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Special Investigative Techniques as Sources of Admissible Evidence in Somalia (*Lex Lata and Lex Ferenda*)

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Abstract

This paper explores special investigative techniques as sources of admissible evidence, especially in complex criminal proceedings. Nowadays, such techniques produce admissible evidence in many countries under their national laws. Their laws provide for the conversion of information acquired by special investigative techniques into documentary evidence admissible in court. Thus, contemporary law introduced a new investigative means of obtaining admissible evidence and laid the foundations of its subsequent transfer across the border with preserved admissibility in the receiving country. Now in Somalia, only Articles 11–13 of the Puntland Anti-piracy Law regulate the deployment of special investigative techniques as sources of admissible evidence. However, the entire country needs such a legal framework, especially for the collection of admissible evidence of organized crime (including piracy) acts, terrorism, corruption and other major crime.

This paper aims at assisting the legislative efforts of Somali authorities in the creation of an efficient legal framework for special investigative techniques, which also guarantees the rights of the persons involved.

Keywords: Somali law, admissible evidence, criminal proceedings.

I. Introduction

In organized crime, corruption and terrorism cases, usually, no one is a candidate to testify as a witness; accused persons do not confess either. The lack of necessary evidence is most understandable in cases of corruption[1]. In practice, bribery is never committed in the presence of third persons who may testify someday. Organized crime and terrorism cases are not different. The lack of evidence in such cases results from the so-called conspiracy of silence. It does not refer only to the members of organised crime and terrorist groups and organizations themselves, who remain silent after the arrest. Silence is also typical of the potential witnesses of their crimes. Such persons are seriously afraid of retaliation if they testified against the members of such groups or/and organizations.

Therefore, oral evidence is rarely available in corruption, organized crime and terrorism cases. As a result, it is often too difficult to prove such criminal offences through the use of conventional investigative techniques. This makes it necessary to look for alternative sources of evidence, admissible in court. Such an alternative is the special investigative techniques. To encourage their use, Article 50 (1) of the UN Convention against Corruption, for example, expressly stipulates that

> "*In order to combat corruption effectively, each State Party shall, to the extent permitted by the basic principles of its domestic legal system and in accordance with the conditions prescribed by its domestic law, take such measures as may be necessary, within its means, to allow for the appropriate use by its competent authorities of controlled delivery and, where it deems appropriate, other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, within its territory, and to allow for the admissibility in court of evidence derived therefrom.*"

What qualifies these investigative techniques as special is the fact that their use is often costly and complicated, requiring specialized expertise and often advanced technological knowledge and instruments. Such expertise, knowledge and instruments are required, mostly because of the overt or secret nature of the special investigative techniques. Authorities always attempt to conceal what is being done to avoid alerting the targeted person, in particular. The tailing of persons, their telephone tapping and filming are by nature secret. The secrecy may vary: the accused may be informed *post facto* of the results of telephone tapping, tailing and filming while the identity of an infiltrated/undercover agent (the "walking special investigative technique") will usually be kept secret up to and including the trial phase of criminal proceedings.

The aim of the secrecy is not to alter the behaviour of the presumed offender but to deprive him/her of information. Secrecy is not deception because it does not involve falsifying/distorting information. However, accompanying deception is not ruled out altogether. It might be necessary, sometimes, e.g. in case of secret searches (subjecting a vehicle to a compulsory road security check in order to search it surreptitiously).

II. **The Special Investigative Techniques as Sources of Admissible Evidence**

1. In content, the special investigative techniques are the well-known police methods of obtaining information secretly. Such methods are: tapping for overhearing phone conversations, bugging for overhearing conversations in open spaces or premises, filming, photographing and suchlike activities. However, these methods alone are not any source of evidence yet. They may become sources of evidence, admissible in court, only if three conditions are met simultaneously. Which are these three conditions under which secret police methods of obtaining information become sources of evidence, admissible in court?

First of all, the secret methods of obtaining information must be expressly recognized by national law as sources of evidence. It is this law that upgrades these traditional reconnaissance methods to methods of obtaining evidence admissible in court. This upgrading result is produced when the Criminal Procedure Code [CPC] or some special criminal law, such as the Puntland Anti-Piracy Law, determines these methods as an independent investigative action. When these methods become investigative action recognized by law, they are designated as special investigative techniques.

Most of the CPC-s contain an exhaustive list of all investigative actions. The Codes also stipulate that evidence is admissible only if obtained through such investigative actions. At the same time, statements obtained by special investigative techniques from persons who, in accordance with Law, have been relieved from the duty to testify, may be eliminated from admissible evidence.

Secondly, the use of special investigative techniques shall be granted at the application of the investigator or the investigating prosecutor (Article 8.1, "a" of the 1962 Organization of the Judiciary Law of Somalia) for which the evidence is needed. For example, in accordance with Article 12 of the Puntland Anti-piracy Law in conjunction with Article 24 (4) of the Somali CPC, the investigator "*shall apply to the competent Court for such warrant, at the same time informing the Office of the Attorney General*". If non-judicial police services obtain in some way information on their initiative by using special investigative techniques, the result may never be admissible evidence.

Moreover, such actions would constitute, at least, an "arbitrary interference" with the right to privacy and eventually, violate Article 17 (1) of the International Covenant on Civil and Political Rights acceded by Somalia in 1990. This Paragraph reads: "*No one shall be subjected to*

arbitrary or unlawful interference with his privacy, family, home or correspondence..."

Thirdly, special investigative techniques shall be permitted by the competent court. The court decided on the targets and the timeframe of the measure. Anything obtained beyond the court's permission is not admissible into evidence. In view thereof, Article 12 of the Puntland Anti-piracy Law in conjunction with Articles 24 (4) and 53 of the Somali CPC, in particular, also requires a warrant for the use of special investigative techniques. In the absence of such a warrant, their use would constitute an "unlawful interference" with the right to privacy and eventually, violate Article 17 (1) of the International Covenant on Civil and Political Rights[2]. As a result, the evidence obtained would be inadmissible in court.

It is noteworthy that Article 12 of the Puntland Anti-piracy Law redirects to the legal regime of searches and seizures. This is understandable as, like the use of special investigative techniques, these investigative actions also involve coercive measures affecting the right to privacy.

If all three aforementioned conditions are met, the result of the deployment of the respective special investigative technique might be the production of documentary evidence. The conversations of the targets are recorded and the text is transferred onto paper. This specific paper is inserted in the case file and its content regarded as evidence.

If this evidence is relevant for the criminal case, all records and other documents, collected by the Police through Special Investigative Powers, shall be deposited with the Attorney General Office. Otherwise, if the evidence obtained is not relevant for the criminal case, all these records and other documents shall be immediately destroyed unless they contain information relevant for an investigation of any criminal offence defined under Article 35 of the CPC of Somalia.

2. There are two possible solutions regarding **the value of this evidence** obtained through the deployment of some special investigative technique. Most often, this evidence alone may be sufficient for a guilty verdict (the issue is a matter of court discretion only). The Puntland Anti-piracy Law does not require, in addition, any corroborative evidence either. This solution is based on the concept that no evidence shall have a value predetermined by law: the so-called free evaluation of evidence principle.

However, under the law of some foreign countries, the evidence obtained by special investigative techniques is not sufficient for a guilty verdict, e.g. Article 177 (1) of the Bulgarian CPC. Corroborative evidence is also needed to find the accused guilty (regardless of the court opinion) in such countries. This solution guarantees the suspect against abuses. A similar one, for example, is the provision of Article 199 [Accomplices] of the Somali CPC. This Article reads as follows:

> "*The persons who have participated in an offence may be witnesses in the proceedings. However, the Court shall not convict an accused person on the basis of the testimony of an accomplice unless such testimony is corroborated by other evidence*".

Several years ago, I discussed this issue in Baghdad with some Iraqi colleagues: judges and prosecutors. They told me that when the deployment of special investigative techniques becomes an investigative action in their country, the evidence obtained shall not be sufficient for a guilty verdict, at least, during the initial several years. Obviously, careful consideration must be given to the value of the evidence from special investigative techniques and the problem needs to be expressly solved by law.

III. The Targets of the Special Investigative Techniques and Their Rights

1. Traditionally, only a suspect might be the target of special investigative techniques. However, many countries allow – under specific conditions – targeting also: (a) a person who may be communicating with the suspect, (b) a person whose telephone or point of access to a computer system the suspect may be using, (c) a person, the monitoring of which, could lead to the discovery of the full identity of the suspect or the location of the suspect if s/he is in hiding. At the same time, some foreign countries expressly prohibit the use of special investigative techniques against certain categories of persons. These restrictions usually apply to the so-called privileged communications, such as between the defence lawyer and his/her client in criminal matters[3], or privileged witnesses, such as members of parliament and other top officials. In Somalia, such officials are the Somali judges as per Article 175 of the CPC.

2. It is an unavoidable reality the deployment of special investigative techniques, by their very nature, involve a degree of invasion of the target's privacy. Therefore, their deployment inevitably affects his/her right to privacy which is enshrined in Article 17 (1) of the International Covenant on Civil and Political Rights.

Undoubtedly, this right to privacy cannot be an absolute one. The European Court of Human Rights [ECHR], for example, has consistently stated that the right to privacy must be weighed against the restrictions imposed on it to protect society. This is why in some serious investigations the target's right to privacy might be restricted by law. According to Article 17 (1) of the International Covenant on Civil and Political Rights, "*No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation*".

It follows **per argumentum a contrario** that if an authorizing law is in place (Articles 11-13 of the Puntland Anti-piracy Law are the beginning of such a law) the interference would not be unlawful. It would be in accordance with the legal order and must be accepted. Such a law must exist, though. This law should be sufficiently clear in its terms to give individuals an adequate indication as to the circumstances in which, and the conditions on which, public authorities are empowered to resort to covert methods. The law also must indicate the scope of any discretion conferred on the authorities, and the manner of its exercise, with sufficient clarity to give the individual(s) affected protection against arbitrary action.

Restricted or not by such a law, the right to privacy always exists and the target of the special investigative techniques has the procedural right to defend it against unlawful or arbitrary actions by proving that his/her privacy was unjustifiably infringed if s/he thinks that it has been the case. Any such action for which legal framework does not exist would be unlawful (in conflict with Article 17.1 of the aforementioned Covenant), whereas arbitrary would be any action which, although provided for by law, is not reasonable because it does not correspond in the particular circumstances to the aims and objectives of Article 17 and the other provisions of the Covenant.

Therefore, any person, targeted by the deployment of a special investigative technique, enjoys **the right to defence** to protect his/her right to privacy. Article 17 (2) of the International Covenant on Civil and Political Rights expressly stipulates that "*everyone has the right to the protection of the law against such interference*".

Because unlike ordinary (non-covert) searches and seizures, for example, the deployment of any special investigative technique is a secret operation[4], the laws of most countries have found a specific way to guarantee this right to defence. They prescribe that, once the deployment

is over, the targets shall be notified by the authorities of what has been undertaken towards them, e.g. § 126 (1) of the Estonian CPC, Article 96 (4) of the Kosovar CPC and Article 145 of the Romanian CPC. Such legislative implementation of Article 17 (2) of the International Covenant on Civil and Political Rights should be expected in Somalia also: not only in relation to the Puntland Anti-piracy Law but in relation to any other Somali law which would introduce special investigative techniques. Indeed, the provisions of the international human rights conventions, incl. Article 17 of the aforementioned Covenant, are in theory directly applicable in the territories of their Parties. In practice, though, these provisions acquire actual legal force only if implemented in domestic law.

If after the use of a special investigative technique no prosecution and trial follow, the subsequent notification of the target is important because it is the only way to learn that s/he was subject to intrusion into privacy, to challenge the legality of this intrusion and eventually, seek compensation. In case of a trial against the target, if it was found in any way that the special investigative technique was unlawfully used, the evidence obtained from its deployment shall be excluded as inadmissible. Such violations of law shall render the evidence null and void – Article 178 of the Somali CPC.

However, the immediate notification of the target is not an absolute rule. Some laws provide exceptions to the obligation of immediate notification of the targets. The exceptions refer to cases where the notification is likely to pose a threat to the success of the ongoing criminal proceedings or to endanger the security of some person(s) involved. Such laws allow keeping the operation of special investigative techniques secretive for a longer time, e.g. Article 101 (6) of the German CPC. In Europe, such exceptions are in conformity with the judicial practice of the ECHR in Strasbourg. Thus, the Court in question maintains that it might be impossible to immediately meet the demand for providing information to

the person(s) concerned in all cases because such an act may threaten the purpose for which the secret surveillance was conducted or may lead to the exposure of the methods of surveillance (see *Klass v. Germany*, No. 5027/72, p. 58).

IV. The Need to Know the Special Investigative Techniques

1. Somali investigators, prosecutors and judges need to know because, sooner or later, they will be recognized not only in Puntland and for the investigation of piracy; these techniques will be generally recognized by Somali law as investigative actions, as sources of evidence, admissible in court. It is always better to know in advance what devices you shall apply. Moreover, it would be good if investigators, prosecutors and judges take part in the drafting of the legal framework for the special investigative techniques.

Also, Somali investigators, prosecutors and judges need to know about the existence of the special investigative techniques as they may turn for legal assistance to other countries which make use of them, nowadays. In particular, one may write an international letter rogatory to such a foreign country to request it to collect evidence for you in its territory through some special investigative technique. The lack of such an evidentiary action in Somali law would not impede the execution of the request. It is sufficient that the evidentiary action exists in the law of the other country, the requested one. It is noteworthy that the other country is likely to require dual criminality. This means that the offence, in respect of which a judicial actor requests assistance, is a crime both under his/her law and under the law of the other country as well. However, no foreign country is expected to also require any double existence of the requested investigative action: to be an action found in the law of each of the two countries, simultaneously.

Besides, it must be known that once the deployment of the requested special investigative technique is over, the targets are mandatorily notified by the local authorities of what has been undertaken towards them. This is a general rule which applies also to the special investigative technique deployed in the execution of foreign requests. At the same time, in some foreign countries, the notification may be postponed by the local court. Therefore, if one considers sending a request for some special investigative technique to a foreign country, s/he must learn the exact situation there and how to use this situation to the benefit of his/her criminal proceedings.

2. International legal assistance constitutes the typical means to obtain evidence from abroad, especially evidence collected through a special investigative technique, as most foreign countries have already developed the technical and legal capacity to deploy them. Hence, more and more foreign evidence is likely to originate from the deployment of special investigative techniques abroad. In view thereof, the legal provisions regulating the recognition of any evidence received from abroad must be sufficiently precise not to undermine its admissibility in court. This recommendation is applicable to Article 15 of the Anti-piracy Law, in particular. According to its text, "*All evidence, including forensic and foreign evidence, is admissible only if it stays in compliance with the principles of law applicable in the Puntland State of Somalia*".

Presently, this Article 15 may refer only to evidence obtained from the execution of this state's/country's letters rogatory abroad. Other ways of receiving admissible evidence from foreign countries are non-existent in Somalia/Puntland; in particular, these are: (i) the transfer of criminal proceeding [5] and (ii) joint investigative teams[6] in which Somalia/Puntland may participate.

However, no foreign evidence, even the obtained from the execution of letter rogatory, should be filtered as prescribed by this provision requiring that this evidence shall be admissible only if it is "*in compliance with the principles of law applicable in the Puntland State of Somalia*" (as the requesting country). Actually, it is solely the other way around: this is a requirement that only the requested country makes use of it. In general, the requested country grants incoming letters rogatory, if their execution would be "*in compliance with the principles of law applicable in*" its territory, e.g. Article 227 (1) of the Somali CPC and Article 17 (b) of the 1983 Riyadh Arab Agreement for Judicial Cooperation – in force for Somalia as of the 21-st of October 1985.

None of the Muslim countries has any such legal filter for incoming foreign evidence either. They may only request from the country that they approach to apply their own rules in the execution of their letters rogatory. Thus, according to Article 20.8 of the Arab Anti-corruption Convention, *"the request* (the letter rogatory) *shall be acted upon in accordance with the domestic legislation of the requested State Party as well as in accordance with the procedures specified in the request* (the letter rogatory)*, wherever possible, as long as this does not conflict with the domestic legislation of the requested State Party*." In any case, it is solely the requested country that decides whether to grant the additional request for applying the procedures of the requesting country – see, for example, Article 54 (2) of the UAE Law on International Judicial Cooperation in Criminal Matters. But even if this additional request was not granted and the letter rogatory has been executed in accordance only with the procedures of the requested country, no Muslim country would consider the foreign evidence, obtained through the execution of the letter rogatory, inadmissible on the grounds that its additional request was not granted.

Also, no violation entailing inadmissibility of evidence obtained exists, even if the requested country, initially, decides to apply the requesting country's procedures but subsequently, applies only its own. As this country is not legally bound by its initial decision (no such international agreement exist), it can always validly withdraw it afterwards even if it has notified the requesting country of its taking.

3. The actual problem, though, is not that the legal filter under Article 15 of the Puntland Anti-Piracy Law is unique. The problem is that this filter is detrimental to the interests of Puntland and, as a result, to the interests of Somalia as a whole. If this filter stays in Article 15 of the Puntland Anti-Piracy Law, it would mean that foreign countries may spend in some cases one or two weeks in executing a letter rogatory from Puntland and learn, in the end, that their work has been totally ignored on the grounds that they had not complied with rules that they had never heard of. It goes without saying that as soon as foreign countries learn of the possibility that their work might be totally ignored, although it has been done punctually and in compliance with the right procedure (their own), none of these countries would seriously work for Garowe and eventually, Mogadishu as well. To mitigate the negative effects of this requirement, the requesting authorities of Puntland should, at least, request the application of their own rules and state that, if this is not possible, their letter rogatory should not be executed at all. However, this may also create unpredictable confusions. Either way, Puntland as well as the entire Somalia would always experience serious negative consequences. It is beyond any doubt that if something goes wrong with international partners of Garowe, this would, inevitably, affect the whole country.

V. Special Investigative Techniques *Per Se*

Two main types of special investigative techniques [SIT] exist. They are: interception of communications and surveillance.

1. The covert interceptions

A/ Interception of telecommunications is a means of technical obtaining of sound (voice) and/or pictures (texts, photos) during the course of transmission through technical devices. Most often, it includes:

- Interception of ordinary telephone communications ("wire-tapping" of telephone calls) - acquiring the contents of oral communication by secretly connecting to the telephone line used by the target, the person subject to the measure, whose conversations are to be monitored

- Article 11, letter "f" (i) of the Puntland Anti-piracy Law.

- Real-time collection of data transmitted through some computer network (by mob-phones, SMS, e-mails) resulting in obtaining copies of their contents- Article 11, letter "f" (ii) of the Puntland Anti-piracy Law.

B/ Covert interception of conversations is the other type of covert interceptions. This is the "bugging" in public/open spaces or private premises - monitoring (listening to) oral communications between persons and/or only recording them by installed technical means - Article 11, letter "g" of the Puntland Anti-piracy Law.

However, the rules and restrictions on covert interceptions do not apply to any of the public speeches and conversations as they are addressed to anyone and investigative authorities are not excluded. This is why, usually, surveillance in the Internet 'chat rooms'/forums is not restricted and does not require any specific permission. The European countries, in particular, generally, take the view that authorisations are not ordinarily required for participating in Internet 'chat rooms' or other social networking websites, even where one's true identity is concealed. The same is arguably true about surveillance in such settings. Persons participating in open online chat or posting on a social networking site

have no reasonable expectation of privacy regarding content. Thus, each comment or posting is effectively published to a given group of participants many of whom may not have revealed their true identity. Again, with surveillance, as with the undercover agent, the position will certainly change once steps have been taken to restrict access to a few known or verifiable individuals.

Lastly, interception is applicable not only to communications *per se* but also to postal items (physical objects) as well - Article 11, letter "a" of the Puntland Anti-piracy Law. This is a covert examination of a postal item, whereby evidence derived from the inspection of the item is collected. If necessary, the item may be replaced. Usually, the activity is video-recorded, photographed or copied or recorded in another way. Once the covert examination of the postal item is over, this item or the replaced one shall be sent to the addressee.

It is sometimes forgotten that seizure of or interference with postal items during the course of their transmission amounts to a form of communications interception in *sensu largo*. To that end, Germany provides a lawful basis for this in Section 99 (Seizure of Postal items, order by the public prosecutor) of its CPC.

2. Covert photographic or video surveillance (in public/open spaces and private premises). This surveillance, whether or not by means of electronic or other devices, is used to establish the whereabouts of targets (persons, vehicles, etc): their locations by positioning devices and movements by tracking devices. This is achieved by secret photographic, film or video recording of persons in public/open places or the use of surveillance devices for determining the whereabouts (e.g. electronic or binoculars or similar ones).

Surveillance, by its very nature, is likely to involve some breach of the Right to Privacy under Article 17 of the International Covenant on Civil and Political Rights [Somalia acceded thereto in January 1990], unless it is expressly provided for in the law, is appropriately authorised and is both necessary and proportionate.

3. Other deployable SIT-s:

A/ Such ones which do not involve obtaining information about the contents of conducted communications between targets:

A covert metering of telephone calls – Obtaining a record of telephone calls from a given telephone number about the number of calls (dialled and received), the time and length of each call without the knowledge of the correspondent who is the subject of the measure.

A covert collection of computer traffic data – Obtaining computer data beyond the contents of the communications. Usually, this information is generated automatically by the computer system; it indicates the communication's origin, destination, route, time and length of each communication, size, duration, etc.

B/ Secret Examinations:

Covert search of (private, usually) premises – Performing a careful examination of a house or other premises without the knowledge of the owner or the user who is the subject of the measure.

Covert search of postal items – Performing a careful examination (including X-ray search) of letters or/and other postal items or consignments without the knowledge of the persons who are the subjects of the measure. See also Article 11, letter "a" of the Puntland Anti-piracy Law.

VI. Related Operations

1. Controlled delivery [see also Article 11, letter "c" of the Puntland Anti-piracy Law] is a widely used operation. However, it is not a distinct SIT, a source of admissible evidence acquired secretly, although it is often described as such. Actually, it is a means that utilizes SIT-s *per se*, such as surveillance (of reception and/or distribution of items), incl. the cross-border observation and also hot pursuit, where necessary, as well as interception (of telecommunications, of conversations and/or some item).

The controlled delivery is an operation of allowing the transportation of illicit or suspect consignments to pass out of, through or into the territory of one or more countries, with the knowledge and under the supervision of their competent authorities, with a view to the investigation of an offence and the identification of persons involved in its commission. Most often, the probable offence is the contraband of drugs, weapons, currency, or monetary instruments.

Controlled deliveries are conducted to:

- Broaden the scope of an investigation, identify additional and higher level violators, and obtain further evidence;

- Identify the violator's assets for consideration in asset forfeiture proceedings and

- Disrupt and dismantle by the competent law enforcement authorities criminal organizations engaged in smuggling contraband, currency, or monetary instruments across borders.

Most often, controlled deliveries are across the border; they are cross-border controlled deliveries. Such controlled deliveries are performed in cooperation with customs. The customs authorities are permitted to allow,

under their control, import, export or transit through the country's territory of illegal goods. Controlled delivery can be carried in the country in the framework of the criminal investigations into extraditable offences at the request of another country, in accordance with its procedural law, as well as can be requested by Somali investigators and prosecutors as part of their investigation and then use the obtained evidence in court.

Controlled delivery could be carried out by: (i) recruiting a cooperative suspect after initial recovery of the contraband, (ii) using a suspect or another person as a blind courier, who does not know that the contraband was discovered, or (iii) using, where feasible, the cooperation of the courier company for conducting the controlled delivery operation.

Cross-border controlled deliveries, usually, are performed in cooperation with customs and other authorities of foreign countries based on international agreements. Regretfully, the only such agreement that Somalia is a Party to [this is the 1983 Riyadh Arab Agreement for Judicial Cooperation] does not contain any rules on such controlled deliveries. Besides, even the domestic law of Somalia, the Criminal Procedure Code (Book 5), does not mention cross-border controlled deliveries in any way. Moreover, the CPC does not regulate at all any international transfer of admissible evidence (from one jurisdiction to another), although this is a typical modality of international judicial cooperation in criminal matters. It is usually called "(international) transfer in criminal proceedings".

It is noteworthy, in the end, that each country has somewhat different laws and approaches in performing controlled deliveries. For example, there are two types of controlled delivery, namely: *live* controlled delivery, e.g. Egypt, Malaysia and Indonesia, that allows the original contraband to be moved to its final destination under control of law enforcement officers and *clean* controlled delivery, in which case law

enforcement agencies remove and substitute drugs with a harmless one before allowing the consignments to be delivered, e.g. Japan and Estonia {**Group 2**, Countermeasures against Organized Crime, in UNAFEI Resource Material Series No. 65, 2005, Tokyo, p. 182}.

2. The Joint Investigation is a typical method of investigative work related to cross-border controlled deliveries. It is a very appropriate (flexible and efficient) way of gathering evidence in such cases as well as other cases where criminal activities concern two or more different countries. This evidence gathering, including through SIT-s, is performed in the form of the so-called joint/international investigation team. According to Article 19 [Joint Investigations] of the UN Convention against Transnational Organized Crime and Article 49 [Joint Investigations] of the UN Convention against Corruption,

"*States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. The States Parties involved shall ensure that the sovereignty of the State Party in whose territory such investigation is to take place is fully respected*".

The joint investigation body/team is set up for a fixed period of time. It is presentable as an advanced form of an international letter rogatory (see Articles 276-277 of the Somali CPC). However, in contrast to it, this team works as follows:

a. The team collects pieces of evidence not only for the country where it operates but for the other participating countries as well.

b. Pieces of necessary evidence are not collected in one of the participating countries only but, usually, in the territories of all other countries.

c. There is no letter rogatory and a granting decision. Instead, the interested countries sign an international agreement. In the implementation of this agreement, team members are able to directly request all necessary investigative actions, dispensing with the need for letters rogatory.

d. Most often, the team works at a time in the territory of one country; its officials with investigative powers are tasked with the execution while other participating countries' officials, esp. those with investigative powers are only present at the execution.

Letter Rogatory - vs. - Joint Investigation Team

COMMON FEATURES
Serve justice through collection and delivery of valid evidence across state border – from one country to another
The existence of pending criminal proceedings in the interested country (-ies) is necessary
Dual criminality is not a must
Evidence is collected by local judicial authorities
No transfer of competence takes place

	DIFFERENCES	
	Producing Evidence by:	
Criteria	**Execution of a Letter Rogatory**	**A Joint Investigation Team**

Territory of Action	In a requested foreign country	In the participating countries
Start of the Procedure	A letter rogatory dispatched by the interested country	An agreement by the interested countries for setting up of the team
Direct Availability of Collected Evidence	No, it must be provided to the requesting country	Yes, it is automatically at the disposal of the participating countries through their representatives
Obtainability of Evidence from a Third Country as well	NO	YES
Benefiting Country	Only the requesting country	All participating countries
Necessity of Domestic Legal Framework	YES	NO

Lastly, controlled delivery is very similar to cross-border observation. However, their objects are different. The cross-border observation allows investigators within the framework of a criminal investigation to monitor even beyond the boundaries of their country a person who is suspected of having taken part in a criminal offence, or a person who may lead to the identification or location of the above-mentioned suspect. These investigators may continue their observation in the territory of another country if its authorities agree to such observation.

3. The undercover operation is the infiltration of an agent (undercover officer or another person cooperating with the competent authority) under a false identity into a criminal group. The typical role of such agents is to become part of an existing criminal enterprise.

Like the controlled delivery, the undercover operation is not any distinct SIT, any source admissible of evidence acquired secretly. It is an investigation activity that also prepares the ground for the utilization of SIT-s *per se*, such as surveillance and interception, as well as stimulated purchases, but most often, it is done for the posterior interview of the undercover agent as **an anonymous witness** (or identify persons which might be interviewed as such), a typical method of his protection. Besides, if duly authorized by law, s/he may also produce other admissible evidence. In particular, the agent might be tasked with taking pictures (monitoring, observing, or recording of persons, their movements or their other activities by means of photographic or video devices) or installing bugging devices (interception of conversations by monitoring or recording them by technical means). The products would be admissible evidence if applicable law recognizes them as such. In any case, the undercover operation is closely related and, actually, dependent on the witness protection activities [see also Chapter IV (Article 14) of the Puntland Anti-piracy Law].

Usually, the key source of information as a result of the undercover operation is the anonymous witness. On the one hand, s/he enjoys administrative protection, incl. measures of keeping his/her identity secret. Thus, according to § 136 (3) of the Slovak CPC, "*Before examining a witness whose identity should remain secret, the criminal procedure authority and the court shall take the necessary measures to ensure the protection of the witness, in particular by changing the physical appearance and voice of the witness, or conducting an*

examination with the help of technical equipment, including audio and video transmission technology".

On the other hand, and it is more important when it comes to evidence law, the evidence obtained from this witness, usually, is not equal in procedural value to the evidence obtained from ordinary witnesses. Often, the value of such evidence is limited. Thus, according to Recommendation No R (97) of the EU Committee of Ministers from 25 Nov. 1997 to the Member States concerning Intimidation of Witnesses and the Rights of the Defence, „...*When anonymity has been granted, the conviction shall not be based solely or to a decisive extent on the evidence of such persons* ...". Article 23 [Verdict Requires Other Evidence] of the Bosnian Law on Protection of Witnesses under Threat and Vulnerable Witnesses and Article 262 (3) of the Kosovar Criminal Procedure Code are the same sense. These provisions require corroborating evidence for a guilty verdict.

Apart from the possible insufficiency of his evidence for a guilty verdict, this person enjoys a specific immunity while participating in the respective criminal association. He is not punishable for assisting crimes by the members of the association but not justified for and perpetration or incitement to crime. Unrealistic restriction but this is the situation in Europe, currently. Like it or not, this situation must take it into account.

According to the law and judicial practice in Europe, the infiltrated person shall not act as an 'agent provocateur': to incite the perpetration of crimes, e.g. CASE OF SEPİL v. TURKEY (Application no. 17711/07), *European Court of Human Rights Judgment,* STRASBOURG, 12 Nov 2013. This means that such persons are not permitted to encourage suspects to commit crimes they would not ordinarily commit. The use of infiltrated persons as agent provocateurs is expressly prohibited also under the North Macedonian legislation and the use of such a technique in

bribery cases would fall under Article 358 of the Criminal Code of that country. This method of exposing offenders is often used in the US but is less common in Europe.

Additionally, it is important to know that the use of an agent provocateur cannot result in the production of any admissible evidence. In its Chamber judgment in the case of Furcht v. Germany (Application no. 54648/09) the European Court of Human Rights held, unanimously, that there had been a violation of Article 6 § 1 (right to a fair trial) of the European Convention on Human Rights.

The case concerned the complaint by a man convicted of drug trafficking that the criminal proceedings against him had been unfair, as he had been incited by undercover police officers to commit the offences of which he was convicted. The court found that the undercover measure in Furcht's case – going beyond a passive investigation of criminal activity – had indeed amounted to police incitement. The German courts should not have used the evidence obtained in this way to convict him.

In 2007, Furcht, who had no criminal record, was approached by undercover police officers in the context of criminal investigations against six other people suspected of drug trafficking. One of the suspects was a friend and business partner of Furcht and the officers intended to establish contacts with the suspect via him. They initially pretended to be interested in purchasing real estate and later in smuggling cigarettes. During one of the meetings with the undercover officers, Furcht offered to establish contacts with a group of people trafficking in cocaine and amphetamine (including his friend suspected of drug trafficking), while stating that he did not wish to be directly involved in the drug trafficking, but that he would draw commissions.

The undercover officers expressed an interest in transporting and purchasing drugs. In a subsequent telephone conversation, on 1 February 2008, Furcht explained to one of the officers that he was no longer interested in participating in a drug deal but a few days later, on 8 February, the officer dispersed his fears and Furcht eventually arranged two purchases of drugs for them in February and March 2008. In the meantime, a district court had authorised criminal investigations in his respect. Following the second transaction, Furcht was arrested and, in October 2008, he was convicted of two counts of drug trafficking and sentenced to five years' imprisonment.

At the same time, beyond the prohibition of turning the undercover agent into an 'agent provocateur', no general restriction exists when it comes to using him/her as a means for acquiring admissible evidence. The lack of such restriction may be illustrated by the following example. Two German nationals we arrested in Italy on drug charges. Both were placed in a prison cell with an undercover agent, posing as a cell-mate, who pretended not to understand the German language. He heard one of them speaking about a murder that he had committed. Thereafter, the undercover agent was questioned as a witness and repeated the extra-judicial confession of the German. At the trial, this German sought to argue that the cell confession had been unlawfully obtained and its admission would breach his right to a fair trial. In response, the court held that the undercover operation of the Italian police had not constituted any illegal method of acquiring evidence. The suspect had the interest in not talking to the other German arrestee about his crime in the presence of a third person. If he nevertheless freely did so, it is his own risk and responsibility that this turned against him. The undercover agent did not make him talk about the murder which he had committed. This is why the court accepted that the suspect's freedom of will was not affected by the operation of the Italian police. Therefore, the use of the evidence obtained through the undercover agent could not deprive him of his right to fair

trial {**Council of Europe**, Economic Crime Division, Directorate General – Legal Affairs I, SPECIAL INVESTIGATIVE MEANS IN SOUTHEAST EUROPE, Strasbourg, 2003, p. 30}.

Finally, if the undercover agent does not produce any admissible evidence, s/he would play the role of a secret informant only. There is always some confidential cooperation with individuals to obtain information about crimes being plotted or already committed; informants can operate openly or secretly, free of charge or for a fee, can be hired as permanent or non-permanent staff. Such individuals can also be used to identify potential witnesses which might be exposed. The restriction against the agent provocateur activity is valid for the secret informants as well.

Both secret informants and anonymous witnesses should be distinguished from the so-called **cooperative witnesses**. In some countries, when a member of an organized group, gang or another criminal enterprise, who voluntarily collaborate before or after the detection or during the criminal procedure, if his/her cooperation and statement are of essential importance for the criminal procedure, this person may not be prosecuted on the decision of the judge or the prosecutor in charge, e.g. Article 129 of the Iraqi CPC and Article 44.3 of the North Macedonian CPC. In this situation, s/he will not be treated as a suspect. Instead, this person becomes a witness (a cooperative one)[7].

Most often, the use of cooperative witnesses goes in combination with the deployment of SIT-s. Usually, such a person has already participated in some continued corrupt activities and at a given time, becomes aware of a corrupt or terrorist act that s/he is going to be involved with together with another corrupt person or terrorist. The cooperating witness agrees to maintain his/her relationship with him/her under the supervision of the investigators. The target of the investigation is recorded either by audio, video, or both, while participating in corrupt or terrorist behaviour and

transactions together with the cooperating witness. Once the target sufficiently tied his/her own noose, then the arrest is made.

The cooperative witness's primary motivation is to alleviate his/her own legal troubles by obtaining procedural immunity. One characteristic distinct to this pattern is the desperation of the cooperating witness. Since the cooperating witness is already in trouble, s/he risks less by going to the police. The increase in danger that the cooperating witness faces may oftentimes be outweighed by the benefits received from the government.

The witness in question is not free from prosecution unconditionally. On the contrary, s/he would lose his/her immunity "*if it is established that the testimony of the co-operative witness was false in any relevant part or that the co-operative witness omitted to state the complete truth*" (Article 238.1 of the Kosovar CPC).

The immunity of the co-operative witnesses resembles the immunity of extraditees – see Article 278 (2) of the Somali CPC. Both immunities are procedural being conditional and revocable. The big difference between the two immunities is the following: the extraditee's immunity is general: it covers all his/her criminal offences except for the one(s) in respect of which s/he has been extradited, whereas the cooperating witnesses' immunity is specific: it covers only the criminal offence, s/he will testify of, and, exceptionally, some other closely related offence.

Basically, it is good to grant procedural immunity in exchange for their testimony against others, especially upper-echelon organized crime figures. This result where the alleged offender does not remain prosecution target any longer is achievable easier and safer if based on a comprehensive set of specific rules that clearly regulate the prerequisites and the conditions for the cooperating witness's procedural immunity. These rules are designed to reduce risks while granting immunity.

Finally, the following risks, related to the cooperative witnesses, are worth mentioning. As 'immunized' witnesses, they are often unpredictable, their examiners cannot be sure in advance of the precise value of the withheld testimony. Also, prior to the testimony, there is no way of knowing what crimes are likely to be exonerated. Furthermore, there are risks of granting an "immunity bath", whereby a witness mentions a wide range of crimes he has engaged in knowing that he is immunized from prosecution for any crime s/he refers to. Moreover, there may be a perception that his/her testimony is unreliable because it has been purchased.

4. Financial investigation[8] or obtaining financial data is not any SIT either, although it has been mentioned among them in the Puntland Anti-piracy Law (Article 11, letter "e"). This investigation comprises a set of measures, which may include undercover operations as well direct use of one or more SIT-s, for the collection of information and evidence "*on deposits, accounts or transactions from a bank or another financial institution or remittance service provider*"**.**

A. The collection of the necessary financial data might be performed not only within criminal proceedings. Such data might be collected in a separate financial investigation for the confiscation of assets under penal law even without a criminal conviction. As per Article 54.1, letter "c" of the UN Convention against Corruption, each Party, should "*Consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases*".

Therefore, when Somalia accedes to the aforementioned Convention it may implement the quoted Article 54.1, letter "c" by prescribing in its domestic law confiscations of assets in cases when criminal proceedings are not allowed. Such subsidiary legal proceedings ending up in confiscation under

penal law without any criminal conviction (non-conviction based confiscation) constitute the so-called financial investigations.

Moreover, such investigations might be initiated not only when criminal proceedings shall not be instituted or concluded. Financial investigations may take place even in cases when the owner of the assets liable to confiscation is convicted but because of their larger amount, it would have been too difficult to collect evidence of them within the criminal proceedings against him/her. Thus, in line with Article 31 (8) of the UN Convention against Corruption each Party, incl. Somalia may opt to introduce one of the two modern forms of confiscation, namely: extended confiscation or unexplained wealth confiscation[9]. Under these modern forms, the amount of confiscatable property is too large to be traced and detected in full. This makes it necessary to have special legal proceeding to ensure the successful constraint and confiscation of the whole property wherever and under whatever form it is.

To this end, financial investigations are focused solely on asset searches. Any such investigation aims at finding where the money comes from, how it moves, and how it is used. Also known as forensic accounting, this specific type of investigation is most supportive to ordinary criminal investigations into fraud, embezzlement, bribe, money laundering, tax evasion, terrorist financing and many other crimes conditioning confiscation. In turn, successful criminal investigations and prosecutions of criminal offences conditioning confiscation open the way to confiscating the assets of offenders.

It is to be taken into consideration that, usually, such confiscation is the final part of a long and complex process. The full process of confiscation includes the following actions: [i] Identification of Assets – establishing the holder of a given physical item or bank account; [ii] Detection of Assets – locating the physical item(s) and/or finding the bank account(s) of a given person; [iii] Preservation of Assets – the seizure of some

movable physical item(s) and/or freezing the deposited money in some bank account(s) or/and immovable physical items of a given person; [iv] Confiscation Order - a judicial order for the final deprivation of property, namely: of some physical item(s) and/or of deposited money in some bank account(s) of a given person; [v] Enforcement of the Order to actually confiscate the targeted asset(s); and [vi] Redistribution of confiscated assets, including their sharing and recovery.

B. The major methods that can be employed within a financial investigation are summarized as follows: (i) Analysis of a specific payment, (ii) Analysis of the income and expenditures, (iii) Analysis of fraudulent financial transactions.

1. Analysis of a specific payment

This analysis is used to trace a concrete payment of a bribe from or to the suspect. A good example is a case investigated and prosecuted in a European country, where a company paid a kickback to a local public official in order to receive a public procurement contract for the reconstruction of the city's water and sewage system. The kickback as a percentage of the total contract value was paid to another company, associated with the public official.

The use of the method in question allowed the investigators to establish the direct paper trail of money transfer from the bribe-giver to the corrupt official, which could be used as evidence in court. It is important to note that in addition to the evidence of the receipt of an undue advantage, investigators needed to provide evidence of the violation of the public procurement rules by the corrupt officials, which involves other investigative techniques.

2. Analysis of the income and expenditures

This specific method involves the analysis of the lifestyle, income, assets and expenditures of the suspect. It can be used if the payment of a specific bribe cannot be traced directly to the suspect.

There are various models used in the determination of an individual's assets and expenditure. The following methods are the most common:

- Analysis of income, also known as *"Net-worth analysis method",* is used to establish if there has been an increase in the total income of the suspect over a specific time period. Known lawful income is subtracted from the total income and the remainder represents illicit proceeds. This is a very complex method as it is difficult to establish total income, property and other assets that a suspect owns and benefits from. The results of this analysis can be used as a part of the evidence in conjunction with other evidence that established corrupt activity such as bid-rigging or misappropriation of funds.

- Analysis of expenditures, also known as *"Source and application of funds method"* or *"total expenditure analysis",* is used to establish the total amount of suspect's spending in a given period of time, and compare this amount to the income available from known lawful sources. The difference will also represent illicit proceeds. This method is easier to use than the analysis of income since it is easier to establish the total amount of expenditures and the legal income of the suspect. Like the analysis of income, the analysis of expenditures can generate only additional evidence for the competent court. This analysis can be used to analyse both cash and non-cash expenditures:

a. *Cash Expenditure Analysis* can be useful where the bribe or another form of illicit payment was provided in cash. By adding together all of the suspect's cash expenditures and subtracting all of his known sources of income, the amount of cash expenditure made in excess of legitimate sources of cash for a given period can be ascertained.

b. *Bank Deposits Analysis* examines expenditures by the suspect made in the form of bank deposits. However, given the increasing sophistication of criminals and possibilities of transformation of bank deposits, this method is less reliable than cash expenditure analysis.

3. Analysis of fraudulent financial transactions

Analysis of the financial transactions of a suspect can be used to establish if any of the transactions which increased the wealth of the suspect are fraudulent and disguise the payment of bribes. The suspect may have received various payments which appear legitimate, for instance, consultancy fees or payment for the sale of a house. In such cases, the investigation may analyse these transactions to establish their true nature and to detect if any of these transactions were fraudulent.

For instance, the investigator can establish which consultancy services were provided by the suspect in reality, if the price for the services corresponds to the market prices, and who the owner is of the company paying the fees. In case of the sale of the house, the investigator may explore if the house exists in reality, what is its market value, who were its past owners, and other elements to establish if the suspect was indeed the legitimate owner and the sale price corresponds to market prices, if the sale was used to disguise the payment of some bribe. It is important to bear in mind that such a method would require serious resources and the involvement of outside expertise to investigate and prepare evidence for presentation in the court.

VII. Concluding Observations

1. The special investigative techniques [SIT-s] are efficient methods of evidence collection but their deployment may endanger the right to privacy and other human rights as well. This is why the deployment of such techniques cannot be always justified. It is justifiable only within the

investigations of organized crime, terrorism and other serious and/or complex criminal activities. Moreover, their deployment would be justifiable only if less severe measures would not be effective, i.e. when the necessary evidence to prove the afore-mentioned crimes cannot be obtained in another way. In any case, the law shall restrict their duration and introduce a strict system for obtaining approval for their use.

At the same time, the SIT-s must not be too restrictively deployed either, as their evidentiary effect would be insignificant and, in the end, their existence would remain on paper. Therefore, it is always a matter of constant weighing what is more valuable:

- strengthening the individual's freedoms and rights, which imposes limitations on the repression the criminal law necessarily entails, or

- strengthening the powers of the state ensuring the fight against crime is more efficient but at the expense of the individual's freedoms and rights.

The legal provisions regulating the SIT-s must be of sufficient clarity. Because of the constantly evolving techniques of electronic surveillance, legislators have to take particular care in crafting a legal framework that is sufficiently precise while maintaining a degree of flexibility that ensures its ability to remain relevant as technologies evolve.

Lastly, all these techniques are largely unknown. This is why a punctual plan should be drawn before starting the actual activities concerning their implementation. This plan should eliminate all of the ambiguities and unknown elements as well as procedural errors.

2. The introduction of the SIT-s is probably the most difficult measure for the implementation of the UN Convention against Corruption as required by Article 50. However, their introduction shall not be the only such a measure. There are also some other difficult to implement measures also. These necessary measures shall go hand in hand with the introduction of

the SIT-s and the general strengthening of the Somali investigative capacities as a result of their introduction.

First of all, in accordance with Article 66 (3, 4) of the aforementioned Convention, Somalia should decide what Declarations and Reservations to the Convention it must prepare and submit. Some of them are likely to affect the deployment of SIT-s. The Somali authorities have the advantage of seeing what other Parties have already presented as their declarations and/or reservations to the Convention.

Secondly, the other appropriate measure would be the expansion of the property liable to confiscation. This should result from the introduction of some modern forms of confiscation, including non-conviction based confiscation as encouraged by Articles 31.8 and 54.1, letter "c" of the Convention. The strengthening of the Somali investigative capacities would make much more sense if the law allows for the confiscation of more assets.

Thirdly, certain legislative measures would be needed for the criminalization of some acts as well as for the extraterritorial application of the Somali Penal Code to them as required by Articles 15 – 30, and Article 42 of the Convention. Only after these necessary amendments take place, it might be decided for which of these new crimes SIT-s are to be deployed.

Fourthly, appropriate legislative and operational measures should be taken for the drastic improvement of different modalities of the international judicial cooperation rendered by Somalia. The measures are required by Articles 43-49 of the Convention. The strengthening of the Somali investigative capacities would, in turn, enable the provision of more efficient international judicial cooperation to other countries and *vice versa*: the intensification of this cooperation would make strengthening of the Somali investigative capacities more necessary.

Notes

[1] It is noteworthy that on 04 June 2020, the Federal Government of Somalia approved the joining and signing of the UN Convention against Corruption.

[2] The laws of some countries allow also the initial deployment of such techniques without a warrant: in cases of urgency. These are usually cases of an imminent threat, immediate danger or other exceptional conditions where it is not possible to obtain authorization in the legally prescribed manner. In such circumstances, the investigating body may commence surveillance without any prior permission before the official authorization is granted: within 24 hours in Estonia or 48 hours in the Czech Republic.

[3] See also Article 136 of the Turkish Criminal Procedure Code.

[4] Also Article 135 (5) of the Turkish Criminal Procedure Code.

[5] Articles 23-25 of the Turkish Law on International Judicial Cooperation in Criminal Matters might be a good example for the formulation of the missing Somali rules for this modality of international cooperation.

[6] See also Jesenični̇k, J. & A. S. Ranzinger. Handbook on Joint Investigation Teams, TDP, Sarajevo, 2014.

[7] In some countries, however, s/he is a participant in the crime(s) who testifies against other participants not only for waiver of the punishment. His/her procedural cooperation might be for punishment mitigation only.

[8] On this point see OECD. Investigation and Prosecution of Corruption Offences: Materials for the Training Course, Ukraine, 2012, p. 25.

[9] The Extended Confiscation has been introduced in Bosnia and Herzegovina, Romania, Serbia and some other countries as well. The other type of new confiscation is the so-called Unexplained Wealth Confiscation. It has been introduced in Bulgaria, Italy, Ukraine, the UK and some other countries.

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