of coercion? If the witness refuses to appear before the prosecutor, what are the measures which can be used against him or her?

Neither the Crown Attorney nor the police can interrogate the witness in camera or otherwise.

7. If the prosecutor/investigator cannot interrogate the witness (and are able only to interview them) how can they take the case to court (this includes all the stages of judicial review of investigation and also main court hearing)? How can the prosecutor be guaranteed that the witness will not change the content of the witness interview?

The case is proved in court by the prosecution calling their witnesses and presenting other evidence. The prosecution evidence may have been reviewed previously at a preliminary inquiry to determine whether a prima facie case exists, justifying a trial (see above). S.10(1) of the Canada Evidence Act 1985 (CEA) provides that a witness may be cross-examined as to previous statements made in writing, or which have been reduced to writing, or recorded. If a prosecution witness departs significantly from the account given in the informal witness statement or in the preliminary inquiry, in a way which tends to undermine the prosecution case, prosecuting counsel can ask for permission under s. 9(1) of the CEA to treat the witness as “adverse” and cross-examine them on the basis of a prior statement. This can be done provided the witness confirms that the prior statement was actually made. A witness who intentionally misleads the court can be charged with perjury (see above).

8. Can the witness be interrogated during the pre-trial stage of criminal proceedings? If yes, what are the grounds for interrogation? What are the procedures? Can the witness be interrogated during the pre-trial stage before the judge without the presence of the other party?

The witness can be interrogated only during the preliminary inquiry procedure and only provided that the conditions for holding such a procedure apply (see above). The procedure for the preliminary inquiry is also set out above. Art. 650 requires that an accused must be present in court during the whole of his or her trial and this would include the preliminary inquiry.

9. When the country has the jury trial system, is it possible for the witness to be interrogated in camera by the prosecutor/investigator? What is the procedure on witness interrogation in jury trial?

Canada has a jury trial system and neither the police nor the Crown Attorney can interrogate the witness in camera. Witness interrogation during a jury trial is exactly the same as the procedure during a bench trial. Witness evidence is examined in chief by the party calling the witness and then cross-examined.

## THE POSITION OF THE PROSECUTION WITNESS IN FRANCE

France is a country which still permits compulsion to be used against witnesses as a consequence of the emphasis within its legal system of the principle of “public order”. It is not surprising, given that it is only in the last few decades that adequate safeguards for the right of defendants have been fully in place,<sup>97</sup> that French provisions protecting witnesses should also be underdeveloped by European standards. On the face of it, some protections are available. Article 7 of the French “Declaration of the Rights of Man” of 1789, one of the formative documents of international Human Rights culture, establishes the principle that “no man can be accused, arrested or detained except in those cases established by law and in a manner laid down by law”.

However, this right is not unqualified. In France, individuals have a general duty to provide evidence about crime and any failure to inform the authorities about facts which constitute an offence, is in itself a criminal offence under Art.434-1 of the Penal Code. For obvious reasons, prosecutions under this article are rare. But it nevertheless follows that witnesses can be compelled to attend at the police station. Article 62<sup>98</sup> of the 1957 Code of Criminal Procedure (Code de Procédure Pénale - CPP) specifically empowered the police to arrest and interrogate anyone who they believed was able to provide information about the facts under investigation or objects or documents seized. Force could be used to ensure compliance<sup>99</sup> and until 1993, witnesses could be compelled by the police themselves to testify and to take a judicial oath. Fortunately, these somewhat draconian provisions have been much improved, most recently as a result of major reforms in 2011. The above wording has been replaced in Art.62 by an assertion that persons who are free from any suspicion that they have committed or attempted to commit a criminal offence, are to be interviewed by investigators “without being subjected to any physical compulsion whatsoever”.

Nevertheless, the second paragraph of this Article continues to permit that, if the “necessity of the investigation” justifies it, such persons can be placed under restraint for the minimum time necessary to hear their evidence, up to an overall limit of four hours. This provision was considered by the Constitutional Court in 2011 and found to be fully consistent with Constitutional guarantees on the grounds that, as soon as any suspicion emerges that a witness may actually be an offender, he or she is transferred to the garde à vue procedure and is entitled to the full range of rights available to a suspect.<sup>100</sup> The police are also entitled to call on “all persons able to provide information on the facts in issue or about suspected persons or relative to the scientific enquiry (Art.55-1) and to detain them if necessary.<sup>101</sup> Similarly, Art. 61 empowers police officers to detain all persons present at the scene of a crime and to summons all persons “able to provide information on the facts or relative to objects or documents seized”. Art.78 gives the police authority to use compulsion to bring witnesses to the police station.

97. Giannouloupos, D. (2013). “Custodial Legal Assistance and Notification of the Right to Silence in France: Legal Cosmopolitanism and Local Resistance.” *Criminal Law Forum* 24(3): 291-329.

98. All references to Articles in this section are to the French Code of Criminal Procedure (Code de Procédure Pénale - CPP) unless otherwise indicated.

99. Amended by Law n°2011-392 of 14 April 2011 - art. 14.

100. Decision n° 2011-191/194/195/196/197 QPC, 18 November 2011.

101. Vogler, R. K. (2008). *France. Criminal Procedure in Europe*. R. K. H. Vogler, B. Berlin, Duncker & Humblot: 171-268. pp.197-200.

Despite recent reforms, these powers are still extensive. In principle, witnesses will not be interviewed in the presence of the suspect but a confrontation between them is possible and is a recognised aspect of the French investigatory process. Notwithstanding that an oath cannot any longer be required by the police, witnesses must sign the statement which they have given (the *procès verbale*) after it has been read through to them. This is not a verbatim transcript of their evidence but a version which is prepared by the police, based on the interview (see below).

In cases of serious crime, the file is then handed on to a judicial officer, the examining magistrate (*juge d'instruction*) who enjoys much wider powers to compel witnesses. At this stage, any person “whose evidence appears ... to be useful” (Art.101) can be compelled to attend the office of the examining magistrate for interrogation. Witnesses are examined by the examining magistrate in the absence of the defendant and the defendant’s legal representative and will be asked to explain their evidence in their own words, under oath. They cannot be represented. The examining magistrate will summarise this evidence by dictating the statement to the clerk (*greffier*) and the witness will be asked to sign each page of this text, which becomes part of the official case-file. Failure to attend, to testify or to take an oath can be punished by a fine (Arts. 109 &153). The failure to testify in relation to a criminal offence is punishable by imprisonment or by a fine of up to €3,750 (Arts. 434.15-1, Penal Code). Perjury is also punishable (Art.342, Penal Code). Certain professionals (priests, doctors, lawyers etc) are exempted from testifying in relation to matters within their professional competency and in some circumstances their address (Art 706.57) or the identity (Art.706.58) can be withheld. Witnesses in France are permitted to provide evidence not only about the facts but about the personality and morality of the defendant (Art.331). There is no strict hearsay rule and evidence of matters not strictly relevant to the offence in question may be heard in some circumstances. Art. 105 prevents alleged offenders being heard as witnesses in order to deny them the protection of the due process rights contained in Arts. 114 and 116. Moreover, the Law of 30 December 1987 created the new category of “assisted witness” (*témoin assisté*) for the benefit of any person named in a civil complaint as part of the criminal proceedings. This entitles such a person to enjoy all the due process rights set out in Arts. 114, 116 and 118. The provision has not been much used but nevertheless, the rights of an assisted witness were extended in 2000 to a person merely “implicated” (Art.113.1-8).

France has made significant progress in recent years to liberalise its previously very strict witness compulsion rules. The restrictions implemented in 1993 abolishing the power of the police to require sworn testimony and in 2011, limiting the time that the police can detain witnesses to 4 hours, indicate clearly that the complete abolition of witness compulsion by the police, is unlikely to be long delayed.

## FRANCE: COMPARATIVE QUESTIONNAIRE

### 1. When does the witness interrogation/interview takes place?

Witness interrogation can potentially take place at several stages in the procedure, in the police station, and (for serious offences) in the office of the examining magistrate, and in the trial court. Police officers can compel the attendance of witnesses for interrogation for up to 4 hours under Art. 62 of the CPP. See above.

### 2. What is the probative value of witness interrogation/interview protocols?

Witnesses must sign a statement document called a *procès verbale*. In theory this is a description by the officer or the examining magistrate of the “act” of interrogation and must be an accurate account in writing, in due form of law of exactly what has been done and said verbally in the presence of a public officer and what he or she himself does upon the occasion. It must be dated, contain the name, description and address of the public officer who makes it, and all the relevant facts within the witnesses’ knowledge which serve to substantiate the charge. It must be signed by the officer and all others present, including the witness. As an “act” of the investigation, the *procès verbale* is included in the court file or dossier, which can be examined by the defence under certain conditions. It is available to the trial court which has the discretion to call the witness or not, as an element of the evidence, subject to the overriding imperative to discover the truth. Its weight in evidence is evaluated by the trial court under the principle of the “free evaluation of evidence”.

### 3. Who conducts the witness interrogation? Can the witness be interrogated only before the judge? Can the witness be interrogated in camera by the prosecutor, investigator? What is the procedure for witness interrogation? What is the procedure for subpoena-ing the witness to the prosecutor and/or to the court?

Pre-trial interrogation of prosecution witnesses can be undertaken in camera by police, prosecution and examining magistrate in accordance with the procedures described above. Although prosecutors have the formal responsibility for the direction of the investigation, it is very rare for them to be involved in operational matters at all so, generally speaking, all pre-trial interrogations are conducted by the police, or, in the case of serious crime, by the examining magistrate. The prosecutor may suggest questions for the examining magistrate to put to the witness. The witness is brought to court by the order of the judge, delivered by a bailiff (*huissier*).

### 4. If the prosecutor/investigator can interrogate the witness, can the content of the interrogation change afterwards during the court hearing? If yes, what are the consequences (e.g. contempt of court, criminal offense)?

The *procès verbale* remains on the court file as evidence that the act of interrogation took place unless it is removed by way of “nullity” proceedings, in the case that some significant irregularity in the process is discovered.<sup>102</sup> Witnesses who depart from their

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<sup>102</sup> Art. 206, CPP.

original testimony under oath in court can be prosecuted for perjury. Under Art. 457 of the CPP, if the evidence given by a witness in court appears to be false, the Judge must note the fact on the court record and can remand the witness in custody until the matter can be referred to the Prosecutor with a view to prosecution for perjury under Art. 342 of the Penal Code.

5. If the prosecutor/investigator can interrogate the witness, how is “equality of arms” achieved? Can the defence also interrogate the witness in camera? Or can they be present during the prosecutor’s/investigator’s interrogation? What is the justification for interfering with the principle of “equality of arms”. Does the defence receive any compensation for this interference?

The defendant has no right to participate, either personally or through counsel, in the interrogation of prosecution witnesses at any stage in the pre-trial phase unless he or she is involved in a “confrontation” (see above). “Equality of arms” is clearly not achieved in these circumstances since the investigation has the character of an “official” enquiry. The only compensation is that the procès verbale of a witness interrogation will be made available to the defendant through his or her counsel (see above).

6. If the prosecutor/investigator can interrogate the witness in camera, what are the safeguards for the witness which ensure that the testimony is voluntary and to prevent any form of coercion? If the witness refuses to appear before the prosecutor, what are the measures which can be used against him or her?

There are no such safeguards, except the restriction to four hours of police custody and the requirement that individuals suspected of a criminal offence must not be interviewed in this way (see above). It is not usual for a witness to be required to appear before the prosecutor (see above).

7. If the prosecutor/investigator cannot interrogate the witness (and are able only to interview them) how can they take the case to court (this includes all the stages of judicial review of investigation and also main court hearing)? How can the prosecutor be guaranteed that the witness will not change the content of the witness interview?

Not applicable. The police and prosecution authorities can interrogate witnesses.

8. Can the witness be interrogated during the pre-trial stage of criminal proceedings? If yes, what are the grounds for interrogation? What are the procedures? Can the witness be interrogated during the pre-trial stage before the judge without the presence of the other party?

Witnesses can be interrogated in this way (see the discussion of the grounds and procedures for the interrogation under Art. 62 set out above). The witness can be interrogated during the pre-trial stage before the examining magistrate without the presence of the other party (as described above).

9. When the country has the jury trial system, is it possible for the witness to be interrogated in camera by the prosecutor/investigator? What is the procedure on witness interrogation in jury trial?

France does have a jury system in the trial court for serious crimes (*Cour d'Assises*) in both the first degree (trial) and second degree (appeal for a retrial). It is possible for the witness to be interrogated in camera by the police (see above). Witness interrogation in a jury trial is conducted by the judge although it is possible for the representatives of the parties, after having sought the permission of the president of the court, to put their questions directly (Art. 312). This procedure is exactly the same in the lower, non-jury court (*Tribunal Correctionnel*).

## THE POSITION OF THE PROSECUTION WITNESS IN GERMANY

The German Police have no power to compel the attendance of witnesses. An individual can be arrested without a warrant and brought to the police station only if they are caught in the act of committing a criminal offence or immediately after having done so.<sup>103</sup> The cooperation of witnesses with the police is therefore purely voluntary. This reflects changes in German jurisprudential principles over recent years to the effect that witnesses are no longer seen as objects of evidence but are treated as subjects of the criminal process.<sup>104</sup> Their right to life and bodily integrity is protected by Art. 2 (II) (1) of the *Verfassung Grundgesetz* (Federal Constitution, Basic Law) and their right to self-determination and protection of data by Art.2 (I) (1) of the same. Witnesses in Germany have three main obligations:

- i) to appear before the state prosecutor (but not the police) when summoned, and
- ii) to testify truthfully (if not entitled to refuse to testify), and
- iii) to confirm their evidence under oath before a judge if the court requires this<sup>105</sup>

Witnesses are obliged to appear at the public prosecution office upon receipt of a summons and to make a statement on the subject matter of the investigation. According to Art 48(1) everyone who has been summoned to appear as a witness before a court or the prosecution office has a duty to testify, regardless of whether that person is convinced that he or she does not know anything about the matter.<sup>106</sup> However, only judges and not police or prosecutors, can conduct examinations under oath.<sup>107</sup> If there is a danger that the witness may not be able to attend at trial, the statement is taken under oath by a judge and will be read out at trial.<sup>108</sup> In this case, the judge must first warn the witness about their privilege not to give evidence if they are from a protected class of individuals (see below). The transcript of the examination must be read back to the witness and corrected if necessary before everyone present is asked to sign it. It must also indicate that all the above formalities have been observed and important parts of the interrogation should be recorded verbatim, stating both questions and answers. Although the Code provides these detailed regulations with regard to the conduct of a judicial examination, it merely recommends that the same procedures should be adopted in the case of an interview by a prosecutor.<sup>109</sup> A confrontation with other witnesses or with the accused is possible in the preliminary proceedings if this appears necessary for the conduct of the investigation.<sup>110</sup> Examinations by the police are usually conducted with less formality but a record must be taken.<sup>111</sup>

A witness giving evidence in court may be given counsel to represent his or her interests<sup>112</sup> but a refusal to testify at court can have serious consequences. Under Art. 70 a witness

103. *Strafprozessordnung* (Code of Criminal Procedure, StPO), Art.127.

104. Huber, B. (2008). *Germany. Criminal Procedure in Europe*. R. K. Vogler and B. Huber. Berlin, Duncker & Humblot: 269-372., p.339.

105. StPO, Arts 48ff, 161a, 52-55, 57,59, 60-63, 65. All references to Articles in this section are to the German Code of Criminal Procedure (*Strafprozessordnung-stop*) unless otherwise indicated. The administration of an oath in Germany is increasingly rare. See Bohlander, M. (2012). *Principles of German Criminal Procedure*. Oxford, Hart., p.150.

106. *Ibid.*, p.148.

107. Art. 161a. However, administering an oath in those circumstances is possible "in exigent circumstances" or where the witness may be unavailable at trial (Art. 62).

108. Art.254.

109. Art.168b.

110. Art. 58(2).

111. Huber, *op cit.*, p.302

112. Art.68b.

who without a lawful excuse, refuses to testify or to take an oath at court will have to pay all the costs caused by this refusal, as well as a fine. Failure to pay the fine will result in “coercive detention”. Detention may also be ordered to force a witness to testify, provided it does not extend beyond the end of the proceedings in question, up to a maximum of six months. Exemption from giving any evidence at all is extended to the current or former or future spouse or civil partner of the accused or a person who is or was lineally related or related by marriage, collaterally related to the third degree or related by marriage to the second degree to the accused.<sup>113</sup> Priests, journalists, doctors and other professional persons with a duty of confidentiality are also exempted from any requirement to testify.<sup>114</sup>

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113. Art. 52.

114. Arts. 53, 53a.



## GERMANY: COMPARATIVE QUESTIONNAIRE

### 1. When does the witness interrogation/interview takes place?

Formal interrogation of witnesses (examination by the judge and possible further questioning by the other parties and the lay magistrates) takes place at trial in open court unless there are reasons to believe that the individual concerned may not be able to attend court, in which case the judge will carry out a preliminary interrogation (see above). Witnesses can be compelled to attend for examination by prosecutors and judges but nevertheless in practice the great majority of interviews are conducted by the police, who must rely on the voluntary attendance of witnesses.

The police have no power to carry out the formal interrogation of witnesses or to compel their co-operation with the investigation. Prosecutors and judges can require the attendance of witnesses but only judges can conduct an interrogation under oath.

### 2. What is the probative value of witness interrogation/interview protocols?

Since neither the police nor the prosecutor have the power to conduct a formal interrogation, no such witness interrogation protocol exists. Judges can, however, carry out pre-trial interrogations as described above. Any examination of the witnesses must be carefully recorded in order to be admissible at trial. Only statements recorded in the form laid down in Arts 168ff (see above) can be read out at trial. Trials are conducted according to the principle of the free-evaluation of evidence and so evidence is not accorded any particular, pre-established weight.

### 3. Who conducts the witness interrogation? Can the witness be interrogated only before the judge? Can the witness be interrogated in camera by the prosecutor, investigator? What is the procedure for witness interrogation? What is the procedure for subpoena-ing the witness to the prosecutor and/or to the court?

As indicated above, the police have no power to carry out the formal interrogation of witnesses or to compel their co-operation with the investigation. Prosecutors and judges, however, can require the attendance of witnesses but only judges can conduct an interrogation under oath. The procedure for summoning witnesses and carrying out interrogations is described above but a witness who fails to attend without an acceptable reason can be fined for contempt up to €1,000 for each violation, or a term of imprisonment of up to six weeks. They can also be required to pay any costs occasioned by the adjournment or be brought forcibly to court by the police.

### 4. If the prosecutor/investigator can interrogate the witness, can the content of the interrogation change afterwards during the court hearing? If yes, what are the consequences (e.g. contempt of court, criminal offense)?

Statements given to the police and prosecutor are frequently retracted at trial. In these circumstances, Art. 252 provides that “the statement of a witness examined prior to the main hearing who does not make use of his right to refuse to testify until the main hearing, may not be read out.” Prior statements must be disregarded whether given in a

formal interrogation or even as part of a voluntary spontaneous statement to the police or prosecution, or even to the trial court in an earlier hearing. However, a judge who took an earlier statement can give evidence as to its contents (even refreshing his or her memory from the text) on the grounds that he or she is a responsible court officer. Witnesses who deliberately deceive the court can be prosecuted for perjury, which is punishable under Arts.153-163 of the German Penal Code and False Accusation under Art.163 of the same.

5. If the prosecutor/investigator can interrogate the witness, how is “equality of arms” achieved? Can the defence also interrogate the witness in camera? Or can they be present during the prosecutor’s/investigator’s interrogation? What is the justification for interfering with the principle of “equality of arms”. Does the defence receive any compensation for this interference?

Neither the prosecutor nor the police can interrogate the witness in the formal sense (see above).

6. If the prosecutor/investigator can interrogate the witness in camera, what are the safeguards for the witness which ensure that the testimony is voluntary and to prevent any form of coercion? If the witness refuses to appear before the prosecutor, what are the measures which can be used against him or her?

Neither the prosecutor nor the police can interrogate the witness in the formal sense (see above). As indicated above, witnesses are obliged to appear at the public prosecution office upon receipt of a summons and to make a statement on the subject matter of the investigation. A witness who fails to answer the summons can be prosecuted. However, as noted above, only judges and not police or prosecutors can conduct examinations under oath.

7. If the prosecutor/investigator cannot interrogate the witness (and are able only to interview them) how can they take the case to court (this includes all the stages of judicial review of investigation and also main court hearing)? How can the prosecutor be guaranteed that the witness will not change the content of the witness interview?

The presiding judge is responsible for ensuring that all appropriate witnesses, especially those requested by the prosecution, attend the trial and it is his or her duty to establish the truth on the basis of the free evaluation of evidence. The statements given to the police and to the prosecutor will be in the court file. Before they give evidence, witnesses are admonished to tell the truth and instructed as to the criminal law consequences of incorrect or incomplete statements and the possibility that they will have to take an oath.

8. Can the witness be interrogated during the pre-trial stage of criminal proceedings? If yes, what are the grounds for interrogation? What are the procedures? Can the witness be interrogated during the pre-trial stage before the judge without the presence of the other party?

Only as described above. Both the prosecutor and the defendant have the right to attend any judicial examination of a witness unless, in the case of the latter, their presence would endanger the purpose of the investigation, particularly if it were feared that a witness will not tell the truth in the presence of the defendant.

9. When the country has the jury trial system, is it possible for the witness to be interrogated in camera by the prosecutor/investigator? What is the procedure on witness interrogation in jury trial?

Germany does not have a jury system but only a mixed tribunal (Schöffengericht) in some cases. The rules on pre-trial interrogations are set out above. The taking of evidence before any form of court is conducted by the president of the court who will question the witnesses. However, the lay assessors, state prosecutor, the defendant and his or her counsel all have the right to ask further questions.

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PART II – EXAMINATION OF PROSECUTION WITNESSES:  
GEORGIAN CRIMINAL PROCEDURE COMPARED TO DUTCH  
CRIMINAL PROCEDURE AND ECTHR CASE-LAW

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## ABBREVIATIONS

appl.no.	application number (number of an application made at the ECtHR)
CCG	Criminal Code of Georgia
CCNL	Criminal Code of the Netherlands ('Wetboek van Strafrecht')
CCPG 1998	Criminal Code of Georgia, adopted on 20 February 1998 and most recently amended on 24 February 2004
CCPG 2009	Criminal Code of Georgia, adopted on 9 October 2009 and most recently amended on 31 October 2013
CCPNL	Code of Criminal Procedure of the Netherlands ('Wetboek van Strafvordering')
dec.	decision (of the European Court of Human Rights)
ECHR	European Convention on Human Rights
EcomHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
GC	Grand Chamber (of the European Court of Human Rights)
HR	'Hoge Raad' (Supreme Court of the Netherlands)
NJ	'Nederlandse Jurisprudentie' (main journal in which Dutch leading judgments are published)
Stcrt.	'Staatscourant' (official Dutch journal for publication of some types of legislation)



## INTRODUCTION

This report was commissioned by the Open Society Foundation Georgia. It is part of a broader project which intends to compare Georgian law concerning the procedure surrounding prosecution witnesses to other jurisdictions. Prof. Richard Vogler of the University of Sussex (England) has submitted a report concerning the rules on prosecution witnesses in England and Wales, the United States of America, Canada, France and Germany.

In 2009, the new Code of Criminal Procedure (CCPG) of Georgia entered into force. This code replaced the interrogation of witnesses by an investigator by the interrogation before a magistrate judge. However, the provisions concerning the interrogation of witnesses of the former CCPG remained in force. The public prosecution department took the view that it would be impossible to bring a case to court if the investigator lost his authority to interrogate witnesses. Another relevant aspect of witness interrogation is the position of the witness, who makes himself criminally liable if he changes a previous statement. Mainly, these two aspects gave rise to this comparative witness project.

In this report, Georgian law is compared to Dutch law and to the case-law of the European Court of Human Rights (ECtHR). Chapter 2 concludes with brief answers to the questions provided by the Open Society Foundation Georgia. The comparison to Dutch criminal law is interesting because in the Netherlands pre-trial witness statements – collected during investigation by an investigator or before an investigating judge – can, as a general rule, be used as evidence. Dutch practice shows that witness statements are seldom made during trial. Pre-trial witness statements are read out during trial. This aspect does not have to be justified by special reasons. Georgia is a contracting state to the European Convention on Human Rights (ECHR). It is, therefore, relevant to also compare Georgian law to ECtHR case-law.

Four aspects of prosecution witnesses are emphasized. First, the use of pre-trial witness statements as evidence. Second, the rules applicable to the questioning of witnesses. Third, the position of the defence with respect to witnesses, and more specifically the right to examine witnesses and the right to equality of arms. Fourth, the position of the witness. In Georgian law a legal distinction is made between witness ‘interrogations’ and witness ‘interviews’. In the chapter concerning Georgian law, these concepts are strictly separated. In the chapters about Dutch law and about the ECHR the terms ‘interrogation’, ‘interview’, ‘questioning’ and ‘hearing’ are convertible.

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May 2015

# PROSECUTION WITNESSES IN GEORGIA

No case-law or literature was analyzed in preparing this chapter. Therefore, certain rules may be differently interpreted in practice.

## 1.1 INTRODUCTION

In 2009, the new CCPG entered into force. However, Article 332 CCPG 2009 reads: ‘Until December 31, 2015, the interrogation during investigation shall be administered according to the procedure provided in Criminal Procedure Code of Georgia of February 20, 1998’. The period during which this transitional provision is valid has been extended several times.

## 1.2 USE OF WITNESS STATEMENTS AS EVIDENCE

### 1.2.1 ADMISSIBILITY OF HEARSAY EVIDENCE

The CCPG 1998 did not prohibit the use of hearsay evidence. Under the CCPG 2009, witnesses are, as a rule, required to make a statement during trial. As a rule, hearsay evidence is inadmissible. In special circumstances however, the statement a witness made during the pre-trial investigation before a magistrate judge can be read out during trial or an audio or video recording of the statement can be played back during trial. The pre-trial statement can then be used as evidence. The applicable rules depend on the specific reason for not appearing in court. If there is a real threat to the witness’s life or health or if it necessary to apply special protective measures, Article 118 § 3 CCPG 2009 determines that the pre-trial statement can be read out during trial. A conviction may, however, not rest solely on the pre-trial statement of the witness. If a witness who was interrogated before a magistrate judge is deceased, is outside Georgia, cannot be traced or did not appear in court although the judicial authorities made all reasonable efforts to that effect, Article 243 makes clear that the previous statement may be read out at trial, provided the earlier testimony was made in accordance with the rules prescribed by the CCPG 2009. In the latter case, the CCPG 2009 will not demand evidence supporting the witness statement. Witness statements not produced before a judge – for example statements made during police interviews – are under no circumstances admissible as evidence.<sup>1</sup>

If a witness has testified about information related by another person, his statement is treated as indirect evidence. This type of evidence is admissible under two conditions. First, the witness must disclose the identity of the person who supplied the information. Second, the witness statement must be supported by other non-indirect evidence.<sup>2</sup>

### 1.2.2 Requirements Regarding Witness Testimony

A witness under CCPG 2009 is described as a ‘person who might be aware of the facts necessary for ascertaining the circumstances of a criminal case’.<sup>3</sup> Investigators, prosecutors,

1. Compare Article 3 § 24 CCPG 2009. A police interview does not provide ‘testimony’. Article 243 CCPG 2009 strictly refers to testimony.

2. Article 76 CCPG 2009.

3. Article 3 § 20 CCPG 2009.

defendants, victims, experts and translators can have witness status.<sup>4</sup> Witness testimony is defined as ‘information on the circumstances of the case provided by the witness to the court in relation to the circumstances of the criminal case’.<sup>5</sup> Witnesses must indicate the source of information. Otherwise their statements are not admissible as evidence. Substantial contradictions in the testimony also render statements inadmissible.<sup>6</sup> If the defendant made a pre-trial statement in the capacity of a witness, it will only be admissible as evidence if the defendant does not oppose its reading out at trial.<sup>7</sup>

The CCPG 1998 rules on evidence indicate that pre-trial witness statements can be used as evidence, provided that they meet the conditions set by the CCPG 1998 and have been legally obtained.<sup>8</sup> Witnesses are entitled to make written statements during the pre-trial investigation. Their written statements are admissible as evidence.<sup>9</sup> Evidence must be obtained without the use of physical or mental coercion.<sup>10</sup>

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4. Article 47 CCPG 2009. See specifically with regard to victims Article 56 § 1 and with regard to defendants Articles 230 § 1 and 247 § 1 CCPG 2009.

5. Article 3 § 24 CCPG 2009.

6. Article 75 CCPG 2009.

7. Article 247 § 1 CCPG.

8. Articles 110-132 CCPG 1998 contain the rules on evidence and proof.

9. Article 118 § 2 1998.

10. Article 119 CCPG 1998.

## 1.3 OVERVIEW OF THE RULES REGARDING WITNESS INTERROGATION

### 1.3.1 PRE-TRIAL INTERROGATION UNDER THE CCPG 2009

The CCPG 2009 makes a distinction between interviews and interrogations. An interview has a voluntary character. The witness can be asked by each of the parties to testify. He is not put under oath. The witness will have to be identified and his statement will be included in a report. This report must be made available to the opposite party,<sup>11</sup> but is not admissible as evidence.<sup>12</sup>

An interrogation does not have a voluntary character. Witnesses are obliged to appear. If a witness refuses to fulfil his legal duty, he may be found criminally liable. Interrogations are performed before a magistrate judge. This type of pre-trial interrogation is only permitted if one of the specified reasons exists, to be summarized as the expected unavailability of the witness during trial and the compliance with a request for international legal assistance. During an interrogation, the magistrate judge, defence and the prosecutor will have an opportunity to ask the witness questions.<sup>13</sup> The witness will first be examined by the party that requested the witness to be interrogated.<sup>14</sup> In ‘the interests of justice’ a witness can – on request of one of the parties – be interrogated without the knowledge and presence of the opposite party. Testimony provided by this witness will however be inadmissible if the witness can be examined afterwards.<sup>15</sup> The witness takes the oath and then delivers evidence.<sup>16</sup> The magistrate judge has authority to interrupt the witness if he speaks about circumstances irrelevant to the case.<sup>17</sup>

The witness interrogation is recorded. The witness must approve the record, if necessary after having indicated that the testimony has not been written down correctly. Such indication will have to lead to adjustments in the record.<sup>18</sup> The CCPG 2009 does not contain a provision regarding the audio or video recording of a witness interrogation.<sup>19</sup> However, the fact that Article 143 CCPG mentions that audio and video recordings can be played back during trial suggests that making recordings may be permissible.

Juveniles are heard in the presence of their legal representative or a psychologist. In addition, children under fourteen years of age can only be interrogated with the consent of their legal representative. They are not put under oath, but are informed about their duty to tell the truth.<sup>20</sup>

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11. Article 75 lid 3 CCPG 2009.

12. See footnote 1.

13. Article 114 CCPG 2009.

14. Article 118 § 1 CCPG 2009.

15. Article 114 § 4 CCPG 2009. If the witness can be interrogated at a later stage, only the statement he makes at that occasion will be admissible as evidence.

16. Article 115 § 1 CCPG 2009.

17. Article 115 § 2 CCPG 2009.

18. Article 134 CCPG 2009.

19. Article 304 CCPG 1998 does contain a provision with respect to audio-recording of the interrogation. Articles 243 and 247 CCPG refer to video recordings as well, but the making of video recordings has not been regulated in the CCPG 2009 nor in the CCPG 1998. Article 10 CCPG 2009 indicates that video recordings can be made, but this provision appears to concern video recordings of the main hearing.

20. Article 116 § 3 CCPG 2009.

### 1.3.2 PRE-TRIAL INTERROGATION UNDER THE CCPG 1998

Although the CCPG 2009 replaced the CCPG 1998, the provisions of the CCPG 1998 concerning the pre-trial interrogation of witnesses remained in force. Under the CCPG 1998 no magistrate judge is involved in the interrogation. This interrogation is performed by an investigator, without the defence present. An investigator is a state official, authorized to investigate a criminal case. If a prosecutor performs an investigation himself, he is regarded an investigator.<sup>21</sup> The prosecutor is the formal authority in charge of the investigation.<sup>22</sup>

According to the CCPG 1998, a witness can be summoned to be interrogated.<sup>23</sup> His appearance is mandatory, since the witness is open to criminal liability for failing to appear without a valid excuse. He can be 'subjected to compelled attendance'.<sup>24</sup> The witness is obliged to answer the questions, unless doing so would incriminate himself or a close relative.<sup>25</sup> He may have the assistance of counsel.<sup>26</sup>

The witness may be interrogated about circumstances relevant to the case or, in order to identify a suspect, defendant or victim.<sup>27</sup> After having ascertained the identity of the witness,<sup>28</sup> the witness is invited to tell everything he knows about the case. He may not be interrupted, unless he speaks about circumstances irrelevant to the investigated matter.<sup>29</sup> Subsequently, the investigator will ask him questions.<sup>30</sup> The investigator may not ask leading questions.<sup>31</sup> The duration of the investigation is limited to a maximum of four hours. Although a witness may be interrogated more than once in the same day, the total duration of this interrogation may not exceed eight hours and between two interrogations at least one hour break must be afforded.<sup>32</sup> The witness is, as a rule, interrogated without other witnesses being present.<sup>33</sup> The investigator can however confront the witness with another witness if their statements are contradictory.

Minor witnesses may also be interrogated. Witness under the age of sixteen years can only be interrogated in the presence of a teacher or legal representative. Witness under seven years of age must be interrogated in the presence of a parent or guardian or with the consent of a legal representative. The legal representative will have the opportunity to give his opinion and to put questions to the witness. Irrelevant and leading questions may be barred by the investigator. Witnesses under the age of fourteen years do not take the oath, but are informed of the necessity of speaking the truth.<sup>34</sup>

The investigator must draw up a report of the interrogation. The questions and answers must be included verbatim, as far as possible. The witness must be given the opportunity to

21. Article 37 CCPG 2009.

22. Articles 33 § 6 and 34 § 3 CCPG 2009.

23. Article 295 CCPG 1998.

24. Article 94 CCPG 1998.

25. Article 305 § 3 CCPG 1998.

26. Article 305 § 5 CCPG 1998.

27. Article 305 § 1 CCPG 1998.

28. Articles 296 and 305 § 3 CCPG 1998.

29. Articles 298 § 1 and 305 § 4 CCPG 1998.

30. Article 298 § 2 CCPG 1998.

31. Article 299 CCPG 1998.

32. Article 302 CCPG 1998.

33. Article 305 § 2 CCPG 1998.

34. Article 306 CCPG 1998.

read the record. Upon his request the report must be changed. Witnesses must be allowed to write down the testimony themselves. The witness must state that the report is accurate and must sign every page of the record.<sup>35</sup> An audio recording of the interrogation may be made.<sup>36</sup>

### 1.3.3 EXAMINATION DURING TRIAL

It is the duty of the parties to ensure the appearance of their witnesses in court.<sup>37</sup> If a witness fails to appear, a party can request the court to ensure the presence of the witness at trial.<sup>38</sup> The witness will then be summoned and will be legally obliged to appear.<sup>39</sup> If the witness nevertheless fails to appear, the court can compel such to be present.<sup>40</sup> The court session will be adjourned due to the non-appearance of an essential witness.<sup>41</sup>

Witnesses are separated from each other and examined individually.<sup>42</sup> Before being examined, the witness takes the oath.<sup>43</sup> The party calling the witness will be allowed to examine the witness first (direct examination). Subsequently, the other party will have the opportunity to cross-examine the witness. Leading questions are prohibited. The opposite party may object to a leading question by filing a motion to the presiding judge.<sup>44</sup> The court may decide to have a witness examined remotely, with the use of technical means.<sup>45</sup> If witness statements substantially contradict each other, any party can file a motion in order to have a video of audio recording of a pre-trial interrogation played back during the trial.<sup>46</sup>

Defendants may be examined as witnesses. It is not clear whether they may only testify in their own case or also in the case of a co-defendant.<sup>47</sup> If the defendant made a pre-trial witness statement, this is only admissible as evidence if the defendant does not oppose it being read out or played back in court.<sup>48</sup>

## 1.4 POSITION OF THE DEFENCE

### 1.4.1 RIGHT TO EQUALITY OF ARMS

From the start of the prosecution, equality of arms must be respected.<sup>49</sup> The court must offer both parties equal opportunity to protect their rights and legitimate interests.<sup>50</sup> The

35. Articles 303 and 308 CCPG 1998.

36. Article 304 CCPG 1998. In general, interrogations may be recorded audio-visual (Art. 303 § 2 CCPG 1998), but specifically with respect to witness interrogation only audio recording appear to be allowed.

37. Article 228 § 1 CCPG 2009.

38. Article 149 § 1 CCPG 2009.

39. The court is not authorized to summon a witness of its own initiative (Art. 228 § 2 CCPG 2009).

40. Article 149 § 2 and 3 2009. This provision does not mention the way in which the witness's presence can be ensured. Probably the court will order that the witness is taken to the court by the police.

41. Article 185 § 2 CCPG 2009.

42. Article 228 § 5 CCPG 2009.

43. Article 48 CCPG 2009.

44. Articles 244-246 CCPG 2009.

45. Article 243 § 3 CCPG 2009. Probably a live video link is used.

46. Article 243 § 2 CCPG 2009.

47. Article 230 § 1 CCPG 2009 mentions this possibility. This provision does not mention for what purpose a defendant would wish to be heard as a witness.

48. Article 247 § 1 CCPG 2009.

49. Article 9 § 1 CCPG 2009.

50. Article 25 § 1 CCPG 2009.

parties must have equal opportunity to present and examine evidence.<sup>51</sup> Despite the principle of equality of arms, the defendant can be denied the right to be present during the examination a witness, in order to protect the witness.<sup>52</sup> Also, if the interests of justice require so, a witness can be examined during the pre-trial interrogation without the knowledge and presence of the opposite party. The statement the witness makes without the opposite party present is only admissible as evidence if the opposite party had no opportunity of examining the witness during trial.<sup>53</sup>

## 1.4.2 RIGHT TO EXAMINE WITNESSES

The position of the defence during the pre-trial interrogation by an investigator is not entirely clear. The accused and his counsel seem not to be entitled to attend the interrogation.<sup>54</sup> However, according to the CCPG 2009 a written witness interrogation protocol must be made available to the defence at least five days before pre-trial interrogation.<sup>55</sup> This suggests that the defence will have an opportunity to at least reflect on the protocol.

According to the CCPG 2009, the defendant will be entitled to exercise his right to cross-examine witnesses during trial. If a witness does not appear at trial and the pre-trial testimony is read out, nothing prevents the court from convicting the defendant based on this testimony. Admittedly, Article 118 § 3 CCPG prescribes that testimony obtained during a pre-trial interrogation should, in some situations, be corroborated by other evidence if it is read out during trial.<sup>56</sup> It does however not prevent a court from convicting an accused to a decisive degree on the testimony the witness made before an investigator.

## 1.5 POSITION OF THE WITNESS

Witnesses have the right to refuse to answer questions if answering would incriminate themselves or their close relatives.<sup>57</sup> Some people e.g. defence counsel and journalists, are – under certain circumstances – exempted from giving evidence as a witness.<sup>58</sup> If the defendant made a pre-trial statement as a witness, this is only admissible in evidence if the defendant agrees.<sup>59</sup>

Witnesses have obligations too. They are compelled to appear to be examined after being summoned and to respond to questions.<sup>60</sup> A witness who does not comply with these duties, may be criminally liable. S/he can also be compelled to appear.<sup>61</sup> Article 371 CCG penalizes as ‘impediment of the administration of justice’ to willfully give substantially contradictory evidence as a witness. According to this provision, a witness who made a false statement, is criminally liable if he retracts his statement at a later stage of the proceedings.

51. Article 14 § 1, 39 § 1 and 75 § 3 CCPG 2009.

52. Article 40 § 1 CCPG 2009.

53. Article 114 § 4 CCPG 2009.

54. Article 304 § 2 CCPG 2009 mentions the objection by the defence to have an interrogation recorded, but this provision appears to be relevant only if a suspect or an accused is interrogated.

55. Article 83 § 6 CCPG 2009.

56. This provision is applicable at present if the witness was interrogated by an investigator.

57. Article 49 § 1 CCPG 2009. Article 15 CCPG 2009 mentions the right not to incriminate oneself.

58. Article 50 CCPG 2009.

59. Article 247 CCPG 2009.

60. Article 49 § 2 CCPG 2009.

61. Article 94 § 2 CCPG 1998.

Although witnesses can, as a rule, be examined directly during trial, special protective measures are applicable in special circumstances. For example, if the life, health or property of a witness would be significantly threatened by giving evidence unprotected, such protective measures can be employed.<sup>62</sup> The witness has the right to request for the application of protective measures.<sup>63</sup>

If this request is granted, the witness will be examined during an interrogation before a magistrate judge.<sup>64</sup> If an audio or video recording of this interrogation is made, playing back this recording during trial may be admissible.<sup>65</sup>

A witness may have to make expenses, like travel expenses, if he has to appear to be examined. Victims are entitled to compensation for costs of participation in the criminal proceedings.<sup>66</sup> The CCPG 2009 does not contain a similar provision for witnesses who cannot be regarded as victims. Article 90 § 1(d) CCPG 2009 regards the costs for the appearance of a witness as ‘procedural costs’. The CCPG 2009 does not clarify however which party is responsible for reimbursement of witness expenses. Article 91 § 2 CCPG 2009 merely determines that a convicted person will be responsible for paying the costs related to summoning a witness. This provision does not indicate who will bear these costs if the defendant is acquitted and it is not completely clear whether it concerns other types of costs too, like travel expenses and lost wages.

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62. Article 67(b) CCPG 2009.

63. Article 49 § 1(f) CCPG 2009.

64. Article 114 § 1(d) CCPG 2009.

65. Article 243 § 2 CCPG 2009.

66. Article 57 § 1(d) CCPG 2009.



## 2. PROSECUTION WITNESSES IN THE NETHERLANDS<sup>67</sup>

### 2.1 USE OF WITNESS STATEMENTS AS EVIDENCE<sup>68</sup>

#### 2.1.1 ADMISSIBILITY OF HEARSAY EVIDENCE

One of the most striking aspects of Dutch criminal procedure is that witness testimony gathered during the pre-trial investigation can be used as evidence to prove the indictment, without serious limitations. Shortly after the present Code of Criminal Procedure entered into force, the Supreme Court decided that hearsay evidence could be used as evidence.<sup>69</sup> There are two requirements for this procedure, which are easy to satisfy. First, the pre-trial witness statement must be read out during trial. Second, the court must be cautious in its assessment of the statement. Current practice shows that courts primarily express a cautious attitude if the defence has challenged the reliability of the witness statement.

The use of pre-trial statements as evidence is not only admissible, but it is common practice. In the majority of cases in which pre-trial testimony was used as evidence, the witness has not appeared during trial. This practice is related to the fact that judging criminal cases is the exclusive authority of professional judges, and no forms of lay participation exist. The judges are not for the first time confronted with the evidence during trial, but have taken notice of all reports gathered during the pre-trial investigation before the trial commences. This includes police reports and reports by investigating judges in which witness statements are reported. With respect to this evidence the trial primarily has a verifying character: the court assesses the truthfulness of the facts and circumstances mentioned in the reports. Only in exceptional circumstances, especially if the defence has requested so, witnesses will be called to testify in court.

The fact that pre-trial witness statements are used as evidence, without the witness having testified in court, is in general not considered problematic. This can be explained by several reasons. First, the witness statement may be more reliable if it has been made shortly after the offence was committed. It is not unusual for trials to take place many months or even years after the offence was committed. Meanwhile the witness's recollection of the observed facts may have faded or news items in the media may have influenced memory. Second, an interrogation during trial may appear less effective than a pre-trial interrogation, because of the formal setting of the trial. A pre-trial interrogation in camera before the investigation judge has a relatively informal character. This may reinforce the witness's willingness to answer questions. Third, the argument of efficiency is considered relevant. Compared to trials in other countries, Dutch trials take a relatively short period of time. It is unusual for a trial to last for more than one day. This may occur if the case is complex or if the court decides that more investigation is required.

67. See about the general features of Dutch criminal procedure Groenhuijsen & Simmelink 2008 and Tak 2003.

68. Nijboer 1995 and Simmelink 2012 provide an overview of the rules in evidence in the Netherlands.

69. HR 20 December 1926, NJ 1927, p. 85-91.

## 2.1.2 REQUIREMENTS REGARDING WITNESS TESTIMONY

Witness statements are admissible as evidence only under the following conditions:

- The witness must have testified about facts and circumstances he observed.<sup>70</sup> A sole conclusion does not suffice, as the judge must be able to draw conclusions himself, based on the facts and circumstances mentioned by the witness.
- The statement may not be regarded as unreliable by the judge. Unreliable witness statements cannot be used as evidence.<sup>71</sup>
- The witness statement must be made during trial or must be read out during trial.<sup>72</sup>
- An accused cannot be convicted solely on one witness statement.<sup>73</sup> An exception is the report by an investigator who himself witnessed a criminal offence being committed. His report may constitute the sole basis for a conviction.<sup>74</sup>
- The conviction may not be based to a decisive degree upon anonymous witness statements.<sup>75</sup>
- The conviction may not be based solely on statements by co-accused who testified as witnesses in exchange for the affirmation that the prosecutor will demand a lower sentence than usual.<sup>76</sup>
- The conviction may not be based solely or to a decisive degree on the statement by a witness who could not be examined by the defence, unless sufficient counterbalance has been offered.<sup>77</sup>

Although Article 341 § 3 CCPNL provides that the statement made by the defendant can only provide evidence against himself, due to a very restrictive interpretation of this provision by the Supreme Court, statements by co-accused can be used as evidence, almost without limitation. The Supreme Court held that this provision is applicable only if two or more accused are accused in one indictment or two or more cases are joined, following a special procedure. In practice, this hardly ever occurs, because public prosecutors like to avoid that the statement of a co-accused will be inadmissible as evidence.<sup>78</sup>

If the defence has taken the view that a witness statement cannot be used as evidence, the court that nevertheless uses the statement as evidence is obliged to give reasons for rejecting the view of the defence.<sup>79</sup> Under some specific circumstances – for example if anonymous statements are used as evidence<sup>80</sup> – the court must give a reasoned decision on the use of a witness statement of its own motion.

70. Article 342 lid 1 CCPNL.

71. HR 14 September 1992, NJ 1993/54.

72. Article 342 lid 1 respectively 301 CCPNL.

73. Article 342 lid 2 CCPNL.

74. Article 344 lid 2 CCPNL.

75. Article 344a lid 1 CCPNL.

76. Article 344a lid 4 CCPNL.

77. HR 29 January 2013, NJ 2013/145; elaborated in § 2.3.2.

78. HR 29 October 1974, NJ 1975, 108.

79. Article 359 § 2 CCPNL.

80. Article 360 CCPNL.

## 2.2 OVERVIEW OF THE RULES REGARDING WITNESS INTERROGATION

### 2.2.1 Pre-trial examination before an investigator

An investigator is usually a police officer. The pre-trial interrogation by an investigator is barely regulated by the Code of Criminal Procedure. The only provision regarding the police interrogation concerns the fact that witnesses can report criminal offences to the police.<sup>81</sup> Since such a report often is the first cause to start a criminal investigation, the defence is usually not involved in the first police interrogation. If a witness is interrogated at a later stage of the police investigation, there is no obligation or common practice to invite the defence to participate. The public prosecutor will not be present either. The Ministry of Safety and Justice is currently preparing Legislation which will create an obligation for the police to invite the defence to attend the examination of a witness in specific circumstances. Probably this will concern situations in which it can be foreseen that the witness will not be able to be questioned at a later stage of the proceedings, for example because the witness is a young child, the witness is seriously ill or the witness is a foreign tourist.

Witnesses are not compelled to appear if they are invited to be interrogated by the police. They do not take the oath and therefore cannot make themselves criminally liable for perjury. Their statements are recorded in an official police record. The police record must meet certain formal requirements.<sup>82</sup> The CCPNL does not contain general rules with respect to the way in which statements must be recorded.

The examination of children up to 12 years of age and of mentally disabled witnesses is, with respect to sexual offences and child abuse, guided by directions by the public prosecution department.<sup>83</sup>

These witnesses are interrogated in child-friendly studios, by a police officer especially trained to interrogate these types of witnesses. The studio interrogation is recorded audiovisually.<sup>84</sup> With respect to sexual offences the direction prescribes that the interrogation is performed in question-answer-style and is recorded in a police record verbatim. The defence must be able to watch the audio-visual recording. The direction contains no rules on the presence of the defence during a studio interrogation or on the opportunity for the defence to supply questions to the police officer who will carry out the interrogation. A witness can not only be interrogated in a studio on the initiative of the police. Courts may also decide that a witness be examined this way. Usually, this will be a second studio interrogation, which takes place in order to enable the defence to practice its right to examine witnesses.

If a witness is interrogated with respect to a serious offence, specifically mentioned in the directions of the public prosecution department, an audio recording must be made. This obligation exists for example if the offender risks a term of imprisonment of twelve years or more. An audio-recording will also have to be made if the victim of the offence has deceased.

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81. Article 163 CCPNL.

82. Articles 152-153 CCPNL.

83. Aanwijzing opsporing en vervolging inzake seksueel misbruik, Strct. 2010, 19123 (2010A026) en Aanwijzing opsporing en vervolging inzake kindermishandeling, Strct. 2010, 16597 (2010A0424).

84. Zie daarvoor ook de Aanwijzing auditief en audiovisueel registreren van verhoren van aangevers, getuigen en verdachten, Strct. 2012, 26900 (2010A018gp).

## 2.2.2 Pre-trial examination before an investigating judge

The investigating judge (rechter-commissaris) is an independent and impartial judge, who has authority to perform certain investigative activities. He does not work under supervision or in commission of the public prosecution service. An investigating judge who investigated a certain case, is not allowed to take part in the trial of that case, as this could create the impression that he would not be impartial any more.<sup>85</sup> Interrogation of witnesses, most of whom are previously interrogated by police officers, is an important task of the investigating judge. There are two relevant differences between police interrogation and interrogation by an investigating judge. First, the police are not impartial. Second, as a rule, the parties will be invited to be present at the hearing before the investigating judge, but not to attend the police interrogation. The presence of the parties may prevent the investigating judge from asking leading questions.

An investigating judge can hear a witness on the application of the public prosecutor,<sup>86</sup> on request of the defence,<sup>87</sup> following the order of the trial judge<sup>88</sup> or on his own initiative.<sup>89</sup> It is relevant to know on what grounds it is decided whether a witness who was previously interrogated by the police, should be re-examined by the police or by an investigating judge if a second examination is considered desirable. The CCPNL does not provide substantial guidance here.<sup>90</sup> The public prosecutor and the defence determine themselves whether a re-examination by the police or before an investigating judge is desirable. The most important reason why witnesses are heard before the investigating judge is that the defence wishes to interrogate the witness. Normally, the defence is not offered an opportunity to do so during the police investigation. Even if such an opportunity was offered, it is considered important to have an opportunity to interrogate the witness before an independent judge, who can put the witness under oath and who has the power to order the appearance of the witness.

A witness who has been summoned to appear before the investigating judge, possibly under the judge's order that he will be brought to court, is compelled to appear.<sup>91</sup> As a rule, he has the obligation to answer the judge's or parties' questions. An exception to this rule may occur if the investigating judge prohibits that the witness answers a question<sup>92</sup> or if the witness has the statutory right to remain silent.<sup>93</sup> If the witness refuses to provide answers without a valid reason, he can – in exceptional situations – be taken in custody.<sup>94</sup>

Usually the accused's counsel and the public prosecutor have the right to attend the hearing. Counsel may, however, be excluded if the investigating judge decides that

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85. Article 268 § 2 CCPNL.

86. Article 181 CCPNL.

87. Article 182 CCPNL.

88. Article 316 CCPNL.

89. Article 182 § 7 CCPNL.

90. In § 2.2.3 the opportunity for the trial court to redirect a witness examination to an investigating judge is discussed. If the trial court decides to have a witness examined, this examination will as a rule take place before an investigating judge. In exceptional circumstances the police can be ordered to re-examine a child witness. The reason for this order is that the police has at its disposal special child-friendly studios and police officers especially trained to interrogate children.

91. Article 213 CCPNL in conjunction with Article 444 CCNL.

92. Article 187b CCPNL.

93. Articles 217-219b CCPNL.

94. Article 221 CCPNL.

the interests of the investigation have to prevail.<sup>95</sup> The accused himself has no right to be present at the interrogation of a witness. However, the investigating judge can allow him to attend the hearing if he holds the view that the investigation will benefit from the accused's presence.<sup>96</sup> This opportunity is rarely used. The witness is usually examined in the investigating judge's office. He can however be heard at the place where he resides,<sup>97</sup> for example if he is seriously ill. As a rule, the witness is not put under oath. Instead, he will have to state that he will speak the truth.<sup>98</sup> Making a false statement will not amount to perjury. Only in exceptional situations, for example if the investigating judge suspects that the witness will not be able to appear in court, will the witness have to take the oath.<sup>99</sup> In that case, the witness may be found criminally liable if he makes a false statement. The oath is reserved for specific situations because the point of departure is that a witness should be able to change his testimony during trial without committing perjury.<sup>100</sup>

The witness's testimony is registered in a record of the hearing. Usually this is drawn up only after the witness has answered all questions. A clerk of the investigating judge will write down the summarized statement dictated by the investigating judge. The witness will then be asked to sign the statement.

### 2.2.3 EXAMINATION DURING TRIAL

The public prosecutor can decide to call witnesses to appear during trial on his/her own initiative or upon defence request or court order. As a rule, the public prosecutor will have to call the witnesses requested by the defence, provided that their statements may be relevant for the court's decision. S/he can however reject witness requests by the defence, provided that one of the grounds mentioned in the CCPNL is applicable. For example, the witness is seriously ill or cannot be located.<sup>101</sup> In the event of the public prosecutor denying a request or non-appearance of a witness, the defence can repeat the request before the trial court. The defence may also make a first request for a witness during the trial, but the trial court will then have to apply a stricter criterion: only if it is considered necessary to call the witness, the court will be obliged to have the witness called.<sup>102</sup>

A witness that has been called to appear is obliged to appear. If he fails to do so without a valid reason, he will be criminally liable.<sup>103</sup> The witness takes the oath before being interrogated.<sup>104</sup>

Witnesses will first be interrogated by the party on whose initiative they were called. Witnesses are bound to answer the questions, unless the court prohibits an answer<sup>105</sup> or the witness is exempted from answering.<sup>106</sup> If the witness refuses to answer without a valid

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95. Article 186a lid 1 CCPNL.

96. Article 186a lid 2 CCPNL.

97. Article 212 CCPNL.

98. Article 215 CCPNL.

99. Article 216 CCPNL. The CCPNL does not mention specific circumstances. This provision is applicable for example if it is expected that the witness will die soon, if the witness will be shielded from testifying in court because of his special vulnerability and if the witness is a foreign resident that will leave the country shortly.

100. Perjury is only committable if the witness makes a false statement under oath.

101. Article 264 CCPNL. In § 2.3.2 the grounds for rejecting a request are mentioned more exact.

102. Article 315 CCPNL.

103. Article 444 CCNL.

104. Article 290 § 4 CCPNL.

105. Article 293 CCPNL.

106. Article 290 § 5 CCPNL.

reason, he can, if certain conditions are met, be taken in custody.<sup>107</sup>

As mentioned before, the defence can request to have a witness called during trial. If the court grants the request, it usually instructs an investigating judge, who will not be present during the trial, to hear the witness *in camera*.<sup>108</sup> There can be different reasons to do so. Often, the efficiency of the criminal proceedings will be relevant. The calling of a witness is not always successful. If a witness fails to appear, a court hearing would have to be suspended again. Moreover, in more serious cases, a court session will require the presence of three judges, a public prosecutor and a clerk of the court, whereas the examination before the investigating judge will require only the presence of one investigating judge, who will only call for a clerk to record the witness statement at the end of the hearing. Substantive reasons too can justify a hearing before an investigating judge. For example, for some witnesses a hearing during trial can be too demanding. After the investigating judge has examined the witness, the trial will be resumed.

Article 316 § 2 CCPNL provides the possibility of redirecting a witness examination to one of the judges taking part in the trial, who may continue to judge the case after the examination is finished. He is referred to as a ‘delegate judge’. The CCPNL does not require a special ground for redirecting the examination to a delegate judge. A hearing before a delegate judge has several advantages. First, a judge who is well informed about the case will examine the witness, which is more efficient than instructing an investigating judge without any knowledge of the case. Second, the delegate judge, who will continue to participate in the trial and will ultimately co-decide on the accused’s guilt, can form an impression of the witness’s reliability.<sup>109</sup> A delegate judge’s only task can be the interrogation of a witness or the appointment of an expert. According to the Minister of Justice who introduced the delegate judge in the CCPNL, these activities do not impair the judge’s impartiality.<sup>110</sup>

If a witness is interrogated before an investigating judge or a delegate judge, the rules mentioned in § 2.2.2 are applicable. If a witness is expected not to appear of his own free will, the court can order that he be taken to the court by the police.

## 2.2.4 INDIRECT EXAMINATION

In the situations mentioned before, an accused, counsel, prosecutor or judge asked his own questions to a witness directly. Besides, witnesses can sometimes be asked to answer written questions provided by the defence or the public prosecutor. In mainly two situations this indirect way of questioning is applied. First, the parties will usually not be allowed to attend the hearing of an anonymous ‘threatened witnesses’. The CCPNL prescribes that the parties must be offered the opportunity to provide questions that will be asked by the investigating judge responsible for hearing the anonymous witness. Second, if a witness resides abroad and is examined under letters rogatory by an investigating judge, sometimes the defence is not allowed to be present. If so, the defence can be offered to provide written questions.<sup>111</sup>

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107. Article 294 CCPNL

108. Article 316 CCPNL. The trial will be suspended if the investigating judge is instructed to organize a witness interrogation.

109. The investigating judge is not allowed to take part in the trial if he investigated the case before as an investigating judge.

110. Kamerstukken II 2001/02, 28477, nr. 3.

111. The CCPNL does not contain rules with respect to this second situation. ECtHR 3 March 2011, app.No. 31240/03 (Zhukovskiy/Ukraine), § 46 indicates that the defence must have the opportunity to comment on questions intended to be asked to the witness in this situation. A reasonable interpretation would be that the defence must have the opportunity to provide its own questions as well.

## 2.3 Position of the Defence

### 2.3.1 Right to Equality of Arms

Police interrogations of witnesses are usually not attended by the defence and the public prosecutor. The public prosecutor is formally in lead of the police investigation. On first thoughts, the right to equality of arms seems to be infringed if the defence had no opportunity to question the witness during a police interrogation. The practical influence of the public prosecutor is however virtually absent, as the public prosecutor will not instruct the police how to perform the interrogation and will not be present himself. Moreover, in Dutch practice the public prosecutor responsible for the investigation usually is not the same prosecutor who is the opposite party during trial.

If a witness is interrogated before an investigating judge, as a rule both the accused's counsel and the public prosecutor have the right to be present. If counsel is not invited for the interrogation, the public prosecutor will not be allowed to be present either. The CCPNL states so explicitly with respect to anonymous witnesses who have received the status of 'threatened witness' following a special procedure.<sup>112</sup> If the accused is not assisted by counsel and is not allowed to attend the interrogation, the investigating judge will have to order that the accused is allocated counsel if such counsel would be authorized to be present at the interrogation.<sup>113</sup> The primary purpose of this provision is to safeguard the right to examine witnesses. At the same time the application of the provision will amount to realization of equality of arms.

During trial an accused can be removed from the court room, for example for misbehaviour. If this measure is taken, the accused's counsel will retain the right to attend the hearing and to examine witnesses.

### 2.3.2 RIGHT TO EXAMINE WITNESSES<sup>114</sup>

The defence has the right to examine witnesses who made statements incriminating the accused. As witnesses do not have to testify during trial in order to make their pre-trial statements admissible as evidence, the defence will have to request that witnesses be called to testify in court. Requests for witnesses can be rejected, but only if a specific circumstance, mentioned in the CCPNL, occurs. The following circumstances are the most important:

- 1 It is not likely that the witness will appear in court within a reasonable period of time.
- 2 The health or well-being of the witness will be endangered by making a statement and the prevention of this danger prevails over the interest of the accused to interrogate the witness.
- 3 The accused cannot reasonably be harmed in his defence by rejecting the request.<sup>115</sup>

112. Article 226d § 1 CCPNL.

113. Article 187a CCPNL.

114. See more extensive on the right to examine witnesses: De Wilde 2015.

115. Articles 264 and 288 CCPNL.

As mentioned before, pre-trial witness statements can in general be used as evidence, without the witness being required to repeat his statement at trial. This has a consequence that the interrogation of witnesses by the defence usually is exercised during the pre-trial investigation too, before an investigating judge or – in rare cases – at a police station. The basic principle of Dutch criminal procedure is that the defence must have had an opportunity to test the reliability of a witness statement by interrogating the witness at any stage of the proceedings, either during trial or before.<sup>116</sup>

Subsequently, there must be an opportunity for the defence to contest the witness statement before the trial court. This can be done by including this issue in the pleadings before the court.<sup>117</sup>

The CCPNL does not contain general rules on the admissibility of pre-trial statements by witnesses who could not be questioned by the defence.<sup>118</sup> The applicable rules are provided by the Supreme Court.<sup>119</sup> They can be summarized as follows. Pre-trial testimony untested by the defence is admissible as evidence if the testimony is sufficiently corroborated in other evidence. The other evidence must corroborate those parts of the witness statement challenged by the defendant. If insufficient corroborating evidence is available, the testimony may only be used as evidence if sufficient counterbalancing measures are taken. Examples of counterbalancing measures are playing back a video recording of a witness interview and the assessment of the reliability of the witness statement by an expert.

## 2.4 POSITION OF THE WITNESS

Recently, the position of the victim has been laid down in the CCPNL. For example, victims have the right to legal assistance, the right to speak about the consequences of the offence during trial and the right to be informed about developments in the criminal procedure. Victims often are witnesses too. A witness who was the victim of a criminal offence, is often more vulnerable than an ‘ordinary’ witness. Therefore, measures may be taken to protect the witness. In exceptional circumstances, a measure may be that the request to question the witness is rejected in order to protect the well-being of the witness.

At present, the CCPNL does not provide rules on the position of persons acting as witnesses in criminal procedures without being victims. However, an act of parliament is prepared which will introduce a special section of the CCPNL in which both obligations (e.g. the obligation to appear and to answer questions) and rights (e.g. right to be exempted from answering questions and the right to have travel expenses reimbursed) will be laid down. By the way, most of these obligations and rights are already incorporated in the present rules on criminal procedure.

Witnesses testifying at trial, must take the oath. In special circumstances, they will be put under oath too if they are questioned before an investigating judge. Making a false statement under oath deliberately will amount to perjury.<sup>120</sup> The finding that a witness made a false statement may not be based solely of the fact that a witness changed or withdrew his previous statement. The sole fact that two statements by the same witness are incompatible does not justify the conclusion that the statement made under oath is correct. It could as

116. HR 29 January 2013, NJ 2013/145.

117. There are no formal requirements with respect to contesting witness statements.

118. Article 344a CCPNL only provides rules on the use of anonymous witness statements.

119. HR 29 January 2013, NJ 2013/145.

120. Article 207 CCNL.



well be the other way around. In this regard, it is relevant to take into account the fact that a statement made to the police, not being an independent and impartial instance, may be made due to pressure by the police. This risk is absent if a witness is heard before a judge.

Witnesses who are called to be questioned before an investigating judge or at trial, are compelled to appear.<sup>121</sup> They have an obligation to answer questions,<sup>122</sup> unless they are exempted from answering by the CCPNL<sup>123</sup> or a judge prohibits certain answers.<sup>124</sup> If a judge wishes to put a witness under oath – which is obligatory for the trial judge and optional for the investigating judge – the witness is obliged to take the oath.<sup>125</sup> Non-compliance with these obligations will amount to a criminal offence.<sup>126</sup> If a witness refuses to answer questions, a judge may decide to take the witness in custody if the conditions to take this measure are fulfilled.<sup>127</sup>

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121. Article 213 CCPNL

122. Article 221 CCPNL and HR 8 September 1998, NJ 1998/879.

123. Articles 217-219b and 290 § 5 CCPNL.

124. Articles 190 § 3 and 290 § 3 CCPNL.

125. Articles 215 and 290 lid 4 CCPNL.

126. Articles 192 and 444 CCNL.

127. Articles 221 and 294 CCPNL.

## 2.5 THE NETHERLANDS: COMPARATIVE QUESTIONNAIRE

### 1 WHEN DOES THE WITNESS INTERROGATION/INTERVIEW TAKE PLACE?

Usually, witnesses only testify during the pre-trial investigation. Most witnesses are initially questioned by the police. Sometimes they are subsequently interrogated before an investigating judge.<sup>128</sup> The appearance of a witness at trial is exceptional. The trial court may for example decide to have a witness called because it wishes to form an impression of the witness's reliability. The examination of a witness by the defence usually takes place before an investigating judge.

### 2 WHAT IS THE PROBATIVE VALUE OF WITNESS INTERROGATION/INTERVIEW PROTOCOLS?

Witness interrogation/interview protocols are hardly used and do not have any probative value. Only the answers to the questions included in the protocol have probative value.

### 3 WHO CONDUCTS WITNESS INTERROGATION? CAN THE WITNESS BE INTERROGATED ONLY BEFORE THE JUDGE? CAN THE WITNESS BE INTERROGATED IN CAMERA BY THE PROSECUTOR, INVESTIGATOR? WHAT IS THE PROCEDURE FOR WITNESS INTERROGATION? WHAT IS THE PROCEDURE FOR SUBPOENA-ING THE WITNESS TO THE PROSECUTOR AND TO THE COURT?

Witnesses can be questioned by the police, by an investigating judge and by a trial judge. As a rule, the public prosecutor and the defence are not invited to attend the police examination. They may be invited if it is expected that it will be impossible to question the witness afterwards, for example because he is a foreign resident. However, this hardly ever occurs. The prosecutor and the accused's counsel do have the right to attend the hearing before an investigating judge. Although the CCPNL does not explicitly authorize the public prosecutor to question a witness in the absence of an investigating judge, this does not seem to be prohibited either. In practice witnesses are not questioned by the public prosecutor alone. In § 2.2 the procedures concerning the interrogation of witnesses are described. Witnesses are called to testify and are compelled to appear.

### 4 IF THE PROSECUTOR/INVESTIGATOR CAN INTERROGATE THE WITNESS, CAN THE WITNESS CHANGE THE CONTENT OF HIS TESTIMONY AFTERWARDS DURING THE COURT HEARING? IF YES, WHAT ARE THE CONSEQUENCES (E.G. CONTEMPT OF COURT, CRIMINAL OFFENSE)?

At trial, a witness must speak the truth. If he made a false statement during pre-trial questioning, he can change or withdraw his statement without making himself criminally liable, because during pre-trial questioning he does not testify under oath.

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<sup>128</sup>. Elaborated in § 2.2.2.

5 IF THE PROSECUTOR/INVESTIGATOR CAN INTERROGATE THE WITNESS, HOW IS “EQUALITY OF ARMS” ACHIEVED? CAN THE DEFENCE ALSO INTERROGATE THE WITNESS IN CAMERA? OR CAN THEY BE PRESENT DURING THE PROSECUTOR’S/INVESTIGATOR’S INTERROGATION? WHAT IS THE JUSTIFICATION FOR INTERFERING WITH THE PRINCIPLE OF “EQUALITY OF ARMS”? DOES THE DEFENCE RECEIVE ANY COMPENSATION FOR THIS INTERFERENCE?

The public prosecutor and the defence are usually not present at a police interrogation of a witness. It can be asserted that at this stage of the proceedings equality of arms is not respected, as the police operate under the authority of the public prosecutor. This is however not considered a problem, since the defence has the right to question the witness at a later stage of the proceedings, which offers counterbalance. If the trial as a whole is taken into consideration, the right to equality of arms is not violated. Witness interrogation before the investigating judge may usually be attended by both the public prosecutor and the defence. If the defence is excluded from being present, the public prosecutor will not be allowed to attend the hearing either.

6 IF THE PROSECUTOR/INVESTIGATOR CAN INTERROGATE THE WITNESS IN CAMERA, ARE THERE SAFEGUARDS FOR THE WITNESS WHICH ENSURE THAT THE TESTIMONY IS VOLUNTARY AND FREE FROM ANY FORM OF COERCION? IF THE WITNESS REFUSES TO APPEAR BEFORE THE PROSECUTOR, WHAT ARE THE MEASURES WHICH CAN BE USED AGAINST HIM OR HER?

If a witness is invited to be questioned by an investigator, usually a police officer, he is not compelled to appear or to make a statement. He does not take the oath and can therefore not commit perjury.

7 IF THE PROSECUTOR/INVESTIGATOR CANNOT INTERROGATE THE WITNESS (AND ARE ONLY ABLE TO INTERVIEW THE WITNESS) HOW CAN THEY TAKE THE CASE TO COURT (THIS INCLUDES ALL THE STAGES OF JUDICIAL REVIEW OF INVESTIGATION AND ALSO MAIN COURT HEARING)? HOW CAN THE PROSECUTOR BE SURE THE WITNESS WILL NOT CHANGE THE CONTENT OF THE WITNESS INTERVIEW?

The distinction between ‘interrogation’ and ‘interview’ is not made in Dutch criminal law. The statement made by the witness under interrogation is included in an official police report. This testimony can be used as evidence, provided that it is read out at the hearing. The reading out of statements is not dependent on special circumstances. The witness does not have an opportunity to change a statement once he made the statement that was laid down in a report by an investigator. It is possible, however, that s/he makes a different statement at a later stage. The judge will then have to decide what statement is the most reliable.

8 CAN THE WITNESS BE INTERROGATED DURING THE PRE-TRIAL STAGE OF CRIMINAL PROCEEDINGS? IF YES, WHAT ARE THE GROUNDS FOR INTERROGATION? WHAT ARE THE PROCEDURES? CAN THE WITNESS BE INTERROGATED DURING THE PRE-TRIAL STAGE BEFORE THE JUDGE WITHOUT THE PRESENCE OF THE OTHER PARTY?

As a rule, the witness is heard only during the pre-trial investigation. This does not require a specific justification. If a witness is heard before an investigating judge, the accused's counsel may be excluded from being present. In such a situation, the public prosecutor will not be allowed to be present either.

#### 9 WHEN THE COUNTRY HAS THE JURY TRIAL SYSTEM, IS IT POSSIBLE FOR THE WITNESS TO BE INTERROGATED IN CAMERA BY THE PROSECUTOR/INVESTIGATOR? WHAT IS THE PROCEDURE REGARDING WITNESS INTERROGATION IN JURY TRIAL?

Dutch criminal law does not recognize any element of lay participation in the judicial capacity.

### 3. PROSECUTION WITNESSES UNDER ARTICLE 6 ECHR

#### 3.1 USE OF WITNESS STATEMENTS AS EVIDENCE

##### 3.1.1 THE ECtHR'S TASK

In general, contracting states may determine which national rules must be applied regarding criminal procedure, including rules of evidence. National judges have the authority to decide on the guilt of the accused.<sup>129</sup> The task of the ECtHR is not to assess all aspects of the decision making process, as if it were an additional court of appeal, but to determine whether a specified human right has been violated.<sup>130</sup> The ECtHR has only a subsidiary role in assessing the decisions of the national courts.<sup>131</sup>

As a rule, the national court is not limited in fact-finding,<sup>132</sup> as the ECHR does not contain provisions regarding evidence.<sup>133</sup> If a national court has made mistakes in fact-finding or made legal errors, it is not the task of the ECtHR to correct these mistakes.<sup>134</sup> Even in cases where evidence was obtained in breach of the ECHR, it is – again as a rule – up to the national judge to determine whether it is admissible as evidence.<sup>135</sup>

With respect to witness testimony, the ECtHR's approach to its task is the following. It is the authority of the national court to determine whether a witness statement was collected lawfully, whether it is admissible as evidence and what the evidentiary value of the statement is.<sup>136</sup> The national court will have to assess the credibility of the witness and the reliability of his testimony.<sup>137</sup> If a witness has withdrawn an initial statement, it is the national court's task to determine whether it can nevertheless be used as evidence.<sup>138</sup> If different statements made by the same persons contradict each other, the national court will have to decide what statement is admissible as evidence.<sup>139</sup>

In general, the court does not always have to rely on statements made on oath in preference to other statements<sup>140</sup> and statements made at trial do not always have to prevail over other pre-trial statements.<sup>141</sup> If a witness refuses to answer questions, the national court may decide to use the witness's earlier statement as evidence.<sup>142</sup> Finally, it falls within the national court's margin of appreciation to decide whether a conviction can be based to a decisive degree on statements made by co-accused.<sup>143</sup>

The national court's autonomy is not unlimited, however. Judicial decision may not

129. ECtHR 13 October 2005, appl.No. 36822/02 (Bracci/Italy), § 51.

130. ECtHR 11 December 2008, appl.No. 6293/04 (Mirilashvili/Russia), § 161.

131. ECtHR 16 July 2009, appl.No. 18002/02 (Gorgievski/Macedonia), § 53: 'The Court reiterates that its role in this matter is essentially subsidiary to that of the domestic authorities which are better placed than the Court to assess the credibility of evidence with a view to establishing the facts.'

132. ECtHR 25 November 2005, appl.No. 72370/01 (dec.) (Van Thuij/Netherlands).

133. ECtHR 11 December 2008, appl.No. 6293/04 (Mirilashvili/Russia), § 161.

134. ECtHR 12 July 1988, appl.No. 10862/84 (Schenk/Switzerland), § 45.

135. ECtHR 12 May 2000, appl.No. 35394/97 (Khan/United Kingdom), § 34.

136. ECtHR 20 November 1989, appl.No. 11454/85 (Kostovski/Netherlands), § 39; ECtHR 26 April 1991, appl.No. 12398/86 (Asch/Austria), § 26; ECtHR 11 October 2001, appl.No. 31871/96 (Sommerfeld/Germany), § 62.

137. ECtHR 6 November 2012, appl.No. 41867/04 (Borodin/Russia), § 158; EHRM 11 December 2008, appl.No. 6293/04 (Mirilashvili/Russia), § 161.

138. ECtHR 26 March 1996, appl.No. 20524/92 (Doorson/Netherlands), § 77-78.

139. ECtHR 8 December 2009, appl.No. 44023/02 (Caka/Albania), § 105.

140. ECtHR 26 March 1996, appl.No. 20524/92 (Doorson/Netherlands), § 78. In ECtHR 27 January 2011, appl.No. 24460/04 (Shanin/Russia), § 57 the ECtHR added: 'The above does not exclude that the credibility and weight of an ordinary deposition, which is not punishable for perjury, may be called into question in the circumstances of a given case.'

141. ECtHR 8 April 2003, appl.No. 39470/98 (dec.) (Lindgren/Sweden), p. 8.

142. ECtHR 26 April 1991, appl.No. 12398/86 (Asch/Austria), § 28; ECtHR 25 November 1999, appl.No. 30509/96 (dec.) (Vilhunen/Finland).

143. ECtHR 7 June 2005, appl.No. 27549/02 (dec.) (Jerino/Italy), p. 12.

violate a human right. If the ECtHR's finds that a human right enshrined in the ECHR has not been respected, this may mean that the national court should have excluded a witness statement. An example is the violation of Article 3 ECHR. The sole fact that a witness was forced to make a statement, does not prohibit the national court from using the statement as evidence. However, a statement that was made under torture is under no condition admissible as evidence.<sup>144</sup> Another example concerns the exercise of the right to examine witnesses (Art. 6 lid 3 sub d ECHR). The national court may decide to use the statement by a witness who has not been subjected to an examination by the defence, as evidence. However, if the failure to provide an opportunity to question the witness lacks a good reason or if the witness statement is of decisive importance, the ECtHR may find a violation of the right to examine witnesses.<sup>145</sup>

### 3.1.2 ADMISSIBILITY OF HEARSAY EVIDENCE

In many cases judged by the ECtHR, the national court used a witness statement made during the pre-trial investigation as evidence, while the statement was not repeated during trial. The statement, laid down in an official report, was read out during trial. This is regarded as hearsay evidence.

The ECtHR embraces the principle of immediacy. In the recent case of *Cutean v. Romania* it considered: 'The Court reiterates that an important aspect of fair criminal proceedings is the ability for the accused to be confronted with the witnesses in the presence of the judge who ultimately decides the case. The principle of immediacy is an important guarantee in criminal proceedings in which the observations made by the court about the demeanor and credibility of a witness may have important consequences for the accused'.<sup>146</sup> In earlier cases it already held: 'In principle, all the evidence must be produced in the presence of the accused at a public hearing with a view to adversarial argument'.<sup>147</sup>

Specifically with respect to hearsay evidence in its decision in the *Thomas v. the United Kingdom* case the ECtHR stated: 'Article 6 §§ 1 and 3 (d) of the Convention contains a presumption against the use of hearsay evidence against a defendant in criminal proceedings.'<sup>148</sup> In this decision the ECtHR referred to the EComHR decision in the *Blastland v. the United Kingdom* case to explain for what reason judges should be reluctant to admit hearsay evidence in jury trials: 'The purpose of the rule [the prohibition of hearsay evidence/BW] in the jury trial system is partly to ensure that the best evidence is before the jury, who can evaluate the credibility and demeanour of the witness, and partly to avoid undue weight being given to evidence which cannot be tested by cross-examination.'<sup>149</sup>

The ECtHR's prefers witness statements made during trial for several reasons. First, the judges who take the decision on the defendant's guilt, will be able to form an impression of the credibility of the witness by observing the demeanour of the witness under questioning.<sup>150</sup> Second, the defence will be at a disadvantage since they may not be able to observe the

144. ECtHR 1 June 2010, appl.No. 22978/05 (*Gäfgen/Germany*), § 166.

145. ECtHR (GC) 15 December 2011, appl.nos. 26766/05 & 22228/06 (*Al-Khawaja & Tahery/United Kingdom*), § 119.

146. ECtHR 2 December 2014, appl.no. 53150/12 (*Cutean/Romania*), § 60.

147. ECtHR 20 November 1989, appl.No. 11454/85 (*Kostovski/Netherlands*), § 41; EHRM 6 November 2012, appl.No. 41867/04 (*Borodin/Russia*), § 159.

148. ECtHR 10 May 2005, appl.No. 19354/02 (dec.) (*Thomas/United Kingdom*), p. 13.

149. EComHR 7 Mar 1987, appl.No. 12045/86 (*Blastland/United Kingdom*).

150. ECtHR 20 November 1989, appl.No. 11454/85 (*Kostovski/Netherlands*), § 43: 'each of the trial courts was precluded by the absence of the said anonymous persons from observing their demeanour under questioning and thus forming its own impression of their reliability.'

witness's demeanour if the statement was made out of court, without the defence being present.<sup>151</sup> Third, witnesses often make such statements during police interrogations. The ECtHR considers police questioning primarily as an opportunity for the Public Prosecution Service to gather information in preparation of the trial. The public prosecutor, who can present incriminating evidence at trial, is not impartial. The judges are.<sup>152</sup>

Despite its reluctant position, the ECtHR has not excluded the use of hearsay evidence. Since in most contracting states hearsay evidence can under certain conditions be admissible as evidence, an absolute prohibition of hearsay evidence was unlikely.<sup>153</sup> According to the ECtHR, under certain circumstances, it may be necessary to admit pre-trial statements as evidence.<sup>154</sup> For example, the ECtHR has repeatedly emphasized the problems which the investigating authorities may encounter, especially if witnesses do not dare to testify at trial because they fear reprisal.<sup>155</sup> This may provide a good reason to admit the pre-trial witness statement as evidence. In the general principles in the *Huseyn v. Azerbaijan* case the ECtHR stated:

‘The Court considers that the notion of a fair and adversarial trial presupposes that, in principle, a tribunal should attach more weight to a witness’s testimony given at the trial hearing than to a record of his or her pre-trial questioning produced by the prosecution, unless there are good reasons to find otherwise. Among other reasons, this is because pre-trial questioning is primarily a process by which the prosecution gather information in preparation for the trial in order to support their case in court, whereas the tribunal conducting the trial is called upon to determine a defendant’s guilt following a fair assessment of all evidence actually produced at the trial, based on the direct examination of evidence in court.’<sup>156</sup>

On first thoughts, the ECtHR seems to introduce a high standard: only if good reason exists, a pre-trial witness statement can be used as evidence. A good reason is, however, accepted without real impediment. As a rule, a witness will not have to be questioned during trial if the defence has not challenged the credibility of the witness or the reliability of his statement. Furthermore, the efficiency of the criminal process may involve that a witness will not be required to testify at trial.<sup>157</sup>

151. ECtHR 6 September 2005, appl.no. 66976/01 (dec.) (Hedström Axelsson/Sweden), p. 17; ECtHR 12 July 2007, appl.no. 503/05 (Kovač/Croatia), § 30.

152. ECtHR 26 July 2011, appl.nos. 35485/05 et cetera (Huseyn and others/Azerbaijan), § 211; ECtHR 25 April 2013, appl.no. 51198/08 (Erkapić/Croatia), § 75.

153. ECtHR 6 September 2005, appl.no. 66976/01 (dec.) (Hedström Axelsson/Sweden), p. 17.

154. ECtHR 8 February 2007, appl.no. 25701/03 (Kollcaku/Italy), § 68.

155. ECtHR 27 February 2001, appl.no. 33354/96 (Lucà/Italy), § 40; ECtHR 25 November 2008, appl.no. 8783/04 (dec.) (Plyatsevyy/Ukraine), p. 8; ECtHR 8 April 2003, appl.no. 39470/98 (dec.) (Lindgren/Sweden), p. 7.

156. ECtHR 26 July 2011, appl.nos. 35485/05 et cetera (Huseyn and others/Azerbaijan), § 211.

157. ECtHR (GC) 23 November 2006, appl.no. 73053/01 (Jussila/Finland), § 41-42 and 47-48.

### 3.3 POSITION OF THE DEFENCE

#### 3.3.1 RIGHT TO EQUALITY OF ARMS<sup>158</sup>

Although the right to equality of arms is not mentioned expressly in Article 6 ECHR, it is a fundamental aspect of the right to a fair trial.<sup>159</sup> The ECtHR has often explained the meaning of equality of arms as follows: ‘under the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent’.<sup>160</sup> Since in criminal cases the opponent is the public prosecutor, it must be determined whether the defence was in a disadvantageous position compared to the public prosecutor. The position of the defence does not have to be exactly equal to that of the public prosecutor.<sup>161</sup> To a certain extent inequality is permissible. For example, the fact that in most contracting states witnesses that made incriminating statements are called by the public prosecutor, while the defence does not have the opportunity to call them, does not in itself amount to a violation of equality of arms.

The public prosecutor has a stronger starting position than the accused. S/he has the opportunity to have evidence collected, to charge the accused and to present incriminating evidence. The right to equality of arms implies that the weaker position of the defence will have to be counterbalanced. He must for example have the opportunity to have himself assisted by counsel and to question the witnesses presented by the public prosecutor.

The sole fact that the public prosecutor was able to interrogate a witness without the defence present does not amount to a violation of the right to equality of arms. In some contracting states witnesses are interrogated by investigating officers, under the formal authority of the public prosecutor. Their statements are used as evidence. This is as such not considered a violation of equality of arms, because the ECtHR assesses whether the trial as a whole has been fair. The fact that the defence was not afforded an opportunity to examine a witness during the questioning by an investigating officer can be counterbalanced at a later stage of the proceedings. The defence can request for the witness to be called. If the witness appears, the defence will have an opportunity to test the witness’s credibility. If the defence has not requested that the witness be called and the witness was not called on the court’s or public prosecutor’s initiative, the inequality will not be counterbalanced. However, the ECtHR will not find this fact alone a violation, because the defence failed to exhaust all available opportunities to examine the witness. It is important to note that the defence will not have to make a request if the witness must attend the trial, according to the rules of the contracting state, in order to make statements admissible as evidence.

In two Macedonian cases the ECtHR assessed the situation in which a witness was interrogated by the trial judge and the public prosecutor in camera, where the defence was not allowed to be present. The witnesses were undercover agents whose identities were not disclosed in order to retain the opportunity to make use of them in future operations.

<sup>158</sup> See more elaborately Wasek-Wiaderek 2000.

<sup>159</sup> EHRM 27 January 2004, appl.No. 44484/98 (dec.) (Lorsé/Nederland), p. 12; EHRM 22 January 2002, appl.No. 42011/98 (Oyston/United Kingdom), p. 9.

<sup>160</sup> EHRM 22 February 1996, appl.No. 17358/90 (Bulut/Austria), § 47.

<sup>161</sup> EHRM 27 January 2004, appl.No. 44484/98 (dec.) (Lorsé/Netherlands), p. 12; EHRM 22 January 2002, appl.No. 42011/98 (dec.) (Oyston/United Kingdom), p. 9.



According to Macedonian criminal procedure, a witness could be interrogated in this way, provided that the defence was offered an opportunity to put questions in writing which had to be answered by the witness. In the *Papadakis v. Macedonia* case, the ECtHR did not agree with the application of this procedure, because the defence was offered only one hour time to study the witness statement and to put questions. This was not considered an adequate and proper opportunity to question the witness. In the cases of *Dončev & Burgov v. Macedonia* more time was seems to be offered to the defence case. The ECtHR blamed the defence for not having made use of the opportunity to put questions in writing. The right to examine witnesses had not been violated. Accordingly, the ECtHR seems to have had the view that equality of arms was sufficiently safeguarded by the Macedonian procedure, provided that the defence was offered a reasonable period of time for preparing questions.

A different issue regarding equality of arms with respect to the interrogation of witnesses is whether the defence was provided with sufficient information to enable it to effectively interrogate a witness. If the public prosecutor or an investigating officer had at his disposal information which was not shared with the defence, the right to equality of arms may be violated. In the case of *D. v. Finland* this was one of the considerations supporting the finding that the right to a fair trial had been violated.<sup>162</sup> It must be noted that the sole circumstance that some information was not disclosed does not justify the finding of a violation of the right to a fair trial.<sup>163</sup> In assessing this issue it is important to determine to what extent the non-disclosed material was crucial for questioning the witness, how important the witness statement was<sup>164</sup> and whether the defence was offered an adequate and proper opportunity to question the witness at a later stage of the proceedings.

### 3.3.2 RIGHT TO EXAMINE WITNESSES<sup>165</sup>

Article 6 § 3(d) ECHR affords the defendant the right to examine witnesses. This is not an absolute right. Only in specific circumstances will this right be considered violated if no adequate and proper opportunity to examine a witness was offered. The ECtHR has introduced a decision-making model in the cases of *Al-Khawaja & Tahery v. the United Kingdom*.<sup>166</sup> First, it will assess whether good reason exists for the lack of an adequate and proper opportunity to question the witness. The absence of a good reason in itself justifies the finding of a violation of the right to examine witnesses. If good reason exists, the ECtHR will examine whether the statement by the adequately and properly examined witness must be regarded as decisive evidence. As a rule, no violation will be found if the witness statement has a non-decisive nature.<sup>167</sup> If the statement is considered to be decisive, usually the right to examine witnesses is considered violated. However, this need not be an obstacle if the lack of defence questioning is sufficiently counterbalanced.<sup>168</sup>

<sup>162</sup> EHRM 7 July 2009, appl.no. 30542/04 (*D/Finland*), § 49 and 52. See more general about the effect of withholding evidence from the defence on the fairness of the procedure ECtHR (GC) 16 February 2000, appl.no. 28901/95 (*Rowe & Davis/United Kingdom*), EHRM 19 June 2001, appl.no. 36533/97 (*Atlan/United Kingdom*) and EHRM 24 June 2003, appl. no. 39482/98 (*Dowsett/United Kingdom*).

<sup>163</sup> In EHRM 3 April 2012, appl.no. 18475/05 (*Chmura/Poland*), § 53-57 the ECtHR judged that non-disclosed information did not make the interrogation of the witness ineffective.

<sup>164</sup> EHRM 12 December 2013, appl.no. 19165/08 (*Donohoe/Ireland*), § 78.

<sup>165</sup> See more elaborately about the right to examine witnesses De Wilde 2013, De Wilde 2015 and Maffei 2012.

<sup>166</sup> ECtHR (GC) 15 December 2011, appl.nos. 26766/05 & 22228/06 (*Al-Khawaja & Tahery/United Kingdom*), § 119.

<sup>167</sup> In ECtHR 17 April 2014, appl.no. 9154/10 (*Schatschaschwili/Germany*) the ECtHR has suggested that sufficient counterbalance must be offered too if the witness statement is not decisive. So far, the ECtHR has never based the finding of a violation of the right to examine witnesses on the impossibility to question a non-decisive witness.

<sup>168</sup> Sufficient counterbalance is accepted if the reliability of the witness statement could be tested in a way different from questioning the witness. Several factors can have

This assessment is preceded by the question whether an adequate and proper opportunity was offered to question the witness. A relevant question is whether this should always be an opportunity during trial. In the *Kostovski v. the Netherlands* case the ECtHR held that an opportunity should be offered when the witness makes his statement or at a later stage of the proceedings.<sup>169</sup> Similar general considerations can be found in many ECtHR judgments, including more recent judgments.<sup>170</sup> At first sight, it therefore seems to be justified to state that a pre-trial questioning can provide sufficient opportunity to test the witness's reliability. There are, however, considerations that point in a different direction. In its judgment in the case of *Melnikov v. Russia* the ECtHR formulated as a general principle: 'it is preferable for such examination to take place in the course of adversarial proceedings before an independent and impartial tribunal'.<sup>171</sup> In the *Matytsina v. Russia* judgment the ECtHR went even further and held: 'Even where the defence was able to cross-examine a witness or an expert at the stage of the police investigation, it cannot replace cross-examination of that witness or expert at the trial before the judges.'<sup>172</sup> This consideration is formulated as a rule without an exception. In the same judgment the ECtHR approved the reading out of a pre-trial statement during trial during an oral examination of the witness at trial.<sup>173</sup>

It can be deduced from some judgments that the Matytsina-rule, formulated as recent as 2014, is in fact applied in the assessment of specific cases, but not every case.<sup>174</sup> If a witness could have been examined during the pre-trial investigation, this circumstance is sometimes regarded as a counterbalancing factor. Apparently, in these cases the pre-trial opportunity to question the witness was not considered an adequate and proper opportunity.<sup>175</sup> Other cases however point in a different direction. In these cases pre-trial questioning seems to have been considered an adequate and proper opportunity.<sup>176</sup> The ECtHR has not explained why it took different approaches in different cases.

### 3.3 POSITION OF THE WITNESS

In Article 6 § 3, the rights of the defence are enshrined. In judging whether these rights are respected sufficiently, the ECtHR assesses the overall fairness of the procedure. In doing so, the ECtHR weighs in the balance 'the competing interests of the defence, the victim, and witnesses, and the public interest in the effective administration of justice.'<sup>177</sup> This implies 'that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify.'<sup>178</sup>

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a counterbalancing effect, for example playing back a video recording of a pre-trial witness interrogation and the opportunity to question other witnesses, to whom the key witness had told what he has observed.

169. EHRM 20 November 1989, appl.no. 11454/85 (*Kostovski/Netherlands*), § 41.

170. EHRM 27 February 2014, appl.no. 5699/11 (*Lučić/Croatia*), § 84; EHRM 24 April 2012, appl.no. 1413/05 (*Sibgatullin/Russia*), § 50; EHRM 11 December 2012, appl.no. 3653/05 et cetera (*Asadbeyli and others/Azerbaijan*), § 34.

171. EHRM 14 January 2010, appl.no. 23610/03 (*Melnikov/Russia*), § 74.

172. EHRM 27 March 2014, appl.no. 58428/10 (*Matytsina/Russia*), § 153.

173. EHRM 27 March 2014, appl.no. 58428/10 (*Matytsina/Russia*), § 157.

174. The complex line of reasoning by the ECtHR will not be elaborated here.

175. EHRM 10 May 2012, appl.no. 28328/03 (*Aigner/Austria*), § 39; EHRM 19 December 2013, appl.no. 26540/08 (*Rosin/Estonia*), § 55.

176. EHRM 12 June 2014, appl.No. 30265/09 (*Dončev & Burgov/Macedonia*); EHRM 2 April 2013, appl.No. 25307/10 (dec.) (*D.T./Netherlands*); EHRM 3 April 2012, appl.No. 18475/05 (*Chmura/Poland*).

177. ECtHR (GC) 15 December 2011, appl.nos. 26766/05 & 22228/06 (*Al-Khawaja & Tahery/United Kingdom*), § 119.

178. EHRM 26 March 1996, appl.No. 20524/92 (*Doorson/Netherlands*), § 70.

Courts may reject requests to have witnesses called, based on this approach. The well-being of a witness may provide a good reason for the absence of an opportunity to question a witness. At same time, the protective measures ‘must be reconciled with an adequate and effective exercise of the rights of the defence’.<sup>179</sup> Similar considerations can be found in the European Union Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA).<sup>180</sup>

It is the task of the contracting states to determine by what acts or omissions a witness becomes criminally liable. For example, the contracting states set the rules regarding exemption from testifying. If a witness refuses to answer without valid reason, the application of a means of coercion can be permissible. This depends on the circumstances of the case. In the case of *Van der Heijden v. the Netherlands* the ECtHR decided that holding a witness in custody for a period of 13 days, with the purpose of making her testify, was not a disproportionate infringement of her right to privacy. The ECtHR took into account that the procedure was accompanied by sufficient safeguards, including:

- a relatively short duration of validity of the detention order (24 hours) during which time the investigating judge is obliged to notify the Regional Court of the making of the detention order;
- a further short period of time (48 hours) within which the Regional Court must decide to release the witness or extend the detention order;
- the opportunity to apply to the Regional Court to order his release and the right to appeal against the refusal to grant such an application.<sup>181</sup>

If the witness is employed as a journalist, taking him in custody may violate his/her freedom of expression. In assessing this, the first relevant aspect is whether good reason exists for taking the witness in custody. If this is accepted, the duration of the custody is an important factor. The ECtHR decided that the custody of a journalist for a period of 30 days was disproportionate.<sup>182</sup>

If a witness is forced to make a statement in a way that amounts to torture (Article 3 ECHR), the admission of the statement as evidence will lead to the finding that the right to a fair trial has been violated.<sup>183</sup> It is conceivable that the ECtHR would come to the same conclusion if a witness was compelled to testify without being tortured. Such a decision would be consistent with the ECtHR’s approach of the right not to incriminate oneself. This right ‘presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused’.<sup>184</sup> The use of force to obtain a witness statement can infringe the fairness of the procedure as well.<sup>185</sup>

179. EHRM 2 July 2002, appl.no. 34209/96 (S.N./Sweden), § 47; Hoyano 2001; Keane 2012.

180. See *Associação Portuguesa de Apoio à Vítima 2009* about the implementation of this Framework Decision

181. EHRM (GC) 3 April 2012, appl.no. 42857/05 (*Van der Heijden/Netherlands*), § 77.

182. EHRM 22 November 2007, appl.No. 64752/01 (*Voskuil/Netherlands*).

183. ECtHR 27 June 2007, appl.no. 36549/03 (*Harutyunyan/Armenia*).

184. ECtHR 11 July 2006, appl.No. 54810/00 (*Jalloh/Germany*), § 100.

185. In ECtHR 18 December 2008, appl.no. 30663/04 (*Lutsenko/Ukraine*), § 59-62 the ECtHR assessed the situation in which a witness made a statement under pressure against the background of case-law concerning the right not to incriminate oneself.

## 4. THE GEORGIAN CODE OF CRIMINAL PROCEDURE COMPARED TO DUTCH CRIMINAL PROCEDURE AND ECTHR CASE-LAW

### 4.1 USE OF WITNESS STATEMENTS AS EVIDENCE

The fundamental idea of the CCPG 2009, is that witness testimony is admissible only if the witness made a statement during trial. According to Articles 243 and 118 § 3 CCPG 2009, the reading out of pre-trial statements is permitted only under specific circumstances. Pre-trial statements made during an interrogation by the investigator may be read out at during trial, without the necessity of a witness interrogation during trial, but only if one of the specific circumstances of Article 243 CCPG occurs.

The ECtHR leaves it to the contracting states to determine the applicable rules on evidence, although it prefers evidence to be produced during trial. In the Netherlands pre-trial statements are often used as evidence. No special circumstances are required to justify the reading out of pre-trial statements.

### 4.2 POSITION OF THE DEFENCE

#### 4.2.1 RIGHT TO EQUALITY OF ARMS

According to Georgian transitional procedure, the investigator has the authority to interrogate witnesses before trial, without the defence being present and without the opportunity for the defence to put questions in writing. The investigator has the right to summon a witness. If a witness is summoned, he is compelled to answer questions and will be held criminally liable if he refuses to answer and if he makes a false statement. The defence does not have at its disposal similar ways of compelling a witness to testify.<sup>186</sup>

It is clear that this type of interrogation interferes with equality of arms. The question is whether the right to equality of arms, an aspect of the right to a fair trial, is violated by the application of this procedure. The answer to this question depends on the question whether the defence will have an opportunity to question the witness at a later stage of the proceedings. In some states witnesses are interviewed by investigating officers during the pre-trial investigation, without the defence present. In states like the Netherlands, the statements made by the witness are, as a rule, admissible as evidence. This practice does in itself not violate Article 6 ECHR. The ECtHR assesses the criminal procedure as a whole. A violation of the right to equality of arms will, with respect to witness testimony, only be found if the defence was, at no stage of the proceedings, offered an opportunity to effectively question a witness, while the public prosecutor did have an opportunity to collect testimony from this witness. Moreover, the defence must have expressed a wish to question the witness or must at least have opposed to the use of the testimony as evidence.

The CCPG 2009 has introduced an interrogation before a magistrate judge, in which the both the defence and the public prosecutor are able to participate. This type of interrogation is limited to specific situations, as is the admissibility of the testimony collected during the interrogation.

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<sup>186</sup>. Bokhashvili 2012, p. 182.

Dutch law is to a certain extent similar to the 1998 criminal procedure of Georgia. Witnesses can be interviewed by investigating (police) officers. Their statements are admissible as evidence. This may, however, be different if the defence has requested an opportunity of questioning the witness. Then, the right to examine witnesses will have to be respected. Exercising the right to examine witnesses, either during the investigation or during trial, will lead to the realization of equality of arms. An important difference with Georgian procedure is that witnesses are not compelled to appear and make a statement. The procedure is completely voluntary.

#### 4.2.2 RIGHT TO EXAMINE WITNESSES

According to ECtHR case-law, the defence must have an opportunity to test the reliability of a witness statement, preferably during trial, but at least at some stage of the proceedings. If such an opportunity is not afforded, this must be justified with good reason. According to the CCPG 2009, witnesses must as a rule testify in court, with the opportunity of cross-examination by the defence. Article 243 CCPG 2009 prescribes that the reading out of pre-trial testimony is only allowed in specific situations. These situations will be accepted by the ECtHR as good reasons. Even if good reason exists, the conviction may not be based solely or to a decisive degree of the untested witness statement, unless sufficient counterbalance is provided. At present it appears to be allowed to convict solely or to a decisive degree on a pre-trial statement made by a witness during an interrogation by an investigator, to which the defence is not allowed to attend. According to the ECtHR's case-law, a report by an expert regarding the reliability of a witness statement, has a counterbalancing effect.<sup>187</sup> However, Article 51 § 3 CCPG 2009 does not allow the assessment of the reliability of a witness statement by an expert.

If interrogation before a magistrate judge would become possible, the defence would have the right to participate in the interrogation. In specific circumstances, a witness could be interrogated in the absence of the defence.<sup>188</sup> Article 118 § 3 CCPG 2009 determines that pre-trial testimony obtained during an interrogation before a magistrate judge may in certain circumstances not provide the sole basis for a conviction. This provision does not exclude that a conviction would be based to a decisive degree on the statement by a witness who could not be examined by the defence.

It can be concluded that both under the rules in force at present and under the rules of the CCPG 2009 that have not yet entered into force, the admissibility of pre-trial testimony as evidence may constitute a violation of Article 6 § 3 (d) ECHR.

Dutch criminal law has incorporated the ECtHR approach regarding the right to examine witnesses in the case-law of the Supreme Court. Although witnesses are normally not summoned to appear at trial, the opportunity to question them is considered important. The lack of such an opportunity can lead to the acquittal of a defendant.

187. EHRM 2 April 2013, appLno. 25307/10 (D.T./Netherlands).

188. Article 114 § 4 CCPG 2009.

## 4.3 POSITION OF THE WITNESS

### *Prohibition of withdrawing previous testimony*

A witness who made an incriminating statement is compelled to stick to his statement, because he will make himself criminally liable for ‘impediment of the administration of justice’ if he changes or withdraws his statement (Art. 371 CCG). This provision is problematic for several reasons. First, the finding of the truth is not promoted by criminalizing the adjustment of a witness statement. Under the CCPG 1998 a witness can be summoned, is compelled to appear, is put under oath and compelled to make a statement during the pre-trial interrogation.<sup>189</sup> Witnesses can have various reasons for making untruthful statements during pre-trial interrogation. For example, they may have reported a criminal offence falsely out a revenge, they may be put under pressure by the defendant or by people surrounding him and also the state officials carrying out an interrogation may more or less coerce a witness to make a statement. If a witness decides to tell the truth during trial, thereby discharging the defendant, he cannot do so without making himself criminally liable. Consequently, this provision could prevent the truth being found. This may have as a consequence that innocent defendants are convicted.

A second objection is that Article 371 CCG virtually compels a witness to commit perjury if he does not want to make himself criminally liable for changing his initial statement. An investigator can put pressure on a witness in order to make him testify.<sup>190</sup> If the witness cannot withstand this pressure and makes a false statement incriminating the accused, Article 371 CCG can prevent the witness from making a truthful statement when being interrogated during trial. In this way s/he is practically forced to commit perjury (Art. 371 CCG). This means that s/he will make himself criminally liable no matter what position s/he chooses. The witness will have to commit a criminal offence to avoid criminal liability for a different offence. Remaining silent will be no alternative, as this has been criminalized too.

A third objection concerns the compatibility of Article 371 CCG with Article 6 ECHR. It can be argued that the application of Article 371 CCG can infringe the right to a fair trial. In the case of *Harutyunyan v. Armenia* the ECtHR found that two witnesses were tortured to make certain statements. These statements were subsequently used as evidence against the accused. The ECtHR held that the right to a fair trial was violated. This finding was based on the fact that testimony provided by the witnesses (and the accused himself) under pressure was used as evidence.<sup>191</sup> If a witness has made an incriminating statement to the investigator, Georgian criminal law compels him to confirm his statement when interrogated during trial. Admittedly, the sole risk of being prosecuted cannot be equaled to torture. However, the essence is not different: a statement a witness was forced to make, was used as evidence. If a witness is prosecuted for changing his initial statement, the right not to incriminate oneself can be violated if the statement made during trial is used

189. This practice is not prohibited by the ECHR.

190. From ECtHR 27 May 2010, appl.no. 18768/05 (*Saghinadze and others/Georgia*) it appears that this risk is real in Georgia too. In this case police officers were convicted for compelling a witness to make a false statement. Although Article 119 CCPG 1998 prohibits the use of coercion during witness interrogations, it cannot be guaranteed that a witness is never coerced to testify.

191. ECtHR 27 June 2007, appl.no. 36549/03 (*Harutyunyan/Armenia*). See also ECtHR 8 April 2008, appl.no. 7170/02 (*Gradinar/Moldova*), in which the statements of several witnesses were according the Regional Court made under duress, while the appeal court did not explicitly assess the reliability of the statements. The ECtHR found a violation of Article 6 § 1 ECHR.

as evidence. As mentioned before, the witness did not make a statement of his own free will, because he makes himself criminally liable, no matter what he would state at trial. Therefore, a relevant question is whether pre-trial witness interrogation should not have a more voluntary character.

According to Dutch criminal law pre-trial witness interrogation is completely voluntary, except for specific situations of interrogation before an investigating judge, in which it can be expected that the witness will not appear during trial. The underlying principle is that witnesses must be able to withdraw or adjust their initial statements, if these were, originally, not made in accordance with the truth. This will improve the finding of truth, which is the primary aim of the criminal procedure.

#### *Indictment of persons initially interrogated as witnesses*

Under the CCPG 1998 investigators can summon persons to be interrogated as a witness and these persons are compelled to appear and to make a statement. According to Bokhashvili, it is common practice in Georgia to subsequently charge the same persons with a criminal offence and use the statements made as a witness during the interrogation as evidence.<sup>192</sup> It appears that investigators use their authority to force persons to make a statement as a witness to obtain statements from persons already suspected of having committed a criminal offence. The CCPG 2009 does not prohibit accused from being interrogated as a witness either. However, his pre-trial statements made as a witness are not admissible as evidence unless the accused consents to it.<sup>193</sup>

If a person was compelled to make a statement as a witness, the right not to incriminate oneself, enshrined in Article 6 ECHR, prohibits the use of this statement in a subsequent criminal procedure in which the witness is charged with a criminal offence.<sup>194</sup> Therefore, the practice under the CCPG 1998 to charge persons after they have provided witness testimony that incriminates themselves, is not in accordance with the right to a fair trial.

Dutch criminal law does not allow to use witness statements made under duress. Although suspects/accused can never be interrogated as a witness, it is possible that they are compelled to testify in administrative proceedings. This testimony is not admissible as evidence if they are subsequently charged with a criminal offence.

## 4.4 CONCLUDING REMARKS

The rules regarding pre-trial interrogation of witnesses and the use of their testimony as evidence have dramatically changed under the CCPG 2009. Under the CCPG 1998 an investigator can force a witness to make a statement without the presence of the defence. The statement made under interrogation can be used as evidence. The CCPG 2009 introduced the interrogation before a magistrate judge, as a rule in the presence of both parties. Witnesses can be interviewed by the public prosecutor, but this a voluntary procedure,

<sup>192</sup> Bokhashvili 2012, p. 178: 'After providing statements as witnesses, investigators frequently declare them to be indicted persons, and all material that the person provided as a witness is then used against them.'

<sup>193</sup> Article 247 CCPG 2009.

<sup>194</sup> ECtHR 17 December 1996, appl.no. 19187/91 (Saunders/United Kingdom), § 70-76.

while a witness statement obtained during an interview is not admissible as evidence. The rules regarding the interrogation of witnesses before a magistrate judge are not yet in force.

From the position of the defence, the rules of the new CCPG must be appreciated positively. The public prosecutor would no longer have the right to interrogate witnesses in camera without the defence being present. The interrogation before a magistrate judge would have an adversarial nature. At present, under the transitional proceedings, statements made during a pre-trial interrogation by a public prosecutor are admissible as evidence, provided that one of the special grounds for admitting pre-trial evidence, mentioned in Article 243 CCPG 2009, occurs. It is, therefore, possible to convict an accused based on testimony of a witness who could not be questioned by the defence. This may constitute a violation of Article 6 § 3(d) if the witness statement is of decisive importance.

The proceedings concerning pre-trial interrogation before a magistrate judge have not yet entered into force. The reason is that the Georgian prosecution service expects the new rules to have a negative impact on the opportunities of bringing a case to court. The question is whether this expectation is realistic. It is important to distinguish between two issues. The first issue is under what conditions pre-trial statements provide admissible evidence. There seems to be no discussion about this issue, as Article 243 CCPG 2009 has entered into force. This Article provides that pre-trial witness statements are admissible in exceptional circumstances only. As a general rule, witnesses must testify in court. The CCPG 1998 did not contain a similar provision. Witness statements made during an interrogation by the public prosecutor were admissible as evidence. The second issue is whether the procedure of interrogations before a magistrate judge in itself would result in less opportunities to effectively bring cases to court. The fear of the Georgian prosecution service is probably justified. If the prosecutor conducts a witness interview, the statement a witness makes, is not admissible as evidence. He could request for an interview before a magistrate judge, but this will be only allowed in special circumstances. If these circumstances do not occur, the prosecutor is dependent on the willingness of the witness to repeat the statement made during the interview in court. It is possible that s/he will not repeat it, if s/he is currently deceased, cannot be located or refuses to repeat the statement.

The rules of the CCPG 2009 share some aspects of the Dutch rules of procedure. In both legal systems witnesses can be pre-trial interviewed by investigators and before a judge. Interviews are voluntary. Interrogations before a judge are non-voluntary according to the CCPG and can be non-voluntary according to the CCPNL.<sup>195</sup> There are important differences. The first difference is that statements made by a witness during an interview by an investigator are admissible as evidence according to Dutch law, while they are not admissible according to Georgian law. The second difference is that, according to Dutch law, witnesses can be interrogated before an investigating judge without special circumstances being required. According to Georgian law a witness can only be interrogated before a magistrate judge if this is justified by special circumstances. These differences could be explained by a different view on criminal procedure. In many states, like the United Kingdom,

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195. Witnesses can be put under oath, for example if it is expected that they will not appear at trial, and can be forced to appear at the hearing. In most cases they are not put under oath and appear voluntarily.



pre-trial witness statements are only admissible as evidence under special circumstances. Witness statements must be made during trial, in order to enable the court/jury to form an own impression of the reliability of the witness and his statements and in order to enable the defence to exercise their rights in adversarial proceedings.<sup>196</sup> The Netherlands does this differently. The fact that pre-trial statements made during a police interrogation of a witness can be used as evidence in the Netherlands, probably also shows a certain trust in the way the police interrogates witnesses.

There are two main differences between the CCPG 1998 and the CCPG 2009 rules on pre-trial questioning of witnesses by an investigator. First, the 2009-procedure of interviewing witnesses is voluntary, while the witness is compelled to testify if he is interrogated. Second, the results of an interview by an investigator are not admissible as evidence, while the results of an interrogation may be admissible. The fear of the Georgian prosecution service could be reduced by accepting statements made during an interview as testimony that is admissible as evidence, provided that the requirements of Article 243 are fulfilled. The question is why compelled attendance and taking the oath should be required in order to consider a statement as testimony that can be used as evidence. Witness statements made under oath will not in every case be more reliable than statements made otherwise. If a witness would refuse to appear or to make a statement, the prosecutor could request for an interrogation before a magistrate judge. It could be considered to make this possible in more situations than the CCPG 2009 mentions. A reason for this would be that the unavailability of a witness during trial often will only become known after the trial has commenced. For example, it is possible that a witness could be located during the pre-trial investigation but left the country for an unknown destination afterwards, while his disappearance could not be predicted.

If pre-trial statements would become accepted in more situations, it is important that sufficient safeguards are in place. It must for example be possible for the defence to examine important witnesses at some stage of the proceedings. The reliability of witness statements could be safeguarded by making audio-visual recordings of interviews by an investigator and by allowing a defence counsel during the interview.

In sum, a solution for the problems feared by the prosecution service, could be found in a limited adjustment of the rules on evidence. If the results of a witness interview would be accepted as evidence, provided that the requirements of Article 243 CCPG 2009 are fulfilled, the opportunities for an effective prosecution would increase, while the right of the defence would still be respected.

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196. Summers 2007, p. 141-155.

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