

## XVIIIth International Congress of Penal Law

The principle challenges posed by the globalization of criminal justice  
Istanbul, 20-27 September 2009

### Section III Special procedural measures and the protection of human rights

#### Resolution

##### **Preamble**

The participants at the XVIIIth International Congress of Penal Law, held in Istanbul (Turkey), 20-27<sup>th</sup> September 2009

*Noticing* in the national reports and in the general report that the paradigms of the ‘fight’ against organized crime and terrorism and the seriousness of related crimes

- have led to extensive changes in the criminal justice system and criminal procedure as a result of governing through combating crime and enhancing security;
- have introduced special procedural measures, profoundly affecting the objectives, nature and instruments of the criminal justice system and the applicability of human rights standards;
- have extended the reactive system of punishment for crimes and resocialisation of offenders with a proactive system of prevention of crime and protection of public order and security;
- have produced an intelligence-led law enforcement approach, by which intelligence authorities play an increasing role in the field of law enforcement;
- have produced a digital-led law enforcement approach, by which search and surveillance powers have become very intrusive;
- that substantive changes have been introduced in the criminal procedure systems and practices of the states since 1999.

##### *Endeavouring*

- to elaborate rules of criminal procedure in line with modern, technological society and globalized society and in line with the basic principles of the rule of law and fair justice;
- to raise standards in the area of combating organized crime and terrorism, by which law enforcement, security and human rights are not mutually exclusive.

Taking into account that the AIDP has already addressed several questions in previous Congresses, particularly

- the XIIth International Congress of Penal Law (Hamburg, 1979), protection of human rights in criminal proceedings,
- the XIVth International Congress of Penal Law (Vienna, 1989), relations between the organization and administration of justice and criminal procedure,
- the XVth International Congress of Penal Law (Rio de Janeiro, 1994), reform movements in criminal procedure and the protection of human rights,
- the XVIth International Congress of Penal Law (Budapest, 1999), the criminal justice systems facing the challenge of organized crime.

Have adopted during the XVIIIth International Conference of criminal law the following Resolution<sup>1</sup>

### **Criminal procedure, special measures and human rights standards**

1. States should respect international and regional human rights, and, where applicable, international humanitarian law and may never act in breach of peremptory norms of international law (*jus cogens*), even when using special procedural measures in investigating and prosecuting organised crime and terrorism.
2. States are urged to accept the jurisdiction of international and regional human rights courts. International human rights norms and standards that have a binding effect should be considered as equal to constitutional norms and standards. These norms should be respected *ex officio* and be enforceable as individual rights in court.
3. The punitive reaction to organised crime and terrorism is fundamentally a matter for criminal justice systems and should not be replaced by administrative measures. These should never replace the ordinary course of the criminal justice system.
4. Special procedural measures in a public emergency (state of emergency and use of emergency powers for national security reasons) should be prescribed by law and decided by Parliament and submitted to judicial review by an independent, impartial and regularly constituted court (hereinafter court\*).
5. Moreover, any departure from ordinary principles of criminal procedure or derogable international human rights standards should be in conformity with the principle of proportionality. In a public emergency the rule of law prevails.
6. Whatever the acts of persons suspected, prosecuted or convicted of organised crime or terrorism, non-derogable rights<sup>2</sup> such as the right to life, the prohibition against torture or

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1 This resolution will be submitted to the Scientific Committee of the AIDP, together with the resolutions of Section I, II and IV for final approval.

2 See John A.E. Vervaele, 'Special procedural measures and the protection of human rights – General Report', 2009 *Utrecht Law Review* 5, no. 2, pp. 67-68.

inhuman or degrading treatment or punishment, and the right to recognition as a person before the law and to equality under the law, should under no circumstances be abrogated.

7. No state shall curtail the individual right to essential judicial guarantees for the protection of non-derogable rights. Protection against arrest and detention and the right to a fair and public hearing in the determination of a criminal charge may be subject to reasonable legal limitations. Rights fundamental to human dignity may not be abrogated, even under a public emergency.
8. Courts\* shall have and maintain jurisdiction over all trials of civilians as well as in times of public emergency; initiation of any such proceedings before or their transfer to a military court or to non-judicial bodies shall be prohibited.

*Majority opinion:* specialised extraordinary courts in the judiciary should be prohibited.

*Minority opinion:* specialised extraordinary courts in the judiciary should be independent and impartial and apply rules of procedure that respect the right of defence, including the right to a public hearing.

### **Proactive investigative powers and criminal procedure**

9. The objective of proactive investigations is to reveal the organizational aspects of organized crime and terrorism in order to prevent its preparation or commission and to enable the establishment of reasonable grounds for the initiation of a criminal investigation against the organization and/or its members.
10. In most cases, the provisions of ordinary criminal procedure provide sufficient means to react firmly against organized crime and terrorism but, exceptionally, it may be necessary to provide for the use of proactive investigations by intelligence agencies, police or judicial authorities. As such investigations, including electronic search and surveillance powers, interfere with the right to privacy and to public anonymity, and considering their intrusive character and impact on fundamental rights, they should only be permissible subject to the following conditions:
  - They should be precisely defined in the law and compatible with the rule of law and human rights standards;
  - They should not be used except in the absence of less restrictive legal means;
  - They may only be used for combating organized crime and terrorism and must be proportionate to the aim pursued;
  - They should not be carried out without a court\* authorization, which should be obtained in principle in advance and must be based on a reasonable belief that the measure is necessary in order to prevent the commission of organized crime and terrorism;
  - They should be applied under the strict supervision of an independent and impartial judicial authority, responsible for the scrutiny and control of the use of the intrusive powers;
  - They should respect legal privilege.

### **Pre-trial investigative powers and special investigation techniques**

11. The conditions laid down in point 10 should also apply to special pre-trial investigation techniques. The court\* must base its authorization on a reasonable suspicion or on sufficient reasons to believe that an organized crime or terrorism offence has been committed. This presupposes the existence of facts or factual information that would satisfy an objective observer that the person concerned may have committed the offence.
12. The use of torture or of cruel, inhuman or degrading treatment or punishment, as defined in the United Nations Convention against torture and other cruel, inhuman and degrading treatment or punishment, is absolutely prohibited, in all circumstances, including in a public emergency. Interrogation should comply with the rule of law and international human rights standards.
13. Secret detention centres shall be prohibited under international and domestic law. States and organisations that have secret detention centres should be subject to sanctions.
14. The collection of digital information for law enforcement purposes should be regulated by criminal procedure. In the case of privacy-related information, a court\* warrant is required. The threshold for compelling data from service providers should be higher than the ‘relevant for the investigation’ standard. For prospective transaction surveillance and the use of filter devices a high threshold should be required, including a court\* warrant for content information.

### **Fair proceedings and procedural safeguards**

15. The notion of a fair trial pertains not only to the trial proceedings before the court\*, but to the procedure as a whole. Also, when applying special investigation techniques the presumption of innocence and the right to remain silent must be respected. Defence rights are intrinsically part of a fair trial and equality of arms.
16. In order to avoid unreasonable or arbitrary use of proactive investigation and special investigation techniques, the State should duly notify every person against whom the measures were conducted and provide for judicial remedies before a court\*.
17. In every case of police arrest or detention the remedy of habeas corpus and the presence of a lawyer and interpreter must be available. Pre-trial detention may not be based on illegal anonymous testimony or on evidence obtained by the abuse of special investigation techniques. The arrested person must be brought promptly before the court\*. The burden lies on the State to provide justification for arrest or detention, also for organised crime and terrorism offences. No person shall be detained for an indefinite or unreasonably long period of time.

## **Evidence, disclosure and fair proceedings**

18. *Majority opinion:* Recourse to anonymous witnesses and classified evidence should be exceptional. Recourse to anonymous witnesses and classified evidence is only legal when the conditions set forth in the first three subparagraphs of point 10 are met. In addition:
- Testimony by anonymous witnesses can only be justified by prior authorization of a court\*, in case of a serious, clear and imminent threat to life or on a reasonable belief that the measure is necessary in order to protect the legitimate aims of vulnerable victims or of national security; anonymous evidence from law-enforcement officers or intelligence officers should be very strictly justified;
  - The court\* has to provide sufficient grounds for the refusal to disclose and to justify that this is a proportionate limit on the accused's right to disclosure that is necessary to protect legitimate aims and that the refusal to disclose can be counterbalanced in the procedure by compensatory measures in order to safeguard fair proceedings;
  - The defence can directly test, at the pre-trial or trial stage, the reliability of the evidence and the credibility of a witness;
  - If a fair trial is not possible because the defendant has not received sufficient disclosure, the proceedings must be terminated.
  - Any conviction may not be based solely or to a decisive extent on anonymous testimony.

*Minority opinion:* Recourse to anonymous witnesses and classified evidence should be prohibited.

19. *Majority opinion:* Conviction may not be based on illegal anonymous testimony or on evidence obtained by the abuse of special investigation techniques.

*Minority opinion:* Conviction may not be based solely and to a decisive extent on evidence obtained by the use of special investigation techniques.

20. Pre-trial judges *and/or* trial judges should have full access to all evidence for the determination of the legality and probative value of the evidence. Equality of arms includes the same access for both parties to the documents and files and the same opportunity to summon and examine witnesses.
21. States shall ensure that statements, evidence or other information obtained, directly or indirectly, by torture, cruel, inhuman or degrading treatment or punishment cannot be used in any judicial, administrative or other proceedings, other than for the purpose of establishing the occurrence of such act. Evidence obtained directly or indirectly by means that constitute a violation of other human rights or domestic legal provisions that jeopardize equality of arms and the fairness of the trial shall be inadmissible.
22. If criminal intelligence is used as steering information and as triggering information, it must be under the authority of the judicial authorities to open a judicial investigation. Criminal intelligence can only be used as grounds for coercive measures if the information has been obtained under a court\* warrant or if the use of the information is authorized in advance by a court\*.

*Majority opinion:* Criminal intelligence cannot be used as evidence in criminal proceedings.

*Minority opinion:* Criminal intelligence cannot be used as evidence in criminal proceedings, unless the following conditions are met:

- The pre-trial court\* and/or the trial court\* can fully assess the reliability of the evidence, the credibility of the witness, and the probative value of the evidence and decide whether the witness must testify in court\* and whether or not he/she should be interrogated while remaining anonymous;
- The defence can directly test, at the pre-trial or trial stage, the reliability of the evidence and the credibility of the witness;
- The defence can rely on that type of evidence under the same conditions;
- Any conviction may not be based solely or to a decisive extent on criminal intelligence as substantive evidence.

23. Individuals who are suspected of being members of a criminal organization and who decide to cooperate with the judicial authorities may benefit only from a reduced sentence where this cooperation complies with the principles of legality, subsidiarity and proportionality. In addition, no conviction may be based solely or to a decisive extent on a crown witness's (*pentiti, supergrass*) statement as substantive evidence.