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Chapter 7 Belgium: From Categorical Nullities to a Judicially Created Balancing Test

Marie-Aude Beernaert and Philip Traest

7.1 The General Theory Concerning the Admissibility of Illegally Gathered Evidence

7.1.1 Constitutional and Legal Rules

Any means of achieving certainty may be considered a type of evidence.¹ Under Belgian law, there is no general theory concerning evidence in criminal matters, neither in the Constitution, nor in the Belgian Penal Code or any other law.

True, Art. 6 of the European Convention on Human Rights (hereafter ECHR) lays out a foundational rule that touches upon evidence and more specifically the burden of proof, namely, the presumption of innocence. Art. 14.2 of the International Covenant on Civil and Political Rights (hereafter ICCPR) takes up the same principle. It follows that it is up to the prosecution and the civil party to bring proof of the offense. This principle is important, but it says nothing in terms of the fate that should be reserved for evidence where it appears to the judge that it was obtained irregularly or illegally. In the jurisprudence of the European Court of Human Rights (hereafter ECtHR) it appears that the ECHR does not require the national judge to automatically set aside means of proof that were irregularly obtained. The court

Translated from the French by Joshua Walker and Stephen C. Thaman.

¹Franchimont et al. (2009, 1033)

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only reviews whether the procedure followed in the national court, taken in its entirety, reflects a character of fairness within the meaning of the convention. Art. 6 ECHR does not actually regulate the admissibility of evidence in itself, as this is primarily a matter of national law.²

The Belgian Constitution, for its part, contains an expression of some fundamental rights, such as the inviolability of the home (Art. 15) and the right to respect for private life (Art. 22). Additionally, Art. 12 Const. guarantees the right to personal liberty. The second paragraph of Art. 12 states, "No one can be prosecuted except in the cases provided for by law, and in the form prescribed by law". But, even if that phrase could be interpreted as an expression of the principle of legality of the prosecution (and thereby containing a requirement of the regularity of the evidence obtained), the Belgian Supreme Court (*Cour de Cassation*) has never ruled that Art. 12 Const. requires the trial judge to exclude from trial any irregularly obtained evidence.

Thus, there is no general theory of evidence in Belgian law, neither in the Constitution nor in the codes. The only exception to this is found in Art. 13 of the law of December 9, 2004 on international assistance in criminal matters which modifies § 90ter of the Code of Criminal Procedure (hereafter CCP).³ That article is a literal transposition – concerning elements of proof obtained abroad – of the jurisprudence of the *Cour de Cassation* laid down in a case dating October 14, 2003, discussed below.

There are no other legal texts in Belgium that explicitly and generally regulate the admissibility of evidence in criminal matters. The theory of evidence in criminal matters may, therefore, be considered to be a judicial construction, in which the academic literature has also played a fairly important role.

No constitutional or legal rules exist – the only exception is a rule concerning jury trials in the Assizes Court – which expressly requires that the criminal judge has the mission of searching for the truth. In the literature it is generally accepted that the goal of every criminal trial is to search for the truth regarding an event constituting a crime or misdemeanor. This same literature warns that the search for the truth may not be undertaken at any price. The search for truth may not be done to the detriment of the respect of the fundamental rights of citizens and in particular the rights and liberties found in the ECHR. On the other hand, even though the principle of the criminal judge's search for the truth is not expressly mentioned in the CCP, that same code gives the criminal judge the right to order on his own initiative measures which he deems useful for revealing the truth. The judge may, for example, appoint *sua sponte* an expert during a criminal trial.

The procedure before the Assizes Court is of an exceptional nature. Not only is the decision regarding criminal responsibility made by a popular jury, but also the procedure to be followed before that jurisdiction is, contrary to procedures of courts

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and tribunals staffed by professional judges, the object of fairly detailed legislation. Thus, § Art. 281 (formerly 268) CCP describes the discretionary right of the president of the Assizes Court in the following terms, "[t]he president is vested with a discretionary power, by virtue of which he may take into account anything he believes to be useful for finding the truth; the law charges him with employing in honor and conscience all efforts for bringing the truth to light". The same article (§ 269 CCP) further states that with regard to that power, the presiding judge may hear any witness or introduce any new evidence that seems to him to be "able to shed more light on the disputed fact". This list is merely demonstrative and the discretionary power is not limited to the mentioned acts.⁴

Although these articles are only related to procedures before the Assizes Court, we can say that the duties of the president of the Assizes Court apply by analogy to professional judges. There is no reason to believe that the search for truth would be less important for professional judges in the normal courts than it is for the Assizes Court. That there is an express mention of truth only when referring to the Assizes Court could very well be explained by the fact that when the CCP was promulgated in 1808, the Assizes Court played a far more important role than it does in our time.

We can, thus, conclude that the search for truth occupies as important a place in the normal courts staffed by professional judges as it does in the Assizes Court, but it may not be pursued to the detriment of the fundamental rights of citizens.

7.2 Jurisprudence of the Cour de Cassation Concerning the Admissibility of Illegally Obtained Evidence

As was indicated above, the rules governing the possible exclusion of illegally gathered evidence were to be found exclusively in the jurisprudence of the *Cour de Cassation*. The classical theory of the exclusion of illegal evidence was formulated in a decision by the *Cour de Cassation* of December 10, 1923.⁵ In that landmark decision the court held that evidence illegally obtained was void and without any effect. The *Cour de Cassation* made no distinction, at that time, between an illegality caused by a government agent or a private citizen. If either a government agent or a private citizen was only able to prove a fact in court by virtue of exploiting an illegal act, then the proof was deemed to be contrary to law.⁶ It is therefore clear that, beginning in 1923, the theory of excluding illegal evidence was applied by the *Cour de Cassation* without admitting of any exceptions.

Beginning in 1986, the principle of excluding illegally obtained evidence was extended to evidence obtained in an "irregular" manner. Indeed, in a decision of

⁴Braas (1925, 324).

⁵Pasicrisie 66 (1924, I); See also, Cass., 12 Mar. 1923, Pasicrisie 233 (1923, I). Except in the case of older decisions, the decisions of the *Cour de Cassation* that we cite in the present report may be consulted online on the site www.cass.be.

⁶Kuty (2005a, 350).

²This is the established case law of the ECHR; See, e.g., Eur. Ct. H.R. decisions of *Schenk v. Switzerland* (1991), 13 E.H.R.R. 1342 and *Ramanaukas v. Lithuania* (2010), 51 E.H.R.R. 11.

³Moniteur Belge [Official Journal of Belgium], 24 Dec. 2004.

May 13, 1986, the *Cour de Cassation* found that the exclusion of evidence should apply even if the evidence was gathered "by an act not reconcilable with the substantive rules of criminal procedure or with the general principles of law, and more specifically with respect for the right to a defense".⁷

Since this landmark decision, one customarily distinguishes, among different types of illegally gathered evidence, between evidence obtained by means of a crime or at least an act expressly prohibited by law, and "irregular" evidence obtained by means of an act which, without being illegal, was contrary to the basic requirements of a good administration of justice or to certain general principles of law.⁸ Under this second category fall, for example, confessions obtained by means of a false promise of impunity or a hearing of the accused under oath, in violation of his right to silence.

In reality, it would have been possible to distinguish a third category of illicit evidence, which would include evidence obtained by means of an act which did not comply with all the formalities prescribed by law. In this case, the evidence results from an act which indeed was permissible to do by the judicial authorities but which should have been legally performed by investigating authorities. It violated the law because certain formalities were not respected. And the answer to the question of what lot should be reserved to this last type of evidence would depend then on the type of formalities at issue: if they are established under penalty of nullity or were considered by case law as essential formalities, the evidence would be inadmissible; but in the opposite situation, the non-compliance with the formality would have, to the contrary, no repercussions upon the validity and the admissibility of the evidence at issue.

Beginning in 1990, the *Cour de Cassation* introduced the first step in softening the exclusionary rule for illegal and irregular evidence. Indeed, in two decisions handed down on January 19, 1990⁹ and April 17, 1991,¹⁰ the *Cour de Cassation* decided that an illegal act committed by an individual in the gathering of evidence does not render that evidence inadmissible if the illicit act was not the work of either the investigator or a police informant but of a third party, and if it was not committed with the goal of reporting the facts to the authorities. According to this decision, evidence, even where obtained illegally, could contribute to the conviction of the accused under the double condition that the illegality was not committed by a public official, but by a private citizen, and that the private citizen in question did not act in coordination with a public official. Some in the literature criticized this decision¹¹ on the grounds that, henceforth, the source (legal or not) of the evidence no longer constitutes the only criterion for deciding the admissibility of the evidence in question.

⁷ See Cass., 13 May 1986, I Pasiricisie 1107 (1986), and the conclusions of the Procureur général Dujardin in conformity with this.

⁸ Beernaert (2005, 1095) (note on Cass., 2 Mar. 2005).

⁹ *Rechtskundig Weekblad* 463 (1990-1991). Note of L. Huybrechts.

¹⁰ *Revue de droit pénal et de criminologie* 94 (1992), note of C. De Valkeneer.

¹¹ Traest (1994, 72-75).

A second evolution in the softening of the principle of exclusion of illegally obtained evidence was set in motion by the *Cour de Cassation* in its decision of May 30, 1995. A decision by the Court of Appeal of Ghent had found evidence to be inadmissible where it was gathered in Belgium on the basis of information sent by the French Gendarmerie, since this information was obtained from wiretaps at a time when France did not have legislation compatible with the requirements of Art. 8 ECHR. The *Cour de Cassation* quashed the ruling by the Ghent Court of Appeal on the grounds that "evidence of an offense is different than the disclosure of a crime" and, even if the person reporting an offense obtained that information in an illegal manner, this does not affect the validity of evidence later obtained without an illegal act.¹² In other words, the *Cour de Cassation* refused to apply the principle of exclusion of illegally or irregularly obtained evidence to a mere tip or a report of a crime. In its opinion, a crime report or a disclosure could not be treated as if it did not exist. If a report or a tip was illegally obtained, it is up to the judicial authorities to try to put together evidence of that offense in a valid manner. The illegal or irregular character of the crime report or the reception of the tip in question does not render it impossible, according to the *Cour de Cassation*, to gather evidence of that offense in a completely valid manner.¹³

Following these two decisions softening the principle of exclusion of illicitly gathered evidence, one could have anticipated a fundamental shift in the jurisprudence of the *Cour de Cassation* on this issue. This fundamental shift took place in a decision by the *Cour de Cassation* of October 14, 2003.

Even accounting for some fine tuning done to the classical theory of exclusion of illicit evidence, one principle remained still intact: that of the inadmissibility of evidence obtained by means of an illegal action committed by investigating or prosecuting authorities. This principle was fundamentally modified by the October 14, 2003 decision of the *Cour de Cassation*.

It is worth explaining the circumstances of that case. During a police operation in Antwerp (operation "Antigone"), the appellant was subjected to a pat-down search. Car keys were found in his jacket pocket and the police used them to open his vehicle, where a loaded revolver was found with the serial number filed off. The search of the vehicle was illegal because it was done in violation of Art. 29 of the law of August 5, 1992, on the function of police. The Antwerp Court of Appeals refused to exclude the evidence gathered from this illegal search. The *Cour de Cassation* dismissed the appeal of that decision, deciding, in clear terms, that "the fact that a piece of evidence was obtained irregularly only has, as a rule, the result that the judge in forming his decision may not take that evidence into consideration either directly or indirectly where either: (1) the respect of certain formal conditions is required under penalty of nullity; (2) the irregularity has hurt the trustworthiness of the evidence, or; (3) the use of the evidence is contrary to the right to a fair trial".¹⁴

¹² Cass., 30 May 1995; Kuty (1998, 489) and Traest (1996, 151).

¹³ The question remained whether this theory should also apply where the report of the crime itself was a crime (for example where it constituted a violation of professional secrecy).

¹⁴ Cass., 14 Oct. 2003; Kuty (2004, 405).

This landmark decision of the *Cour de Cassation* in October 2003 signaled the beginning of a new Belgian judicial theory in matters of excluding illicitly gathered evidence. In the place of a *prima facie* prohibition on the use of illicit evidence, this decision of the *Cour de Cassation* substituted a *prima facie* authorization of its use, only limited by a few exceptions specified by the court. It follows that the discretion to consider evidence given to the judiciary is now quite considerable.¹⁵

In the years following the landmark decision of October 14, 2003 (which is today commonly referred to as the "Antigone case"), the *Cour de Cassation* has had several opportunities to explain the criteria put forth in that decision. Namely, the prohibition on using illegally obtained evidence where the use of that evidence would be contrary to the right to a fair trial, which begged for further explanation. These clarifications have come about through the jurisprudence of the *Cour de Cassation* from 2003 until the present. The first two criteria for their part, called for less explanation. The practice of criminal law since 2003 clearly shows that the debates before Belgian courts on the exclusion of an illegally or irregularly obtained piece of evidence have to do for the most part with the interpretation of the third criterion, that of fair trial. This does not come as much of a surprise, considering that the first two criteria are more clearly described by the *Cour de Cassation* than the third criterion on fair trial which is a clear reference to the decisions of the ECHR, that the notion of a fair trial must be analyzed on the basis of the specific facts of each case.

Going back to the first scenario where evidence would be excluded – that of a violation of a formality required under penalty of nullity – it must be said that this is rarely applied in Belgium.¹⁶ In the current version of the Belgian CCP, very few formalities are actually prescribed under penalty of nullity. This would apply for example in relation to certain formalities required for hearing witnesses who are under a complete cloak of anonymity or for wiretaps (governed respectively by §§ 86bis, 86ter, and 90quater of the Belgian Penal Code).

There exist other formalities not established under penalty of nullity by law but which are considered in the case law and the literature as substantive formalities. According to the classical doctrine of evidence in criminal matters, violation of a substantive formality, although not established under penalty of nullity by law, should equally result in the declaration of a nullity. The question was raised, after the *Antigone* decision of October 14, 2003, whether violation of a substantive formality, not established by law under penalty of nullity, could still lead to the exclusion of evidence thus obtained. The answer to this question would appear to be no. Indeed, in two decisions on November 16, 2004, the *Cour de Cassation* addressed the problem of the possible exclusion of evidence obtained through an illegal search. In one of these cases,¹⁷ an accused's home was entered without him

¹⁵ Kuty (2005a, 352).

¹⁶ Beernaert (2005, 1103).

¹⁷ Cass., 16 Nov. 2004, R.G. P.04.1127.N, *Revue de droit pénal et de criminologie* 665 (2005). On the consequences of an irregular search warrant, we also refer to the decision of November 15, 2005, Pasicrisie 2254 (2005).

having consented to it in writing, in spite of the fact that Art. 1bis of the law of June 7, 1969 makes the legality of a consensual search – one without a warrant by a magistrate – dependent upon there being a document signed by the person who has lawful enjoyment of the premises. Although not established under penalty of nullity, the requirement of a written consent to search signed by the person in question before beginning a search is considered to be a substantive formality in the literature. The *Cour de Cassation* nevertheless decided that the failure to abide by this formality did not bring about the exclusion of the evidence obtained in the search. The *Cour de Cassation* argued: "it does not follow from Art. 6 ECHR that guarantees a fair trial, nor from Art. 8 ECHR which guarantees the right to respect for one's private and family life, his home and his correspondence, nor from any constitutional or legal provision that evidence obtained in violation of one of the fundamental rights guaranteed by the Convention or by the Constitution is always inadmissible". And the court continued: "Except in cases where a treaty or statutory provision itself establishes the legal consequences of the failure to follow a legally established formality relating to obtaining evidence, the judge shall decide what the consequences of that irregularity are to be". For the court, this rule also applies where the formality that was disregarded concerns one of the fundamental rights guaranteed by Arts. 6, 8(2) ECHR and by Arts. 12(2), 15 Const. Following this precedent, it seems clear that the *Cour de Cassation* is no longer interested in finding that the failure to follow a substantive rule of criminal procedure would require the nullification of evidence which stems from it.¹⁸

The *Antigone* jurisprudence of the *Cour de Cassation* does not seem to apply to cases where strict formalities that the legislature enacted to guarantee the intrinsic quality of evidence were not followed (such as in matters requiring expert testimony relating to DNA¹⁹ or measuring the concentration of alcohol in a breathalyzer test²⁰); even if they are not established under penalty of nullity but "merely" by statute, the evidence obtained in violation of these rules is intrinsically flawed and may not be admitted.²¹

The second factor put forth by the *Antigone* decision of October 14, 2003 concerns cases where an irregularity has hurt the trustworthiness of the evidence. Opportunities for applying this option may themselves prove to be exceedingly rare. This option is likewise of little help to the extent that a piece of evidence which is not trustworthy would not be taken into account by the criminal judge anyway, regardless of the cause of its lack of trustworthiness.

¹⁸ Kuty (2005a, 353). See also, more recently, Cass., 26 Jan. 2011, R.G. P.10.1321.F, *Revue de droit pénal et de criminologie* 82 (2012), note of D. Dillenbourg.

¹⁹ Cass., 25 May 2005, R.G. P.05.0672.F, *Revue de Jurisprudence de Liège-Mons-Bruxelles* 1408 (2005).

²⁰ Cass., 26 Nov. 2008, R.G. P.08.1293.F, *Journal des Tribunaux* 741 (2008) (and the conclusions of D. Vandermeersch).

²¹ Franchimont et al. (2009, 1045).

As mentioned above, the third factor in the *Antigone* decision, namely the respect of the right to a fair trial, is what has given rise to the greatest amount of discussion in the literature and in case law developments. Since 2003, the *Cour de Cassation* has actually identified in its jurisprudence four additional criteria²² that the criminal judge should take into account when deciding whether taking an irregularly obtained piece of evidence into account would or would not impair the right to a fair trial.

In a decision of March 23, 2004,²³ the *Cour de Cassation* held for the first time that a criminal judge may, in determining if there was or was not a violation of the right to a fair trial, take into account one or several of the following factors: (1) whether the authority in charge of an inquiry, an investigation, or the prosecution of an offense did or did not intentionally commit the illicit act; (2) whether the gravity of the underlying offense significantly eclipses the illicit act committed; and (3) whether the evidence illicitly obtained concerns only one of the material elements required to prove the offense. The literature has raised fundamental questions about these additional criteria.

First, the intentional nature of the illegality committed by the authorities can certainly play an important and even decisive role in any potential disciplinary or criminal proceedings against the officials involved, but it is not clear that this fact should also play a role in the decision of the criminal courts whether or not to accept the evidence in question in the original criminal proceedings.²⁴

The reference to the relative seriousness of the illegality committed and the underlying offense being investigated introduces, for its part, a certain criterion of proportionality in the decision of the judge on the admissibility of evidence. Although proportionality tests are certainly not unknown in criminal law or in criminal procedure, the introduction of this criterion in the decision regarding the possible exclusion of an illegally obtained piece of evidence still raises some questions. On the one hand, it is understandable that the extreme seriousness of an offense committed by the accused could go against excluding an illegally obtained piece of evidence where the act in question only involved a "minor" illegality. But on the other hand, we could just as easily argue that a guilty verdict involving a particularly serious offense will typically bring with it a very heavy punishment and it is therefore particularly important that the verdict be the result of a procedure conducted in conformity with existing law. There exists a paradox in saying that the rules governing admissibility of evidence in cases involving a serious offense should be more flexible than those which apply in the trial of less serious offenses with lesser punishments.²⁵

The third factor, namely whether the illicitly obtained evidence concerns only one of the material elements required to prove the offense, seems at first glance to be fairly obscure. This third factor should probably be understood in relation to cases

where the illicit evidence would establish the guilt of the accused all by itself.²⁶ We could use the example of an illegal entry of a place used for selling narcotics, during which the police discover the corpse of a murder victim. In such a case, the discovery only relates to the substance of the crime of homicide. It is therefore logical and appropriate that this circumstance would justify opening an investigation, independent of the illegal nature of the search of the home.

In a decision on March 2, 2005,²⁷ the *Cour de Cassation* added a fourth factor to the three already cited. The *Cour de Cassation* decided that the criminal court, when deciding on the possible exclusion of an illegally obtained piece of evidence, may also take into account the fact that the illegality committed had no impact upon the rights or liberties protected by the standard violated. The case in question concerned the existence of a security camera focused upon the cash register of a store, which made it possible to show that one of the cashiers had not registered the totality of purchases made by clients and had fraudulently appropriated the difference between the registered sales and the actual sales. The recordings were made without the knowledge of the cashier, which constituted an illegal practice, contrary to Art. 9 of Collective Labor Agreement No. 68 of June 16, 1998. The appellate judges nevertheless argued that the camera, focused on the store's cash register, was only watching this and not the cashier herself. And the *Cour de Cassation* decided that, in such circumstances, the illegality did not have any impact upon the right to privacy protected by the standard violated, and that the criminal judge could therefore have accepted the evidence, although irregularly obtained.

The *Cour de Cassation* has, since 2003, held, that it is up to the judge to decide the admissibility of illegally obtained evidence that is not expressly excluded by statute, in light of Art. 6 ECHR and Art. 14 ICCPR taking into account all facts of the case, including the means used to obtain the evidence and the circumstances surrounding the illegal act. The three aforementioned criteria—whether the authority in charge of the investigation intentionally committed the illicit act, the extent to which the gravity of the illicit act eclipses that of the underlying offense, and whether the evidence illicitly obtained concerns only one of the material elements of the offense—all must be taken into consideration.²⁸

In case law since 2003, the *Cour de Cassation* has also specified that the three factors, put forth in the *Antigone* case of October 14, 2003, and interpreted in decisions on March 23, 2004, November 16, 2004, and March 2, 2005, are the only criteria that can lead to the exclusion of an illegally obtained piece of evidence. The judge excluding a piece of evidence following the violation of a rule not established under penalty of nullity may therefore not do so without examining in what way that illegal act compromises the right to a fair trial or harms the trustworthiness of the evidence.²⁹

²² De Valkeneer (2005, 688).

²³ *Journal des Tribunaux* 211 (Kuty 2005a).

²⁴ Cass., 31 Oct. 2006, Pasirisie 2239 (2006); Cass., 21 Nov. 2006, Pasirisie 2437 (2006); Cass., 4 Dec. 2007, *Rechtskundig Weekblad* 110 (2008–2009).

²⁵ Cass., 12 Oct. 2005, *Revue de Jurisprudence de Liège-Mons-Bruxelles* 585 (2006).

²² Criteria which are nevertheless neither exhaustive nor cumulative. *Ibid.* 1052.

²³ Pasirisie 500 (2004); *Revue de droit pénal et de criminologie* 661 (2005).

²⁴ Bosly et al. (2010, 1015–1016).

²⁵ *Ibid.*

The jurisprudence of the Belgian *Cour de Cassation*, which commenced with the *Antigone* decision of October 14, 2003 has since then been the object of a decision by the ECtHR. Indeed, one of the two decisions given by the *Cour de Cassation* on November 16, 2004, concerning an illegal act during a search, was subjected to the scrutiny of the Strasbourg court. In its decision of July 28, 2009, that court repeated that it does not in principle decide on the admissibility of certain categories of evidence, for example evidence obtained illegally according to national law. The Court held that, in order to determine if the procedure in its entirety was fair, the court must ask itself if the rights of the defense were respected and it must specifically look into whether the accused was given the possibility to challenge the authenticity of the evidence and to oppose its use. The European court held that, in the case in question, the evidence gathered in violation of internal law was not in violation of any article of the convention. It was clear that the national law violated in the case in question, did not coincide with Art. 8 ECHR³⁰ or any other article dealing with certain rights considered to be among the most fundamental of the Convention. The court noted that before the Belgian court of appeals the judges engaged in a thorough examination of the configuration of the premises in order to rule on the question of whether there was or was not a trespass.

The ECtHR concluded: "In this case, the circumstances in which the impugned evidence was obtained shed no doubt whatsoever on its reliability or accuracy. Furthermore, the applicant had an opportunity to challenge the evidence at three levels of jurisdiction and to object to its use and to the resulting findings, in conformity with the jurisprudence cited by the court. Thus, the Court finds the merits of the criminal charges against the applicant were examined fairly, in keeping with the requirements of Article 6(1), and there has been no violation of that provision of the Convention".³¹

From this decision of the ECtHR, we can infer that the jurisprudence of the *Cour de Cassation* developed in the *Antigone* case and subsequent cases was not itself contrary to the European Convention, certainly not if the legal provision of internal law that was violated in obtaining the evidence did not constitute a fundamental right guaranteed by the Convention.

The jurisprudence of the *Antigone* case of the *Cour de Cassation* also poses the question regarding the fate that will meet the exclusionary rule of the "fruits of the poisonous tree".

The jurisprudence of the *Cour de Cassation* since the *Antigone* case of 2003 has not expressly challenged the rule according to which the nullity of an act extends also to subsequent evidence to the extent that, without the act that was done irregularly, that evidence would not have been obtained.³² The so-called *Antigone*

³⁰ Illegally searched premises were certainly not publicly accessible but they were not a "home" within the meaning of Art. 8 of ECHR.

³¹ Lee Davies v. Belgium, No. 18704/05, ECHR, 28 July 2009.

³² Cass., 12 May 2004, R.G. P.04.0572.F.

jurisprudence has to do with the question of whether or not to exclude an illegally obtained piece of evidence. The fundamental shift in the jurisprudence of the *Cour de Cassation* since 2003 does not necessarily mean that the rule of the "fruits of the poisonous tree" should be abandoned or marginalized.

We can say that the fundamental principle of the "domino" theory remains valid, in the sense that pieces of evidence that are the direct or indirect result of illegal or irregular evidence are tainted by the same vices as the original evidence.³³ However, if the judge decides that illegal evidence should not be excluded from trial because its exclusion could not be justified by one of the factors arising from cases of the *Cour de Cassation*, it seems clear that the subsequent piece of evidence should not be kept from trial either, even if it is the result of the first, illegally obtained piece of evidence. These pieces of evidence are all just as illicit, but their exclusion from trial would no longer be automatic: it would depend on the fate of the piece of evidence from which they arose.

Conversely, if the judge decides to exclude the evidence based upon the *Antigone* cases and the factors described above, it seems that pieces of evidence that are the result of the evidence in question should be excluded from trial for the same reason because they are the product of it. We believe the jurisprudence of the *Antigone* case should not be applied to each piece of subsequent evidence. If a piece of evidence is excluded because it is the result of an act of investigation contrary to a statutory provision established under penalty of nullity, the evidence resulting from it should be kept out of trial in the same way because it is the direct consequence. The same answer applies where said evidence was gathered or introduced into court in violation of the right to a fair trial. In this situation, it is enough that the criminal judge decides first that a piece of evidence was illegally obtained and that its use would be in violation of the right to a fair trial, then notes that the subsequent evidence is the direct result of the first piece of evidence, itself illegally obtained and without which the subsequent evidence would not have been obtained. Indeed these circumstances corrupt the subsequent procedural acts that follow.³⁴

According to one theory, we could still allow an exception to the "domino" theory where a piece of evidence is the result of another piece of evidence obtained through an illegal or irregular act which stains its trustworthiness. We could indeed argue that the simple fact that the illegality or the irregularity stains the trustworthiness of evidence resulting from it does not necessarily extend to other evidence which result from that and which, itself, may prove to be completely reliable.³⁵

³³ Kuty (2005b, 95).

³⁴ Ibid.

³⁵ Ibid, 96.

7.3 Admissibility of Evidence and Protection of Privacy

7.3.1 The General Framework of the Protection of Privacy

Many provisions guarantee, in Belgian law, a general protection of privacy. This is the case of Art. 22 Const. but also Art. 8 ECHR and Art. 17 ICCPR, which are both considered to have a direct effect upon national law.³⁶ Regarding the treatment of personal information, Belgium moreover has an organic law with a date of December 8, 1992,³⁷ which establishes an exception for the treatment of information of a personal nature, administered by public authorities as part of the exercise of their duties as judicial police.

Following the lead of the ECtHR, the Belgian *Cour de Cassation* holds that the right to the protection of one's private life guaranteed by Art. 8 ECHR is not absolute and may be subject to restrictions. The restrictions are listed in Art. 8(2) ECHR: the restriction must be established by law (legality principle); must work towards one of the enumerated goals of Art. 8(2) (principle of finality); and must be necessary in a democratic society for the realization of that goal (principle of proportionality).³⁸ Regarding the first condition, the legality principle, the *Cour de Cassation* again aligns itself with the jurisprudence of the European Court in recognizing that, for the purposes of applying Art. 8 ECHR, "the term 'law' means any rule of internal law, written or otherwise, provided that it is accessible to the persons concerned and is stated in a precise manner."³⁹

7.3.2 Protection of the Private Home

Art. 15 Const. contains the principle of the inviolability of the private home. §§ 87 and 88 of the Belgian Penal Code confer upon the investigating magistrate the right to issue a search warrant and, thus, impair the right of a citizen to the inviolability of his home. Indeed, these provisions allow the investigating magistrate, where he deems it useful, to enter into the home of the accused or in any other place where he might believe that objects helpful for revealing the truth might be hidden.⁴⁰

³⁶ Particularly in this sense see the decision of the Constitutional Court (at the time the *Cour d'arbitrage*) No. 14/93 of 18 Feb. 1993, point B.2.7.

³⁷ Supplemented by a royal decree of February 13, 2001.

³⁸ For an illustration, see e.g. Cass., 8 Jan. 2003, RG P.02.0694.F.

³⁹ See in particular Cass., 2 May 1990, RG 8168.

⁴⁰ §§ 46quinquies and 89ter of the Criminal Code go even further because they allow an investigating magistrate to put a home under a "discrete visual inspection". This measure allows for entry into a private space to inspect it, not only without the consent of the owner, but even without knowledge of it. Bosly et al. (2010, 404). This is nevertheless subject to strict conditions and may not, in particular, be authorized other than for certain offenses (those for which wiretaps may be authorized or those committed in the context of a criminal organization).

The search warrant issued by the investigating magistrate must always mention the police officer's desire to search, the reason for the search, the person whose place will be searched, the exact location where it is to take place, the goal of the search, and the offense to which it is related.⁴¹ In a decision of December 9, 2004, the ECtHR decided that information provided in the search warrant should, among other things, allow the interested person to have control over the limits of the warrant by identifying, preventing and denouncing abuses committed upon execution of the search and, where that fails, to be able to seek remedies either at that time or retrospectively.⁴²

Belgian law recognizes several exceptions to the need for approval from a magistrate. Thus, a search warrant is not necessary in cases of consent by the person who has lawful enjoyment of the premises, provided that the consent is established in writing (Art. 1 bis of the law of June 7, 1969).

Any possible illegality committed during the execution of a search warrant could bring about the exclusion of the pieces of evidence resulting therefrom. In practice, this exclusion could result in those things found as a result of a search and seizure not being usable as the basis for convicting the accused. However, exclusion of evidence obtained during an illegal search is not automatic. The rules and criteria coming from the *Antigone* decision of the *Cour de Cassation* must also apply when the judge decides whether or not to exclude any evidence obtained during a search deemed illegal. At this point we may return to the decision of the *Cour de Cassation* of November 16, 2004, concerning a search done without the approval of a magistrate and without the written consent of the person having lawful enjoyment of the premises. The Belgian *Cour de Cassation* applied the criteria of the *Antigone* decision plain and simple. The decision by the ECtHR of July 28, 2009, in the case of *Lee Davies v. Belgium* supports applying these rules to evidence resulting from an illegal search. It remains to be seen if the *Cour de Cassation* and/or the ECtHR will be so "permissive" in a case where a search is done in flagrant violation of the principle of the inviolability of the home guaranteed by the constitution and the Convention, without any authorization by the magistrate and without the consent, even oral, of the person having lawful enjoyment of the premises in question.

7.3.3 Protection of Private Communications

The secrecy of private communications is not specifically protected by the Constitution apart from the protections accorded to written correspondence. Indeed, Art. 29 Const. effectively guarantees the secrecy of letters. All other forms of private communication fall under the scope of the general protection of privacy, guaranteed by Art. 22 Const., Art. 8 ECHR and Art. 17 ICCPR.

⁴¹ Franchimont et al. (2009, 460–461).

⁴² Van Rossem v. Belgium, No. 41872/98, ECHR, 9 December 2004.

These provisions are supplemented by a law of June 30, 1994, "relating to the protection of private life against wiretaps, surveillance and recording of communication and private telecommunications", which implemented the general principle of prohibiting wiretaps, surveillance and recording of communications and private telecommunications during their transmission and with the assistance of any sort of device. These prohibitions are set up as crimes, punished heavily with fines and imprisonment (§§ 259bis, 314bis Penal Code).

The Belgian CCP regulates three types of investigative measures which affect the secrecy of private communications: the identification of the user of a means of telecommunications (§ 46 bis CCP⁴³), the identification and location of telecommunications (§ 88bis CCP⁴⁴) and, finally, wiretaps and the recording of private communications or telecommunications (§ 90ter et seq. CCP⁴⁵).

The first measure allows for contacting phone service providers and/or internet access providers, either to know to which means of communication a given person subscribes, or, conversely, to obtain the identity of the person using a given means of communication. This is allowed equally during a preliminary investigation, done by the prosecution, or during a judicial investigation, supervised by an investigating magistrate, and for all crimes or misdemeanors.

The second measure of identifying and determining the location of telecommunications is an even more intrusive search technique into private life, because it allows identification of the means of communications used on both ends of a conversation: the apparatus used for incoming communications and that used for outgoing communications. It also permits the determination of the time and the length of the call or communication. It further allows discovery of the origin or the destination of a call or a communication,⁴⁶ but never allows for intercepting the content of such communications. An investigating magistrate may authorize the identification and localization of telecommunications in the investigation of all offenses, whether felonies or misdemeanors. As an exception, the prosecutor may prescribe the measure in two very specific situations: in cases of phone or electronic harassment, under the condition that the complainant requests it, or in cases of flagrant crimes or misdemeanors, but only where it involves an offense listed under § 90ter (2-4) CCP⁴⁷ and only for a maximum of 24 h.⁴⁸

⁴³ Inserted by a law dating June 10, 1998, becoming effective on October 2, 1998.

⁴⁴ Inserted by a law dating February 11, 1991, becoming effective on March 26, 1991.

⁴⁵ Inserted by a law dating June 30, 1994, becoming effective on February 3, 1995.

⁴⁶ Which, in the case of mobile phones, involves identifying the antennae that relayed the telecommunication.

⁴⁷ These are different offenses which can, among other things, give rise to wiretaps and recording private (tele)communication (see *infra*).

⁴⁸ Beyond this duration, the intervention of an investigating magistrate will be necessary.

The last investigative measure consists of intercepting, or alternatively recording, private words or messages exchanged between people,⁴⁹ either directly,⁵⁰ or via a means of telecommunication. Because it is particularly intrusive into one's private life, this surveillance measure is subject to very strict conditions: it is reserved for a number of serious offenses, exhaustively enumerated in the code (§ 90ter (2.4) CCP),⁵¹ and it is not allowed where other means of investigation could suffice for discovering the truth⁵² (§ 90ter(1) CCP); it is strictly limited in time⁵³, and finally, in theory only the investigating magistrate may authorize this,⁵⁴ by a reasoned order subject to a series of formal conditions, the violation of which is punished by nullity (§ 90quater(1) CCP).

The *Cour de Cassation* has issued opinions relating to the various investigative measures. It has held that telephone communications constitute aspects of one's private life and correspondence, which are protected by Art. 8(1) ECHR,⁵⁵ but that both § 88bis CCP (authorizing tracking) and § 90ter CCP (governing wiretaps) are standards which, because they are accessible to the persons concerned and articulated in a sufficiently precise manner, are interferences in private life by public authorities in conformity with Art. 8(2) ECHR.⁵⁶

The *Cour de Cassation* also applies *Antigone* case law relating to the admissibility of evidence, whereby the judge may no longer exclude illegally gathered evidence except in three situations: where a formal rule established under penalty of nullity

⁴⁹ To fall within the scope of the measure, the interception must occur during the transmission of the speech or message, that is to say, on the trajectory between transmitter and receiver. The *Cour de Cassation* has held, however, that the discovery of the contents of a recording from a telephone answering machine and its seizure, done in the context of a search executed in a regular manner by the investigating magistrate or under his order, do not fall under § 90ter CCP (and further do not violate Art. 8 ECHR). (Cass., 27 Oct. 1999, RG P.99.0715.F).

⁵⁰ This type of eavesdropping, called direct, may be done with the assistance of technical means placed *outside* the private space where the intercepted conversations are taking place (in which case, the *Cour de Cassation* believes there hasn't been an affront to the inviolability of the home; Cass., 26 Mar. 2003, RG P.03.0412.F), or *inside* that space and without the knowledge of its occupants (it is then a special type of discrete visual inspection; see § 90ter (2) C.C.P.).

⁵¹ Under § 90ter(1)(para. 3) CCP, the measure may not be ordered except in respect, either to persons suspected, on the basis of specific evidence, of having committed one of the infractions listed in the law, or regarding (tele)communications regularly used by these suspects, places thought to be frequented by them, or people presumed, on the basis of specific evidence, to be in communication with them.

⁵² However this requirement is considered *in abstracto*, and does not assume that all other means of investigation have actually been attempted before the measure is ordered.

⁵³ It may not exceed 1 month after the decision ordering it (§ 90quater(1)(4) CCP), unless renewed for a new term not permitted to exceed 1 month, with a maximum limit of 6 months (§ 90quinquies(1) CCP).

⁵⁴ Except in flagrant cases of hostage taking or extortion for which the prosecutor may authorize the measure exceptionally for a duration not lasting more than 24 h (§ 90ter(5) CCP).

⁵⁵ Cass., 10 Apr. 1990, RG 4346.

⁵⁶ Cass., 11 Oct. 2000, RG P.00.1245.F; Cass., 26 Mar. 2003, RG P.03.0412.F; Cass., 10 Oct. 2007, RG P.07.0864.F.

was disregarded, where the irregularity harms the trustworthiness of the evidence, or where use of the evidence would compromise the right to a fair trial. Although § 90quater(1) CCP is one of the rare provisions established under penalty of nullity in matters of evidence, the Court has recently interpreted this nullity provision in rather restrictive terms, because it felt that it did not apply except in relation to defects affecting the warrant itself, but not its execution: thus, even though § 90quater(1)(paras. 2-5) CCP provide that the order by which the magistrate authorizes a wiretap must indicate, under penalty of nullity, the name and rank of the officer of the judicial police who will execute the measure, a violation of this requirement would not lead to the declaration of a nullity and exclusion of the evidence thus gathered if the surveillance measure was actually executed by a different agent. According to the court, this only concerns the execution of the measure and does not involve the regularity of the order itself.⁵⁷

7.3.4 Searches of Vehicles or Other Means of Transportation

Art. 29 of the law of August 5, 1992, on the role of the police, allows the search of a vehicle if police officers have reasonable grounds for believing, on the basis of physical evidence, the behavior of the driver or passengers, or the circumstances of time and location, that the vehicle or the means of transportation was, is or could be used to commit an offense, to hide or transport wanted persons, to avoid an identity check or to store or transport objects dangerous to public order, evidentiary exhibits from a trial or general evidence of a crime.⁵⁸

If the vehicle is in a private garage or is parked on private land, the judicial authorities must abide by the requirements relating to dwelling searches. The search of a vehicle converted in a permanent manner into housing and which is actually used to this effect at the time of the search is treated as a search of a dwelling. Such a vehicle, therefore, benefits from the protection tied to the inviolability of the home. In this case, the rules governing the legality of a dwelling search must also be applied.

It thus follows that a search of a vehicle, which is neither being used as a home nor found in a private garage or on private property, is governed by Art. 29 of the law on the role of the police, not by the legal provisions concerning the legality of a dwelling search. An irregularity or an illegality committed during a search of a vehicle based on the law of August 5, 1992, must also be judged according to the so-called *Antigone* criteria. The landmark decision of the *Cour de Cassation* of October 14, 2003, also specifically addressed searches of vehicles that did not serve as a home which were done contrary to the provisions of Art. 29 of the law on the role of the police.

⁵⁷ Cass., 19 Jun. 2007, RG P.07.0311.N.

⁵⁸ On this question, see Franchimont et al. (2009, 308–310).

Searches of computers, for their part, are governed by §§ 88ter, 88quater CCP. The magistrate has the power to authorize a search of a computer system. In this case, also, any possible illegality or irregularity must be judged on the basis of the *Antigone* jurisprudence of the *Cour de Cassation*. There is indeed no reason to suppose that this new jurisprudence of the *Cour de Cassation* on the exclusion of illegally obtained evidence would not apply to evidence obtained in violation of §§ 88ter, 88quater CCP.

7.4 Admissibility of Evidence and the Legality of Interrogations

7.4.1 The Right to Silence and the Principle of *nemo tenetur*

The Belgian Constitution does not guarantee persons accused of an offense the right to remain silent and to not contribute to their self-incrimination. For some time,⁵⁹ on the other hand, the *Cour de Cassation* has held that the right to silence is part of the right to a defense and that under this rubric, it constitutes a general principle of law.⁶⁰ Since then, it has been expressly guaranteed by § 47bis CPP, as modified by the law of August 13, 2011.⁶¹

There exists, as well, an obligation imposed by international standards, which are given direct effect in the Belgian legal order. While the right to silence is formally guaranteed by Art. 14 (3)(g) ICCPR, it is not expressly mentioned in the ECHR. However, the ECHR has, since 1993, recognized that it is included in the right to a fair trial, guaranteed by Art. 6 of the Convention.⁶²

In the opinion of the ECtHR, the reason for this right has to do with protecting the accused from abusive coercion on the part of the authorities and the acquisition of pieces of evidence through duress or pressure, without regard to the will of the accused, and, thus, helps to avoid judicial error and makes it possible to achieve the goals of a fair trial under Art. 6 ECHR.⁶³ But the court also sees a corollary to the presumption of innocence enshrined in Art. 6(2) ECHR,⁶⁴ which implies that the prosecution has the burden of proving its case, while the defense may carry on in a purely passive role.

⁵⁹ Cass., 13 May 1986, I Pasierisite 1107 (1986), and the conclusions of the Procureur général Dujardin in conformity with this.

⁶⁰ Traditionally, the Belgian *Cour de Cassation* evokes, on this topic, the respect of the rights of the defense “which the right to silence is a part of” (see notably Cass., 13 May 1986, RG 91/36 and Cass., 13 Jan. 1999, RG P 98.0412.F). More recently, it has specified that there “does not exist a general principle of a right to silence separate from the general principle of law concerning the rights of the defense” (Cass., 16 June 2004, RG P.04.0671.F).

⁶¹ Usually referred to as the “Salduz law”.

⁶² Funke v. France (1993), 16 E.H.R.R. 297, 326, § 44.

⁶³ Murray v. United Kingdom (1996), 22 E.H.R.R. 29, 60, § 45.

⁶⁴ Saunders v. United Kingdom (1996), 23 E.H.R.R. 313, 337, § 68.

The right to not contribute to your own incrimination can be undermined in two different ways, neither of which excludes the other: it can be violated through extracting statements from a suspect against his will, by means of ill treatment, pressure or threats but also in cases where an accused makes uninformed statements, and in particular if he is not fully informed of the fact that he has the right to remain silent throughout the interrogations to which he is subjected, and that he is entirely free to decide how to deal with the charges brought against him.⁶⁵

7.4.2 Protection Against "Extracted" Statements

There are different ways to extract statements from an accused against his will. The most characteristic ways, obviously, include the use of ill treatment (torture or inhuman and degrading treatment). But more subtle forms of pressure can also be exercised, such as interrogating a suspect, as if he were a mere witness, where he is obliged to answer and tell the truth.

7.4.2.1 Torture and Inhuman and Degrading Treatment

The law of June 14, 2002, brought Belgian law into conformity with the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which was adopted in New York on December 10, 1984. It added §§ 417bis and 417quinquies to the Penal Code, which penalize torture and the use of inhuman or degrading treatment and establish heightened penalties for public officials when acting within the scope of their duties. This law did not expressly include the prohibition contained in Art. 15 of the New York Convention against using as evidence a statement that was obtained through torture. Such a ban should result from the application of the combined jurisprudence of the Belgian *Cour de Cassation* and the ECtHR. For according to Belgian precedent, exclusion will ensue if there was a violation of the right to a fair trial (so-called *Antigone* jurisprudence), and according to the ECtHR, the use of statements as evidence in criminal proceedings or other material collected by means of acts that qualify as torture automatically taints as unfair the entirety of the proceedings.⁶⁶ It is difficult to see how such evidence could be admitted in criminal proceedings in Belgium.

Things are less clear when dealing with evidence gathered by means of acts no longer qualifying as torture, but "merely" inhuman or degrading treatment. When dealing with these, the jurisprudence of the ECtHR⁶⁷ is indeed less clear-cut: although

⁶⁵ In other words, confessions or other self-incriminating statements must be both free and made in full knowledge of the facts.

⁶⁶ *Gäfgen v. Germany* (G.C.) (2011), 52 E.H.R.R. 1, 42, § 166 and the case law cited therein.

⁶⁷ Which, indirectly, also sets the standards applicable in Belgian law regarding the case law of the *Cour de Cassation* and the benchmarks made therein for the criteria of a fair trial.

the Court believes that there absolutely has been a violation of Art. 6 ECHR in cases involving the use of *statements* obtained by means of treatment contrary to Art. 3 ECHR, but not considered torture, it is not as categorical when dealing with the use of physical evidence that was found as a result of such treatment. On the contrary, in this second situation the possible violation of Art. 6 will depend, according to the Court, upon the circumstances of the case and, in particular, on whether there has been "a break in the causal chain leading from the prohibited methods of investigation to the [accused] conviction and sentence in respect of the impugned real evidence".⁶⁸

It remains, in any case, for the defendant to prove the existence of any possible bad treatment he may have been subjected to during interrogations and, on this point, the protection offered by Belgian law has recently been increased, since suspects interrogated while being taken into police custody do now receive the right to be assisted by counsel during all the interrogations conducted before they're placed in pre-trial detention.⁶⁹

7.4.2.2 Testimony Under Oath

For the *Cour de Cassation*, the right to silence prohibits questioning an accused under oath during his own trial.⁷⁰ This does not mean, however, that the right to a fair trial will thereby be irreparably compromised. In the view of the Court, an appropriate solution would be to exclude from the trial any evidence found to be null and any evidence derived there from.⁷¹ In contrast an accused who was not himself heard under oath may not move to exclude from the trial a statement made against him by another suspect under oath, which would be inadmissible against that suspect.⁷²

7.4.3 Protection Against "Uninformed" Statements

If we wish to ensure that an accused who makes self-incriminating statements is doing so with full understanding of the facts and is duly informed of the right to silence which he is waiving, two minimum guarantees seem necessary: an express

⁶⁸ *Ibid.*, 42, § 180.

⁶⁹ This right has been guaranteed by the *Saldaz* law of August 13, 2011, which entered into force on January 1, 2012.

⁷⁰ Cass., 16 Feb. 1996, RG A.84.0002.F.

⁷¹ Cass., 16 Sept. 1998, RG A.94.0001.F. This decision is older than the new *Antigone* jurisprudence of the *Cour de Cassation*, but its teachings remain, for our purposes, valid, because in cases of violations of the right to silence, we find ourselves in one of the three situations where the *Cour de Cassation* still allows setting aside illicit evidence, namely where the use of the evidence would compromise the right to a fair trial.

⁷² Cass., 27 June 2007, RG P.07.0333.F.

warning regarding the existence of this right and the assistance of an attorney who could clarify the exact extent of that right. On both these points, Belgian law which offered insufficient protection in light of the *Salduz* jurisprudence of the ECtHR, has recently been reformed.

Respect for the right to silence would, in principle, prohibit the use of any unfair procedures for obtaining confessions, but would not lead to exclusion of statements obtained through the use of surprise and secret information.

7.4.3.1 The Duty to Warn the Accused of His Right to Silence and the Right to Assistance by an Attorney

Since January 1, 2012, §§ 47bis and 70bis CCP expressly provide that any person interrogated as a suspect must be informed of his/her right to remain silent. Besides, if the suspect is interrogated in relation to "serious" offenses (i.e. offenses punished with a maximum sentence of at least one year imprisonment, and not related to road traffic), he/she has the right to a private consultation with a lawyer prior to being interrogated. The first interrogation can be delayed at the suspect's explicit request in order to allow such consultation. However, if the interrogation takes place upon written invitation informing the suspect of his/her rights as well as of the facts and events he/she will be questioned on, the prior consultation with a lawyer is presumed.

In addition, and as already mentioned, the suspect taken into police custody also receives the right to be assisted by counsel during the interrogations conducted before he/she is placed in pretrial detention.

7.4.3.2 Prohibition on Unfair or Deceptive Practices

Statements obtained with the help of false promises have been declared illegal for being acquired in violation of the right to silence.⁷³ This should also be the case where confessions are obtained because of lies by those preparing a report, which reflect an unfair attitude on the part of the person in charge.⁷⁴

7.4.3.3 Right to Silence and the Effect of Surprise

It goes without saying that, to be effective, investigative measures such as wiretaps are done without the knowledge of the persons being listened to, who may during that time – and this is of course the goal of the measure – provide the authorities

⁷³ Cass., 13 May 1986, RG 9136. In this case, agents of the *Inspection spéciale des impôts* had obtained statements from suspects by guaranteeing them they would not be prosecuted criminally, even though they did not have the authority to make such a promise.

⁷⁴ On this issue, see De Valkeneer (2006, 171–174) and the case law cited therein.

with information that they would not have agreed to provide in a classic interrogation. However, these methods do not imply a violation of the right to silence, so long as, of course, they are not accompanied by illegal or unfair means. The *Cour de Cassation* has held that "neither Arts. 6(1) and 6(2) of the ECHR, nor the general principle of law relating to the rights of the defense prohibit listening and recording the communications of a suspect, made pursuant to § 90ter (1) CCP, even if this act of investigation makes it possible to obtain statements the declarant would not have made in the presence of a judicial authority or the police".⁷⁵

7.5 Conclusion

For years it was said in Belgian law that the criminal judge could not take into consideration, as the basis for a conviction, any evidence that was gathered in an illicit manner. Following the new teaching of the *Cour de Cassation* – beginning with the *Arrêt* decision of October 14, 2003 – this is no longer the case. In lieu of a *prima facie* prohibition on the use of illicit evidence, the Court substituted a *prima facie* authorization, except in three narrow cases: violations of a formality established under penalty of nullity, where the reliability of the evidence has suffered, or the right to a fair trial has been undermined.

This reversal of the traditional rule was received rather poorly in the literature. It was argued that it was apparent nonsense for the legislature to incorporate a series of evidentiary rules into law that fix strict limits and conditions on when evidence can be used, and afterwards to admit evidence that was gathered in disregard of the rules thus adopted. Such a form of "legal schizophrenia", consisting of taking from one hand and giving to the other, deprives the law of evidence of a good part of its effectiveness: if illicitly gathered evidence can contribute to forming the opinion of the judge, it is hard to see how it would be possible to effectively dissuade the investigating authorities from again resorting to illegal conduct.

It is also painful to admit that the question of the fate reserved for illegal evidence has up to the present essentially been left to the courts. It seems to us that it would be more in line with the principle of legality of the prosecution if it were decided by the legislature itself.

While waiting for this legislative intervention, it is left to the *Cour de Cassation* to continue fashioning Belgian evidentiary law in criminal matters.

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⁷⁵ Cass., 10 Oct. 2007, RG P.07.0864.F.

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Chapter 8

The Netherlands: Statutory Balancing and a Choice of Remedies

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8.1 The General Theory of Admissibility and Exclusion of Illegally Gathered Evidence

8.1.1 An Introduction to Dutch Criminal Evidence Law

This chapter will give an overview of the way in which the Dutch law of criminal procedure deals with illegally gathered evidence, in particular when the suspect's right to privacy or privilege against self-incrimination is violated.¹ For a proper understanding of this aspect of the Dutch law of criminal procedure, it is important to outline several basic principles of Dutch evidentiary law in criminal cases.

First, the evidentiary system in criminal cases is based on the principle of establishing the substantive truth. This is expressed in the Dutch Code of Criminal Procedure (CCP) (*Nederlandse Wetboek van Strafvordering (Sv)*) in the requirement that a judge may assume that the offense charged is proven only if he "is convinced of it".² This means that a high degree of certainty must exist that the accused has committed the offense.

The judge must also be convinced by the contents of legal evidence. This is the evidence that the CCP considers admissible in criminal proceedings. It may include: the judge's own perception, statements by the defendant, statements by witnesses,

¹For literature on this subject, see: Embregts (2003, 2010), Van Woensel (2004, 119–171), Nijboer (2008, 138–156), Kuiper (2009, 35–59), and Corstens and Borgers (2011, 724–740).

²There is no constitutional provision articulating the same principle.

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