

Towards an International Code of Criminal Procedure and Evidence?

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Change and convergence in criminal law

Criminal justice systems are increasingly facing challenges at the national, transnational and international level to make changes to the way in which they have traditionally processed criminal cases. Some of these pressures have arisen out of a need to accommodate developments within states such as rising crime, a concern for victims and the cost and delay in processing cases. In some regions of the world systems have been forced to change by cataclysmic political changes such as the break up the former Soviet Union and the former Yugoslavia in Asia and eastern Europe in the 1990s or by the transition to democracy that took place in many Latin American countries during the 1980s and the 1990s.¹ As well as internal pressures within states, there have been external pressures on them to find common solutions to problems of organised crime, drug smuggling, people trafficking and, most recently and urgently, international terrorism. Within the last 15 years as well, acts of barbarity arising out of conflicts in a number of regions of the world have led the international community to make efforts to bring to justice those who have engaged in international war crimes and crimes against humanity through international criminal tribunals.

The pressure to meet these demands would seem to be leading toward greater consensus on how criminal cases should be handled both at the national and international level.² At the same time there continues to be considerable attachment towards traditional processes and suspicion regarding 'foreign' solutions. A contrast may be made here between reaching a consensus on substantive criminal law and reaching a consensus on issues of procedure and evidence. Generally speaking, it would seem easier to reach consensus on substantive laws than on procedural laws.

¹ See R Vogler, *A World View of Criminal Justice* (2005) chapters 8 and 9, M Langer, 'Revolution in Latin American Criminal Procedure: Diffusion of Legal Ideas from the Periphery' (2007) 55 *AJCL* 617.

² On the convergence thesis generally, see B S Markesinis, *The Gradual Convergence* (1994).

Two examples may be given of this. There has already been discussion in the conference on the subject on an international criminal code. Considerable work and progress has been made by the international community on agreeing upon a set of international crimes.³ There has also, it is true, been considerable success in agreeing rules for trying those charged with these crimes in the international ad hoc tribunals and now more recently before the International Criminal Court (ICC). But with the delays that have occurred in bringing those charged to justice, first in the ad hoc tribunals and now before the ICC, questions are being raised about whether we have devised the best structures and procedures for trying these cases.⁴ In a recent symposium Geoffrey Robertson has declared that now that the world accepts that impunity must end, it behoves us to turn more to the nuts and bolts of international criminal justice to work out how to deliver it fairly and effectively and in particular cost effectively.⁵

The other example is within the European Union (EU). Since the EU decided to establish a competence in the area of criminal justice, a number of framework decisions have established common definitions of offences in the fields of counterfeiting, fraud, money laundering, terrorism, human trafficking, illegal immigration, corruption, sexual exploitation and drugs offences.⁶ There have also, it is true, been developments in procedural law on the basis of the principle of mutual recognition such as the framework decision on a European Arrest Warrant, mutual recognition of freezing assets and a framework decision on a European evidence warrant, although this has yet to be adopted. It has proved much more difficult, however, to move towards the harmonisation of criminal procedure and a proposal for a framework decision on certain procedural rights (FDPR) has run into the ground.⁷

In some respects this contrast between substantive and procedural law is not surprising. It would seem that there is already a high degree of homogeneity on substantive criminal law among criminal jurisdictions in the EU and a fair degree of consensus on the underlying principles of substantive lawmaking in matters of

³ A Cassese, *International Criminal Law* (2003).

⁴ See, eg, G Boas, *The Milošević Trial* (2007).

⁵ G. Robertson, 'General's Editor Introduction to Essays On Fairness and Evidence in War Crimes Trials' (2006) 4 *International Commentary on Evidence* Issue 1, Article 1.

⁶ See generally M Fletcher and R Loof, *EU Criminal Law and Justice* (2008)(forthcoming)

⁷ Proposal for a Council Framework Decision on certain procedural rights in criminal proceedings throughout the European Union, COM (2004) 328.

criminal law.⁸ As a result it would seem that there is little significant difference between the member states in the EU in the kinds of behaviour they have criminalised. Certain exceptions stand out. The decriminalisation of soft drugs in the Netherlands is sometimes given as an example real disagreement but this stands as an exception to the general rule of homogeneity.

By contrast there are some quite considerable divergences in the criminal procedural systems of EU member states and it is not surprising that there is sometimes resistance when attempts are made to modify features that are closely associated with particular national traditions. It has been suggested that the EU straddles three different legal traditions: the common law adversarial tradition based on the notion that the best way of determining guilt or innocence is by a contest between two parties, the accuser and accused – a role now fulfilled by the prosecution rather than the victim and the defence; the civil law inquisitorial tradition which is more centralised and where the evidence that comes before the court is not the product of opposing parties but an inquiry conducted by the prosecutor or an investigating judge; finally, there is a third post-socialist tradition where states are emerging from a system where the focus was heavily on pre-trial investigation and confession.⁹

Beyond these different legal traditions that still maintain their hold on national systems, there is the point that the issues at stake in devising common standards of procedure are not just about finding the best means to make the system run smoothly – not just, if you like, about ‘nuts and bolts’. Issues of criminal procedure and evidence concerning pre-trial detention or the means to challenge the evidence against one go to the heart of the rights of the individual and the relationship between the state and the individual. Scholars like Professor Damaška have explained the differences that exist in the laws of procedure and evidence of different countries around the world by showing the links that there are between procedure, the organisation of authority and political ideology.¹⁰

Why a Code?

⁸ A Cadoppi, ‘Towards a European Criminal Code’ (1996) 4 *European J Crime, Criminal Law and Criminal Justice* 2.

⁹ See E Cape, J Hodgson, T Prakken and T Spronken, *Suspects in Europe* (2007) 5.

¹⁰ See M Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (1986).

Given the pressures towards convergence but the different understandings that there are about the way criminal procedures should be organised, the question that arises from the theme of this conference is whether there might be advantage in the international community trying to devise a common international code of procedure and evidence that form the foundation of a set of best practices for national and international system of justice. The chief advantage of such a code is that it would help to guide those involved in devising new procedures whether at the national or international level. Analogies might be drawn with the Uniform Penal Code which has done much in the United States to assist state legislatures in drafting codes of criminal law or with the uniform Evidence Acts which have done much to harmonise evidence law within Australia.

Against this it may be said that a code within the transnational and international context would be fraught with difficulty, inappropriate and unnecessary. Taking the view such an effort would be fraught with difficulty, it may be said that if the member states of the EU among whom there is at least a shared understanding in terms of common values could not agree upon a framework decision on procedural standards that was actually very modest in its content, confined as it was to setting minimum standards for suspects and defendants within the EU, what chance is there of achieving agreement amidst the wider international community? Even if agreement were to be reached, the final product would more likely be based on a political compromise with the most dominant legal traditions featuring principally in such a code to the detriment of other traditions than on a coherent reflection of best principle and practice. It is true that the lesson of the ad hoc tribunals and the ICC may seem to be that it is possible to blend elements of different traditions into a *sui generis* procedure that benefits from the respective strengths of different municipal traditions.¹¹ Equally, however, there has been criticism that the synthesis which has been achieved – a system of adversarial presentation mixed with a continental system of free proof – is more the result of compromise and pragmatism which is ill-suited to needs of international criminal justice.¹²

¹¹ P Robinson, 'Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia' (2000) 11 *European Journal of International Law* 569- 589, 579.

¹² See eg M Fairlie, 'The Marriage of Common Law and Continental Law at the ICTY and its Progeny, Due Process Deficit' (2004) 4 *International Criminal Law Review* 243.

This brings us to a further criticism that to attempt a code of procedure and evidence which can do justice within the variety of different national legal systems and in the context of international criminal justice is inappropriate as it would try to impose a 'one size fits all' paradigm which is ill-suited to the needs of different systems.¹³ Again to take an example from the ad hoc tribunals, one of the problems that has been noted with the adversarial procedures that have been established for the ICTY is that they are totally alien to the Balkan culture in which they have been set.¹⁴ This created difficulties for witnesses and lawyers who were not used to coping with the kind of confrontational questioning which is a hallmark of the adversarial system. Such procedures are even more problematic when witnesses from non-western cultures have to give evidence in this fashion as illustrated by the experience of the Rwanda Tribunal. The lesson from the so-called internationalised tribunals that are emerging in Cambodia and most recently in Lebanon is that local traditions can be respected when tribunals are established within national systems with international judges on their benches. It is important, of course, that national systems applying international criminal justice adopt international human rights norms - something which the Iraqi High Tribunal singularly failed to do in the case of Saddam Hussein - but this can be achieved without reliance on any standardised international code.

This takes us to a third criticism of the idea of any code which is that any such attempt is also unnecessary. Although there is considerable diversity in national systems around the world, states have international obligations to ensure that they meet the standards of a fair trial laid down in various international instruments such as the International Covenant on Civil and Political Rights (ICCPR) and many have signed up to similar obligations in regional systems such as the European Convention on Human Rights (ECHR), the American Convention on Human Rights (ACHR) and the African Charter on Human and Peoples' Rights. On top of this states have also acceded in various treaties to certain forms of review to be exercised by international authorities. Thus the UN Human Rights Committee (HRC) is tasked with applying the ICCPR, the European Court of Human Rights (ECtHR) with applying the ECHR, the Inter American Court the ACHR and the African Commission the African Charter. This development has enabled a considerable jurisprudence to be developed on how

¹³ For the argument against a 'one size fits all paradigm', see P Roberts, 'Why International Criminal Evidence?' in P Roberts and M Redmayne, *Innovations in Evidence and Proof* (2007) 347, 364.

¹⁴ I Bonomy, 'The Reality of Conducting a War Crimes Trial' (2007) 5 *Journal of International Criminal Justice* 348

the fair trial standards should be applied in particular cases. Besides this a formidable jurisprudence is now emerging in the international criminal tribunals which can be cited not only in international arena but is increasingly being cited in domestic systems as well.¹⁵ Surely, it may be argued, it is better to let these systems evolve and set common standards of procedure and evidence than to try to impose a 'one size fits all' code of rules that may not be well suited to the particular circumstances of each procedural system. Moreover, judicial setting of standards may achieve as much if not more than any code. The pre-trial rights included in the EU's FDPR for example, were already covered by the judicial standards established by the ECtHR in its interpretation of the ECHR and in certain respects the judicial standards are higher. Recital 8 of the Preamble to the FDPR, for example, states that the proposed provisions are not intended to affect specific measures in force in national legislation in the context of the fight against certain serious and complex forms of crime in particular terrorism. The ECHR, however, does not provide any comparable lessening of standards in the case of serious crime and the ECtHR has on the whole (but not entirely) steered clear of arguments that would permit fair trial rights to be balanced against considerations such as the seriousness of the offences. Indeed in certain instances it has developed important rights such as the right of access to pre-trial legal advice precisely in cases of seriousness.¹⁶

The Content of the Code

These criticisms need to be taken seriously but they would seem to point more towards taking a cautionary attitude towards what a Code might achieve rather than towards any wholesale rejection of the idea of a Code altogether. Regarding the point that a Code would be fraught with difficulty, in the first analysis at least a Code should not attempt to lay down any binding requirements on states in the manner of the EU's Framework Decisions. Rather they should serve as standards of best practice that should guide policy makers and legislators rather than be binding on them. Of course, there may still be difficulty in reaching a consensus but experience has shown that experts from different jurisdictions can achieve a fair measure of common ground in establishing common procedures despite the different legal

¹⁵ An example is to be found in the recent House of Lords decision on the use of anonymous witnesses, see *R v Davis* [2008] UKHL 36.

¹⁶ See, eg, *John Murray v UK* (1996) 22 EHRR 29.

traditions from which they hail. In the course of developing a common code to tackle fraud within the EU which became known as the Corpus Juris project, experts found after comparative study that changes in national systems such as the abolition of the investigating magistrate in a number of European systems and the introduction of public prosecutors in England had paved the way for mixed procedures where hybridisation could take the best from each system.¹⁷

Regarding the inappropriateness of a 'one size fits all' approach, such a Code should not arguably attempt to provide a detailed template of rules for all criminal procedural systems. Rather again it should serve as a standard setting exercise, attempting what Professor Delmas-Marty has described as a 'common grammar', defining the guiding or meta principles that can structure different systems around general international law principles, human rights instruments and the best practices in national criminal justice systems. These can then serve as the bedrock for procedures that are developed within different contexts.

The third criticism, however, is that such a code is unnecessary because such standard setting is already being attempted by regional human rights systems and by international criminal tribunals. There is little doubt that much has already been achieved within these specific regimes. It can be argued that the ECHR regime in particular has made important strides in the direction of a 'common grammar' through its development of concepts such as the 'equality of arms' and the principle of 'adversarial procedure' which can be accommodated within both common law and civil law systems. This has given rise to a vision of defence participation in the decision making of justice systems which is rooted both in common law principles of natural justice and due process and in the continental principle of *la procedure contradictoire*.¹⁸ In certain respects the international tribunals and the ICC have built upon these fair trial standards by developing within their own codes strong pre-trial as well as trial safeguards for the accused. Their rules not only require that if questioned by the prosecutor the suspect has a right to legal counsel to be present during questioning but that the suspect must be informed of this right and the right of silence

¹⁷ For a description of this project, see J Spencer and M Delmas-Marty, *European Criminal Procedures* (2002) 62 – 65 and M Delmas-Marty, 'Reflections on the Hybridisation of Criminal Procedure', in J Jackson, M Langer and P Tillers (eds), *Crime, Procedure and Evidence in a Comparative and International Context* (2008)(forthcoming).

¹⁸ J D Jackson, 'The Effect of Human Rights on Evidentiary Processes: Towards Convergence, Divergence or Re-Alignment?' (2005) 68 *MLR* 737.

before being questioned and that questioning shall not proceed without the presence of counsel unless there has been voluntary waiver.

But each of these specific regimes are necessarily rooted in particular contexts which have weaknesses in terms of standard setting. The ECtHR for example is precluded from making formal rulings *in abstracto* that the laws of particular national systems are in breach of fair trial standards. It is confined instead to make a ruling in particular cases as to whether a particular trial was fair or not. Although this has given the Court a certain flexibility to read other rights into the notion of a fair trial, it has meant that it has had to build up its vision of defence participation in a piecemeal fashion case by case and there is sometimes a lack of clarity on the general applicability of certain standards. The international criminal regime is limited for its part in a different manner by the fact that it has developed in a very specific context to apply without proper law enforcement mechanisms and in situations of conflict or post-conflict. This has prompted a debate as to how far it is appropriate to apply fair trial norms that have been developed for domestic systems to the international arena.¹⁹

As a result of these limitations, there has at times been a lack of clarity and consistency in the standards that have been developed. A Code could help to ameliorate these difficulties. Two examples may be given from the area of protection of rights. First of all, there has been considerable uncertainty about the scope of improperly obtained evidence. At an early stage of its life the ECtHR considered that rules on the admissibility of evidence were ‘primarily a matter for regulation under national law’.²⁰ In more recent times, however, it has come to recognise that certain categories of evidence should not be used for the purposes of determining guilt. Art 3 of the ECHR and art 7 of the ICCPR prohibit in absolute terms the use of torture, inhuman or degrading treatment. Other international instruments have proscribed the use of evidence obtained as a result of torture (see eg Art 15 of UNCAT) and the HRC has declared in relation to Art 7 of the ICCPR that the law must prohibit the use or admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment.²¹ In the recent case of *Jalloh v Germany*²² the

¹⁹ See eg A Cassese, ‘Opinion: The International Criminal Tribunal for the Former Yugoslavia and Human Rights’ (1997) EHRLR 329, G McIntyre, ‘Defining Human Rights in the Arena of International Humanitarian Law’ in G Boas and W Schabas (eds.), *International Criminal Law Developments in the Case Law of the ICTY* (2002).

²⁰ *Schenk v Switzerland* (1991) 13 EHRR 242.

²¹ HRI/GEN/1/Rev 3, A/47/40, Annex VI, para 12.

²² (2006) 20 BHRC 575.

ECtHR stressed that the use of evidence obtained by torture would always render the trial unfair but it left open the question whether the use of evidence obtained by inhuman and degrading treatment automatically renders a trial unfair. There is even greater uncertainty about the admissibility of evidence obtained by ill-treatment, coercion and deception falling short of a violation of Art 3 of the ECHR. The Statutes of the international tribunals and the ICC are also less than clear about the circumstances in which improperly obtained evidence can be used. Art 69(7) of the ICC Statute states that evidence obtained by means of a violation of internationally recognised human rights shall not be admissible if the violation casts substantial doubt on the reliability of the evidence; or the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings. A Code could help clarify this issue by setting out at least the various categories of improperly obtained evidence and when if ever they may be used in evidence against a defendant.

The other example relates to the way in which criminal justice systems should deal with what would appear to be the growing recourse to anonymous witnesses. There is a well established common law principle that the defendant in a criminal trial should be confronted by his accusers in order that he may cross-examine them and challenge their evidence. International human rights standards also recognise a right to cross-examine adverse witnesses. A question that has arisen in a number of recent cases both at national and international level is whether there are circumstances in which witnesses may give evidence anonymously. A series of authorities from the ECtHR suggest that while the use of anonymous witnesses is not under all circumstances incompatible with the ECHR, no conviction should be based solely or to a decisive extent upon the statements or testimony of anonymous witnesses.²³ But because at the end of the day the question for the Strasbourg court is only whether the trial in the case at hand was fair, the court has always been averse to laying down absolutely inflexible rules. The position of the international tribunals is even less certain. The issue was the subject of different views in the first case to be heard by the ICTY, the case of *Tadić*.²⁴ The majority in *Tadic* and tribunal in the later case of *Blaskić*²⁵ laid down certain criteria as to when anonymous witnesses may be used but

²³ See eg *Doorson v Netherlands* (1996) 22 EHRR 330, *Van Mechelen v Netherlands* (1997) 25 EHRR 647, *Krasniki v Czech Republic* (2006) Appl No 51277/99.

²⁴ IT-94-1-T.

²⁵ IT-95-14-T.

there is no doubt that there could be greater clarity on this question which could be fulfilled by a Code.

Conclusion

I would conclude then by suggesting that the international community could through some body - such as the International Law Commission or perhaps this Society - set out certain standards of criminal justice relating to procedure and evidence which go further than the rather stark statements set out in the international human rights instruments without going so far as to set out in minute detail a code of procedure to cover all cases. An argument that regrettably would seem to have gathered pace since the events of 9/11 is that the circumstances or seriousness of certain offences may justify lower protections for the accused. So in leaving open the question whether evidence obtained by inhuman or degrading treatment is always inadmissible, the ECtHR in *Jalloh* suggested that it was relevant to consider the public interest in securing a conviction. Similarly in relation to anonymous witnesses, the majority in *Tadić* considered that an accused's fair trial rights had to be interpreted within its own legal context which imposed particular obligations on the tribunal to protect victims and witnesses and had to operate in the midst of a continuing conflict without a police force or a witness inspection programme. The advantage of a Code is that it could set standards that would relate to the most serious offences and to the most difficult circumstances in which criminal justice may have to operate. Of course, situations may become so dire that it is necessary to suspend the right to a fair trial altogether. But so long as criminal justice systems are tasked with determining questions of guilt, standards of fairness must be maintained in order to legitimise the process of justice and a Code could assist in this process.