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Developments in the protection of fundamental human rights in criminal process
Introduction

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This issue of Utrecht Law Review is devoted to a problem that is by no means new: the protection of human rights and individual freedoms in criminal process. Indeed, the question of how to reconcile the necessary powers of the state for maintaining order and ensuring the security of society with their inevitable encroachments on the freedom of citizens and their right to be treated with the respect and dignity they command as human beings is a perennial one in the field of criminal law. But for all that, and despite great advances in the establishment of international human rights conventions and in the academic study of human rights, the answers, though tantalisingly close in theory, have in practice become increasingly complicated and pressing in recent years.

It is therefore unsurprising that two international associations of legal scholars – the Académie Internationale de Droit Comparé/International Academy of Comparative Law (AIDC) and the Association Internationale de Droit Penal/International Association of Penal Law (AIDP) – should have (again) turned their attention to the issue. The main body of the text of this issue consists of the general reports on behalf of AIDC and AIDP, both written by Professors of Criminal Law from Utrecht.[1] They are followed by an epilogue, in which Stefan Trechsel, himself a general AIDP reporter in 1979,[2] looks back at developments in the field of human rights and criminal process over the past thirty years. Both reports (based on the answers to extensive questionnaires received from the reporting countries)[3] deal with the fundamental problem of finding a balance: between the due process of law that protects the rights and freedoms of those involved in a criminal offence – be they suspects, victims or law enforcement officials, whose competing rights may in themselves require a delicate balancing act – and addressing the security concerns that arise in a globalised world where societies and governments struggle to cope with the fear of crime at a national level and the perceived threat of international organised crime and terrorism.[4]

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2 Stefan Trechsel is a judge at the Trial Chamber III of the International Criminal Tribunal for the former Yugoslavia and the former President of the European Commission of Human Rights.

3 In this publication, the AIDC questionnaire is to be found as an appendix to the report. The AIDP reporter has chosen to incorporate the questions into the report, which also ends with resolutions that have been adopted by the International Congress, a procedure not applicable at the AIDC congress in Mexico.

4 As the AIDP reporter notes, security concerns are a social construction and as much about fears and perceptions as about substantive empirical changes in actual crime rates and patterns, for which criminological data provide no support.

Needless to say, the reports have much in common, though their approach is different and in that they complement each other. The AIDC report was written for the First Intermediate Congress of the International Academy of Comparative Law concerning 'The Impact of Uniform Law on National Law. Limits and Possibilities' that was held in Mexico City on 13-15th November, 2008. Its aim is to examine the effect of the uniformed standards of human rights contained in international conventions on criminal process in general in different countries, and to identify the factors inherent in different national systems that influence the scope of international standards and the way in which they are implemented in a national context. While in this report the global security paradigm and the (internationalised) counter-terrorism policy that accompanies it figure as external factors of change, they do not form the main focus as they do in the AIDP report. That was written for the Third Section of the XVIIIth International Congress on Criminal Law that took place in Istanbul on 20-27th September 2009 and was first presented during the Preparatory Colloquium in Pula in November 2008. Dealing explicitly with the challenges posed by the globalisation of criminal justice – more specifically with the changing nature of criminal process as governments worldwide seek to meet those challenges by instigating special procedural measures yet attempt to reconcile them with human rights norms – it follows on where the AIDC report leaves off.

The AIDC reporters received answers to their questionnaire from fourteen countries, in alphabetical order: the Republic of Croatia, the Czech Republic, England & Wales, Finland, France, Germany, the Netherlands, Romania, South Africa, Spain, Switzerland,[5] Taiwan, the United States of America and Venezuela. The general report identifies three overreaching issues that influence the reception of a uniform set of international fundamental rights and freedoms in criminal process. The first concerns constitutional arrangements such as whether international law is part of the domestic legal order or must be incorporated/transformed first into national law (monism versus dualism), the significance of the existence of a constitutional bill of rights that (also) governs criminal process, and the nature of the international treaty regime to which a country has signed up. The second issue is whether the legal tradition of a country (common or civil law), and the adversarial/inquisitorial dichotomy that is usually associated with the respective traditions, is relevant to the implementation of internationally recognised standards of fundamental rights in criminal process. And finally, it asks what practical circumstances promote or detract from the effectiveness of such implementations; some are matters of everyday practice such as the training and remuneration of judges and defence counsel, others concern security and crime control at a national level and the wider issues of international terrorism and organised crime.

While all of these issues certainly influence the impact of international human rights norms on domestic criminal process, there is no such thing as the uniform implementation of convention standards. Most countries make a serious attempt to adhere to them, but the scope and manner of their reception into domestic law depends firstly on whether they are received under a monistic or dualistic system and compete with a domestic constitution containing the same rights. By the evidence of the European countries, a convention with substantial enforcement mechanisms is most likely to lead to convergence towards a minimum standard of uniformity, and the European Convention on Human Rights and Fundamental Freedoms and the case law of the European

5 Partly because of the unique situation in Switzerland, where profound reforms of criminal process are taking place, the Swiss reporter was unable to answer the questionnaire in a form that made comparison feasible. For this reason, the reporters have elected to omit references to Switzerland from the general report as reproduced here.

Court of Human Rights play a significant role. However, even where this is the case in Europe, there is still much diversity in the actual implementation of international norms due to the influence of legal traditions which, in some respects, form a counter force to the weight of convention obligations. An even greater counter force is at work in practical circumstances – at the national but especially at the international level – that can undermine international norms.

Indeed, global issues of security and crime control must be seen as the most important counter force, perhaps even a force of convergence – not towards but away from guaranteeing fundamental rights in criminal process. In any event, there appears to be widespread international consensus (followed by the enactment of legislation) that collective security and protection against perceived threats is of greater importance than individual security to be free from undue interference by the state. Almost all of the reporting countries have amended procedures or introduced new measures to deal with the threat of organised crime and terrorism. Although here too convention norms are still in place, there is a very real risk that they are circumvented or at least diluted in order to increase effective crime control, with in some cases (the United States) resorting to dealing with terrorism outside of criminal process, thereby attempting to bypass the restrictions imposed by treaty and/or constitutional obligations, or even fundamental norms of *ius cogens* (such as the absolute prohibition of torture). The summary findings of the AIDC reporters with regard to changes in crime control and criminal process in the wake of global developments are borne out by the AIDP report of which these are the specific subject-matter.

The AIDP general reporter received answers to the questionnaire from seventeen countries (eight of which also replied to the AIDC questionnaire): Argentina, Austria, Belgium, Brazil, Colombia, Croatia, Finland, Germany, Hungary, Italy, the Netherlands, Poland, Romania, Spain, Turkey, the United Kingdom (England & Wales) and the United States. The aim of the general report is a comparative analysis of the national reports in order to trace transformation processes in domestic criminal justice systems, in particular criminal process, as special procedural measures are introduced to deal with terrorism and organised crime, and to map whether this has led countries to depart from their own fundamental rules, procedures, principles and applicable human rights standards. Starting from the premise that the integrated system of criminal law has three dimensions – the protection of individuals (the shield dimension), the provision of instruments of law enforcement (the sword dimension), and of checks and balances/*trias politica* (the constitutional dimension) – the report provides a comprehensive overview of interrelated transformations that have affected all three in three waves of 'war' (on drugs, organised crime and terrorism), although not always in the same way. There are, however, some common features.

All reporting countries have introduced substantial changes, including special procedural measures to deal with serious crime, especially organized crime and terrorism, within both their own constitutional framework and that of international human rights, usually (with the exception of Colombia and the US) without resorting to emergency clauses (state of emergency) in their constitution or in international HR conventions. Special procedural measures to deal with organized crime and terrorism have usually been incorporated into ordinary criminal procedure, and this has had a net-widening effect, in the sense that exceptional procedures have often become the norm for all serious criminal offences. Again, only Columbia and the US post-9/11 have introduced and maintained alternative tracks of special proceedings outside the regular criminal justice system in which the classic procedural guarantees and rights of both the ordinary and military criminal justice system are set aside. As a result of the dominant paradigm of the war against organized crime and the war against terrorism, and strengthened by the use of technology

in an online and digital context that has replaced the old concepts of judicial investigation such as search and seizure, the main goals of the criminal justice system have changed. It is no longer a reactive system aimed at punishing crimes and rehabilitating offenders, but a proactive and preventive one that protects public order through the exclusion of potentially dangerous people. On the other hand, in the majority of reporting countries, the constitutionalisation of criminal procedure is an ongoing process, both in law and in practice, and even special criminal procedures are dealt with by supreme courts, constitutional courts and human rights courts.

While there are (sometimes quite substantial) differences in the ways in which countries actually implement reforms because of differences in legal culture and/or for historical reasons (in countries that have experienced at first hand what a lack of democracy can mean for criminal law, such as Croatia, Romania and Spain, changes are likely to be less drastic), they nevertheless have similar consequences for its different dimensions, most especially pre-trial. In criminal investigations, there appears to be a shift from the judiciary to the executive (the police, the prosecution services) with new agencies – administrative enforcement agencies but especially the Intelligence Community, playing an increasingly important role, while private persons (journalists, lawyers) and organisations (telecom, financial service providers) are obliged to provide enforcement information. Information-led investigation has come to replace mere suspicions. Not only have investigative powers and techniques been widened, the classic measures dealing with securing evidence and the confiscation of dangerous instruments or products have become an autonomous field of security measures concerning goods and persons. At the same time the triggering mechanisms or minimum thresholds for the use of coercive measures to combat serious crimes are changing. Criminal investigation no longer starts with a reasonable suspicion that a crime or an offence has been committed or attempted or a reasonable suspicion that a preparatory act for committing a serious crime has been committed or attempted. Investigation techniques and coercive measures are also used to investigate, *ante-delictum*, the existence and behaviour of potentially dangerous persons and organizations in order to prevent serious crimes.

In many reporting countries, procedural guarantees and principles that protect against the infringement of fair trial rights are considered a burden to the efficiency of serious crime prevention, serious crime investigation and serious crime prosecution. The protective function of warrants and judicial monitoring and control has been undermined by measures that allow the police and prosecutors more autonomy and less supervision of their investigative work; thresholds that activate investigative powers have been lowered from reasonable suspicion or serious indications to simple indications; reversed burden of proof, and legal presumptions of guilt jeopardise the presumption of innocence which is replaced by objective security measures. There is also a need to secure the functioning of the criminal justice system and its players. Increasingly, the criminal justice system is shielding its agents from the defence by *ex parte* proceedings and forms of secret evidence gathering, and the use of anonymous testimony and secret evidence in both the pre-trial and trial setting.

These reforms have resulted in a clear expansion of the punitive state and a blurring of classic distinctions, and do not favour the rule of law. The focus on public security and preventive coercive investigation undermines the criminal justice system and the balance between the sword, the shield and the constitutional dimension, where the equilibrium between the three branches of the *trias politica* is under great pressure in favour of the executive. With the criminal justice system increasingly used as an instrument to regulate the present and/or the future rather than to punish past behaviour, and a criminal process in which pre-trial investigation is not about truth-finding related to committed crime, but about the construction and de-construction of social

dangerousness, the interests of national security may be said to be prevailing over justice and to be threatening due process and the protection of human rights – notwithstanding that general principles of criminal procedure seem to have become more important in the reporting countries, also where organized crime and terrorism are concerned, and are designed to conform with constitutional and human rights standards.

If these changes in the majority of reporting countries may be said to put classic guarantees against the power of the state at risk, at the very least, the reforms in the countries that have introduced special procedural measures outside their regular criminal justice system (Colombia and the US) have redefined concepts of criminal justice completely as far as organised crime and/or terrorism are concerned. The target is not a suspect, but the enemy; classical judicial authorities have been replaced by new authorities acting under special statutes, their competences and techniques and the safeguards and the constitutional and human rights dimension have been redefined. The result is a massive expansion of the punitive state in all its manifestations (security law, preventive coercive investigation, enemy law), by which the criminal justice system and its balances between the sword and the shield are circumvented to the extent that, in the US, even the prohibition on torture has been essentially set aside. Only the efforts of supreme and constitutional courts stand between the almighty state and the individual defined as the enemy.

In conclusion, what do these two general reports have to tell us about the state of criminal justice in the world in what must surely be termed a troubled global era? As a prior remark, it should be noted that it is difficult to generalise about the world, with ten of the fourteen national reports for the AIDC and thirteen of the seventeen for the AIDP being from European countries. South American and Asian countries are sorely underrepresented, and the continent of Africa not at all (with the exception of South Africa, which is hardly the most representative of African nations). It is especially unfortunate that neither report is also based on information from countries that are signatories to international human rights instruments but are struggling to implement even the most basic of fundamental rights (such as those to sufficient water and food, housing, education) or have other forms of institutionalised social control and (legal) procedure in criminal matters – perhaps because they do not belong to the civil or common law tradition, and/or have other (traditional) means of solving social conflict outside of criminal process as we in the West understand it. Such contributions could have shed a very different light on the impact of international human rights instruments and the security paradigm on national (criminal) law.

However, within those limitations, some general conclusions are still possible. There is no doubt that substantial and far-reaching changes have occurred and are still occurring. On the one hand, the influence of human rights conventions and indeed the awareness of the significance of fundamental rights and freedoms for criminal process is an important force driving those changes. Even if different legal cultures and systems still implement international standards in different ways, the result is a gradual convergence towards uniform human rights norms, as the AIDC shows. On the other hand, a very profound transformation in the objectives, nature and instruments of the criminal justice system and its procedural law is currently taking place as a result of a shared security paradigm and intense international pressure for a common procedural approach to terrorist investigation, prosecution and judgment.

This is an equally important counter force, although as yet, most countries make serious, if not always successful attempts to uphold at least an absolute minimum of fundamental rights. While incorporating special procedures into ordinary criminal procedure to deal with what are regarded as the most serious security threats has a number of exceedingly worrying side-effects (widening the net, the shift of powers to the executive, the involvement of – secret – intelligence

organisations and information, and the transformation towards a system of proactive rather than reactive law), it is important to realise that constitutional and convention norms still rule criminal process. Moving the action to procedures outside of criminal law is not a good idea. Even if that keeps criminal process 'uncontaminated', it also circumvents precisely those guarantees of human rights and due process that are most necessary when the threat appears great and the state therefore claims unfettered powers to deal with it, as the case of the US and the Guantanamo aberration makes abundantly clear.