THE PROTECTION OF FUNDAMENTAL HUMAN RIGHTS IN CRIMINAL PROCESS

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INTRODUCTION

To our mind, any work of a comparative nature must attempt to go beyond the immediately apparent diversities in the law of different countries and also address issues that could explain them. For we should not be so much concerned with the obvious fact that different countries do things differently but more with the underlying reasons as to why that should be the case, and seek to discover what factors influence the continued existence of difference or the possible convergence of legal systems. The questionnaire we sent out to the national reporters for the purpose of compiling this general report was therefore so set up as to hopefully allow us to find answers to questions that transcend differences or similarities in positive law. We are concerned with a number of aspects relating to the extent of the influence of international standards and the way in which they are implemented.

In the coming pages, we examine constitutional differences, such as whether international law is part of the domestic legal order or must be incorporated first (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. We also look at the wider context and, given that all of the respondent countries have legal systems that fall within the common or civil law, ask whether the dichotomy adversarial v. inquisitorial that is usually associated with the respective traditions, has any relevance for the implementation of internationally recognised standards of fundamental rights in criminal process.[2] At the same time, that wider context requires that we look beyond

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[2] Taiwan, part of mainland China until the end of the 1940's, is difficult to place in any one legal tradition. The structure of its criminal process, however, is recognisable as a mixture of adversarial and inquisitorial (see Paragraph 4).

court procedure to include pre-trial process, and beyond the law in books to the law in action and the practical matters that enhance or impair the enforcement of any fundamental rights that may exist on paper. And finally we examine whether some of the effects of wider, globalised issues such as terrorism, organised crime and social feelings of insecurity have led to changes in domestic law. We expand briefly on all of these underlying issues in the following paragraph.

Before we do so, there is one point we must address: the preconceived notion that one system of law is somehow better or more legitimate than another, delivers more legitimate results or is more capable of accommodating individual fundamental rights. Our starting point is that different systems, at least within democratic societies, are neither better nor worse but simply different, because they function in their own, historical, political, social and legal context. Our question is whether such differences influence the scope and manner of protection of internationally recognised fundamental human rights in domestic criminal process.

UNDERLYING ISSUES

Within both the common and civil law traditions, criminal process forms part of a wider system of criminal justice that can be described in terms of three related assumptions deriving from the basic necessity of the rule of law in a democratic society – to attain an even balance between the rights and interests of the individual and those of the collective. The first is that criminal justice provides security in two senses: by allowing public authorities to deal legitimately with (the threat of) crime through law enforcement and by preventing unwarranted interference in our freedom and well-being by public authority as it goes about its business of investigating crime and apprehending and punishing criminals. The second assumption is that this can only be achieved by having in place a criminal process that will produce the truth, and do so fairly and without undue interference in individual rights and freedoms. The third, that this process requires an intricate and interrelated system of checks and balances that guarantee fairness, and will, as far as is humanly possible, prevent mistakes: legitimate truth requires fairness in the way it is established, while procedural fairness is in itself a guarantee, albeit not an absolute one, that the truth will be found.

A. FUNDAMENTAL RIGHTS AND CRIMINAL PROCESS

International human rights instruments, notably the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights and Fundamental Freedoms (ECHR), but also such treaties as the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, provide for a number of fundamental human rights that have such interrelated links to criminal process, as well as encompassing humanitarian values regarding the inherent rights of individuals as human beings to physical integrity, freedom and self determination. These set the boundaries of what a state may do in order to achieve the prosecution, trial, conviction and punishment of (suspected) criminals, and therefore the security of society at large. While the rule of law dictates that the state is bound by the limits the law sets upon it, human rights conventions provide the extra guarantee that, in the final event, state activities regarding criminal justice that infringe upon the fundamental rights of individuals be scrutinised by an impartial and independent tribunal – a principle that is explicitly guaranteed by the ICCPR (Article 9) and by the ECHR (Article 5) with regard to the deprivation of liberty (habeas corpus).

The same requirement also applies to criminal trials, and both the ICCPR and the ECHR have so-called fair trial paragraphs (Articles 14 and 6 respectively) that enumerate the right to a public trial before an impartial and independent tribunal, and other procedural rights. However, fair trial is not only determined by the fair trial paragraphs and neither do they pertain to court procedure only, although their wording might seem to suggest that they do. The standard interpretation of the European Court of Human Rights (ECrtHR) is that, in determining whether there has been an infringement of Article 6, regard must be had to the procedure as a whole,[3] so that fair trial guarantees also cover the pre-trial stage of criminal investigation, hearings in camera, etc.

Furthermore, other fundamental rights, guaranteed by the same or other Conventions, may also influence the fairness of proceedings. The

[3] See for example ECHR 2 July 2002, S.N. v Sweden (the use in evidence of statements obtained at the stage of the police inquiry and judicial investigation) and ECHR 11 July 2006, Jalloh v Germany (admissibility of evidence secured through inhuman and degrading treatment in the pre-trial stage).

presumption of innocence and the right to silence can, for example, be undermined by undue infringements by investigating officers of the right to privacy, or by degrading and humiliating treatment of a suspect at the hands of the police, while the right to a public trial may be affected if the media are barred from attending proceedings and therefore unable to exercise their right to gather information, which is part of the fundamental right to free expression. It is also immediately apparent that the international guarantees of fair trial are intricately related to accurate truth-finding (correct verdicts): the right to silence, closely linked to the protection against self-incrimination and the prohibition of undue methods of persuasion during interrogation, not only derives from humanitarian notions that torture is unacceptable, but also from the recognition that statements/confessions obtained by force are inherently unreliable and likely to contribute to miscarriages of justice. Likewise, the right to know and contest the evidence not only reflects the idea that it is unfair to try and convict a person on the basis of evidence he does not know, but is also an important means of establishing the truth by ensuring that both sides of the story are heard by the tribunal of fact.

B. SIMILARITY AND DIFFERENCE

All of the countries that figure in this report are signatories to either the ICCPR or the ECHR, or both, and with exception of Taiwan, to either or both of the Torture Conventions, while South Africa is also a contracting party to the African Charter on Human and People's Rights. Many American countries have also ratified the Inter-American Convention to Prevent and Punish Torture and the American Convention on Human Rights; in our case, Venezuela has, the United States has not. Most, again with the exception of Taiwan, also afford their citizens the right of some form of individual complaint under one or more of these treaties.[4]

They could therefore all be said to be at least bound to the same underlying fundamental rights in criminal process, even if most have made reservations on one or more points. However, there are important overreaching

[4] Taiwan is a contracting party to the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights, but is not a member of United Nations, nor recognized as an independent country by most of the countries in the world.

differences, all of which could affect the (scope of the) implementation of international standards and the degree of convergence or divergence of national criminal procedures and practice. We seek to discover whether they are reflected in the domestic legislation of, and situation in, the countries concerned, and what the consequences are.

Firstly, only the ECHR has a long-standing regime under which the rights of the Convention are interpreted and upheld by a court to which individual citizens can complain directly and which has produced a large and influential body of case law. Secondly, in some countries human rights treaties are self-executing under a monistic system and become part of domestic legal order on ratification (for instance the Republic of Croatia, the Czech Republic, Romania, Spain and Venezuela), while others maintain a dualistic system and require that they be incorporated by means of domestic legislation (for instance Finland, Germany, Switzerland, the United States, and the United Kingdom). Thirdly, most countries (with the exception of France, The Netherlands and the United Kingdom) have constitutions containing a bill of rights that includes fundamental rights in criminal process identical to or comparable with those guaranteed under international conventions.

Fourthly, the system of checks and balances in criminal process that should provide for fairness without unduly hampering efforts of crime control, differs widely, also among the countries under consideration, according to whether they could be said to have a more or less adversarial or inquisitorial style of procedure. Fifthly, the practical conditions of criminal process also vary. A fair trial is not an abstract notion that can be guaranteed by the existence of fair trial rights on paper, but requires that such rights are also both enforceable and effective. A right to counsel, for example, is of little use if none are available, or if the rights of the defence are so curtailed that adequate preparation is impossible, or if indigent defendants are unable to obtain financial help in securing effective legal aid. The right to an impartial and independent tribunal has little meaning if judges are subject to political pressure and/or sanctions that are likely to influence their decisions.

C. FORCE AND COUNTERFORCE

In a way, we may therefore view international treaty obligations of fair trial and the national legal and practical conditions of their enforcement as force

and counterforce, pushing towards and pulling away from an internationally converging legal order of guaranteed fundamental rights in criminal process. In the same way, global issues of security and crime control, greatly magnified in the face of international terrorism, may well be one of the counter forces, perhaps even a force of convergence – not towards but away from guaranteeing fundamental rights in criminal process. Indeed, (international) threats to security and political issues of crime control could possibly give rise to widespread international consensus (followed by the enactment of legislation) that collective security and protection against such perceived threats is of greater importance than individual security to be free from undue interference by the state.

In the following paragraphs we propose to elaborate on this proposition, by examining three overreaching issues with reference to the information provided in the national reports. To what extent do: 1. constitutional arrangements, 2. legal traditions and styles of procedure, 3. practical circumstances, including (international) concerns with security and crime control, promote or detract from the implementation of fundamental rights in criminal process?

CONSTITUTIONAL ARRANGEMENTS

A brief picture of some constitutional arrangements, both on an international and on a national level, is important for a better understanding of the impact of international human rights law on domestic criminal law and criminal procedure. Conventions and charters have different regimes of enforcement that are relevant to establishing how international standards are implemented in domestic legal orders, which, moreover, have different ways of incorporating international law. Furthermore, a national constitution and a bill of rights, containing similar provisions as those in international treaties on human rights (a feature of most of the responding countries but not all) may be also be significant in determining the impact of uniform law. The focus in this paragraph will be on these three elements.

A. TREATY REGIMES

The following is a brief overview of the enforcement regimes of the four treaties that are relevant for consideration of the countries represented in this report.

a. International Covenant

Parties to the International Covenant on Civil and Political Rights (all of the countries relevant to this report) have the obligation to promote the rights recognised in the Covenant with regard to all people within their territory and subject to their jurisdiction (Article 2 § 1). Accordingly, states must offer an effective remedy to an individual, if such a right is allegedly violated. States must also ensure that authorities shall enforce a remedy, if granted (Article 2).

The Human Rights Committee plays a vital role in ensuring the rights of the Covenant. Besides considering reports of the contracting parties, it may also receive and consider claims from one state that another state is not fulfilling its obligations. This possibility for one state to complain about another has never actually been used. The possibility for individuals claiming to be a victim of a violation of rights set out by the Covenant, to submit communications to the Committee, however, has led to several hundreds of decisions. This individual right of complaint was constituted by the Optional Protocol to the Covenant, and is therefore only applicable if state parties are party to the Protocol (at the time of writing 111 states). Communications will not be considered by the Committee if the same matter is being examined under another procedure of international investigation or settlement or, as is the case with all human rights conventions mentioned in this report, if domestic remedies have not been exhausted (Article 5 § 2 of the Protocol). The exhaustion of domestic remedies is not necessary if their application is subject to undue delay.

b. European Convention

Contracting states to the ECHR shall, according to Article 1, secure to everyone within their jurisdiction the rights and liberties defined in the Convention. To this end, each state must furnish an explanation of the

manner in which its internal law ensures the effective implementation of the Convention (Article 52). Both provisions emphasise that the Convention leaves, first and foremost, the task of securing human rights and liberties to each individual state. The machinery of protection established by the Convention, and the subsequent Protocols, is therefore subsidiary to the national systems safeguarding human rights.[5] This principle of subsidiarity is also articulated in Articles 13 and 35 § 1 of the Convention. According to the European Court of Human Rights, the object of Article 13 is to provide a means whereby individuals can obtain relief at a national level for violations of their Convention rights, before having to set in motion the international mechanism of complaint before the European Court. The purpose of Article 35 § 1 is, as the Court has pointed out, to afford the contracting states the opportunity of preventing or putting right the violations alleged against them before these allegations are submitted to the institutions created by the Convention.[6]

On a permanent basis, the European Court of Human Rights ensures the observance of the engagements undertaken by the signatories, but – as a consequence of the subsidiary character of the Convention machinery – only after all domestic remedies have been exhausted, and within a period of six months from the date on which the final domestic decision was taken (Article 35, § 1). Although Article 52 is illustrative of the principle of subsidiarity, at the level of forcing states to comply with the Convention it may be considered irrelevant, as it is never used. However, the Court may, according to Article 34, receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation of the Convention and this right of individual complaint is considered fundamental to ensuring compliance. At the same time, however, the steady growth in the number of cases brought before the Convention institutions have made it increasingly difficult to deal in a proper and timely manner with all complaints. The number of applications increased from 404 in 1981, to 4,750 in 1997 and in 2007 some 41,700 applications were allocated. By the end of 2007 more than 100,000 cases were still pending before the Court (and it has recently given its 10,000th judgment). These figures illustrate the need for a reform of the Convention mechanisms and for streamlining procedures.

[5] Cf. ECrtHR 7 December 1976, Handyside v United Kingdom.

[6] Cf. ECrtHR 26 October 2000, Kudla v Poland.

If the Court finds that there has been a violation of the Convention, just satisfaction may be afforded to the injured party (Article 41). Besides, the contracting states undertake to abide by the (final) judgment of the Court in any case to which they are a party (Article 46 § 1). As a consequence, various countries provide for reparation after a judgment of the Court in which a violation has been established, by offering an opportunity to have the criminal case reopened (for instance the Republic of Croatia, Germany, the Netherlands). From the early days, the Court has ruled that its judgments in fact serve not only to decide those cases brought before the Court, but, more generally, to elucidate, safeguard and develop in the rules instituted by the states the engagements undertaken by them.[7] Indeed, the Court is in the habit of incorporating general principles in its judgment, before turning to the merits of the case. These general principles on the various provisions of the Convention extend the impact of a judgment beyond the particular facts of the case decided. The execution of judgments is supervised by the Committee of Ministers of the Council of Europe (Article 46 § 2). Most member states view all of the Court's judgments as (generally) binding.

c. African Charter

Parties to the African Charter on Human and Peoples' Rights, which came into force on 21 October 1986, are obliged to recognize and give effect to the human rights and liberties envisaged in the Charter (Article 1), and must submit a report every two years (Article 62). The enforcement mechanisms of the Charter can be initiated by a state, if it has good reasons to believe that another state has violated the provisions of the Charter. This mechanism however has only been used once as yet, and has not led to the Court determining a violation.

The African Court, however, did not come into being until January 25, 2004 with the ratification by fifteen member states of the Protocol to the African Charter on Human and Peoples' Rights Establishing the ACHPR, and only met for the first time in 2006. Although it provides for states to allow other entities than state parties the right of individual complaint, it is obviously very early days yet to be able to say anything about the efficacy of this enforcement mechanism. However, individuals have been able to communicate directly with the African Commission which has existed since the beginning. Article 55 of the Charter makes it possible for individuals,

[7] ECrtHR, 18 January 1978, Ireland v. UK.

groups of individuals and NGOs to submit a communication to the Commission and it is to be hoped that this will have created an effective opportunity to bring about changes to the protection of human rights in Africa.

The Commission determines by majority which communications will be considered. According to the requirements of Article 56, the communication must indicate the authors (even if they request anonymity); must be compatible with the Charter of the OAU and with the African Charter on Human and Peoples' Rights; must not be written in language that is disparaging or insulting to the state, its institutions or to the OAU; must not be based exclusively on the media; must have been sent after exhausting local remedies and within a reasonable time; and should not deal with matters which have been settled by other means. It has been argued that some of these criteria appear to be unnecessary:[8] there has never, for instance, been a communication that failed the language test. The requirement of exhaustion of national remedies, on the other hand, has led to several cases being judged inadmissible.[9] Prior to consideration by the Commission, any communication must be brought to the knowledge of the State concerned by the Chairman of the Commission (article 57).

Article 58 provides an important provision concerning "special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights," therefore serious and urgent cases that cannot wait, or deserve separate treatment because of their urgency.[10] If it appears, after deliberation by the Commission, that any communication relates to such a special case the Commission must draw it to the attention of the Assembly of Heads of State and Government. The latter can then request the Commission to start an in-depth study and make a factual report, accompanied by its findings and recommendations. If an emergency is duly noticed by the Commission, it shall submit it to the Chairman of the Assembly of Heads of State and Government, who can then request an in-depth study. The Commission may start an investigation on its own

[8] U. Oji Umozurike, *The African Charter on Human and Peoples' Rights*, The Hague: Kluwer Law International, 1997, p. 76.

[9] See, among others: 8/88 *Nziwa Buyingo* v. *Uganda*, 127/94 *Sana Dumbaya* v. *The Gambia* and 107/93 *Academic Staff Union of Nigerian Universities* v. *Nigeria*.

[10] U. Oji Umozurike, *The African Charter on Human and Peoples' Rights*, The Hague: Kluwer Law International, 1997, p. 77. Article 58 was used with regard to the conflicts between Sudan and Rwanda and Rwanda and Burundi.

initiative, after having obtained the permission of the concerned state, although not necessarily on the spot, given that article 46 creates the possibility to "resort to any appropriate method of investigation." No provisions exist granting victims the right for a civil claim/compensation or any other form of redress.

d. American Convention

All parties to the American Convention on Human Rights are obliged to adopt such legislative or other measures as may be necessary to give effect to the rights and liberties defined in the Convention (Article 2). To that effect, individuals must have the right to an effective remedy against acts that violate any of the Convention rights or liberties on the national level (Article 25). Two organs have a (subsidiary) role in enforcing the Convention: the Commission and the Court (Article 33). Only a state or the Commission can present a case to the Court (Article 61 par 1). A person, a group or a non-governmental body may lodge a petition with the Commission, in order to bring a violation of the Convention to the attention of the Commission (article 44). This possibility appears to have created a fairly effective system of individual communication.[11] It has been used frequently and has resulted in several important judgments from both the Commission and the Court.

Several requirements, named in Article 46, have to be met for a petition or communication to be admissible. First, the remedies under domestic law have to be exhausted. Second, the petition or communication has to be lodged within a period of six months from the date of notification of the final judgment by the alleging party. Third, the subject of the petition or communication cannot be pending in another international proceeding for settlement. Fourth, a petition under Article 44 must contain the name, nationality, profession, domicile, and signature of the person or persons or of the legal representative of the entity lodging the petition. Furthermore, Article 47 judges a petition or communication to be inadmissible if, inter alia, it is substantially the same as one previously studied by the Commission or by another international organization.

[11] Davidson, S., *The Inter-American Court of Human Rights*, Aldershot: Dartmouth Publising Company Limited, 1992, p. 15.

Besides the right to lodge a petition to the Commission, individuals have the right to request interim measures, as arranged by Article 25 (1) of the Rules of Procedure which states that in "serious and urgent cases" and when it is necessary according to the information available, the Commission may adopt precautionairy measures to prevent irreparable harm to persons. The arrangement concerning interim measures is better than in the European context and has been used more frequently. According to Article 62, states may recognise a judgment by the Court and declare its judgment binding. If a violation of the Convention is found, the Court may rule that the victim will be ensured the enjoyment of the right or liberty at issue or that the violation should be compensated (Article 63). Compensation will be executed on a state level, and governed by domestic procedures (Article 68).

B. THE RELATIONSHIP BETWEEN THE NATIONAL AND INTERNATIONAL LEVEL

The protection of human rights in criminal process is the subject of both international treaties and domestic law. However, the relationship between these international and national levels differs, according to whether a country employs a monistic or a dualistic system in incorporating international norms into its own domestic legal order.

Monism and Dualism

In a monistic country, an international convention becomes part of the domestic legal order on ratification, and its provisions can be applied directly; that is to say that, in the case of human rights instruments, citizens may invoke their protection directly before the national courts. In a dualistic country, on the other hand, international treaties must first be implemented through national statutes before they can take effect. Both concepts are present in the national reports. A monistic system is, for instance, described in the reports from the Republic of Croatia, the Czech Republic, Rumania, Spain and Venezuela, while a dualistic system can be recognised in, among others, the reports from Finland, Germany, South Africa and the United States.

The concepts of monism and dualism are closely connected to the status of international law in a country. In some monistic legal orders – like in the Republic of Croatia, the Netherlands and Venezuela – international law

prevails over domestic law. Article 23 of the Venezuelan Constitution, for instance, states:

"The treaties, covenants and conventions related to human rights, entered and ratified by Venezuela, have constitutional rank and prevail in domestic order, inasmuch as they have rules on their enjoyment and performance being more favourable than those provided by this Constitution and by the laws of the Republic, and are directly and immediately enforceable by the courts and other bodies of Public Power."

Not all monistic countries apply such an absolute superiority-rule as this Venezuelan provision. In the Czech Republic, for instance, international law ranks higher than ordinary law but it is considered inferior to the Czech Constitution. A special monistic system is provided for in Switzerland. This nation consists of 26 cantons in a federal structure. Ratification of international treaties is subject to the approval of the people and the cantons in a referendum. As a consequence, the ratification process takes a long time and requires a lot of persuasion. The ECHR was not ratified until 1974, although it led to amendments of national law before ratification.

Neither is the concept of dualism unequivocal in its consequences. In South Africa, for instance, a self-executing provision of a treaty has the same standing as domestic law, if Parliament approves it, unless this provision is inconsistent with the Constitution or other domestic law. According to the South African Constitution, courts "must consider" international law in interpreting the (national) Bill of Rights, but they have shown themselves less inclined to use the African Charter and the decisions of the African Commission of Human Rights as interpretive tools. The German Constitution requires that treaties be transformed into (federal) national law. Though a treaty does not have constitutional rank, German courts must apply the transformed convention with the principle in mind that the legal order in Germany is "international law friendly", i.e. violations of international law are to be avoided.

A special position is taken by the United Kingdom. Following the Human Rights Act 1998, which took effect in 2000, the ECHR is now implemented in national law and must inform judgments of the UK courts. Under this Act, it is unlawful to act in a manner that is incompatible with a Convention right. Furthermore, Convention rights take precedence over any rule of common law and over most delegated legislation, whereas primary legislation must be read and be given effect in a manner which is compatible with Convention

rights, so far as it is possible to do so.[12] Other international treaties, however, are still enforceable in line with the principle of parliamentary sovereignty: international treaties are used to help the interpretation of domestic law but cannot override it.

Constitutional Rights and Treaty Rights

Most countries under examination here have a Constitution containing a Bill of Rights, although its impact, and especially the relationship to international law, differs. The French Constitution does not contain a Bill of Rights, but refers in the Preamble to the Declaration of the Rights of Man of 1789. The Dutch Constitution provides for only a limited set of fundamental rights, but not in the sense that citizens can usually invoke them before the courts in criminal cases, and the Constitution does not, for example, refer to a right to a fair trial. Rather, its provisions are addressed to the national legislature who must give statutory effect to the rights it contains.[13] The courts may not test such statutes against the Constitution. According to the national report from the Netherlands, however, this flaw is effectively neutralized by the direct and mandatory application by the courts of the provisions of the ECHR under the monistic system, which effectively make the Convention the Dutch Bill of Rights.

At the other end of the spectrum, the United States of America combines a very reserved position to international law with a strong focus on human rights standards in criminal process originating from the Supreme Court's interpretation of the Constitution, in particular the 4th, 5th and 6th Amendments, which form part of the Bill of Rights. According to the national report from the USA, the strong focus on the Constitution and the almost complete absence of international law in debates on human rights can be demonstrated in various ways. The USA has, for instance, generally taken the position that the treaties incorporate those rights already granted under domestic law. Should this not be the case, these international provisions

[12] A short word on the national report is indicated here. While international instruments apply throughout the United Kingdom, as does the Human Rights Act, the country itself has different jurisdictions: Scotland has, in some respects, a (very) different system of criminal process and Northern Ireland a slightly different one. As far as the system of criminal process is concerned, the national reported has limited himself to England and Wales; there is no national report from Scotland. Because the House of Lords is not the highest court for Scotland in criminal cases, human rights issues raised in Scottish Courts ("devolution issues)" are decided in the final event by the Privy Council.

[13] Because most criminal law derives from the national legislature, the opportunity for a defendant to invoke the rights of constitution before the court does not arise, although they can override municipal laws containing criminal provisions.

should be implemented through national statutes and are not self-executing. Furthermore, the USA has added (many) reservations, "understandings" and declarations to the ratification of treaties. And finally, judgments of international courts can be set aside:

"A number of foreign countries – Paraguay, Germany, and Mexico – have espoused their citizens' claims as to violations of the Vienna Consular Convention before the International Court of Justice (ICJ). Even though the ICJ has found such violations, the U.S. Supreme Court declared any state to be within its rights in not following the order, without the federal government having the power to enforce it."[14]

Most other countries have adopted positions somewhere in between The Netherlands and the United States. We have already seen the position of the Czech Republic and Germany, where constitution ranks higher than international law, although their constitutional courts frequently refer to case law of the European Court of Human Rights, as does that of Spain. Both Romania and the Republic of Croatia provide for human rights in their Constitution, and yet recognize the direct application of human rights provisions in international treaties.

CONCLUSIONS

We have to bear in mind an important starting point of this general report: different systems, at least in democratic societies, are neither better nor worse but simply different. This also holds true for the differences between the various treaties with regard to fundamental rights in criminal process, for the various concepts of reception of international law into domestic legal order (monism and dualism) and for the relationship between constitutional rights and convention rights. Nevertheless, some general remarks can be made.

We cannot yet say whether the ECHR, with its far-reaching enforcement mechanisms, the extensive case-law of the European Court that contracting parties regard as binding, and the right of individual complaint directly to the Court, all dating back more than 50 years, has greater significance for the domestic criminal process of the contracting parties, than the other

[14] The national report refers to U.S. Supreme Court March 25 2008, Medellin v Texas.

conventions, or whether it leads to greater convergence of national systems of criminal justice. It is a hypothesis, to which we shall return after we have examined the scope and nature of the protection of fundamental rights in criminal process in paragraph 5.

It does appear to be the case however, that monism promotes a more open mind to international law than dualism. As a rule, a dualistic scheme slows down the implementation of international standards in the field of human rights.[15] It is argued, for instance, in the Finnish report that Finland made wide reservations to Article 6 of the ECHR, and did not withdraw them until recently. In the UK, although it had recognised the right of individual complaint from the outset, the courts were obliged to apply domestic law – even if it contravened treaty rights – until the advent of the Human Rights Act, therefore until almost 50 years after ratifying the European Convention.[16] In a way, dualistic countries have more opportunities to preserve national traditions.

Dualism or monism can also influence the relationship between national constitutions and international law. The importance of the provisions of the Basic Law and of the case law of the Federal Constitutional Court to criminal procedure in Germany can, at least to a great extent, be explained by the dualistic scheme: the ECHR has by statute been transformed into domestic law, but does not have constitutional rank. This is not to say that the protection of fundamental rights in criminal process is less in Germany than in, for example, The Netherlands where treaty rights are directly enforceable. In some cases the Constitution affords greater protection than the ECHR.

And finally, given the differences in the manner of reception of international law into the domestic legal order, its consequences for the relationship between national constitutions and international conventions and the differences in the extent of domestic constitutional rights, we should not be surprised to find that, from a constitutional point of view, there is no such thing as a uniform impact of international human rights standards on national criminal justice systems.

[15] The Swiss report demonstrates that a monistic system could also lead to a delay.

[16] See for an example: ECtHR 12 May 2000, Khan v. UK.

LEGAL TRADITIONS

A. COMMON AND CIVIL LAW

Legal systems and, within them, procedural traditions are often distinguished as being either adversarial or inquisitorial, with adversarial systems belonging to the so-called common law countries where the law has its origins in English common law (therefore: the United Kingdom, the United States and all of the countries that were once colonised by the British). Inquisitorial systems are found predominantly in the civil law countries of continental Europe and the countries once colonised by them. Of the countries that are represented in this report, England and Wales, South Africa and the United States of America belong firmly in the common law tradition, while Germany, Finland, France, The Netherlands, Switzerland and Venezuela are traditionally civil law countries. The Republic of Croatia, Romania and the Czech Republic, although part of the socialist (Soviet) legal family for fifty years, nevertheless have continental-European legal traditions that go back further to the civil law.[17]

The major theoretical differences between these traditions concern, on the one hand, the way in which the relationship between the law, the individual and the state is conceived of (including the conception of individual, fundamental rights and freedoms) and, on the other, the way in which that law is 'found'. As we shall see, this has important consequences for criminal procedure, for such differences are also reflected in the way in which, in the different traditions, ideally the truth in criminal procedure is to be found, and therefore affect the nature of checks and balances that help achieve a fair trial.

a. The Theory: The Individual, The State and The Notion of Individual Rights and Freedoms

Civil law traditions are rooted in the 18th century ideologies of Enlightenment and Revolution, which reflect a concept of political society in which the state is regarded as fundamental to the rational realization of the 'common good'. Because of the immense powers needed to carry out this

[17] We are, of course, aware that these countries have not always existed as such (in the sense of not covering the same geographical territory, and/or being independent nations).

task, the state is regarded with some suspicion: by their very nature, those powers represent a continuous threat to the liberty of the individual. And yet, precisely because individual liberty is seen as transcending individual interests and as an essential part of the common good itself, only the state can secure and uphold it. In order to resolve this paradox, the exercise of state power is curtailed by the primacy of written rules of law (this is the original meaning of the – very continental – concept of Rechtstaat), by entrenched abstract constitutional rights of the individual and by the division of power within the state, which implies judicial scrutiny of executive action on the basis of written law, and hierarchical monitoring and control within the executive itself. Consequently, only the (written) law can provide executive state institutions with the power to infringe on individual rights; without legally conferred powers, they can do nothing.

By contrast, in the common law tradition from which adversarial process originates, a state that is presumed to act in the common good is very much less in evidence – indeed neither the concept of the state nor that of the common good exist in the same way, for these are continually offset against the assertion of individual rights and interests, with which the government may or may not be entrusted for so long as it happens to be democratically in power. Individuals define their relationship to the state in terms of the rule of law: as a set of concrete rights and freedoms from particular forms of state intrusion, which they themselves can assert. And far from requiring hierarchical monitoring between different branches of the executive – which in civil law states is premised on the notion of a strong and organic executive arm of the state – under the common law (executive) organs of criminal justice do not monitor each other. Rather, they exist in a state of coordinate authority and all their tasks are governed by the rule of law. Within these parameters, executive officials need no statutory conferment of powers, but may do anything that is not expressly forbidden in law.

The common law simply ‘is’, built up as it is of custom and its judicial interpretation over (hundreds of) years; it is law of and for the people, within which fundamental freedoms, to be invoked against state intrusion, attach to individuals as of right. There is no need to provide them in the abstract through codification of (international) norms of criminal procedure, as they already exist and will be ‘found’ naturally through interpretation by the courts. This is not to say that modern common law countries have neither constitutions with a bill of rights, nor statutes that govern (parts of) criminal process, although we have already seen that the common law countries in this report, all of which have dualistic constitutional arrangements with

regard to international law, have some difficulty in accommodating written international norms of fundamental rights in criminal procedure.[18]

In the civil law tradition, the division of powers and the primacy of written law imply that all law must be statutory, coming not from the people directly to be interpreted by judges, but from their elected representatives acting with government as the legislative power, to be enforced by the executive, and to be applied by the courts and (ideally) interpreted only in so far as it does not deviate from legislative intentions.[19] Fundamental rights also require legislation, not only in order to establish their entrenchment and individual applicability in law, but especially in order to secure them against the state (not only is all executive action limited by written rules, the organs of state criminal justice are required to see that fundamental individual rights are upheld), and they are therefore written into a constitutional bill of rights and/or further elaborated in codified criminal procedure that cannot detract from constitutional rights and freedoms.

It should be noted that the original civil law notion that, according to the doctrine of trias politica, the judge should simply be (in Montesquieu's words) bouche de la loi has long since been abandoned. The great disadvantage of statutory law – that it is inflexible, cannot take all circumstances into account and is unable to adapt to sometimes rapidly changing situations – is eliminated by the courts' powers of interpretation, though the degree to which this may be exercised to extend the scope of legal provisions beyond what the legislator intended, differs considerably between jurisdictions.

b. Common and civil law in practice

Although they have been mitigated by modern developments and the subsequent progression of legal theory, these fundamental differences still exist and influence the institutional organisation and legal precepts of criminal process. All of the civil law countries reported here, with the

[18] In South Africa, the position seems to be that adherence to international standards is regarded as a "common law" rule. That is not, however, how the mother of common law countries, England, sees it (although latterly the position is changing), nor the United States for that matter.

[19] The model of the Dutch Constitution is a typical example of the classic interpretation of the trias politica at work (in the 19th century), not affording fundamental rights directly to citizens, but ordering the legislature to do so (see *supra* paragraph 3). So although the constitution does contain a limited number of fundamental rights, it is not a bill of rights in the usual sense of the word.

exception of the Netherlands and France, have a constitutional bill of rights and all have codified criminal procedures that cover the protection of fundamental rights and freedoms. Of the common law countries to which we are referring, only the UK has no (written) constitution or bill of rights, although since recently it has an increasing number of statutes.[20] In the United States, most criminal (procedural) law is statutory, although the federal nature of the country means that no nationally uniform code of criminal procedure exists. Everywhere, however, fundamental standards of criminal procedure come from the US Supreme Court's interpretation of the US Constitution, which enunciates 'self-evident' rights and freedoms – extended through the Fourth, Fifth and Sixth Amendments that form part of the Bill of Rights. State law can only grant defendants further rights beyond those guaranteed by the US Constitution, an unusual occurrence, so that decisions by state courts and state statutes are not a significant source of criminal procedure.[21]

Given the basic tenets of the civil law tradition, it comes of no surprise that all ten civil law jurisdictions report the statutory regulation of police and prosecution powers, based on the principle that the criminal justice authorities may only act if specifically permitted to do so by the relevant laws (the term "law" including interpretation of the written law by the courts). While "specifically permitted" suggests separate authorisation in law for each and every action, with regard to criminal investigation by the police this is not necessarily the case. Germany and The Netherlands, for example, do not require specific authorisation for measures that do not constitute serious infringements of fundamental rights (e.g. a short-term observation of a citizen in public). Nevertheless, it is interesting to note that such measures still need at least a general basis in law.[22] To a certain extent, Spain provides an exception to this rule, in that the Spanish Code of Criminal Prosecution (LECr) dates from 1882 and is seriously outdated. In consequence, some of its provisions are no longer ever applied (for example, those concerning the identification of a corpse); in other cases – such as entering a private dwelling for the purposes of criminal investigation, or taking a breath sample without consent – the lack of regulation has been

[20] Including the Human Rights Act, through which, it could be said, the European Convention has been introduced as a sort of bill of rights.

[21] On the significance of the US Constitution, and the insignificance of the fact that France and The Netherlands do not have a domestic bill of rights, see *supra* Paragraph 3.

[22] In Germany, Article 163 (1) 2nd sentence of the German code of criminal procedure (STPo); and in The Netherlands, Article 2 of the Police Act (Politiewet).

substituted by case law. Though several modifications have been made, for obvious reasons the national reporter underlines the importance of a new code. Switzerland might, in this respect, serve as an example to Spain: a new Code of Criminal Procedure for all cantons, on a federal level, has recently been accepted in Switzerland and will enter into force in 2010.

In the common law countries, the basic principle that no statutory conferment of powers is required has been considerably eroded by the perceived necessity of regulating the exercise of police powers.[23] Such regulation however is (relatively) recent. According to the report on the United States for example, it is the Supreme Court that

"has taken upon itself to regulate policing […] Close governance of police procedures leading up to an arrest was not a part of the common law heritage, and, until the 1960's, even constitutional limits on federal agents' conduct did not apply to the States."

The US Supreme Court interprets the Constitution to set rules for police procedure that effectively govern what the police may (not) do in criminal investigation and extend to both general principles (what constitutes reasonable suspicion, when must a suspect be cautioned) and circumstantial details (what is the difference between a stop and an arrest, may the trunk of an apprehended vehicle be searched, what are the consequences if the police trespass on private open land).

In contrast, the United Kingdom has, over the past 20 years, increasingly resorted to statutory regulation of criminal investigation powers.

"The development of the modern British police force was predicated on the notion that they were "citizens in uniform" and would have no powers above those of any citizen to apprehend an offender. However, 'in the past a large amount of police work has relied on the co-operation and consent of citizens together with a certain amount of "bluff" as to the extent of police powers. With cooperation and consent apparently diminishing and a greater awareness of people as to their 'rights', the need grows for a thorough review and reform of the law of police powers.'[24] This review subsequently led to the Police and Criminal Evidence Act 1984 which governs police powers and the rights of those suspected of crime. If a constable is acting in

[23] With Taiwan reporting that criminal process is governed by a code of criminal procedure, but that, in general, the police may do anything an ordinary citizen may do unless the action is expressly forbidden or involves a substantial infringement of fundamental rights.

[24] S. Bailey, *Civil Liberties: Cases and Materials*, 1980, p. 33.

the purported exercise of specific legal powers or duties he must remain within the limits set by law to those powers or duties."[25]

Even more recently, a spate of statutes prompted partly by the fragmented nature of the rules governing criminal procedure and partly by the requirements of the ECHR as incorporated by the Human Rights Act 1998, has resulted in most aspects of criminal process now being governed predominantly by statutory law, although common law principles still apply.[26]

B. LEGAL TRADITIONS AND STYLES OF PROCEDURE

We have elaborated, albeit very summarily, on the differences between the civil and common law traditions, because they affect the way in which criminal process is organised as a process of truth-finding that at the same time may not encroach unduly on the fundamental individual rights of those concerned. While all of the countries under consideration are bound to uniform standards of fundamental rights in criminal process, they also all have their own legal tradition and legal culture that dictate the form in which such rights can and will be guaranteed: deeply felt and ingrained attitudes about what law is and should be, and how it translates and should translate into institutions, institutional roles and the procedures and rules that govern them.[27]

That translation results in a legal system. Legal systems are not the same as legal traditions or cultures, but they are closely related, and their procedural traditions must be an important focus in any comparative research, precisely because they are much more than a collection of rules that determine how criminal process is done. It follows that, where common law and civil law traditions are generally associated with adversarial and inquisitorial styles of procedure respectively, we now examine more closely how these embody different concepts of truth finding and fair trial and the relationship between them, given our proposition that this might be one of the underlying issues

[25] National report on the UK (more specifically England and Wales).

[26] With regard to intrusive and investigatory powers, see Regulation of Investigatory Powers Act 2000.

[27] R. Williams, *Politics and Letters*, London: NLB, 1979.

that affect the implementation of fundamental international norms in criminal process. It should be said at the outset, that while the dichotomy adversarial-inquisitorial makes historical and theoretical sense, in practice there is (nowadays) no such thing as purely inquisitorial or purely adversarial criminal procedure.[28] Nevertheless, it is possible to regard styles of criminal procedure as being more or less inquisitorial or adversarial, and to point to the characteristics that make them so, but always bearing in mind that the distinction is a useful analytical tool –better conceived of as a continuum rather than a pure dichotomy – and not a universally applicable descriptive mechanism. And there is one more caveat.

Although by and large inquisitorial and adversarial procedures can be traced to civil and common law roots respectively, there is a tendency in comparative studies to lump the often quite diverse procedures from each tradition together without taking note of the differences between them.[29] Continental scholars talk about 'Anglo-American procedure', ignoring not only that the procedural rules, not to mention the cultural context, in England and the United States differ substantially, but also in all of the other countries where criminal process is based on the adversarial tradition. For their part, scholars from these countries are inclined to talk about the 'continental inquisitorial system', without realising that even between such close (legal) neighbours as The Netherlands and Germany there are real differences in the extent to which a criminal trial could be described as inquisitorial or adversarial.

And finally, bearing in mind that systems are different, not a priori better or worse, there is no definitively prescribed type of procedure for the realisation of a fair trial or the accommodation of fundamental rights for the defendant or any other individual involved. Moreover, fair trial rights are not absolute in the sense that the defendant is not the only person with fundamental rights in criminal process: victims and witnesses have rights too (for example regarding protection of their physical and mental integrity, their right to privacy). But again, in offsetting these against the rights of the defendant – with all of their consequences for accurate truth finding – what matters is that a delicate balancing act that can promote both the fairness of

[28] See M. Damaska, *The Faces of Justice and state authority: a comparative approach to the legal process*, New Haven etc.: Yale University Press, 1986.

[29] M. Damaska, Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Approach, 121 *University of Pennsylvania Law Review*, 1973, p. 506-589.

the procedure and the accuracy of its outcome, is achieved within the parameters of the particular system.

a. Adversarial and Inquisitorial

Both adversarial and inquisitorial procedures are concerned with determining the truth and therefore with establishing guilt or innocence in a fair manner that allows scope for individual rights and interests. None would lay claim to finding the absolute truth. Rather, they seek to establish a version of events that can be regarded as the relevant truth, in that it is acceptable and legitimate for all concerned and for society in general. What make criminal process predominantly inquisitorial or adversarial, however, are how the ideal search for the truth is conceived of, and the corresponding guarantees that it will be both found and found in a fair manner.

b. Theoretical assumptions

In the context of criminal procedure, which is an important institutional means of serving an essential element of the common good (the security of society and individuals in both senses of the word), the basic assumptions of the civil law tradition imply that it is the state that is best entrusted with truth finding. Here the police, together with, but subordinate to, the public prosecutor and in some cases an investigating judge (in countries influenced by Napoleonic law, more usually called the judge of instruction)[30] undertake the major steps towards that goal: a thorough criminal investigation and the presentation of evidence before the court, and in this context "thorough" means not only as complete as possible, but also non-partisan, taking both possible guilt and innocence into account.

The agenda for the case that is eventually presented to the court is set by the trial "dossier" compiled during the investigation. The defendant must react to that agenda and cannot determine it once the dossier is completed, although during its compilation the defence plays a role in pointing the

[30] Some systems have both; in some the investigating judge, or judge of instruction, will take the decision to prosecute after examining the merits of the case, while in others the public prosecutor plays the most important role. Examples of the former are France and Spain, where the *juge d'instruction* is the most important figure in pre-trial investigation and takes the decision on (non-)prosecution. In the Netherlands, while it always was the prosecutor who made the decision on whether or not to prosecute, the role of the investigating judge has altered and he/she no longer plays a significant role in investigation either. In Germany, the figure has been abolished altogether.

prosecutor towards avenues of investigation favourable to the defendant and the prosecutor has a duty to investigate them. Once the case comes to court, however, the defence role is limited to an attempt to undermine what is essentially the prosecution case, among other things by prompting the judge to ask the relevant questions, for it is the judge who plays the primary active role in establishing the "truth". But in such systems, the central role of the dossier means that there is already one version of the truth on paper. That is debated and verified in court, but the actual setting of the agenda takes place pre-trial and is essentially determined by the prosecution. In inquisitorial systems, the emphasis is very much on pre-trial procedure, and defence rights are proportionate to the role of the defence in truth finding: making sure that the prosecution and the court are able to perform their central role in establishing the truth. It is not, in such systems, a theoretical necessity that all evidence is produced in court; in theory, both incriminating and disculpatory evidence is already all contained in the dossier, including transcripts of witness statements.

In the common law tradition, adversarial criminal process is conceived of as a struggle between parties in which the individual defendant fights his own corner. In the clash of opinions between prosecution and defence about 'what happened', the truth, it is assumed, will eventually emerge. Such truth-finding is only possible if each party has equal rights and uses them to try to establish their own version of events by presenting their own evidence of that version to a tribunal of fact. In most common law jurisdictions, the tribunal of fact, at least in serious cases, is a jury, although South Africa abolished juries in criminal cases in 1969 and the presiding judge sits with assessors (lay or professional, according to the type of court). South Africa, however, with its complex race relations (one of the reasons which led to the abolition of the jury system), is not a representative case,[31] and certainly both in the UK and the United States serious crime is tried by jury. But it would be a misapprehension to suppose that the jury is a necessary feature of an adversarial trial.[32] In both countries, the majority of cases that make it to court are tried before a single judge (lay or professional), while lay participation in the form of a jury or, more usually, lay assessors is a feature of most European civil law jurisdictions with more or less inquisitorial

[31] See Milton Seligson, Lay participation in South Africa from apartheid to majority rule, *Revue internationale de droit pénal* 2001- 1/2 (Vol. 72), p. 273 - 284.

[32] A jury *is* characteristic of the common law tradition, but its essential role is a democratic one. The jury is the final link in a system of checks and balances that protect the people against abuse of power, not only with regard to the executive, but also the legislature and the judiciary.

procedures: only two out of our ten (The Netherlands and Romania) report that criminal cases are always tried by professional judges only, regardless of how serious they are.

Whether the tribunal of fact is a judge or a jury, an essential feature of adversarial trials is that they do not take place on the basis of a dossier compiled by state officials, and what happens in court therefore is not verification of the state's case by the judge, but falsification of that case by the other party, the individual accused of an offence, in the presence of an impartial tribunal. "Impartial" in the context of an adversarial trial, logically means that the tribunal of fact is not predisposed to a particular verdict through prior knowledge of all the facts of the case, as well as not being biased in any other way. The great significance of adversarial debate in open court implies that in principle all evidence must be produced there. And, contrary to inquisitorial procedure where witnesses and experts are called by the court and examined by the judge on the basis of what is already on the table in the dossier, in adversarial trials each party examines the other's witnesses and their own, produces their own experts, searches for and produces their own evidence in an attempt to establish that there is an equally if not more compelling version of events than that put forward by the other side. Such trials are of necessity highly oral and 'immediate' in nature, for their aim is to convince a tribunal of fact with no prior knowledge of the case, of the accuracy of one party's account. The judge is there to make sure that the contest takes place according to the rules, not to become involved in the actual process. In such systems, the emphasis lies on the two-sided presentation of evidence at trial, rather than on its collection in a dossier to form a coherent – but essentially one-sided – version of events.

c. Checks and balances

It is obvious that these very different concepts of the ideal way to find the truth imply that a fair trial, i.e. a trial acceptable as legitimate to all concerned, will depend on different sorts of checks and balances. For the adversarial system to work, based as it is on partisanship and the ability to prepare, fight and win (in direct confrontation) a more convincing case than the other party, equality between prosecution and defence is a must, and what the defendant needs more than anything else is a good lawyer. The ability of the defendant to prepare and present his/her own complete and convincing case in court depends therefore entirely on equality of arms between defence and prosecution, not only in theory, but also in practice.

The partisan nature of adversarial process implies that prosecutors are regarded as, and perform as, advocates of the state case, and that their basic training is geared towards this role.

That means that defence lawyers must be not only capable, but also affordable, that there must be enough of them and that they must be able to assist their client at every point in the procedure, both pre-trial and at trial. If this is not the case, there is no safety net, no judge to come to defendant's aid to assert his rights for him, or take over the lawyer's role in truth-finding. It also means, given that prosecution and defence are structurally unequal in the coercive powers they can use in pre-trial investigation, that some form of disclosure is indicated should the police/prosecution investigation produce evidence that would undermine the prosecution case, or help that of the defence. For there is no second chance, no appeal on facts that could have been put forward but weren't, because the defence investigation did not unearth them when that would have been possible, or chose not to lead evidence although it was available.[33]

Guarantees that the final decision will be the relevant truth that is legitimate and therefore acceptable in an inquisitorial system, lie firstly in the prosecutor's or investigating magistrate's role of representing and guarding all interests involved and in the prosecutor's control over the police: a secure society requires that crime control and due process be equally important and it is the state's task to see that both interests are respected. A magisterial role implies that prosecutors are not only advocates of the state's case in court, but that they also take decisions and perform in a judicial manner throughout the process and especially pre-trial, and that they will be trained in a way to make this possible. Other guarantees flow equally from the notion that the truth is best found through investigation by the state: the role of the defence in pointing to factual and legal deficiencies in the prosecution case and the attendant rights necessary for this; the fact that appeal on the facts – a full re-trial before a higher court – is a normal feature of judicial control in inquisitorial criminal process; the requirement that judges actively involve themselves in the truth finding process in court and that they give reasoned decisions.

[33] In part, this is also the consequence of the democratic significance of the jury as the final link in the checks and balances that ensure that, in the final event, the law 'belongs' to the people, so that no court can overturn a jury verdict that has been rendered according to the law. Consequently, normal appeals in an adversarial system are allowed on points of law only.

In the theory of the inquisitorial tradition, both the legitimacy of criminal justice and the fate of the individual in terms of fair trial depend to a large extent on the integrity of state officials and their visible commitment to non-partisan truth finding. For the system to work, what the defendant needs, more than anything else, is a good, i.e. non-partisan prosecutor and an impartial judge – i.e. a judge trained and capable of ignoring preconceptions about guilt that could form as a result of knowing the dossier – and thus willing to actively participate in critically verifying the accuracy of the case the prosecutor sets out. The relative paucity of the scope of rights available to the defence (at least in comparison to adversarial process) stands in direct relation to the presumed proportionality that is needed in order to make sure that the other participants actually attend to all of the interests involved – including the defendant's. But the proportion itself is derived from theoretical understanding of the role of those other participants in the procedure, not from what may actually happen in practice. If , for any reason, the faith in their ability is misplaced, the defence lawyer may be empty handed in terms of defence rights to challenge the prosecution case on issues, or at a point in the procedure, where it could make a difference.

d. Adversarial and inquisitorial systems in practice

Although nowadays in practice criminal process cannot be seen as purely adversarial or inquisitorial, each type having incorporated features from the other, there are nevertheless some defining characteristics when we relate the type of system to its historical common or civil law traditions and the corresponding concept of truth finding. Contrary to popular belief among adversarial lawyers, the presumption of innocence and the burden of proof for the prosecutor are not the prerogative of the adversarial system and it is certainly not the case that in inquisitorial trials the defendant is presumed guilty until he proves his innocence. In both systems, it is up to prosecution to prove the case against the defendant beyond reasonable doubt. The difference lies in the way in which the prosecution case is built up, its significance in setting the agenda for trial and the position of the suspect/defendant. Defining characteristics may therefore be found in: the nature of pre-trial investigation and the interrelated roles of investigators and position of the suspect as a subject in legal process or object of investigation with limited rights, the scope of defence rights and the active or passive role of the judge at trial, and the link between both that is embodied in the absence or existence of a pre-trial dossier prepared by state officials.

We asked our reporters to rate their own system as more or less inquisitorial/adversarial.[34] Not surprisingly, the common law countries all put themselves in the adversarial camp, and the process described in the reports did indeed have predominant adversarial features: a party driven process with each party preparing and presenting their own case, an important role for the defence based on equality of arms both pre-trial and at trial, coordinate authority with an independent police force conducting the investigation, the absence of a "dossier", prosecutors trained as advocates and a passive judge, with the tribunal of fact having no prior knowledge of the case. However, the English reporter describes a situation in which there appears to be, in pre-trial process, a slight move towards the inquisitorial in the changing nature of the relationship between the police and Crown Prosecution Service (CPS);[35] and, as we shall see in paragraphs 5 and 6, in the rules that now govern (non-)disclosure of information, and therefore affect the equality of arms relationship between defence and prosecution at trial.

The civil law countries show both inquisitorial and adversarial elements in criminal process as a whole, and most rate themselves, "somewhere in the middle" in the words of the Romanian reporter. However, this is usually based on the rights of the defence at trial to know and contest the evidence (indeed a necessary feature of adversarial process), not on a fundamentally adversarial understanding of the roles of participants or concept of truth finding. In almost all cases, we would classify pre-trial procedure as more or less entirely inquisitorial, and again in almost all cases truth-finding at trial

[34] Taiwan reported that the country had recently (2002) switched from an inquisitorial to an adversarial procedure, but that the inquisitorial legal culture still persists. For example, the Code of Criminal Procedure (Article 163) provides that judges may intervene in the truth finding process at court, and indeed must do so in some cases. Most judges interpret this article to mean that they therefore still have an inquisitorial role. Truth finding at trial is also still based on the prosecutor's dossier, although there are – understandable – moves to abolish this. Unfortunately, we have no report from Italy or from South American countries other than Venezuela, since Italy and many South American jurisdictions also made the switch from inquisitorial to adversarial, but maintained the institution of an inquisitorial prosecutor and/or judge of instruction and other inquisitorial features.

[35] Until 1985, there was no prosecution service in England and Wales, with the police investigating and charging a suspect, and then engaging a barrister (lawyer) to present the case for the prosecution at court. After the creation of the CPS, its main role was to simply filter out those cases in which there was insufficient evidence to prosecute, and then to engage an independent barrister for the prosecution. As a result of the continued development and professionalisation of the CPS and of recent legislative changes, more of its members – who are recruited from lawyers trained as advocates – have become qualified to appear themselves before the courts, with the formulation of the charge no longer the prerogative of the police, but of the prosecutor. That said, although this requires co-operation, the police still have in law independent powers of, and control over the, investigation and are certainly not subordinate to the CPS in that sense.

is not party driven but based on an active judge examining the evidence contained in a dossier, although, usually, the defence may produce evidence at trial. Finland and Venezuela appear to have genuinely mixed systems: despite the existence of a dossier, and of separate professional training for prosecutors akin or identical to that of the career judiciary, both have a passive judge in the role of guardian of due process and adjudicator of procedure, party driven leading of evidence and adversarial argument at trial, where the main emphasis lies. From an organisational perspective, in Finland the police are more or less independently responsible for pre-trial investigation, in Venezuela however they are subordinate to the prosecutor.

All of the other civil law countries describe a system in which "in theory the locus of fact-finding is the trial […] and in practice the pre-trial process is of great significance for the fact finding at trial".[36] A prosecutor and/or judge of instruction is responsible for pre-trial investigation (in practice, the police are fairly independent in most cases, though bound in law to follow the prosecutor's instructions), and lays down the results in a comprehensive dossier. Prosecutors are trained in the same way as judges and indeed, in some countries, such as The Netherlands and Croatia, the prosecution service is regarded as part of the judiciary or as a judicial body.[37] At trial, the court has an active truth finding role, with the (presiding) judge usually asking the questions and also holding the authority to determine, in the final event, which witnesses shall appear and what (additional) evidence may or must be produced in court.

CONCLUSION

One of our propositions is that legal traditions and associated styles of procedure could be an underlying factor affecting the implementation and scope of the internationally guaranteed fundamental rights that pertain specifically to fair trial. In this paragraph, we have looked first at the theoretical basis of the common and civil law respectively and at the implications in theory for the (adversarial and inquisitorial) procedural traditions usually associated with these legal families. Subsequently, we

[36] Report on the Federal Republic of Germany.

[37] Dutch prosecutors are known as "standing magistrates" because they stand during their performance in court. Judges, who remain seated, are "sitting magistrates".

examined the answers in the national reports to our questionnaire, of which the part II was devoted to trying to establish a picture of the essential nature of criminal process in the countries concerned. We found that much of the theory still holds true, although criminal procedure is one of the areas where common law countries no longer rely predominantly on judge-made law but have resorted increasingly to statutory regulation. This is especially true of the United Kingdom, and one of the predominant influences here seems to be the ECHR as it has been incorporated through the Human Rights Act 1998. For the Convention requires a clear and unambiguous demarcation in law of the limits of the powers of the criminal justice authorities. No longer may they do anything that is not forbidden under the common law, but not more than that. They are now bound to extensive powers conferred in statute. In the United States, however, it is the Supreme Court that determines, through interpretation of the Bill of Rights in the US Constitution, what the individual rights of due process mean.

As to criminal procedure, it has been said that common, internationally agreed standards of fair trial have introduced a greater adversarial element into European continental procedure, while ever more professionalised crime control by public authorities has brought to countries with predominantly adversarial style procedures a pre-trial phase that has much of the inquisitorial.[38] That is not entirely borne out by the national reports we received. Certainly, no procedure can be described as absolutely adversarial (although the U.S. comes very close) or absolutely inquisitorial. In England and Wales there does indeed seem to be a (slight) move in the changing role of the prosecutor pre-trial towards the inquisitorial and professionalisation certainly plays a role, but as a driving force this is equalled by the ECHR requirement of legality and lex certa. As we shall see, in "inquisitorial" countries the trial phase does indeed include an adversarial element, namely the requirement that criminal trials allow challenges to evidence: what the French call le contradictoire, but this, we will argue, is not the same as adversariality. Moreover, most civil law countries retain essentially inquisitorial features in the agenda-setting function of the pre-trial dossier, the significance of the role of the prosecutor or judge of instruction in conducting an impartial pre-trial investigation, and of the active truth-finding judge at trial.

[38] J.R. Spencer, Introduction, in: Mireille Delmas-Marty & J.R. Spencer (eds.), *European Criminal Procedure*, Cambridge: Cambridge University Press, 2002, p. 1-81; see, however, Sarah Summers, who postulates an "enduring legacy of the inquisitorial/accusatorial divide" *(Fair trials. The European Criminal Procedural Tradition and the European Court of Human Rights*: Oxford: Hart Publishing, 2007, p. 3).

The question however, is not whether previously inquisitorial systems have now become adversarial. As the Dutch reporter remarked on the question of whether or not a procedure is predominantly adversarial or inquisitorial:

"Given that only a few fundamental rights demand adversariality – this applies especially to the right to examine witnesses for and against the defendant (cf. Article 6 § 3(d) ECHR) – as such, this says little about whether or not the system applies high human rights standards, if only because accurate truth-discovery is a prerequisite to a case outcome that is fair to all involved."

Our question indeed is whether, how, and to what extent each country is able to implement the fundamental uniform rights of fair trial set out in international human rights instruments within the parameters of the guarantees of its own criminal process, and whether the essential nature of that process influences the scope of implementation. That is a matter to which we turn in the following paragraph.

INTERNATIONALLY GUARANTEED FUNDAMENTAL RIGHTS

International human rights instruments contain a number of provisions that are highly relevant for due criminal process. They do not necessarily concern the right to a fair trial, although in some cases they may have some effect on the fairness of proceedings. In this paragraph we propose to deal first with such rights (the right to life, the prohibition of cruel and humiliating treatment, detention rights and conditions), before delving deeper into the international guarantees for a fair trial as such and the possible sanctions under domestic law when fair trial/due process requirements have not been respected. The right to privacy and the freedom of expression, which are independent rights but also have links to criminal process, will not come under separate consideration in this report, but are referred to on a piecemeal basis in this and the following paragraph where appropriate.

A. FUNDAMENTAL RIGHTS INDEPENDENT OF FAIR TRIAL

a. The right to life and the prohibition against torture and cruel and humiliating treatment

The rights to life and to protection against cruel and humiliating treatment, of which torture is the most extreme form, are fundamental to the dignity to which every human being is inherently entitled and they are the first individual rights enunciated in both the ICCPR and the ECHR:

"Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life." (Article 6, §1 ICCPR)

"No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment […]." (Article 7 ICCPR)

"Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." (Article 2, §1 ECHR)

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment". (Article 3 ECHR)

It is immediately obvious from the text that, paradoxically, the right to life is not regarded as absolute, while the right to protection against torture is. While there are no qualifications to the prohibition against torture, both Conventions allow in the main body of the text for the death penalty. However, Optional Protocol No. 13 to the European Convention (2002), to which all of our European respondents have signed up, contains an absolute and non derogable prohibition of capital punishment.[39] Although France and Spain did not ratify, it has nevertheless been totally abolished under domestic law in both countries. In consequence, none have the death penalty under any circumstances. In some countries it was abolished long ago (e.g. in 1870 in The Netherlands), in others not until recently. The UK suspended it in 1965, followed by step by step abolition until acceding to Protocol 13 in 2004. France abolished capital punishment in 1981 (and amended the Constitution to accomplish total abolition in 2007). The former east-bloc countries (Croatia, the Czech Republic and Romania) abolished it immediately after

[39] The earlier Protocol 6 (1983) allowed for the death penalty for acts committed in war time or in the imminent threat of war.

independence and their transition to democracy. Total abolition occurred in Spain in 1995.

The non-European countries represented in this report are signatories to the ICCPR, which not only encourages abolition of capital punishment in the text of Article 6,[40] but also has an Optional Protocol No. 2 prohibiting the death penalty although allowing derogation for military crimes in wartime. In Venezuela, it has been totally abolished in law. In South Africa, capital punishment was abolished as unconstitutional in 1995 in a judgment by the Constitutional Court, while in Taiwan the penalty is on the statute books for many crimes, but plans for abolition have been announced and there have been no executions for 2 years (although by the standards of Amnesty International, which requires 10 years, the country cannot be regarded as abolitionist in practice). The United States not only retains capital punishment, but has no plans for its abolition. As we have seen, the U.S. considers its own Constitution as the sole base of fundamental rights in the domestic setting and the U.S. Senate resolution of advice on the ratification of the ICCPR, for example, includes reservations that retain for the United States the right to impose the death penalty based on domestic law.[41] Indeed, the American reporters regard this lack of international commitment, combined with the fact that neither the judiciary nor the legislature has developed rules restricting punitive sentences so that U.S. criminal sanctions today count among the most punitive in the Western world, as one of the salient, albeit less attractive, features of American criminal justice.

Contrary to the death penalty, the main text of both the ICCPR and ECHR absolutely prohibit cruel, inhuman or degrading punishment, while Article 2 of the International Torture Convention reads:

"1. Each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction.

2. No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture.

[40] For example, in § 6: "Nothing in this article shall be invoked to delay or to prevent the abolition of capital punishment by any State Party to the present Covenant."

[41] Reservations were not strictly necessary, given the text, but it would appear that the U.S. Senate was somewhat alarmed by the abolitionist tone of Article 6.

3. An order from a superior officer or a public authority may not be invoked as a justification of torture."[42]

With the exception of the United States[43] (and to a certain extent Taiwan, that has ratified the ICCPR but not the torture convention and does not prohibit torture by statute), all of the respondent states adhere to the prohibition of torture and cruel or inhuman treatment or punishment. Most have such absolute prohibitions in either their Constitutions or legislation, while European countries that do not, such as The Netherlands, are nevertheless bound by Article 3 ECHR that has direct effect.

IMPLICATIONS FOR FAIR TRIAL

The death penalty and the prohibitions against torture and cruel or inhuman treatment or punishment are obviously directly related to criminal process, in the sense that they proscribe certain sanctions or actions for reasons of fundamental dignity and humanitarian considerations. Articles 7 ICCPR and 3 ECHR however, also have implications for guarantees in the interrelationship between truth finding and fair trial, for statements obtained through coercion are not only unacceptable for humanitarian reasons, but also inherently unreliable. Such implications are especially relevant pre-trial when the police interrogate suspects, and in (other) detention situations. And indeed, Article 10 ICCPR states: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person".

There are several ways of providing guarantees to safeguard against the risk of statements being procured through coercion during interrogation: legal prohibition or criminalisation of coercion by officers of the law; informing a suspect of his rights and notably the right to remain silent; making sure the suspect understands the full significance of what is being said by providing an interpreter and translation of documents if necessary; affording legal

[42] Although according to the text, this absolute prohibition only concerns torture, the Committee against Torture has determined that it also pertains to the inhuman and degrading treatment to which Article 16 of the Convention refers (see: CAT/C/XXVII/Misc.7, 22 November 2001, Statement of the Committee against Torture).

[43] Here too the United States has entered a reservation, to Article 7 ICCPR, reserving the right to interpret the term "cruel, inhuman or degrading treatment or punishment" in accordance with the domestic interpretation of constitutional amendments with similar language.

assistance at the first relevant moment in criminal process (i.e. at the moment of detention and in any event before a suspect is to be interrogated), and, one step further, allowing defence lawyers to be present during interrogation and/or tape-recording and videoing events. While such rules may be enforced through sanctions against offending police officers, a possibly more effective sanction, and in any event one that protects against the risk of false confessions contributing to a miscarriage of justice, is declaring statements obtained through coercion inadmissible as evidence (exclusionary rule). All of the reporting countries have at least one or more such measures in place though not necessarily all of them. Informing suspects of their rights, including the right to remain silent, the provision of interpretation and translation (though not necessarily into all languages), legal assistance at an early stage of criminal investigation and the exclusionary rule seem to be the norm everywhere.[44] The interesting differences lie in the type of prohibition against coercion and in the scope of legal assistance.

In countries that have experienced systemic police brutality in the past (Romania and Taiwan for example), obtaining statements through coercion is either a qualified criminal offence, or subject to a highly detailed prohibition in the code of criminal procedure. In other countries (The Netherlands for instance) the code simply contains the provision that officials interrogating a suspect must refrain from any action aimed at obtaining a statement not given freely. The United Kingdom, that has faced the problems of false confessions as a result of police coercion leading to miscarriages of justice, has detailed rules about how interrogations should take place in the Police and Criminal Evidence Act and in the attached Codes of Practice.[45] Apart from Taiwan, this is the only country where tape-recording and/or videotaping of interrogations is mandatory.

As to legal assistance, differences here seem to point to the nature of criminal process as more or less adversarial or inquisitorial. Obviously, in the common law tradition in which individual rights must be asserted in adversarial process, the assistance of a legal expert at the very earliest stage

[44] As far as the exclusionary rule is concerned, how effective this is in "policing the police" will depend on how far the exclusion extends. In the United States, the fact that a statement obtained in breach of the "Miranda rules" does not prevent other evidence (gathered on the basis of that statement) being used against the defendant at trial undermines that efficacy of the rule. In other words, all depends on whether exclusion includes "the fruits of the poisonous tree". In most jurisdictions it does not, depending on how serious the form is that the coercion took.

[45] Although the English reporter refers to situations in which such provisions are circumvented.

is of the utmost importance. And indeed, all of the common law countries report that the suspect not only has the right to legal assistance as soon as he is detained by the police, but also to the presence of a lawyer during police interrogation. Finland and Venezuela, where criminal process is a mix of the adversarial and inquisitorial though leaning towards adversarial in the position of the pre-trial suspect as a subject in law rather than an object of investigation, also allow the presence of a lawyer at all stages. In inquisitorial process with its basic tenets of pre-trial investigation by the state as the focus of truth finding and reliance on the integrity of the officials who conduct it, where the police are subordinate to a "magisterial" prosecutor or investigating judge and all information will end up in a dossier and be scrutinised by a court anyway, the necessity of allowing a lawyer to be present during police questioning is not a logical given.

Indeed, in those countries where pre-trial process most closely fits the inquisitorial model (France, Germany, The Netherlands) counsel have not right to be present during police interrogation. In the Netherlands, the right to counsel does not apply at all during the first (six hour) phase of questioning. There are, however, plans in the offing to introduce recording of interrogations and in some districts an ongoing experiment where lawyers are present.[46] Moreover, recent decisions by the European Court seem to imply that the presence of a lawyer during police questioning is a fundamental right and that there should be no exceptions.[47]

Pre-trial detention and habeas corpus

While the danger of coerced (and possibly false) statements is probably greatest at the moment of police interrogation, the same danger (as well as humanitarian objections) obtains if a person is held in unacceptable conditions of detention, in secret or incommunicado, in isolation, without access to counsel, etcetera. Guarantees that fundamental rights governing such matters will be respected are not only found in pro- and prescriptions in treaties and domestic law with regard to coercion and the right to remain silent, but especially in the principle of habeas corpus (Articles 9 ICCPR and

[46] They are, however, simply allowed to be there and may not say anything (neither may lawyers in the Czech Republic help their clients answer questions). There has been much debate in The Netherlands on the presence of lawyers during interrogation. It has always been refused on the grounds that this would "hamper the investigation" and that there was no evidence that the police coerced suspects. The present proposal for recording and the experiment are both the consequence of a recent miscarriage of justice, where this faith in the police proved misplaced.

[47] ECtHR 27 November 2008, Salduz v Turkey, and ECtHR 11 December 2008, Panovits v Cyprus.

5 ECHR) and the exhortation of Article 10 ICCPR to humane and respectful treatment of detainees.

Lawful detention therefore requires not only a procedure prescribed by law and that everyone who is arrested is informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him, but as an extra safeguard that everyone arrested or detained is brought promptly before a judge or other officer authorised by law to exercise judicial power, and is entitled to trial within a reasonable time or to (conditional) release. Moreover, the state must provide for a legal remedy by which the lawfulness of the detention may be decided speedily by a court and release ordered if the detention is not lawful. Although countries report that special conditions and procedures apply with regard to special categories of detainees (notably organised criminals and terrorists), to which we shall return in the following paragraph, by and large under normal circumstances they all comply with these requirements.

There are differences, for example in the degree of suspicion required before someone can be arrested, held in custody or remanded in pre-trial detention.[48] Some countries always require serious indications that the detainee could have committed the crime, others a reasonable suspicion for arrest and custody and more serious suspicions for remand.[49] There are also differences that can be traced to differences in legal culture and procedural style. Conditional release in the common law countries always takes the form of bail, which is a right that can only be refused under limited circumstances – being free before trial is a theoretical necessity for the defendant who has to prepare his own case before trial, but not if pre-trial investigation is the prerogative of the state. In the civil law countries the situation differs, but in those with the most inquisitorial investigations pre-trial (e.g. The Netherlands and Germany) there is no right to bail as such, although pre-trial detention can be suspended conditionally or unconditionally at the discretion of the judge. Again, the position of the public prosecutor as a magisterial figure means in some cases that he is the

[48] The terminology also varies widely, as do classification of types of detention and the time police custody lasts.

[49] Only Spain reports a separate form of detention known as “retention” for the purpose of identification (therefore without a reasonable suspicion) that is not limited as to time (it may not last longer than is strictly necessary for its purpose), a controversial regulation in the country itself.

figure who can decide on extending detention after the initial period of police custody and before the detainee is brought before a judge.[50]

Positive obligations?

A separate question, but one that directly concerns criminal process, is whether the right to life and to protection against cruel and inhuman treatment implies positive obligations on the part of the state to initiate a criminal investigation and possible subsequent proceedings if reliable information points to a life-threatening situation or one in which an individual may be subject to such treatment. Most of the European countries report that there is indeed such an obligation, although not in domestic law. In any event, bound as they are by the ECHR and its interpretation by the European Court of Human Rights, for the contracting parties this obligation derives from the case law on Articles 2 and 3.[51] Venezuela reports the same obligation deriving from Articles 1 and 2 of the American Human Rights Convention, and in South Africa it is deduced from case law of the Constitutional Court. Taiwan recognises no such obligations; neither does the United States.

B. THE INTERNATIONALLY GUARANTEED RIGHTS OF FAIR TRIAL

The fair trial paragraphs of the ICCPR and the ECHR are not identical, but by and large they provide the same types of rights, and differences are not

[50] In France, for another 24 hours. In The Netherlands, it can be almost 4 days (3 days and 15 hours) after arrest before the suspect must be brought before the (investigative) judge who will examine the lawfulness of the detention (Article 59a § 1 CCP). Taiwan reports a change in 1995, when the Constitutional Court declared the powers of the prosecution to detain an accused unconstitutional (followed two years later by legislation: the prosecutor now requires a detention order from the court).

[51] On Article 2: ECtHR (Grand Chamber) 28 October 1998, Osman v The United Kingdom; ECtHR (Grand Chamber) 24 October 2002, Mastromatteo v Italy; ECtHR (Grand Chamber) 15 May 2007, Ramzahai v The Netherlands; ECtHR (Grand Chamber) 30 November 2004, Öneryildiz v Turkey; and on Article 3: ECtHR 24 January 2008 Maslova & Nalbandov v Russia; ECtHR 3 May 2007, Gldani Congregation of Jehovah's Witnesses v Georgia; ECtHR 12 October 2006, Mubilanzila Mayeka & Kaniki Mitunga v Belgium; ECtHR, 4 December 2003 M.C. v. Bulgaria. It should be noted that such positive obligations also arise under the ECHR with regard to other provisions – e.g. Article 8 (privacy) and Articles 9 and 10 (freedom of religion and expression.

essential for our purposes of identifying whether and how such rights are implemented in domestic legal orders.

Article 14 ICCPR

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 6 ECHR:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly. The press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

Everyone charged with a criminal offence has the following minimum rights:

(a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;

(b) to have adequate time and the facilities for the preparation of his defence;

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

(d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

From these provisions we may deduce two different sorts of rights that, although both articles are referred to as the fair trial paragraphs and seem to apply to the trial setting only, as we have seen may be applicable where appropriate to all stages of the procedure:

The right to a hearing and the fundamental normative assumptions underlying that right: that it be public and held within a reasonable time before an impartial tribunal; and that the defendant be presumed innocent until proved guilty (implying also the right to remain silent and placing the burden of proof on the prosecution).

The nature of the hearing, namely adversary, from which derive a number of rights that directly influence the relationship between participants: the right to know the charge(s), the right to have adequate time for the preparation of one's defence, the right to know and contest the evidence on an equal footing with the prosecution (equality of arms), the right to an interpreter and translation of documents, and to counsel and legal assistance (implying that these must be provided to those without sufficient financial means).

a. The right to a public hearing

All of our respondents report a situation in which the right to a public hearing held within reasonable time and before an impartial tribunal, the presumption of innocence and prosecutorial burden of proof are firmly anchored in constitution or law, and the fundamental rights of criminal process apply indiscriminately to all persons. Exceptions to the public nature of trials occur everywhere, and conform to international standards (that is to say, (parts) of trials may be held behind closed doors in order to protect either national interests of security or public order, or the individual interests

and rights of juveniles or third parties – witnesses, victims – etcetera). Most countries do not explicitly define "a reasonable time" or undue delay", which again is acceptable under the treaties: all depends on the circumstances of the case and which party caused the delay in the first place. Sanctions that can be imposed if the fault lies with the criminal justice authorities range from a stay of proceedings if the consequences are (very) serious for the defendant, to mitigation of sentence.

The situation therefore seems very similar everywhere. Nevertheless, there are differences that are attributable to the legal culture of the country in which the trial takes place. The media, in the words of the European Court "public watchdogs" and guardians of the free flow of information and democratic public debate, are allowed access to trials in all of the respondent countries (although the quality of the material facilities provided at the courts varies), but only in the United States is full television coverage allowed.[52] The difference is undoubtedly the consequence of the overriding significance attached in the U.S. to the freedom of expression as the foundation of democracy.

More interesting, perhaps, is that concepts such as impartiality of the tribunal and presumption of innocence are defined differently in the adversarial and inquisitorial setting. A tribunal of fact (partly) composed of laymen, may be less impartial in the sense of being less able to put prejudice aside as a matter of professional competence, but more impartial in the sense of not having any prior knowledge of the case (or preconception of guilt or innocence), as the inquisitorial judge has who has read the dossier beforehand. As we have already indicated, this does not mean that the presumption of innocence does not obtain in an inquisitorial system or that the burden of proof does not lie with the prosecutor. Rather, it is a reflection of a fundamental aspect of the system: as in other respects, it is highly dependent on the professionalism, integrity and training of its judiciary.[53]

[52] In Europe, some countries allow cameras in the courtroom for (the formal) part of the proceedings (e.g. The Netherlands), or before the trial starts or during a recession (Germany). France allows television coverage of historically important trials as documentation for future generations.

[53] It is interesting to note that, in general, our reporters indicate that the media in countries with an inquisitorial tradition are entirely free to report on ongoing trials and are not subject to limitations (and possible contempt of court proceedings) as they are, for example, in England. The professional judge in such situations already knows all about the case – usually more than the journalist. In the Netherlands it is considered first and foremost a breach of the *Trias Politica* principle on the separation of powers if politicians or important public officials make statements on individual cases that are before the courts, Only in the second instance does the problem arise that, in the words of the Dutch reporter, "it might *even* [our

Neither do the conventions require an adversarial interpretation of such concepts, as is immediately obvious from, for example, the case law of the European Court on impartiality. Apart from situations in which judges may have personal interests in a case, the test is not whether they are subjectively predisposed to guilt or innocence (for that no-one can know, given that in the dossier they have the means to form a prior opinion but have not necessarily done so), but whether they present the objective appearance of impartiality.[54] For that reason, a judge who has already given decisions before the trial in which guilt or innocence could be at stake, or who has acted as a judge of instruction on the case, cannot be said to be objectively impartial and must withdraw or be recused.[55] In some countries, the judge of instruction is legally barred from trying the case (for example Spain and The Netherlands) or from hearing an appeal when he has given judgment in the first instance (for example, Germany and Croatia). What matters, therefore, is that the trial in an inquisitorial tradition has in place guarantees to offset potential risks to impartiality – just as in the United States parties may challenge a juror on the basis of prejudice.

Ne bis in idem

There is one difference between the texts of the two articles regarding the consequences of a fair trial, in that article 14 ICCPR embodies the principle of ne bis in idem (also known as the prohibition against double jeopardy): no one may be tried twice for the same offence after having been convicted or acquitted in accordance with the law and penal procedure of each country. This principle is embodied in the ECHR by means of Optional Protocol No. 7. Although not all of the responding countries have signed up to this, all have embraced the principle of ne bis in idem in law, though not always with the same or equally far-reaching consequences (or according to the same interpretation).[56] Some countries (e.g. South Africa, The Netherlands and

italics, cb/sf] constitute a violation of the presumption of innocence or the right to a fair trial in Article 6 ECHR".

[54] It is indicative of the concept of impartiality in a country with a predominantly inquisitorial process, that the rules of Dutch criminal procedure refer to the (professional) court's being required not to show in any way that they have any prior inclination towards guilt or innocence: Article 271, §2, Code of Criminal Procedure (Wetboek van Strafvordering).

[55] See: ECrtHR 24 May 1989, Hauschildt v Denmark; ECrtHR 14 September 1987, De Cubber v Belgium.

[56] Common law countries with their adversarial procedures regard a retrial after a judgment on the facts has been given in first instance, as a violation of the principle of *ne bis*. Such retrials, however, are not only a normal feature in the inquisitorial tradition, far from being a violation of a fundamental right they are

Spain) go further than the Conventions require, and recognise the validity of domestic and foreign judgments as a bar to further prosecution. Others do not (Germany, for example, except with regard to decisions taken in EU-member states), while in the US the principle also does not obtain between the different states of the federation, let alone for judgments from overseas. In some cases (e.g. Venezuela and Finland and, very recently England, an example to which turn in the next paragraph) the law allows for exceptions, even to the detriment of the convicted person (for instance, if new evidence not knowable during the trial comes to light).

b. An adversary hearing

Although Article 6 ECHR refers explicitly to an adversary hearing as the prescribed form (and the wording of Article 14 ICCPR implies the same), what applies to the fundamental pre-conditions of fair trial – namely that each system of criminal process must have in place the guarantees that are necessary for and compatible with the underlying assumptions of its style of procedure – is equally true for the form that procedure takes. In its case law, the European Court of Human Rights makes perfectly clear that what is meant here is not a full blown adversary trial as can be found in England or the U.S., but a process – pre-trial and in court – that in the balance of its safeguards is fair and capable of producing, as far as is humanly possible, the truth.

If the question is that the trial must conform to the safeguards inherent in its own basic tenets, are there any that apply to both inquisitorial and adversarial systems equally? In the original theoretical models, the answer is no. For an adversarial process, true equality of arms that will allow both the leading of evidence and contestation of that of the opposing party in an oral and immediate clash of opinions in open court, is a must, as is legal representation. Strictly speaking, disclosure is not a necessary feature, for true equality of arms allows each party an equal chance to investigate and produce evidence in their own case. In inquisitorial procedure, none of this is necessary, for if the organs of the state do their job properly – i.e. impartially and thoroughly – and produce the results of pre-trial investigation in a comprehensive dossier to be fully scrutinised by an active

seen as one of the guarantees of fair truth finding: defendants and prosecutors usually have the *right* to appeal on the facts, and Article 2 of Protocol 7 ECHR even provides a right of appeal in criminal matters.

fact-finding judge, there is little reason to reproduce the whole business again in court. There is certainly no reason to allow full contestation: if any evidence is not clear – especially witness statements - the court can itself request clarification and, if necessary examine the witness in camera. There is, in the final event, not even any need for the defence to be a party to fact-finding proceedings.

Modern versions of these systems, of course, have bowed to reality, and to humanitarian considerations. True equality of arms does not exist: the defence is not on an equal footing with the prosecution as far as means of pre-trial investigation are concerned, so disclosure by the prosecution (of evidence that might help the defence) has become a must if all arguments for and against guilt are to be presented. The reality of the inquisitorial system, of course, is that prosecutors (and police) are neither always impartial nor thorough, so that it is by no means a foregone conclusion that the dossier is either comprehensive or represents a balanced version of events that the judge need only verify as to whether the prosecution has sufficient evidence to prove the case beyond reasonable doubt. In these systems, the contribution of the defence lawyer, both to the constitution of the dossier and to the debating of its contents at trial, has become a fundamental necessity for ensuring that the judge does not rule on the basis of an entirely one-sided and possibly incomplete case.

Common law jurisdictions

Of the countries represented in this report, all have two basic requirements in place that ensure that a defendant will at least have the means to exercise such rights as are afforded him or her: the right to interpretation and translation[57] and to legal assistance, also for indigent defendants, with the attendant lawyer-client privilege that assures free communication between a lawyer and a defendant.[58] As to the nature of the hearing, however, while many countries have a trial process that they describe as adversarial, only

[57] This would also appear to be the case in Romania, although the report does not make the situation clear.

[58] The attorney-client privilege, however, is not elaborated in Taiwan. While it exists in Romania, it seems to be not fully respected, as conversations between lawyer and client can be recorded, though the records "can only be used as evidence if they contain clinching and useful data or information indicating preparation or commitment by the lawyer of a crime (…), while tapping and recording are imposed for establishing the truth or because identification or localization of the offenders cannot be achieved in a different way or the investigation would be much delayed." In practice, communications between lawyers and clients in The Netherlands have also been the subject of telephone taps, although this is illegal and the results certainly cannot be used in evidence.

three – namely the common law countries – have an adversarial system in the true meaning of the word. And of these, only the United States has remained (almost) entirely true to the fundamentals of the party contest.

In the U.S., each party must build up and present its own case. The prosecution must disclose all material evidence, i.e. evidence that could determine the outcome, could assist the defence or undermine the credibility of the prosecution case.[59] The defence has a constitutional right under the "confrontation clause" (6th Amendment) to be confronted by witness against him and to obtain and examine witnesses in his favour, which also means that the defence must produce witnesses á decharge, including expert witnesses. The confrontation clause includes a principle of orality: all admissible evidence must be presented orally in court, so that it can be challenged in the form of cross examination. Hearsay evidence is not allowed (although there are certain exceptions if a witness is truly unavailable), and only rarely may government witnesses keep part of their identity (such as their home address) secret. The U.S. relies on witness protection programmes for threatened witnesses and has only recently allowed vulnerable child witnesses in sexual assault cases to testify via one way video link. Questions as to whether the prosecution has a duty to disclose in a given case and to the admissibility of evidence are settled via pre-trial motions, which again require alertness and activity on the part of the defence, in, again, adversary pre-trial procedures.

In South Africa the formula of the trial is very similar, although here confrontation rights are not upheld as strictly. There are witness protection programmes, but threatened and vulnerable witnesses may testify in camera, hearsay testimony may be admitted if the court considers it in the interests of justice (for example to protect the identity of witnesses), and access to the prosecutor's file may be barred for the same reason. Until fairly recently, an English trial would also have had all of the true guarantees of adversarial fact finding in place. However, in recent years there have been a number of changes, some of them due to a desire to achieve greater efficiency, some in connection with the requirements of the ECHR and case-law of the European Court. The situation has shifted from one in which the prosecution was not required to disclose anything, to full disclosure, to disclosure of evidence that would assist the defence or undermine the prosecution and of all materials to be used in evidence, plus unused material that the defence may scrutinise and compel the prosecution to disclose if it can show the

[59] Increasingly, a duty of disclosure also rests on the defence.

relevance of disclosure.[60] For reasons of efficiency, defence and prosecution are now required to attempt to agree on non-contested evidence that therefore need only be read to the jury, not presented and contested orally, and to indicate the essence of their case in a so-called "plea and directions hearing" (pre-trial and before a judge).[61]

Because the UK is party to the ECHR, now incorporated in domestic law in the Human Rights Act, the case-law of the European Court concerning the essence of an adversary hearing in Article 6 has had some influence on the common law guarantees previously in place at trial, but in the sense that it has allowed them to be watered down to a certain extent (a matter to which we shall return in paragraph 6). All of the European civil law countries are of course also bound to Article 6.[62] It is therefore of crucial importance to see how the European Court interprets the text of Article 6, with its reference to an adversary hearing, so that systems that do not have an adversarial, i.e. party driven, truth finding procedure and the attendant guarantees in place – by and large most of the civil law jurisdictions – can nevertheless conform to ECHR requirements.

Civil law jurisdictions

The core of the European Court's interpretation of Article 6 is that the defence must be able to know and contest the evidence,[63] but not necessarily in a hearing in open court. There is certainly no requirement that during the hearing fact-finding must take place in a truly adversarial manner, therefore be entirely party driven with the defence having an unrestricted right to conduct their own investigation and introduce any witness of their choosing or to cross examine every prosecution witness in open court. The European Court requires a contradictory procedure, not true adversary proceedings in an inquisitorial setting. In order to guarantee this, it has qualified the fair trial requirements.

[60] See the following paragraph for the most recent development: non-disclosure of sensitive material for reasons of public interest.

[61] At such hearings, the defence must also indicate whether the defendant will plead guilty, and the prosecution whether they will accept this.

[62] Venezuela is bound to Article 14 ICCPR. There, the trial has adversary elements and defence rights, though no right of cross examination. The process however, though the trial is contradictory, also retains essentially inquisitorial features.

[63] See e.g. ECtHR 18 February 1997, Nideröst-Huber v Switzerland.

Disclosure (in inquisitorial systems defence access to the dossier) is of the utmost importance, for the defence must know the evidence in order to be able to contest it.[64] However, there is a difference in what must be disclosed, according to whether the court is dealing with an adversarial or inquisitorial system. In the former, disclosure must cover "all material evidence for or against the accused",[65] in the latter "all relevant elements that have been or could be collected by the competent authorities".[66] As to the calling of witnesses, it is not unusual that, in inquisitorial systems, the prosecution can refuse to call witnesses or to adduce evidence the defence thinks important and relevant. Here too, the European Court has formulated a guarantee, namely, that in the final instance not the prosecution but the judge will decide on the relevance of evidence.[67]

If disclosure and the production of witnesses and material evidence to be contested at trial are essential elements of the “adversary procedure” of Article 6 and therefore defence rights under the ECHR, that does not mean to say that they can always be realised. One of the problems of the dossier driven inquisitorial trial is that prosecutors might either leave evidence out of the dossier or refuse to accede to requests to call certain witnesses. While it is the judge who must decide, the European Court also does not countenance pure “fishing expeditions” and requirements in domestic law that the defence must show the relevance of a request for information to be added to the dossier or a witness produced, are perfectly acceptable. The problem is that the defence will not know either the exact relevance of the information and nor what a potential witness they feel the prosecution should call has to say. This is the more important, because the European Court has identified a number of situations in which there are legitimate exceptions to the duty of disclosure and the right to confront witnesses.

In a decision against the Netherlands almost twenty years ago, the European Court decided that, while the use of an anonymous witness did not in itself render a trial unfair, this was the case if a verdict was based solely or to a decisive extent on anonymous testimony. In the same decision, a decisive factor was that the defence had had no chance at all, not at trial and

64 ECtHR 18 March 1997, Foucher v France, and EcomHR 14 December 1981, Jespers v Belgium.

65 EcrtHR 16 December 1992, Edwards v United Kingdom.

66 EcomHR, Jespers v Belgium, *supra* note 64.

67 ECtHR 16 February 2000, Rowe and Davis v UK.

not at any other stage of the procedure, to challenge that testimony.[68] These two points have been further elaborated over the years. "Entitlement to disclosure is not an absolute right": the rights and interests of the defendant in disclosure and confrontation must be weighed against competing interests, such as national security, the need to protect witnesses at risk of reprisals or vulnerable witness likely to be traumatised by confrontation, or the need to keep police methods of investigation secret.[69] However, such restrictions may only be imposed if they are "strictly necessary",[70] and any limitation of the defendant's rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities. Such procedures must include affording the defence an opportunity, somewhere in the procedure, if necessary pre-trial, in camera and/or with protective measures such as disguise and anonymity in place, to examine a witness or to have such information disclosed as will not unduly prejudice other legitimate and competing interests.

Bearing in mind that the fair trial guarantees of the European Convention are minimum guarantees that every country must have in place in its criminal process (there is nothing to stop a state guaranteeing more), and considering the exceptions and legitimate restrictions that the European Court has formulated in its case law, it is fair to say that all of the civil law signatories to the ECHR in our report meet at least the minimum requirements of a contradictory procedure – at least in theory and on paper. Some do more, but only Finland, where as we have indicated a genuinely mixed adversarial-inquisitorial system of criminal process appears to exist with the emphasis on truth finding at the trial stage, can be said to meet not only Article 6 requirements, but those of an adversarial trial. Procedure in England and Wales remains adversarial, but has been diluted in recent years. The primary reasons are a desire for greater efficiency and the perceived necessity, fuelled by external and internal pressures of public and political opinion to deal (more) effectively with the threat of organised crime and especially terrorism, of restricting some of the common law adversarial rights of the defendant – an issue to which we return in paragraph 6.

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[68] ECrtHR 20 November 1989, Kostovski v The Netherlands.

[69] See e.g. ECrtHR 26 March 1996, Doorson v. The Netherlands; and ECtHR 16 February 2000, Jasper v United Kingdom, application nr. 27052/95; Rowe and Davis, *supra* note 67.

[70] In another case against The Netherlands, the court did not consider it strictly necessary not only to withhold the identity of undercover police agents, but also to refuse to allow them to appear as witnesses, among other things because the Dutch CPP provides less far-reaching measures provisions for such situations that would, in this case have sufficed: ECrtHR 23 April 1997, Van Mechelen v The Netherlands.

c. Settlement out of Court

Although the rights of fair trial are formulated for the situation in which the matter of guilt or innocence is settled in court, the actual amount of cases dealt with in this way is minimal. Almost all countries have in place a system whereby cases can be settled out of court. In countries with an adversarial procedural tradition, the rights and duties of parties with regard to truth finding and their theoretical equality, implies that both are responsible for the scope of truth finding, not only if an impartial tribunal finally settles the issue, but also if they wish to stop the process because they are in agreement, for example if the defendant pleads guilty, thereby a priori accepting the prosecutors version of the truth. In such systems, settlement out of court and therefore the avoidance of a costly and traumatic procedure of which the results are often uncertain, takes the form of negotiation between equal parties: the outcome is a compromise in which the prosecutor accepts the plea in exchange for a lesser charge (and therefore lesser sentence). No trial need take place and the case proceeds at once to the sentencing stage, the prerogative of the judge. The significance of such a plea in the adversarial system is essentially different to the importance attached to a confession in the inquisitorial tradition, which simply means that prosecutor and judge need to be less extensive in proving and deciding the case. In such systems, settlement out of court usually takes place by the prosecutor offering to drop the prosecution in return for the fulfilment of certain conditions, including payment of a certain sum. There is no trial, for there is no longer a sentence to be imposed.

Obviously, in such situations, the rights of fair trial do not apply in full. Nevertheless, they are still relevant, for the first and most fundamental is that everyone has the right to have their case heard in public by an impartial and independent tribunal. Under the Conventions, it is possible to waive that right, but a waiver must be accompanied by certain safeguards, notably that it was made knowingly – i.e. in full understanding of the consequences – and is voluntary – i.e. not "tainted by constraint".[71] A second safeguard is that access to an independent judge is not cut off entirely. These guarantees however, have different implications in different systems.

If plea bargaining is the issue, then inequality in practice between prosecution and defence, the prospect of a lesser sentence rather than the uncertainty of trial, or indeed personal reasons such as the wish to protect

[71] ECrtHR 27 February 1980, Deweer v Belgium.

someone, may all mean that a guilty plea is not made knowingly and/or freely, even though legal representation is presumed to safeguard against innocent persons pleading guilty. As the judge cannot intervene in the agreement as to the truth in any substantive sense in an adversarial system, his role here is procedural and the safeguard consists of his making sure, before sentencing, that the requirement of free and knowing consent has been met. If it is a matter of the inquisitorial prosecutor accepting a settlement and dropping the prosecution, there is no opportunity to access a judge. For that reason, such systems proceed on the assumption that the prosecutor will only settle if he has sufficient evidence to prove the case, but also have in place the right to have one's case brought before an independent tribunal: no one can be forced to settle out of court.

It follows from the above that we would expect to find plea bargaining as a means of alleviating pressure on the court system in the common law countries that responded to our questionnaire. That is indeed the case, including Taiwan that recently introduced plea bargaining to coincide with the switch to an adversarial procedure, and all also have safeguards in place. They differ in details, but in each case an independent judge is involved in assessing that the plea was voluntary, and made with full knowledge of the consequences.[72] In the civil law countries, systems of settling out of court differ considerably, while Romania, Venezuela and Finland do not have the possibility to waive the right to appear before an independent tribunal.[73] Only the Netherlands appears to conform entirely to the inquisitorial model.[74] Croatia and the Czech Republic require that a judge first examines whether the settlement between prosecution and accused was made freely and knowingly, before approving it. Germany has no legal provision specifically addressing the matter, although the prosecutor can agree to conditional dismissal of prosecution and out of this negotiations arise. There

[72] This is a recent development in England, where plea, charge and sentence bargaining were widespread, but judges were supposed not to become in any way involved. Legislation now ensures that the judge is bound to a tariff system – the earlier the plea the greater the discount – but also that he satisfies himself as to the informed and voluntary nature of the plea. This does not, however, according to the English reporter, mean that a plea of guilty always reflects reality.

[73] We can only speculate as to why this should be the case: perhaps the fact that these are countries with small populations has something to do with it.

[74] The Dutch system is in the process of changing, owing to new legislation, which allows the prosecutor to impose sanctions in the same type of cases that were previously settled out of court. It will be the prosecutor who then decides on guilt, in essence a step backwards to true inquisitorial procedure in which the investigator/prosecutor and the judge were one and the same. The person who receives notice that he will be subject to this procedure, will be able to appeal the decision before a court and insist on bringing his case before an independent and impartial tribunal.

is also a widespread practice of "sentencing bargaining" in white collar and organised crime cases, approved in case law. Legislation is pending.

CONCLUSIONS

Of the fundamental rights that are independent of but relevant to criminal process, we may conclude that most countries in this report adhere strictly to both the prohibition of the death penalty and of torture and cruel or inhuman treatment. Only the United States still has capital punishment and has entered reservations to Article 7 ICCPR. When it comes to guaranteeing that statements in pre-trial criminal investigations are not obtained by force or ill-treatment, however, there are interesting differences, primarily in the position and rights of the defence lawyer, which seem to be connected to whether a system is adversarial or inquisitorial, and thus to derive from the legal procedural traditions in each country. In the same way, there are differences in the length and conditions of pre-trial detention and in the process of habeas corpus.

Fundamental fair trial rights that provide the essential conditions in which a trial may take place – in public and before an independent and impartial tribunal, with the burden of proof resting on the prosecution and the defendant presumed innocent until guilt is proven – are respected in all countries. Although again there are differences, this time in the definition of what constitutes impartiality and the presumption of innocence and therefore in the form that safeguards take, these too can be traced back to the adversarial or inquisitorial tradition. All countries respect the principle of ne bis in idem, though not to the same degree. Out of court settlements – plea bargaining or conditional dropping of the prosecution – do not occur everywhere. But where they do, they too, by and large, meet the main requirement: that there are safeguards in place to guarantee that a waiver of the right to a public hearing before an independent tribunal is made with knowing consent and that there is always, in one or another form, recourse to a judge.

It is when we come to the rights that guarantee the nature of a fair trial as an "adversary hearing" that the greatest differences, deriving from procedural style and tradition, become apparent. As we have seen in Paragraph 4, criminal procedural styles differ considerably in the emphasis put on pre-trial or court procedure, in the (oral) production and contestation

of evidence, in the interrelated roles of the prosecution, defence and court and, above all, in the notion of how, ideally to find the truth. Consequently guarantees of fairness and accuracy also differ accordingly, as do interpretations of the scope of such notions as the impartiality of a tribunal, equality of arms, etcetera. Although the fair trial provisions in international treaties seem to point towards an adversarial procedural style, it is perfectly possible to meet their requirements of a fair trial in more inquisitorial traditions. What is important is not so much the style of the procedure itself, but the way in which the guarantees that are built into it function together to safeguard the fairness of the procedure as a whole.

The essence of those requirements is a contradictory procedure, in which the defence can know and challenge the evidence produced. But there is no absolute right either for the defence itself to adduce defence witnesses, or to challenge evidence in open court (both features of adversary process); nor is (full) disclosure an absolute right. Ideally, that is the case, but there are many exceptions in connection with "competing rights and interests". Failure to observe fair trial obligations at the trial stage in court, however, must be able to be compensated by measures or proceedings at a different (or prior) stage in the procedure and a judge must have the final say over both what is relevant and which restrictions are strictly necessary.

It is easy to see why the United States, with its full blown adversarial procedure in which disclosure, confrontation and orality are essential, easily meets these requirements, and more. And why civil law jurisdictions have often been found wanting by the European Court, especially with regard to disclosure and confrontation. However, gradually, as a result of that court's case law, it must be said that more than a small a degree of convergence has taken place in Europe. Though (inquisitorial) criminal process in European countries still exhibits many differences, these are predominantly in the detail. In all of the countries in this report, at least the minimum guarantees of contradictory procedure as interpreted and elaborated by the European Court, are in place. Criminal process in the United Kingdom is still essentially adversarial. There have, however, been recent changes that tend to undermine the necessary adversarial guarantees. These have been driven, to a great extent, by practical circumstances, and it is to those that we now turn.

PRACTICAL CIRCUMSTANCES, (INTERNATIONAL) CONCERNS AND LEGISLATIVE REFORMS

As we indicated in the introductory paragraph, the wider social and political context requires that we look beyond the law in books to the law in action for a fuller understanding of the scope of international norms with regard to criminal procedure, the continued existence of difference and/or the converging of domestic systems. We have concentrated on two areas. On the one hand, we see what we have called practical domestic problems, which could be political in nature or relate to financial constraints or the limited capacity of the criminal justice system. On the other, there is the public perception of the dangers of crime and subsequent public demand to be collectively protected against them, sacrificing if necessary the (full) individual protection afforded by fundamental rights and freedoms.

Some of these issues are domestic and typical of the situation in one country only. Others however, notably organised crime and terrorism, are matters of international (political) concern and the reaction to them is often politically driven. All of these issues could impair the enforcement of any fundamental rights that exist on paper, although there may well be (shared) circumstances, such as an increased commitment to democracy and the rule of law, that enhance such rights. We do not pretend to any comprehensive discussion of all such matters and all of the ways in which they influence the domestic systems in the countries represented with which this contribution deals. We simply wish to highlight the examples of a number of salient issues raised by the national reporters.

A. PRACTICAL PROBLEMS RELATED TO THE POSITION OF THE COURTS, PROSECUTION AUTHORITIES, DEFENCE LAWYERS AND INTERPRETERS

Despite the fact that almost all countries have means of settling cases out of court, several report overloading of the system resulting in cases not always being dealt with as promptly as is appropriate and/or in streamlining of procedures, which almost of necessity produces short cuts with regard to the interrelated guarantees of truth-finding and fair trial (one such consequence is a shift towards powers of the executive, i.c. the prosecution, and away from the judiciary in determining and sometimes deciding criminal cases). Where this almost invariably concerns lesser crimes, the Czech Republic

reports that, while the courts should apply human rights norms ex officio in criminal process, the increasing case load means that in practice, it is the role of parties to invoke human rights and allege possible violations.[75] All over the United Kingdom, prison overcrowding is a serious problem, especially the growing number of prisoners on remand, suffering, according to the reporter, some of the worst conditions within the prison system, contributing to a rising number of suicides of remand prisoners.

Some serious problems are also reported with regard to judicial independence. Judicial authority is vested in the courts. True independence of the judiciary requires judges to be free from interference, constraint or (temptation to) corruption in deciding cases. Judges should be bound only to the law, including arrangements in the field of human rights on a constitutional and/or international level. As a consequence, they should be remunerated in a manner appropriate to their responsibility and independence, and not subject to sanctions for the decisions they have taken after due consideration of the case and the law. In a very similar way prosecution authorities should not be subjected to political pressure, and gear their activities to the law only.

Some national reports observe that their judges are not very well paid (France and Venezuela). The national report from the United States notes that the growing disparity between the income of large firm lawyers and judges has made recruitment to the judiciary difficult, and made it more likely that less qualified lawyers are elected and appointed to the bench.[76] Judges in Venezuela are not appointed for life. Though the Venezuelan Constitution provides for judicial impartiality and independence, this temporary appointment and the fact that judges are not appointed in strict compliance with the Constitution and applicable statutes, raise concern. It is noted in the Venezuelan report that all too often judges are suspended when

[75] In a country with a system leaning strongly towards the inquisitorial, based on the predominance of the prosecution pre-trial and a limited role for the defence, a comprehensive dossier and a fact-finding court, this is an anomaly and a potential threat to the balance of safeguards. The Czech Republic is not the only country where this tendency is apparent – it is also visible for example in The Netherlands.

[76] Unlike the other responding countries, judges and prosecutors at state level are (usually) elected for a period of office in the United States. While this obviously means that the concept of independence must be interpreted differently from countries where they are appointed for life or, in the case of prosecutors, are part of a career-service, this manifestation of direct democracy in which law is of and for the people, does not necessarily mean that the judiciary is not independent. It does mean that they will be more likely to take account of public sentiment in sentencing – perhaps one of the reasons why, according to the reporters, U.S. criminal sanctions today count among the most punitive in the Western world and the United States has the largest prison population in the world.

having decided against the executive's interest. There is also some concern in relation to regulation in Spain, according to which judges and prosecutors are submitted to civil, criminal and disciplinary liability. This broad concept of accountability of judges could justify doubts as to the actual protection of the independence of the judiciary.

As to the prosecution, political interference might be an issue in South Africa. Besides the police and the public prosecution service, there is the Directorate of Special Operations (DSO), according to the national report known as "The Scorpions". This agency has a legislative mandate to investigate and prosecute organized crime, corruption, serious and complex financial crimes and money laundering and racketeering. Charges of corruption brought by the Scorpions against leaders of the ruling African National Congress (ANC) have attracted criticism within this political party, which has suggested enacting legislation that will deprive the DSO of its independence. It should however also be said that, over the past 14 years since South Africa became a democracy, judges, especially the Constitutional Court judges, have declared their resolute commitment in a number of decisions to uphold the doctrine of separation of powers as contemplated by the Constitution

In some countries the right to counsel and the right to legal aid are not entirely uncomplicated. Firstly, it should be noted that defence lawyers in various countries (Croatia, Czech Republic, The Netherlands, Spain, Taiwan) argue that they are not well paid in legal aid cases. In the United States, again the disparity between salaries in large law firms and this time that of Public Defenders argues against a career in public defence, or indeed a criminal law practice assisting indigent suspects and defendants. In the Czech Republic, some three quarters of the 10,000 active members of the Bar Association refuse to represent clients on a legal aid basis, partly because of insufficient payment. Access to legal aid can be hampered as a consequence. In Taiwan no right to free legal assistance exists for indigent suspects.

One aspect of the Croatian criminal justice system potentially violates the right to effective legal assistance. Defence counsel can be fined, if they disturb order or fail to comply with the directions of the president concerning the maintenance of order. Furthermore, defence counsel can be fined if their actions are clearly aimed at delaying criminal proceedings or if they offend the court or a person participating in the proceedings. A similar system obtains in the UK where counsel can be found in contempt of court or served with so-called "wasted costs orders". However, here extensive

guarantees are in place to ensure that the defence is not prejudiced and that the disciplinary and punitive nature of these sanctions is reflected in a procedure that, as required by the ECHR, is a fair hearing within the meaning of Article 6. Without such guarantees, these limitations and risks have the potential to undermine the effectiveness of legal assistance if counsel is tempted not to advocate the interests of clients with rigour because of the threat of sanctions.

A different concern is raised in the national report from the United Kingdom. Criticisms of a system with a public defenders office are:

"[…] that it lacks independence from the government and that it is perceived as such. There is also the danger that it will be overloaded with work and that it will fail to secure high quality staff. Furthermore, it could lead to less choice for the accused, by reducing access to the private sector, and this could reduce overall quality through lost competition."

Unfortunately, research in the United Kingdom suggests that these concerns have some factual ground. Defence lawyers are often compliant in the speedy production of guilty pleas.

The Venezuelan report argues that there are neither sufficient interpreters in the country, nor sufficient guarantees of quality. A similar problem occurs in South Africa, where most trials are held in English whereas most defendants are not native English speakers. Issues of language are also dominant in Switzerland, which has four official languages.

B. Public and International Concerns about Crime and Security and Legislative Reforms

There are substantial differences in how countries formulate and implement procedural rules and principles, and therefore also in how they accommodate international standards regarding fundamental rights and due process. Some countries are more plagued by practical concerns than others. All, however, face the challenge of attaining a fair balance that respects the rule of law, in weighing individual fundamental rights that protect from undue interference by the state, against the security of society that may expect to be protected against crime and danger. Certainly countries in Western Europe have seen the expanding use of criminal law in response to social and political demands for security: the re-interpretation of principles in order to provide existing provisions with greater scope, or the introduction of new provisions and new powers in or outside of the criminal justice sphere, to the detriment of fundamental rights and freedoms. We understand from the responses to

our questionnaire – in which we asked specifically about recent legal changes that have affected fundamental rights resulting from (changing) perceptions of public safety and the risk of certain types of crimes – that these developments are not restricted to Western Europe. Responses to the demands of law and order and (international) security need not, per definition, interfere with basic rights and freedoms. But unfortunately, they very often do and there is substantial evidence in the national reports that this is the case almost everywhere.

In some countries, purely domestic concerns, driven by what is regarded nationally as a matter of urgency, have prompted legislative reform where others have seen no need to address this particular problem, or at least not the need for the same type of measures. In England, for example, the principle of ne bis in idem has recently been set aside by statute in special cases, where, roughly speaking, new evidence becomes available with regard to very serious crimes of which the offender has, apparently, been wrongly acquitted. This legislation was the result of public outcry in a particular case, but also of ongoing public and political concern that guarantees of fair trial and the maxim in dubio pro reo allowed too many criminals to go free. The possibility of any second prosecution, however, is surrounded by strict guarantees.[77] The Spanish reporter cites new laws dealing with gender violence, enacted in 2004, as the "most important reform in criminal process". They provide for special courts to judge certain crimes against women, and very quick proceedings to adopt protection measures for the victim against the offender. It is not clear from the report whether these reforms simply enhance women's fundamental rights, or also impair those of the defendant.

The latter is certainly the case in Taiwan, where, since its promulgation in 1997, the Sexual Assault Crime Prevention Act has provided that trials of sexual assault crimes are not open to the public unless victims agree.[78] A trial judge also has the discretion to order the examination of the victim to be carried out outside of the courtroom.[79] The defendant can still hear or see the examination of the victim via audio or video transmission or any other suitable means. While this provision conforms to international standards –

[77] In The Netherlands too, there are proposals for very similar legislation, and for very similar reasons.

[78] Article 18 of the *Sexual Assault Crime Protection Act*.

[79] The measure must be imposed if a victim is unable to speak freely or completely at trial due to mental disability or physical and psychological injury.

the defendant still knows the evidence and can contest it, albeit not immediately – the blanket provision ordering a hearing behind closed doors does not. Public trials are the norm, restrictions the exception, and they should only be imposed on a strictly case to case basis, after all indications of their necessity and the interests of other parties have been weighed against those of the defendant.

Again in Taiwan, Chinese illegal immigrants are subject to special conditions and procedures in detention. Illegal immigration is one of the global problems that have led to the erosion of human rights and due process, and the international norm of non-discrimination. The other most salient concerns are organised crime and, especially terrorism. Interestingly, Taiwan alone reports no legislative changes to deal with the terrorist threat.[80] The rest have all enacted new laws, many of which refer to terrorism and organised crime in the same breath.[81]

A. CHANGES WITHIN CRIMINAL PROCESS

There are differences in the scope of these reforms. In some cases, they are restricted to certain areas and subject to judicial monitoring, in others they are very broad and, increasingly, coercive measures and invasive surveillance and monitoring of suspects – in some cases people against whom no allegations are made but who have connections with suspects – are in the hands of the prosecution, police or intelligence services. In The Netherlands, for example, telephone tapping has been widespread for many years, and legislation has been in place since the Eighties in connection with organised crime and drug trafficking. Starting with the legalisation of anonymous testimony, it was expanded in the Nineties to include the interception of telecommunications, bugging, extensive surveillance and extended tap-powers, and in camera and sometimes ex parte hearings before

[80] Unification in Switzerland was partly encouraged by the threat of terrorism and its financing, and organised crime. Investigations into organised crime, money laundering and corruption have been transferred from the cantonal level to the federal level, though complications and demarcation problems still exist.

[81] Taiwan does have an *Organized Crime Prevention Act* of 1996 that provides two major protections for witnesses at trial. Firstly, a defendant is denied the knowledge of the identity of the witness. Secondly, the judge may deny a defendant's request to confront the witness. Given that the reporter does not refer to any compensating procedures, the constitutionality of the provisions, as the reporter himself remarks, is dubious. In any event, they do not meet the international standards of fair trial.

the judge of instruction in cases of sensitive information which the prosecutor wishes to withhold from the defence. The most recent development has allowed the use of secret information, gathered by the intelligence services, as evidence at trial. Crimes of "terrorist intention" have been specifically criminalised.

Other countries have only recently introduced such measures. In Finland too, terrorist offences have been criminalised in a specific way, and the police now have wider powers of telecommunications interception, telecommunication monitoring and technical surveillance. There are plans to allow anonymous hearing of witnesses. In Croatia, the investigating judge may decide to monitor letters, messages and conversation between defendant and counsel for a maximum period of two months, in proceedings for criminal acts against values protected by international law, anti-state terrorism, kidnapping, murder, robbery, abuse of narcotic drugs, counterfeiting of money, money laundering, endangering life and property by dangerous public acts or means, if there are grounds for suspicion that these offences have been committed by a group of people or a criminal organization. These exceptions seem to undermine the very essence of the attorney-client privilege, which should be upheld – even, or especially, in cases concerning the most serious crimes.

In many countries, formal requirements for and conditions during detention have been amended for detainees suspected of terrorism. The Netherlands already had a special detention regime for organised and/or dangerous criminals (it was found to be in breach of Article 3 ECHR)[82] but within the walls of this detention centre there is now a special section for terrorists. Terrorism suspects can also be detained in custody for longer than usual, even if there are no serious and likely allegations against them (as would be required in normal cases), but merely a reasonable suspicion that they may be involved. In Spain too, suspects of terrorism can be held for longer than normal and, moreover, in isolation and incommunicado (although they may not be prevented from communicating with their lawyer). Germany also has special rules of pre-trial detention applicable to persons suspected of belonging to a terrorist group. Here however, although some of the acts implementing changes carry titles indicating a connection with global

[82] ECrtHR 4 February 2003, Van der Ven v. The Netherlands, and Lorsé v The Netherlands.

concerns, such as organized crime and terrorism, by and large most of the safeguards of German criminal procedure have remained intact, sometimes because of intervention by the Constitutional Court.

Some of the most far reaching reforms of criminal process have taken place in South Africa and the UK. The Scorpions-agency in South Africa, with a mandate to investigate and prosecute organized crime, corruption, financial crimes, money laundering and racketeering, has already been mentioned. This office has wide powers to hold in camera investigative inquiries. According to the national reporter, the South African Protection of Constitutional Democracy Against Terrorist and Related Activities Act of 2004

"defines terroristic activity very broadly, and imposes onerous and extensive obligations on the individual to report terrorism offences, both past and future. The Act provides, inter alia, for broad powers of investigation and secretive investigative hearings, the constitutionality of which is questionable."

As in many other countries, as regards suspected terrorist property the Act contains a provision reversing the onus of proof, according to which the accused facing charges of aiding or funding terrorist activity has to disprove that he or she doing so.

In the UK, a good deal of legislation has been enacted in relation to terrorist offences. This includes: the Terrorism Act 2000; the Anti Terrorism Crime and Security Act 2001, the Prevention of Terrorism Act 2005 and the Terrorism Act 2006. Among other things, these Acts provide increased powers of stop and search which do not require reasonable suspicion and increased powers of surveillance. The English reporter refers to the fact that a number of terrorist offences potentially offend against the principle of the presumption of innocence, and include the use of presumptions against a defendant and the lack of the need to establish mens rea, with the defendant having the burden of disproving knowledge or intent. At trial, special in camera and sometimes ex parte hearings with regard to public interest (sensitive) information have been introduced that, in some cases, mean that the defence will have no knowledge of that information or be able to challenge it. Although the judge may not allow the use of such information if it would prejudice the interests of a fair trial, for an adversary system in which fairness and truth finding depend on equality of arms, this is an anomaly indeed.

Many of the reforms described above, although they relate specifically to terrorism and organised crime, share a characteristic that is more general and that has important ramifications for another right: to be protected against arbitrary or unlawful interference with privacy, family, or correspondence (Articles 17 ICCPR and 8 ECHR). The ever-increasing reliance on surveillance and monitoring by criminal justice authorities, greatly enhanced by the availability of electronic technology and telecommunications, is eloquently described in the national report from the United Kingdom:

"Policing is increasingly 'intelligence-led' in that specific areas or offenders might be targeted for police action on the basis of crime data or information received. (…) Some have argued that policing has shifted to providing security by predicting and managing risks rather than providing crime control."

The Venezuelan report comes to a more or less similar (and gloomy) conclusion:

"One must say, however, that the government's growing trend towards increasing more control over all public powers and institutions and its determination to shape a new citizen with lessened individualism and greater dependence on the State, has been a decisive factor for legal changes affecting human rights."

B. A SHIFT AWAY FROM CRIMINAL PROCESS

The reforms described above have all taken place within the context of the regular criminal justice system, expanding and shifting authority and powers and lifting or amending some fundamental rights because they are seen as onerous restrictions to crime control, or, but often related, in some cases as detrimental to victims or witnesses.

Anti-terrorism measures, however, are not necessarily linked to criminal law and criminal procedure. An interesting observation in the UK-report is that a provision for indefinite detention without charge if the government reasonably believed a person to be a suspected international terrorist whose presence in the United Kingdom was a risk to national security, was successfully challenged as a violation of Article 14 of the ECHR because it discriminated against foreign nationals – only to be subsequently replaced by so-called "control orders". Both indefinite detention and control orders

are examples of a movement towards the use of executive authority, with appeal bodies outside the normal court processes of criminal law.[83] According to the English reporter, the Joint Committee on Human Rights in 2008 stated:

Particular concerns are expressed over the increasing reliance by the UK authorities on diplomatic assurances and memoranda of understanding in deportation cases. This practice raises certain questions in the context of Article 3 ECHR and Article 7 ICCPR which envisage an absolute prohibition of torture. Other problematic matters in this context relate to the refusal of the UK Government to investigate fully possible usage of the UK territory and airspace in the US "extraordinary renditions" programme and the practice of imposing control orders that raises concerns in relation to the right to personal liberty and security provided for in Article 5 ECHR and Article 9 ICCPR.[84]

And indeed, extra-renditions are exemplary of the situation that in (and outside of) the United States, terrorists are subject to extra-judicial processes that are a far cry from the high standard of due process that obtain in domestic criminal cases.[85] There is ongoing litigation on the former U.S. government's position

"that the individuals detained as `enemy combatants' and `terrorists' on Guatanamo Bay, Cuba, and in secret detention facilities around the world do not have the right to access the criminal justice system with its attendant protections but merely have the right to an attenuated review process."

The national report from the United States of America concludes with a warning on this development, that we greet with approval:

"Attempts to deal with national security matters have so far largely taken place outside the regular criminal justice process through the creation of special military commissions. Legislation extending wire-tapping authority and interrogation measures has largely aimed at expanding the powers of

[83] It is to be noted that in some terrorist cases the whole of the case against the suspect remains confidential, for example, the Secretary of State can issue control orders on the basis of confidential evidence. In such circumstances the use of Special Advocates is intended to protect the suspect's fair trial guarantees.

[84] Joint Committee on Human Rights, *The Work of the Committee in 2007 and the State of Human Rights in the UK*, Sixth Report of 2007-8, 2008, HC 270.

[85] In terrorism cases that do appear before civilian domestic courts, governments have sometimes been relieved of turning over evidence on national security grounds.

national security agencies. They are also empowered to secretly arrest and detain individuals, at least outside the United States. In addition, the immigration system through its power to deport has been used to remove individuals from the United States who are considered security threats. It may also exclude select individuals from entering the United States. Finally, national security agencies and law-enforcement agencies have taken advantage of extraordinary rendition procedures. While circumvention of the criminal justice process will protect that process, it opens the possibility of increasingly coercive measures being used, including the expansion of so-called border searches ever further into U.S. territory and the expansion of wire-tapping authority."

CONCLUSIONS

It is not easy to do human rights. Financial constraints, overloading of the criminal justice system, and more especially public perceptions of crime and attendant public and political demands that legislators act and judges punish more harshly, growing awareness that the victim has a right to protection too, a discourse on crime and crime control that has at its heart that the pendulum has swung too far in the direction of protecting internationally guaranteed individual rights and freedoms to the detriment of public safety, and above all the perceived international threat of organised crime and terrorism – all contribute to the counter forces that prevent the uniform and full implementation of treaty obligations. Indeed, they are to a certain extent themselves a force of convergence.

In Europe, where the ECHR is a force of some persuasion, there seems to be, in some of the old and long established democracies on the continent, a certain amount of what could perhaps be termed as metal fatigue with regard to the constant effort of fully implementing its requirements. Legislator, administration and courts have other more pressing concerns that push human rights in criminal process to the background. In the words of the Dutch reporter:

"As a result, fundamental rights seem increasingly to function only as absolute minimum conditions which have to be met, less and less as guiding principles, the generous fulfilment of which is an aspiration for legislation, policy and practice."

This is, for obvious historical reasons, less apparent in Germany and possibly Spain, while the new democracies of Eastern Europe are still in the process of, and committed to, improving the implementation of what they were denied for so long. Romania for example, reports that

"since 1990, modifications serve the main purpose of ensuring additional standards for the protection of human rights, in consonance or by comparison with the standard laid down in the ECHR and other international treaties."

While this applies to the fair trial rights of the defendant, at the same time everywhere the rights of victims have been considerably increased.

A special situation obtains in the United Kingdom that is not found on the continent, and it leads us to the following – speculative – set of conclusions. Like the United States, this is a common law jurisdiction, where the individual rights and freedoms of its citizens against undue interference by public authority are a given, also in criminal process. This centuries old notion of inalienable rights that lies at the heart of common law legal culture makes it difficult to reform criminal process to accommodate restrictions to those rights in the way in which a civil law jurisdiction can, where the state is the guardian of the common good – including individual rights and freedoms – and theoretically the enactment of legislation in accordance with the checks and balances of trias politica is presumed always to serve the common good.

Perhaps that explains why both the UK and the US resort in the first instance to extra-judicial means of dealing with terrorism, in so far as the "terrorist", or "enemy combatant", can be defined as not one of the people to whom the law belongs. A desire to "keep criminal process clean", however, cannot, under the international conventions that guarantee fundamental rights and freedoms for all, serve as a justification for not meeting international obligations. A state cannot circumvent Article 5 or Article 6 of the European Convention by claiming that habeas corpus does not apply to some people, or by redefining crime as something else (terrorism) that therefore does not fall under the requirements of a fair trial.[86] This has pushed the United

[86] The UK (the only European country to do so) has invoked Article 15 ECHR – state of emergency – twice in connection with terrorism. This provision allows derogation from Article 5, but, although states have a margin of appreciation, it does not exclude "European supervision". During the first period of derogation (IRA terrorism) emergency measures removing the usual rights of *habeas corpus* were found unacceptable by the ECtHR with regard to both Article 5 and 6 (see ECtHR 29 November 1988, Brogan and others v UK.

Kingdom into a difficult position. Where the United States has no time for international law that interferes with its perceived interests or legal traditions, the United Kingdom is not only a common law country, but also part of Europe and, moreover, now bound to the ECHR through the Human Rights Act, which is part of its own legal order. It is forced to accommodate measures against terrorism in criminal process and within the limits of Articles 5 and 6 and 14. That is an exercise that has led to some of the most far-reaching reforms in Europe. However, many of them sit ill with the adversarial procedural tradition that is also the legacy of common law and indeed, have diluted some of the common law procedural rights that are essential in adversarial procedure.

CONCLUSION

The question we set out to answer in this report concerns three overreaching issues that may influence the reception of a uniform set of international fundamental rights and freedoms in criminal process. To what extent do: 1. constitutional arrangements, 2. legal traditions, 3. practical circumstances, including (international) concerns with security and crime control, promote or detract from the implementation of fundamental rights in criminal process?

We received fourteen national reports: in alphabetical order, from the Republic of Croatia, the Czech Republic, England, Finland, France, Germany, The Netherlands, Romania, South Africa, Spain, Switzerland, Taiwan, the United States of America and Venezuela. While our conclusions cannot be generalised on the basis of 14 reports, 10 of them from Europe, we nevertheless feel confident enough to provide some tentative answers to our question. We do so on the basis that no one system is better than the other, only different, and propose that these differences can be traced to constitutional features (the treaty regime to which a country has signed up, how it implements international law, and what the relationship is between international treaties and a national constitution), legal traditions (common law, with an adversarial procedural tradition, or civil law with an inquisitorial tradition), and the practical circumstances in which criminal process functions.

A. CONSTITUTIONAL ISSUES

It does appear to be the case that monism (international treaties become part of domestic legal order on ratification) promotes a more open mind to international law than dualism that requires statutory transformation of treaty obligations into domestic law. As a rule, a dualistic scheme slows down the implementation of international standards in the field of human rights and leaves more opportunities to preserve national traditions. Dualism or monism can also influence the relationship between national constitutions and international law, depending on whether the constitution has greater standing than a convention, and whether it provides broader or narrower guarantees of fundamental rights: a dualistic country can set aside treaty guarantees (as in the United States), or supplement them with even greater protection (as in Germany)

Given the differences in the manner of reception of international law into the domestic legal order, its consequences for the relationship between national constitutions and international conventions and the differences in the extent of domestic constitutional rights, we should not be surprised to find that, from a constitutional point of view, there is no such thing as a uniform impact of international human rights standards on national criminal justice systems. However, we have found that in Europe the European Convention on Human Rights and Fundamental Freedoms is a driving force in the direction of convergence. All of the countries in this report have, at the very least the same minimum guarantees in place, but during the 50 years that the Convention has been in force in Europe the similarities between European countries have become ever greater. This is, in our view, in no small part due to the regime of the European Convention and its enforcement mechanisms: the right of individual complaint and the European Court of Human Rights with its extensive and authoritative body of case law and enforceable judgments.

B. LEGAL TRADITIONS

One of our propositions is that legal traditions and associated styles of procedure could be an underlying factor affecting the implementation and scope of the internationally guaranteed fundamental rights that pertain

specifically to fair trial. We found that much of the theory pertaining to common law and civil law jurisdictions and the related styles of adversarial and inquisitorial procedure respectively, still holds true. Where the United Kingdom has come to rely increasingly on statutory law in the field of criminal procedure, the predominant influence (as well as a desire for greater efficiency and, in the Eighties, for controls on police behaviour) seems to be the ECHR as it has been incorporated through the Human Rights Act 1998. In the United States, however, it is still the Supreme Court that determines, through interpretation of the Bill of Rights in the US Constitution, what the individual rights of due process mean.

As to criminal procedure, the assertion that common, internationally agreed standards of fair trial have introduced a greater adversarial element into European continental procedure and that increasingly professionalised crime control by public authorities has brought to common law, adversarial countries a pre-trial phase that has much of the inquisitorial is not entirely borne out by the national reports we received. No one procedure can be described as absolutely adversarial (although the U.S. comes very close) or absolutely inquisitorial. In England and Wales there does seem to be a (slight) move in the changing role of the prosecutor pre-trial towards the inquisitorial and professionalisation plays a role, but as a driving force this is equalled by the ECHR requirement of legality and lex certa. Most civil law countries retain essentially inquisitorial features in the agenda-setting function of the pre-trial dossier, the significance of the role of the prosecutor or judge of instruction in conducting an impartial pre-trial investigation, and of the active truth-finding judge at trial. Moreover, an adversarial trial is not what is required, as became apparent from our investigation of how inquisitorial systems manage to comply with international standards of fair trial, while till maintaining these essential characteristics.

The question is not whether previously inquisitorial systems have now become adversarial. Our question is whether, how, and to what extent each country is able to implement the fundamental uniform rights of fair trial set out in international human rights instruments within the parameters of the guarantees of its own criminal process, and to what extent the essential nature of that process influences the scope of implementation.

C. FUNDAMENTAL RIGHTS IN CRIMINAL PROCESS

Of the fundamental rights that are independent of but relevant to criminal process, we may conclude that most countries in this report adhere strictly to both the prohibition of the death penalty and of torture and cruel or inhuman treatment. Only the United States remains fully committed to retaining capital punishment and has entered reservations to Article 7 ICCPR. When it comes to guaranteeing that statements in pre-trial-criminal investigations are not obtained by force or ill-treatment, however, there are interesting differences, primarily in the position and rights of the defence lawyer, which seem to be connected to whether there is an adversarial or inquisitorial system and thus to derive from the legal procedural traditions in each country. In the same way, there are differences in the length and conditions of pre-trial detention and in the process of habeas corpus.

Fundamental fair trial rights that provide the essential conditions in which a trial may take place – in public and before an independent and impartial tribunal, with the burden of proof resting on the prosecution and the defendant presumed innocent until guilt is proven – are respected in all countries. Although again there are differences, this time in the definition of what constitutes impartiality and the presumption of innocence and therefore in the form that safeguards take, that can be traced back to the adversarial or inquisitorial tradition. All countries respect the principle of ne bis in idem, though not to the same degree. Out of court settlements – plea bargaining or conditional dropping of the prosecution – do not occur everywhere. But where they do, they too, by and large, meet the main requirements: that there are safeguards in place to guarantee that a waiver of the right to a public hearing before an independent tribunal is made with knowing consent and that there is always, in one form or another, recourse to a judge.

It is when we come to the rights that guarantee the nature of a fair trial as an "adversary hearing" that the greatest differences, deriving from procedural style and tradition, become apparent. What is important is not so much the style of the procedure itself, but the way in which the guarantees that are built into it function together to safeguard the fairness of the procedure as a whole. The essence of international fair trial requirements is a contradictory procedure, in which the defence can know and challenge the evidence produced, as case law from the European Court abundantly makes clear. However, it also formulates legitimate restrictions, and guarantees to ensure

that these are only enforced if it is strictly necessary, therefore in conformity with the principles of proportionality and subsidiarity.

There is no absolute right either for the defence itself to introduce defence witnesses unless these are relevant, or to challenge evidence in open court (both features of adversary process); nor is (full) disclosure an absolute right. These are the norms that (ideally) should obtain, but there are many exceptions in connection with "competing rights and interests". An important safeguard, however, is that failure to allow confrontation at the trial stage in court, must be compensated by measures or proceedings at a different (or prior) stage in the procedure. Another, that if prosecutors do not allow full access to the dossier, refuse to add certain information or to produce certain witnesses at the request of the defence, a judge must have the final say over both what is relevant as evidence and which restrictions are strictly necessary.

It is easy to see why the United States, with its full blown adversarial procedure in which disclosure, confrontation and orality are essential to quality of arms and restrictions the absolute exception, easily meets these requirements, and more. And why civil law jurisdictions have often been found wanting by the European Court, especially with regard to disclosure and confrontation. However, gradually, as a result of that court's case law, as we noted above, no small degree of convergence has taken place in Europe. Though criminal process in European countries still exhibits many differences – and the greatest are between countries with adversarial trial procedures (Finland and the UK) for whom it is easier to meet the ECHR rights of fair trial, and those where criminal process is still predominantly inquisitorial in it fundamental characteristics. In the other "old" democracies, trial procedure has been adapted, while former east-bloc countries have started afresh on the basis of the requirements of the ECHR. Where there is difference, this is predominantly in the detail. In all European countries in this report, at least the minimum guarantees of contradictory procedure as interpreted and elaborated by the European Court, are in place. Criminal process in the United Kingdom is still essentially adversarial in almost all aspects, both pre-trial and at the trial stage. There have, however, been recent changes that tend to undermine the necessary adversarial guarantees.

D. PRACTICAL CONSIDERATIONS

It is not easy to do human rights. Financial constraints, overloading of the criminal justice system, and more especially public perceptions of crime and attendant public and political demands that legislators act and judges punish more harshly, growing awareness that the victim has a right to protection too, and a discourse on crime and crime control that has at its heart that the pendulum has swung too far in the direction of protecting internationally guaranteed individual rights and freedoms to the detriment of public safety, and above all the perceived international threat of organised crime and terrorism – all contribute to the counter forces that prevent the uniform and full implementation of treaty obligations. Indeed, they are to a certain extent themselves a force of convergence, but in the other direction.

In Europe, where the ECHR is a force of some persuasion, there seems to be, in some of the old and long established democracies on the continent, a certain amount of what could perhaps be termed as metal fatigue with regard to the constant effort of fully implementing its requirements. Legislator, administration and courts have other more pressing concerns that push human rights in criminal process to the background. This is, probably for obvious historical reasons, less apparent in Germany and possibly Spain, while the new democracies of Eastern Europe, still improving the implementation of what they were denied for so long, are committed to complying with the standards laid down in the European Convention. However, if in some countries a certain minimalism has crept into protecting the fair trial rights of the defendant, at the same time they, and all of the other countries in this report, have considerably increased the rights of victims.

Almost all of the countries have amended procedures or introduced new measures to deal with the threat of organised crime and terrorism. In the civil law countries, such reforms have all taken place within regular criminal process, and are therefore still governed by the minimum requirements of the ECHR. The United States, and to a lesser extent the United Kingdom however, have resorted in the first instance to dealing with terrorism outside of criminal process, a tendency that we attribute to the thinking in the common law tradition about the relationship between inherent individual rights and the possibility of state interference in them. This seems to lead to a tendency to want to "keep criminal process clean" by defining terrorists as something other/more than criminal. But under the international conventions

that guarantee fundamental rights and freedoms for all that does not justify circumventing habeas corpus, or the fundamental right to a fair trial, let alone the prohibition on torture. Where the United States has no time for international law that interferes with its perceived interests or legal traditions, the United Kingdom is not only a common law country, but also part of Europe and, moreover, now bound to the ECHR through the Human Rights Act, which is part of its own legal order. It is forced to accommodate measures against terrorism in criminal process and, moreover, within the limits of Articles 5 and 6 and 14. That is an exercise that has led to some of the most far-reaching reforms in Europe. However, many of them sit ill with the adversarial procedural tradition that is also the legacy of common law.

FINALLY

We may, we think, conclude with the observation that the role of constitutional arrangements, procedural traditions and practical circumstances play in impairing or enhancing the reception of fundamental rights and freedoms in criminal process is considerable. Uniform standards laid down in conventions, are not implemented uniformly. They are usually adhered to, but the scope and manner of their reception into domestic law depends on whether they are received under a monistic or dualistic system, and whether they compete with a domestic constitution containing the same rights. By the evidence of the European countries in this report, a convention with substantial enforcement mechanisms is most likely to lead to convergence towards a minimum standard of uniformity. For here, all countries look to the convention and the case law of the European Court for the standard to be achieved, unless their own convention affords even greater protection. But it takes time before the effects of convergence become apparent. Even then, the influence of legal traditions in maintaining difference is a counter force that allows much diversity. And finally, even if a uniform standard is in place in the law in books, the law in action is subject to the force of practical circumstances that can undermine international norms.