

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

Stefan Trechsel*

The topic under consideration at the XVIIIth International Congress of AIDP is fundamentally the same as that dealt with at the XIIth Congress – the protection of human rights in criminal proceedings. Even at that time, it was not a new issue – in 1953, under the title of ‘The Protection of personal freedoms during criminal proceedings’, the VIth Congress dealt with the same problems. It is remarkable that the term ‘human rights’ was not yet mentioned, even though the European Convention had been adopted almost three years earlier. In the meantime the subject has become a central concern for the international community which is demonstrated by the present publication which unites the General Report of the AIDC with that of the AIDP.

I regard it as a very friendly gesture that the AIDP General Rapporteur of 1979 has been invited to contribute an epilogue to this publication. It provides an opportunity to look back and to reflect on the developments which we have witnessed over the last thirty years. Of course, the temptation to embark upon a detailed comparison of what was examined and determined then and now is enormous. It is equally obvious that this is not the place for an in-depth study of this kind. Even without addressing the details, one has to admit that over the last thirty years there have been significant developments. ‘Human Rights’ in the context of criminal proceedings has practically become a household term. At the time of the VIIth Congress, the ECrtHR had passed less than three-dozen judgments of which less than a third concerned criminal proceedings; now the number exceeds 10,000. There is also a wealth of academic publications in many languages. A number of landmark judgments have extended the very notion of ‘criminal proceedings’, many guarantees have been developed in detail, and, with a few exceptions – *Murray v United Kingdom* for instance – the scope of guarantees has been expanded.

Rather than dwelling on such issues, I want to mention five points:

1. the entry of human rights into the realm of criminal law;
2. the reappearance of international criminal law;
3. the challenge of terrorist criminality to the rights of the defence;
4. the recognition of the interests of victims and of society; and
5. the future of criminal proceedings.

* Stefan Trechsel is a Judge at the Trial Chamber III of the International Criminal Tribunal for the Former Yugoslavia (Churchillplein 1, 2517 JW The Hague, the Netherlands, tel. secr.: +31 70 512 56 56, tel. office: +31 70 512 85 66, email: trechsel@un.org) and the former President of the European Commission of Human Rights.

1. The entry of human rights into the realm of criminal law

Thirty years ago, human rights were within the domain of public international law. As the substance of fundamental freedom is primarily set out in the constitution as domestic public law, constitutional law was, as it were, next in line. Professors of criminal law hardly bothered with the subject. It took years until textbooks on criminal procedure dealt with the Strasbourg case law in an appropriate way. In Germany, Gollwitzer and Kühne were among the first who displayed an appropriate interest. The personalities elected to the European Court and Commission of Human Rights were professors of international and public law rather than of criminal law. This has changed to some extent, although the specialists in criminal law do not yet have the weight they ought to have.

2. The reappearance of international criminal law

This phenomenon can still be observed in the preparation of international criminal law. International criminal law exemplified by the Nuremberg and Tokyo trials which had been almost forgotten by most, save for a few specialists, has had a revival, first with the *ad hoc* Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), and since then with a number of other Tribunals set up to judge persons suspected of having committed serious crimes against humanitarian law and the law of war – in Sierra Leone, Cambodia and the Lebanon, to give but a few examples – and finally the International Criminal Court (ICC). Again, we cannot help noticing, the Rome Conference was dominated by diplomats.

The relationship between human rights and International Criminal Proceedings, the object of a careful study by Zappalà, is of some interest. I shall limit myself to the Law of the ICTY, the largest body of case law in international criminal law to date. Human rights, *i.e.* the rights of the accused, are dealt with in Article 21 of the Statute. This text is almost identical to Article 14 of the ICCPR and Article 6 of the ECHR. However, Article 20(1) states: ‘The Trial Chambers shall ensure that a trial is fair and expeditious and that proceedings are conducted in accordance with the rules of procedure and evidence, with full respect for the rights of the accused and due regard for the protection of victims and witnesses’. What I find quite remarkable about this sentence is that it refers to fairness without limitation to the accused as is the case with International Human Rights instruments. On the contrary, it is quite clear that fairness must also be secured for the prosecution. As victims have no *locus standi* at all before the Tribunal, their interests are those represented by the Office of the Prosecutor (OTP). Witnesses are yet another special group which must be protected.

The most remarkable aspect of this lies in the procedural sphere: The Office of the Prosecutor is entitled to file an interlocutory appeal whenever it comes to the conclusion that a Trial Chamber has gone too far in the recognition of defence rights, so that the interests of the victims cannot be effectively brought before the Judges.

3. The challenge of terrorist criminality to the rights of the defence

The General Report of the AIDP focuses on a problem which has recently been studied and discussed intensely, namely the apparent conflict between an effective prosecution of terrorist offences, on the one hand, and respecting the fundamental rights of suspects on the other. A number of striking formulations have been heard in this respect, such as ‘taking off the gloves’ or ‘the war on terrorism’. There is a stream of thought which is pursued, for example, by the

Bush administration, according to which terrorism presents such a threat to security that any means must be acceptable to control it. In approaching this problem it is essential to recognize that the state is responsible for the security of persons under its jurisdiction; the fight against terrorism is an instrument for the (indirect) protection of human rights. On the other side, many reasons militate against any idea of this aim justifying any means.

In fact, there are many arguments which support this. For instance, as far as the issue of torture and other inhuman, degrading or cruel treatment is concerned, there are very serious doubts as to whether coercive methods of interrogation actually yield useful results. Suspects will tend to give fictitious answers just to ease the pain. More importantly: By disregarding fundamental rights, the state acts wrongly and loses its legitimacy; at the same time the ‘other side’ is justified in feeling victimized and will gain sympathy and a moral victory.

One will have to recall that the international instruments for the protection of human rights contain specific rules for cases of emergency. Certain derogations from the ‘normal’ guarantees are allowed in situations where the life of the nation is under threat. However, these are not unlimited. For one thing, the question arises whether terrorism actually endangers the life of a nation – this will only be the case in exceptional situations. Furthermore, a number of rights resist any restriction, in particular the right not to be submitted to torture and similar treatment.

Therefore, there remains only limited scope for special rules in criminal proceedings against suspected terrorists. To define these is, however, an important and difficult task to which the work of international organizations such as AIDP will make a particularly valuable contribution.

4. The recognition of the interests of victims and of society

In retrospect, there were certainly good reasons for international human rights instruments to focus primarily on the rights of the accused. Here, where the individual is exposed to the powers of the state with many possibilities to interfere with the fundamental values of the individual, such as physical integrity, the private sphere and in particular personal liberty, it was an important and legitimate concern which has not lost any of its importance. The complete neglect of victims’ rights has, however, left a painful lacuna. The fact that the rights of victims in criminal proceedings were not recognized was partly justified by the fact that such rights might interfere with the rights of the accused. This may well be the case. But justice is essentially a matter of balancing. Is it not represented, according to a widespread tradition of iconology, as a lady with her eyes covered, carrying a set of scales? As far as the actual concerns of people goes, the European Commission of Human Rights has received numerous complaints from victims, many of course having in mind the merits of their case, but often also alleging a lack of fairness in criminal proceedings to their detriment. This ought to have been an argument in favour rather than against including procedural rights for victims.

Human rights advocates – as opposed to human rights lawyers – tend to have a somewhat one-sided view of criminal justice. There can be no doubt that one of its elements is the protection of the rights of the accused, but this object cannot be paramount. The ultimate goal of criminal proceedings is to produce, as Luhmann and others have convincingly shown, justice. In international criminal proceedings, the *ad hoc* Tribunals have entirely neglected this aspect with regard to victims, while the ICC recognizes victims’ interests without, however, giving them a place in the courtroom. This is due to certain specific characteristics of proceedings for the violation of humanitarian law and the law of war which I cannot discuss here. But I remain strongly in favour of including victims’ procedural rights in human rights instruments.

5. The future of criminal proceedings

My final observation raises a problem which I fear has not yet been solved at all. It is the future of criminal proceedings. We all know the prerequisites for fair proceedings: Such proceedings must be truly adversarial; the evidence must essentially be produced 'live' in front of the tribunal; every element must be open to challenge by the parties who must be informed in advance of the witnesses to be called, not only regarding their identity, but also what the particular witness is going to say – without such information it is not possible to effectively cross-examine and challenge the evidence.

It is well known that this is a very cumbersome programme. I currently sit on the bench in a trial against six accused, *Prosecutor v Prlić et al.*, at the ICTY. The presentation of the evidence will take roughly four years at a ratio of 20 hours of hearings per week. This is certainly an extremely complex case, but nobody holds the opinion that the mass of criminal acts to be processed in criminal proceedings could usefully be dealt with in full conformity with the requirements of the rights guaranteed by international human rights law (and the constitutional law of a number of states such as the United States).

Matters are of course relatively simple in those cases in which the defendant enters a plea of guilty, which is made without any pressure, and the truthfulness of which can be verified by other objective elements of proof. But this is not a panacea. The current solution, which has a long tradition in the United States and is increasingly accepted in the criminal procedure systems of European countries, as the General Report of the AIDC finds, is *plea bargaining*, whereby the accused agrees to a certain extent, sometimes excluding the sentencing element, to be convicted of something. What that 'something' is, cannot generally be determined. Probably it is not the set of facts on which the indictment is based. There will be some guarantees surrounding the character of the indictée's admission as 'voluntary'. The assistance of counsel is of particular importance. To some extent the system certainly seems to 'work'. Yet, it has a number of serious flaws.

For one thing, even assuming that the agreement to the solution by the defendant has been made voluntarily, one still wonders what his motives were. It may be that he or she is actually guilty and assumes that there will be a conviction. By agreeing to enter a plea of guilty, he or she may hope for a more lenient sentence. It is also possible that the defendant has no confidence in the judiciary and, although innocent or guilty to a considerably lesser extent than alleged by the prosecution, he or she fears that the truth will not be established, that, for some reason or another, there will be a conviction. Persons who have read Grisham's *The Innocent Man* – and that may include the defendant – could have such a view of the administration of justice. Between these extremes a plethora of other motives may exist, including the awareness of the defendant that a trial might bring to light important misdeeds as yet not discovered or he or she may prefer to go to prison or to pay a substantial fine rather than stand trial in public.

Avoiding trials by means of plea bargaining may be a useful technique to deal with an aspect of crime control, but it is not 'administration of justice'. For one thing, the truth remains in the dark (which, let us not be naïve, may also be the case after a proper trial). Furthermore, there is practically no publicity, no public control of what has happened.

I openly confess that I do not have a solution to this problem up my sleeve, but I think that we must all look for a better solution. It would be great if AIDP could make a contribution towards that goal.