



Third Study Commission
Criminal law and procedure

Meeting in Vienna, 9-13 November 2003

Conclusions

A DIFFERENT APPROACH TO ORGANIZED CRIME

The Third Study Commission discussed following subjects: A different approach to organized crime; new investigative measures; the gathering of evidence; the protection of individual liberties in criminal cases; the physical arrangements of the courtroom; illegal immigration and so-called "new terrorism".

17 written reports were received from Argentina, Australia, Austria, Belgium, Denmark, Georgia, Ireland, Israel, Japan, Lithuania, the Netherlands, Puerto Rico, Portugal, Romania, Sweden, Switzerland and Taiwan.

In addition, representatives from Argentina, Australia, Austria, Belgium, Brazil, Cameroon, Canada, Ivory Coast, Cyprus, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Northern Ireland, Israel, Italy, Liechtenstein, Luxembourg, Morocco, the Netherlands, Portugal, Puerto Rico, Romania, Senegal, Slovenia, South Africa, Switzerland, Togo, Tunisia, Taiwan, the United Kingdom and the United States took part in the lively discussions of the Commission.

There seemed to be general agreement that responsibility for the security of the courtroom could be left to the discretion of the president of the court and that each country has adequate resources which can be called on when special precautions are appropriate for a particular case.

The Commission examined more carefully the following subjects:

New Methods of Investigation

Almost all those who wrote reports and those who contributed to the discussion emphasised the fundamental importance of powers to seize and confiscate the profits of crime.

A number of remarkably similar recent initiatives have been taken by different countries.

1. Obligations are imposed upon banking and other financial institutions to disclose transactions which are unusual and therefore suspicious. In some countries, for example in the United Kingdom, this obligation extends to advocates who must disclose to the proper authority all undeclared sums, however small, received by their clients, without telling their clients that they are making this disclosure. This provision sometimes disrupts and delays the course of court proceedings.

2. Some countries have set up one or more specialised agencies to track down and confiscate the proceeds of crime. In the United States for example, a special task force devotes itself to examining those bodies which split large sums of money into sums less than \$250 with a view to returning those small sums, for example to countries which produce illegal drugs. Such activity is itself criminal.

3. Co-operation between the banking authorities of different countries is essential because the electronic movement of funds from country to country takes place so quickly and can make such funds impossible to recover. For example, without the co-operation of the prosecuting authorities in Switzerland and Luxembourg, it would not have been possible to conclude the recent ELF case in France. In Portugal, it is possible for a judge to block for 24 hours a financial transaction so that there is time to check its probity. However this means that a suitably qualified judge has to available round the clock to deal with such cases.

4. Once the tainted origin of assets is suspected, those assets can be frozen, and after due process, confiscated. Assets seized in one country may be the profits of crimes committed in another and this presents some evidential difficulties. Closer international co-operation is necessary and seems to be contemplated by many international organizations.

Gathering of evidence, the safeguarding of human rights and the protection of witnesses

Most countries now permit surveillance, eavesdropping and even tapping into computer systems but only when such action is with the consent of a judge or subject to his direction. There are various special measures available for the protection of witnesses. These may include the use of screens or one-way mirrors, and the use of a video-link. Such measures are important not only for ordinary witnesses but also for informers or those police or security officers who are acting under cover or using assumed names. A statute in Lithuania even authorises plastic surgery to protect the identity of such witnesses. Justice depends upon the reliability of witnesses and this could be called into question if all witnesses were anonymous. For its 1999 law which seeks to protect witnesses, Portugal had relied on the cases of Kostowski and Van Meghelen in which the Court of Human Rights at Strasbourg delivered important judgements. The evidence of an anonymous witness can be accepted provided there is other evidence in the case and the judge makes clear that he has not relied solely on the evidence of the anonymous witness. In the context of witness protection, the United Kingdom has introduced a Witness Service, staffed by trained volunteers who offer moral and practical support for those called to give evidence at court.

Illegal immigration and the so-called new terrorism

The problem of illegal immigration has to be approached from several very different points of view, depending upon where they arise.

1. In Africa, countries which became independent in the 1960's did not have a tradition of frontier checks. After independence, new communities with their own identities were established. But some family members might live on either side of the new frontiers and there were no problems. Nowadays, when the economic crisis makes things more difficult, a system of strict border control would have to be introduced with tact. Some countries are forming groups and working together to find mutually satisfactory solutions.

2. Togo has entered into a quadripartite agreement with Benin, Nigeria and Ghana which aims to deal with those who transport children to provide cheap labour in big cities. Those involved will be prosecuted in the countries where they are arrested and the children will be returned to their families.

3. Countries within the Schengen treaty find themselves faced with a deliberate organized manipulation of the asylum system. Criminal gangs, often organized outside the region, know that if their members claim the right to asylum, there will be a delay of a month or two whilst their claims are processed and that, during this period, they will be able to carry out all sorts of crimes, to the distress of local people.

4. It can be very difficult to protect frontiers. The example of Brazil with 14,000 Km of frontiers, mostly in the Amazonian jungle, is particularly striking. This difficulty emphasizes the benefits of multi-national co-operation such as exists between Romania and Austria and between Slovenia, Croatia and Italy.

5. All those taking part in our work express the hope that more effective rules will be established by international agencies so as to deal with these problems in general and for those countries such as Taiwan with special problems.

General conclusions

All our contributors feel strongly that international agencies should take as quickly as possible effective measures in the areas we have considered. They regret that judges who are undoubtedly well intentioned are expected to tackle these important and difficult problems without always having the necessary powers.

The subject for the next meeting

Restorative justice and the position of the victim in criminal law.

Vienna, November 12th, 2003