XVth INTERNATIONAL CONGRESS OF PENAL LAW
(Rio de Janeiro, 4 – 10 September 1994)[15]

Topics:

1. Crimes against the environment. Application of the general part.
2. Computer crimes and other crimes against information technology.
3. Reform movements in criminal procedure and the protection of human rights.
4. The regionalization of international criminal law and the protection of human rights in international cooperative procedures in criminal matters.

Resolution on the international criminal court.

Section I. Crimes against the environment. Application of the general part

Preamble

Considering the increasing risks to the present and future generations, their health, and the environment of which they are a part, posed by industrial and similar activities;

Considering worldwide concerns about the degradation of the environment caused, *inter alia* by the commission of crimes against the environment contrary to national and international laws;

Considering recent developments towards the recognition of crimes against the environment in national penal codes and environmental protection laws and in international conventions, recommendations and resolutions;

Considering the Council of Europe Resolution 77(28) on the *Contribution of Criminal Law to the Protection of the Environment,* Recommendation 88(18) on the *Liability of Enterprises for Offences,* Resolution No.I of the European Ministers of Justice adopted at their Conference in Istanbul in 1990 and the on-going work of the Council of Europe towards the development of a European Convention on the protection of the environment through criminal law;

Considering the United Nations General Assembly Resolution No. 45/121 of 1990 adopting the Resolution on the protection of the environment through criminal law submitted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders; the United Nations Economic and Social Council Resolution 1993/32 and June 1994 and the preparatory

[15] RIDP, vol. 66 1-2, 1995, pp. 20-46 (French); p. 47-72 (English); pp.73-99 (Spanish).

documents of the forthcoming Ninth UN Congress on the Prevention of Crime and the Treatment of Offenders on agenda item *"Action against national and transnational economic and organized crime and the role of criminal law in the protection of the environment"*;

Considering the recommendations contained in the report of the International Law Commission to the UN General Assembly, 1991;

Considering the *Model for a domestic law of crimes against the environment* proposed by an International meeting of experts on environmental crime held in Portland, Oregon from 19-23 March 1994.

Considering the desirability of providing appropriate sanctions for serious crimes against the environment and for the reparation of damage to the environment;

Having examined and deliberated upon the recommendations of the AIDP Preparatory Colloquium on the application of criminal law to crimes against the environment held in Ottawa, Canada from 2-6 November 1992,

Recommendations

I. General principles

1. *Environment* means all components of the earth, both abiotic and biotic, and includes air and all layers of the atmosphere, water, land, including soil and mineral resources, flora and fauna, and all ecological inter-relations among these components.

2. The *Principle of Sustainable Development,* as articulated by the World Commission on Environment and Development in 1986 (better known as the Brundtland Commission) and adopted by the General Assembly of the United Nations in 1992, states that economic development to meet the needs of the present generation should not compromise the ability of future generations to meet their own needs.

3. The *Precautionary Principle,* as articulated by the United Nations Conference on Environment and Development held in Río de Janeiro in June 1992 and adopted by the General Assembly of the United Nations, states that where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

4. States and society have a responsibility to ensure as far as possible that the *Principle of Sustainable Development* and the *Precautionary Principle* are respected by all natural persons and private and public entities involved in activities that have the potential to harm the environment.

5. To ensure the observance of the *Principle of Sustainable Development* and the *Precautionary Principle,* States must have available a wide range of compliance measures

including compliance incentives, enforceable compliance agreements, licensing and regulatory powers, and sanctions for failure to observe established standards. In appropriate cases, criminal law might be seen as providing cost-effective measures to ensure the protection of the environment.

II. Specific issues in relation to crimes against the environment

6. Consistent with the *principle of legality,* there should be certainty in the definition of crimes against the environment.

7. A distinction should be drawn between *sanctions* which are imposed for non-observance of established administrative and regulatory standards, which do not include deprivation of liberty or punitive closing of an enterprise, and *criminal sanctions* which are imposed to prevent and punish culpable acts or omissions that cause serious harm to the environment.

8. The minimum material element in offences against the environment subject to criminal sanctions should be:

(a) an *act or omission* that causes serious harm to the environment or to human beings; or

(b) an *act or omission* in contravention of established environmental standards that creates a real and imminent *(concrete)* endangerment to the environment or human beings.

9. The minimum mental element, with respect both to an act or omission and to its consequences, required in the definition of an offence against the environment subject to criminal sanctions should be knowledge, intent, recklessness *(dolus eventualis* or *culpa gravis* or its equivalent in national laws) or, in cases where serious consequences are in issue, culpable negligence.

10. Where it is established that an accused acted or omitted to act, knowing that serious harm to the environment would likely result, and such harm does in fact result, compliance with the terms of a license or permit or with standards and prescriptions laid down in regulations should be reasonably limited as a justification for the act or omission.

11. Consistent with the *principle of restraint,* criminal sanctions should be utilized only when civil and administrative sanctions and remedies are inappropriate or ineffective to deal with particular offences against the environment.

III. Criminal liability of entities

12. Conduct that merits imposition of criminal sanctions can be engaged in by private and public entities as well as by natural persons.

13. National legal systems should, wherever possible under their constitution or basic law, provide for a variety of criminal sanctions and/or other measures adapted to private and public entities.

14. Where a private or a public entity is engaged in an activity that poses a serious risk of harm to the environment or to human beings, the managers and directing authorities of such entity should be required to exercise supervisory responsibility in a manner to prevent occurrence of harm and the entity should be held criminally liable if serious harm results as a consequence of the failure of its managers and directing authorities to properly discharge this supervisory responsibility.

15. To minimize the risk of injustice arising from uneven application of laws concerning offences against the environment in different countries, domestic laws should specify as clearly as possible the criteria establishing liability of human agents within private or public entities who may be responsible for ensuring compliance with environmental laws for offences against the environment committed by such entities.

Private entities

16. Where allowed under the constitution or the basic law of a country, notwithstanding the usual requirement of personal responsibility for criminal offences, proceedings against a private entity should be possible for offences against the environment even if responsibility for such offences cannot be directly attributed to any identified human agent of such entity.

17. Where a private entity is responsible for serious harm to the environment or human beings, proceedings against such entity should be possible for offences against the environment, regardless of whether the harm results from an individual act and/or omission or from cumulative acts and/or omissions over time.

18. Imposition of criminal sanctions or other measures against a private entity should not exonerate culpable human agents of such entity who are involved in the commission of offences against the environment.

Public entities

19. Where a public entity, in the course of executing its public functions or otherwise, causes serious harm to the environment or to human beings or, in contravention of established environmental standards, creates a real and imminent *(concrete)* endangerment to the environment or human beings, it should be possible to prosecute the criminally responsible human agents of such entity for an offence against the environment.

20. Where it is possible under the constitution or basic law of a country to hold a public entity responsible for criminal offences committed in the course of executing its public functions or otherwise, proceedings against such entity should be possible for crimes against the environment even if responsibility for the crime cannot be directly attributed to any identified human agent of such entity.

IV. Crimes against the environment

21. Core crimes against the environment, that is crimes that are *sui generis* and do not depend on other laws for their content, should be specified in national penal codes

22. Where offences against the environment are subject to criminal sanctions, their key elements should be specified in legislation and not left to be determined by subordinate delegated authorities.

23. Core crimes against the environment affecting more than one national jurisdiction or affecting the global commons outside any national jurisdiction should be recognized as international crimes under multilateral conventions.

24. Within the framework of the constitution and the basic law of national legal systems, legislation should facilitate the participation of citizens in the initiation of investigation and prosecution of alleged crimes against the environment.

V. Jurisdiction

Trans-border crimes

25. Where the harm or serious risk of harm *(concrete endangerment)* that underlies a core crime against the environment arises outside the jurisdiction of a State where the crime is committed, wholly or in part, it should be possible, subject to appropriate safeguards for the accused and to applicable international laws, to prosecute the accused in the State where the crime was committed or in any State where the harm or serious risk of harm arises.

Extra-territorial crimes

26. Where the harm or serious risk of harm *(concrete endangerment)* that underlies a core crime against the environment arises in the global commons, States should agree on an international convention or implement existing international conventions that would enable them to prosecute the crime by applying, in the following order: the flag principle; the principle of nationality; the principle of *extradite or prosecute*; and, in cases of generally acknowledged international crimes, the principle of universality.

Extradition

27. Crimes against the environment of particularly serious gravity should be made extraditable offences.

International Criminal Court

28. In order to facilitate the prosecution of international crimes, in particular crimes against the global commons, the jurisdiction of the international court proposed by the International Law Commission and currently being considered by the General Assembly of the United Nations

should include crimes against the global commons.

Implementation of international conventions

29. Where international conventions respecting crimes against the environment are not self-executing under domestic law with respect to execution of criminal sanctions, signatory States should implement such conventions by enacting the necessary domestic legislation.

Section II. Computer crimes and other crimes against information technology

Preamble

Recognizing the proliferation of information technology and the emergence of an information society which is bringing about fundamental changes in all aspects of life;

Noting that a range of anti-social activities are subverting information technology to the detriment of individuals and of all sectors of society;

Aware that the rapid expansion of interconnectivity of information technology in the world transcends traditional national boundaries, and involves both developed and developing countries;

Concerned that the abuse of information technology is occurring at the national and international level;

Concluding, therefore, that such activity is relevant to all states;

Taking into account the previous contributions of other learned bodies, non-governmental and inter-governmental organizations[16].

Recommendations

I. Non penal preventive measures

1. There is a growing recognition of the increasing range of non penal options for preventing computer crime. These measures and new creative approaches should be encouraged on the national, supranational and international level in order to keep pace with technological innovation.

2. Such measures could include, among others:

[16] Such as the OECD, the Council of Europe, the European Community, the Commonwealth, the United Nations, Interpol and the International Chamber of Commerce.

- Implementation of voluntary security measures by computer users.
- Imposition of obligatory security measures in certain sensitive sectors.
- The creation and implementation of computer security legislation, policies and guidelines by national governments.
- Commitment by management and senior executives to security and crime prevention within an organization.
- Incorporation, explanation and promotion of security measures by the information technology industry.
- Development, promotion and cultivation of computer ethics by all sectors of society, especially educational facilities, professional societies and the public.
- Cultivation of professional standards in the data processing industry, including the possibility of disciplinary measures.
- Promotion of victim co-operation in the reporting of computer crime. Training and education of personnel in the investigative, prosecutorial and judicial systems.

II. Substantive criminal law

3. Abuses of information technology affect computer -related economic as well as privacy-oriented interests and include situations where data processing and its components are only used as tools to commit violations of traditional values, as well as where they are the direct object of the misconduct.

4. To the extent that traditional values are injured or endangered by the misuse of data processing, the new *modi operandi* may reveal loopholes in traditional criminal law. On the other hand, the development of information technology reveals the emergence of new types of interests which call for legal protection, especially the integrity of computer systems and the data involved, and the availability and the exclusivity of certain data (data security and data protection).

5. To the extent that traditional criminal law is not sufficient, the modification of existing, or the creation of new offences should be supported if other measures are not sufficient (principle of subsidiarity). This also applies to areas where criminal law is an annex to other areas of law (as in the area of copyright law), and where the extension of criminal law follows from changes in substantive civil or administrative law.

6. In the enactment of amendments and new provisions, emphasis should be put on precision, clarity and on defining offences in terms of objective elements. In areas where criminal law is only an annex to other areas of law, this requirement should also be applied to the substantive part of that other law.

7. In order to avoid over criminalization, regard should be given to the scope to which criminal law extends in related areas. Extensions that range beyond these limits require careful

examination and justification. In this respect, one important criterion in defining or restricting criminal liability is that offences in this area be limited primarily to intentional acts.

8. In this regard, the previous work of the OECD and the Council of Europe has made important contributions in specifying the types of conduct that should be penalized by national law. The AIDP welcomes the guidelines for national legislators included in the Recommendation No. R (89) 9, adopted by the Council of Europe on 13 September 1989, which enumerates a list of acts that should, or could, be the subject of criminal sanctions.

The minimum list of acts, which the Council of Europe recommended should be criminalized if committed intentionally, is as follows.

a. *Computer-related fraud*

The input, alteration, erasure or suppression of computer data or computer programs, or other interference with the course of data processing that influences the result of data processing, thereby causing economic or possessory loss of property of another person with the intent of procuring an unlawful economic gain for himself or for another person (alternative draft: with the intent to unlawfully deprive that person of his property).

b. *Computer forgery*

The input, alteration, erasure or suppression of computer data or computer programs, or other interference with the course of data processing in a manner or under such conditions, as prescribed by national law, that it would constitute the offence of forgery if it had been committed with respect to a traditional object of such an offence.

c. *Damage to computer data or computer programs*

The erasure, damaging, deterioration or suppression of computer data or computer programs without right.

d. *Computer sabotage*

The input, alteration, erasure or suppression of computer data or computer programs, or interference with computer systems, with the intent to hinder the functioning of a computer or a telecommunication system.

e. *Unauthorized access*

The access without right to a computer system or network by infringing security measures.

f. *Unauthorized interception*

The interception, made without right and by technical means, of communications to, from and within a computer system or network.

g. *Unauthorized reproduction of a protected computer program*

The reproduction, distribution or communication to the public without right of a computer

program which is protected by law.

h. *Unauthorized reproduction of a topography*

The reproduction without right of a topography, protected by law, of a semi-conductor product, or the commercial exploitation or the importation for that purpose, without right, of topography or of a semiconductor product manufactured by using the topography.

The guidelines of the Council of Europe also identify, in an "optional list", the following additional areas that could also be criminalized, if committed intentionally:

a. *Alteration of computer data or computer programs*

The alteration of computer data or computer programs without right.

b. *Computer espionage*

The acquisition by improper means or the disclosure, transfer or use of a trade or commercial secret without right or any other legal justification, with intent either to cause economic loss to the person entitled to the secret or to obtain an unlawful economic advantage for oneself or a third person

c. *Unauthorized use of a computer*

The use of a computer system or network without right, that either: (i) is made with the acceptance of a significant risk of loss being caused to the person entitled to use the system or harm to the system or its functioning; or (ii) is made with the intent to cause loss to the person entitled to use the system or harm to the system or its functioning; or (iii.) causes loss to the person entitled to use the system or harm to the system or its functioning.

d. *Unauthorized use of a protected computer program*

The use without right of a computer program which is protected by law and which has been reproduced without right, with the intent, either to procure an unlawful economic gain for oneself or for another person, or to cause harm to the holder of the right.

9. Having regard to the progress in information technology, to the increase in related crime since the adoption of the 1989 recommendation of the Council of Europe, to the significant value of intangibles in the information age, to the desirability to promote further research and technological development and to the high potential for harm, it is recommended that states should also consider, in accord with their legal traditions and culture and with reference to the applicability of their existing laws, punishing as crimes (in whole or in part) the conduct described in the "optional list".

10. Furthermore, it is suggested that some of the definitions in the Council of Europe lists - such as the offence of unauthorized access- may need further clarification and refinement in the light of the progress in information technology and changing perceptions of criminality. For the same reasons, other types of abuses that are not included expressly in the lists, such as trafficking in wrongfully obtained computer passwords and other information about means of

obtaining unauthorized access to computer systems, and the distribution of viruses or similar programs, should also be considered as candidates for criminalization, in accord with national legal traditions and culture and with reference to the applicability of existing laws.

In light of the high potential damage that can be caused by viruses, worms, and other such programs that are meant, or are likely, to propagate into and damage, or otherwise interfere with, data, programs or the functioning of computer systems, it is recommended that more scientific discussion and research be devoted to this area. Special attention should be given to the use of criminal norms that penalize recklessness or the creation of dangerous risks, and to practical problems of enforcement. Consideration might also be given as to whether the resulting crime should be regarded as a form of sabotage offence.

11. In regard to the preceding recommendations, it is recognized that different legal cultures and traditions may resolve some of these issues in different ways while, nevertheless, still penalizing the essence of the particular abuse. States should be conscious of alternative approaches in other legal systems.

III. Specific issues of privacy protection

12. The significance of protecting privacy interests in the transformed information age against new dangers emanating from the information technology should be recognized. However, the legitimate interests in the free flow and distribution of information within society must also be respected. Privacy interests include the right of citizens to access, by legal means consistent with international human rights, information about themselves which is held by others.

13. The discussion demonstrated that there are significant differences in opinion as to both the means by, and the degree to, which protection should be afforded by administrative, civil, regulatory and criminal law. There are also serious disagreements as to the extent to which criminal law should be involved in the protection of privacy. Therefore, non-penal measures should be given priority, especially where the relations between the parties are governed by contract.

14. Criminal provisions should only be used where civil law or data protection law do not provide adequate legal remedies. To the extent that criminal sanctions are used, the AIDP notes the basic principles, which should be taken into account by states when enacting criminal legislation in this field, as recommended in Recommendation (89) 9 of the Council of Europe. The AIDP proposes further that criminal provisions in the privacy area should in particular:

- be used only in serious cases, especially those involving highly sensitive data or confidential information traditionally protected by law;

- be defined clearly and precisely rather than by the use of vague or general clauses (*Generalklauseln*), especially in relation to substantive privacy law;

- establish a difference between the various levels of gravity of the offences and to respect the requirements of culpability;

- be restricted primarily to intentional acts; and

- permit the prosecutorial authorities to take into account, in respect of some types of offences, the wishes of the victim regarding prosecution.

15. Further study should be undertaken to attempt, with special regard to public data banks, to define a list of acts which should appropriately be criminalized. This could include intentional acts of infringement of secrecy and serious forms of illegal collection, use, transfer and alteration of personal data which create a danger to personal rights. A starting point for this study might be the tentative proposals that were considered by the select committee of experts on computer related crime of the Council of Europe.

IV. Procedural law

16. The investigation of computer crime and of other more traditional crimes in an information technology environment requires, in the interest of an effective social defense, the provision of adequate coercive powers for investigative and prosecuting authorities, which must be balanced equally by adequate protection for human rights and privacy interests.

17. In order to avoid abuses of official powers, all actions by government agencies that restrict human rights may be undertaken only if there are clearly-defined provisions of law consistent with international human rights standards. Unauthorized infringements of human rights by government agencies may render the evidence obtained invalid and give rise to criminal liability on the part of the agent acting in violation of law.

18. In the light of these general principles, there should be clearly defined:

a. powers for conducting search and seizure in an information technology environment, particularly in regard to the seizure of intangibles and the search of computer networks;

b. duties of active co-operation by victims, witnesses and other users of information technology, other than the suspect, (especially to make information available in a form usable for judicial purposes); and

c. powers to permit the interception of communications in or between computer systems, and to use the obtained evidence in court proceedings.

19. In view of the multitude and variety of data that may be contained in data processing systems, the execution of coercive powers should be pursued in a manner that is proportional to the seriousness of the offence and that is least disruptive to an individual's lawful activities. In addition to traditional monetary values, the thresholds to commence investigations should take into account all the various asset values that exist in the information technology environment, such as loss of economic opportunity, espionage, violation of privacy interests, loss or risk of economic deprivation, and the cost of reconstructing the integrity of data.

20. The existing rules for the admissibility and reliability of evidence may create problems

when applied to the consideration and evaluation of computer records in judicial proceedings. Where necessary, appropriate changes should be made.

V. International co-operation

21. The mobility of data in international telecommunication networks and the highly interconnected nature of modem information society makes international co-operation in the prevention and prosecution of computer crime particularly vital.

22. Since certain forms of international co-operation (such as extradition and even mutual assistance) may require double criminalization and since under existing law states may be limited in their ability to provide means of assistance to other states, effective international cooperation would be facilitated by both the above mentioned harmonization of substantive criminal law and the enactment of adequate coercive powers in all member states.

23. Moreover, co-operation is necessary in additional areas. This should include development of:

a. International standards for the security of computer systems.

b. Adequate measures for resolving questions of jurisdiction over transborder and other international computer crimes.

c. International agreements among nations that take advantage of new information technology for more effective investigations, including agreements to provide for effective, prompt and lawful transborder search and seizure in interconnected computer systems, as well as other forms of international cooperation, while at the same time protecting the rights and freedoms of individuals.

VI. Future work

24. In order to realize these objectives, associations of academics, governmental bodies, information technology professionals and international organizations should promote the implementation of these recommendations and the ongoing adoption of appropriate means of crime prevention in order to address the new challenges of information technology.

25. The academic and scientific community, as well as governments, should undertake further research concerning information technology crime. Such research should, in particular, examine the incidence of computer crimes, the extent of losses, the methods of commission and the characteristics of offenders. It should also deal with the development of new alternative measures that will permit the use of criminal sanctions as a last resort. Legal theory and policy should give special attention to the study and development of information law, taking into account the specific characteristics of information as compared to tangible objects, and investigating possible changes of general principles and paradigms of criminal law.

26. Law enforcement and prosecuting authorities should, at both the national and international levels, increase their efforts in combating computer crime, and coordinate their activities in

order to achieve effective global protection.

27. Associations of computer hardware and software industries and of consumers should be involved in addressing the issue of computer crime, and every effort should be made by non-governmental and inter-governmental organizations to involve industry associations in achieving international consensus.

28. The manual on computer-related crime prepared on the initiative and under the auspices of the United Nations as a means of consolidating information on world-wide activities in this field is welcomed, and it is suggested that the manual be updated, so as to keep the academic, governmental and inter-governmental communities aware of contemporary developments; and that a future revision of this manual and future work of the United Nations should take into account the principles of this Resolution.

Section III. Reform movements in criminal procedure and the protection of human rights

Preamble

Starting from the idea that each reform of criminal procedure law must narrowly conform to the rights guaranteed by the "Universal Declaration of Human Rights" of 10 December 1948 and the "International Convenant on Civil and Political Rights of 19 December 1966 as well as the regional Conventions on human rights;

Taking into account the Resolutions of the XII International Congress of the IAPL (Hamburg 1979) that correspond to a great extent to the declarations mentioned above;

Convinced that the essential core of fundamental rights and liberties mentioned in these documents may not be restricted, even in the event of war or crisis threatening the existence of the nation;

Considering that even the fight against terrorism and organized crimes could only restrict these fundamental rights to the extent absolutely necessary to prevent entire sectors of criminality going unpunished;

Regarding the necessity to develop higher standards of reform that go beyond the level of such guarantees by means of concretization and definition in respective procedural systems and situations;

Recommendations

I. The initial stages of the criminal process and the application of guarantees

l. The protection of human rights must be guaranteed in each stage of the criminal procedure, even if the procedure is not necessarily opened by a formal decision of a judge or another official; it suffices when the prosecuting authorities begin state prosecution of a crime.

II. The presumption of innocence and its consequences

2. The accused has the benefit of the presumption of innocence throughout the procedure until a judgment becomes effective. The presumption is also applicable to justifications and excuses.

3. In the stage preceding judgment, the principle of innocence requires the application of the principle of proportionality with respect to all coercive measures. According to this principle, there must exist a reasonable relationship between the gravity of the government measure interfering with the criminal defendant's fundamental rights on the one hand, and the objective of the restraining measures, on the other hand. This must give the legislator impetus to provide, above all, for alternatives to pretrial detention, which must in every case remain an exception.

4. During trial and judgment, application of the presumption of innocence requires the impartiality of the judge. For this impartiality to exist, there must be a clear separation between the functions of the prosecution and the adjudicator. Furthermore, the judge rendering the judgment must not have participated in the preparatory stages. It is highly advisable that the judge rendering the judgment not be identical with the judge who admits the accusation against the suspect.

5. In accordance with the principle of the presumption of innocence, pretrial detention has to be ordered by a judge and must be motivated according to the particularities of the case. The pretrial detention may not be ordered and/or maintained if there are no strong indications of guilt and if the responsible authorities do not show a serious will to precede or continue the prosecution. Pretrial detention is also illicit when its duration goes beyond the duration of the punishment that the court will probably hand down with regard to the circumstances of the case at hand.

6. The defending attorney and, on request by the detainee, any close relatives or other close persons have to be informed about the facts, reasons and place of the detention as quickly as possible, that is not later than 24 hours.

7. In determining the punishment, the court may not consider other criminal acts committed by the accused which have not been proved and judged in fair proceedings.

8. Mass media coverage during criminal procedure must be prevented from having the effect of a preconviction of the accused or a sensational trial. If such an effect is to be anticipated, the broadcast of the hearing by radio or television can be restricted or prohibited.

III. The intervention of the judge

9. Temporary detention must be ordered by a judge, after considering the particularities of the case.

10. Each government measure affecting the fundamental rights of the accused, including those undertaken by the police must be authorized by a judge or be subject to a judicial review.

11. Regardless of Recommendation No. 10, each coercive measure taken or ordered by the prosecution or the police requires judicial confirmation within 24 hours.

12. Those means of proof that seriously impinge upon the fundamental right of privacy, such as wiretapping, may only be admitted in terms of evidence if they have been ordered by a judge and expressly provided for in law.

14. The mere confession of the accused does not necessarily give rise to a conviction without examination of the credibility of the confession.

IV. Evidence

13. The mere collection of evidence in the preparatory phase of the procedure is not sufficient as a basis for condemnation.

15. It is recommended that the legislature also determines the conditions under which genetic printings and eavesdropping are admissible.

16. The granting of criminal law privileges to secret witnesses and secret agents must remain an exception provided for only in cases of serious criminal acts or organized crime. If the identity of these persons is not revealed in the hearings, their declarations are invalid and inadmissible and cannot be used to motivate coercive measures. On the other hand, the protection of each witness threatened by criminal organizations must be guaranteed.

17. All evidentiary investigations must respect privileged professional secrecy.

18. Any evidence obtained by violation of a fundamental right, including any derivative evidence thereof, is invalid and inadmissible with respect to any stage of the procedure.

V. Defense

19. The right to a defense is to be guaranteed in every stage of the procedure.

20. No defendant may be forced to contribute directly or indirectly to his own criminal conviction. The accused (in the material sense of Recommendation No. 1 above) has the right

to remain silent and the right to know the content of the charges starting from the first police or judicial interrogation. This silence may not be used against him.

21. The State must guarantee from the very beginning of criminal procedure the defendant the right to counsel. This assistance is to be free if the defendant cannot afford an attorney. The State shall be in charge of the costs. If a public defender is appointed, he must understand the fundamental customs and social situation of the client.

22. The defendant in custody has the right to communicate in private with his attorney. The attorney should have the right to be present during each stage in the criminal investigation.

23. The defense council should have access to the documents of the prosecution by the first moment.

24. If the defendant does not speak or understand the language used during criminal procedure, an interpreter shall be appointed. If an assigned counsel has been appointed, he should basically know the customs and the social organization of his client.

VI. Principles of prosecution

25. The principle of mandatory prosecution may be considered an important guarantee. Nevertheless, in view of the expediency of the criminal procedure and the lack of qualified personnel, this principle should be relaxed in the sense of controlled discretionary prosecution. There should be such relaxation at least in cases of petty damages, negligible fault of the accused or necessary Protection of the victim. In such cases, precise criteria should be set forth in order to limit the discretionary power of the prosecuting authorities.

26. Serious infractions must not be subject to summary proceedings or those proceedings open to the discretion of the accused. As far as other infractions are concerned, the legislator should determine the requirements of these proceedings and introduce means of guaranteeing the voluntary nature of collaboration between the accused and the judiciary, such as the assistance of counsel. Such proceedings are recommended for cases of light infractions in order to expedite the criminal procedure and afford the accused heightened protection.

VII. Rights of the victim

27. The person who considers himself or herself damaged should have the opportunity of being an "accusing party" ("civil party" or "*acusador particular*"), free of charge if necessary, and request review by a court or another independent body if the prosecuting authorities refuse to prosecute the perpetrator. The damaged party should also have the right to influence the development of the penal procedure when there is a public charge. Above all, he or she should be able to participate in and contribute to the evidentiary hearing and assert a right of appeal. In the same situations, the victim should also have the right to ask a ruling from the tribunal on the damages.

28. In view of certain offences, a similar role of collaboration should be granted to associations that are legally recognized as defending general or collective interests.

29. Each person who considers her fundamental rights violated by an act of criminal procedure should have - in addition to the means pursuant to 8 and 9 above - the effective opportunity of requesting the review of these acts by a constitutional court, a supreme court or an international court of human rights.

VIII. Future reforms

30. The purpose of these recommendations is to stimulate future reforms of the penal procedure. Such reforms, as well as any other modernization of the fundamental rules of criminal process in any given country should be adopted by the respective parliaments in the form of a formal law. While preparing their debates, the parliaments are invited to seek out the advice and opinions of the criminal justice bar and the civic associations.

Section IV. The regionalization of international criminal law and the protection of human rights in international cooperative procedures in criminal matters

Preamble

Considering that international criminal law, as is the case with criminal law in general, seeks a balance between the protection of society through the efficient operation of the criminal justice system, the protection of the rights of the individual (defendant and victim), and the maintenance of the rule of law;

Given the recent phenomenon of the regionalization of international criminal law;

Determining next the position of the individual within the framework of this process.

Recommendations

I. The regionalization of International Criminal Law

l. Although the control of crime remains basically the domestic responsibility of the individual State, the regionalization of formal and informal co-operation in criminal matters should be promoted for a variety of reasons. Among these are the need to increase effectiveness in the prevention and control of crime, in particular in respect of crime which manifests itself on the regional level, to increase domestic and international security, and to avoid practical difficulties in the day-to-day relations between States.

2. Institutional arrangements for co-operation in criminal matters and other forms of legal co-operation should be incorporated into the activities of regional organizations which have been established for the development of closer co-operation within the region concerned in economic matters, the improvement of the freedom of movement of persons, goods and capital or for other forms of development of the region. Such legal co-operation should not only be directed towards the economic objectives of the regional organization, but also towards the general interests of each participating State.

3. Harmonization of criminal laws and laws of criminal procedure of the participating States, although potentially helpful in co-operation in criminal matters, is often difficult to achieve and should not be made a prerequisite for the development of multilateral regional instruments for co-operation in criminal matters.

4. When developing multilateral regional instruments on co-operation in criminal matters, participating States should ensure that the exercise of forms of democratic control is guaranteed in their elaboration. Similarly, judicial control should be exercised over formal and informal cooperation at the law enforcement level, which includes police cooperation.

5. Regional instruments on co-operation in criminal matters should recognize the importance of developing policy-oriented criminological research programs, training programs, and information and documentation systems at a regional level for law enforcement personnel and other practitioners in criminal justice, of making available information and experience between regions.

6. The United Nations model for bilateral agreements for various types of international juridical co-operation in criminal matters might appropriately be used for the development of regional treaties. Similar models developed by certain regional inter-governmental organizations might be considered for the same purpose.

7. Regional instruments on co-operation in criminal matters may appropriately provide for mechanisms for the settlement of disputes. Such mechanisms might include the reaching of understanding through the exchange of diplomatic notes, submission of disputes to arbitration, international judicial litigation or for the rendering of advisory opinions.

8. Regional instruments on co-operation in criminal matters should be drafted in a way that minimizes the possibility of and necessity for reservations. One way of achieving this is through listing permissible or impermissible reservations. Another way, which might be combined with the first, might be to oblige States having entered reservations to periodically review the propriety of retaining them and to give special reasons for doing so.

9. When drafting regional instruments on co-operation in criminal matters, participating States should contemplate the possibility of suspending -and eventually denouncing- the instrument by one or several Parties in relation to another Party, if that other Party has committed a

material breach of its obligations under the instruments or if a fundamental change of circumstances has occurred in the political structure of such other Party.

10. In order to prevent impunity international co-operation for the prevention, investigation and prosecution of international crime should also be enhanced through the establishment of impartial permanent international courts of criminal jurisdiction, be it on a regional or a universal level, as recommended and pursued by the AIDP for decades.

II. The protection of human rights in international cooperation in criminal matters

11. The growing recognition in recent international instruments and domestic legislation of the importance of the protection of human rights within the framework of international co-operation in criminal matters should be encouraged. Similarly, the growing recognition of the individual as a subject of public international law should be fostered. The concern for the protection of human rights should not only justify certain restrictions that limit the scope of existing forms of co-operation but should also prompt the development of new forms of co-operation. The protection of human rights should not be considered as an obstacle to international co-operation, but rather as a way of reinforcing the rule of law.

12. When confronted with conflicting obligations under public international law pursuant to conventions on the protection of human rights. on the one hand, and on international co-operation in criminal matters on the other hand, States should let their obligations with respect to human rights prevail, either by refusing assistance, or by imposing conditions on the other State involved, or by reaching mutually acceptable agreements in the interest of the persons concerned.

13. States should review treaties on international co-operation in criminal matters to which they are bound as to their compatibility with internationally binding obligations concerning the protection of human rights.

14. States should, when concluding new treaties on international co-operation in criminal matters, as certain that such treaties do not create obligations which might result in the violation of fundamental human rights, such as the right not to be subjected to torture, or inhumane or degrading treatment, to discrimination, to arbitrary arrest, or expropriation or to criminal procedures which do not meet generally accepted principles of a fair trial.

15. When called upon to provide international assistance in criminal matters, States should not adopt a rule of non-enquiry into the fairness and legitimacy of procedures conducted in other States. They should take into account the extent to which rights and freedoms are effectively protected in such other States.

16. In the elaboration of new instruments on international co-operation in criminal matters, States should pay specific attention to the definition and protection of the rights and the interests of the individual in proceedings conducted in the course of the application of such

instruments. Such rights and interests may include, where relevant: the right to instigate the application of the instrument on his or her behalf, the right to be informed of any application of the instrument and the right of access to court in order to challenge the legitimacy of such an application.

17. The rights mentioned in Para. 6 should also be put into practice with regard to all existing instruments, particularly in cases of the transfer of prisoners. In view of the specific humanitarian aspects involved, existing instruments for the transfer of prisoners should be more extensively applied.

18. States where the laws of evidence in criminal proceedings restrict the use of evidence illicitly obtained, should apply the same restrictions with respect to evidence obtained through international assistance in criminal matters. In all States evidence that has been obtained in disregard of fundamental human rights should be excluded.

19. Abducting a person from a foreign country or enticing a person under false pretences to come voluntarily from another country in order to subject such a person to arrest and criminal prosecution is contrary to public international law and should not be tolerated and should be recognized as a bar to prosecution. The victim of such a violation should have the right to be brought into the position which existed prior to the violation. The violation entails liability in respect of the person concerned and the State whose sovereignty has been violated, without prejudice to any criminal liability of the persons responsible for the abduction. Similarly, procedures such as deportation or expulsion, deliberately applied in order to circumvent the safeguards of extradition procedures should be avoided.

20. Methods of providing the individual with the right of access to international judicial control over the application of international instruments on co-operation in criminal matters, in particular at the regional level, should be explored urgently and effectively implemented without delay.

Resolution on the International Criminal Court

The International Association of Penal Law (AIDP), at its XVth International Congress of Penal Law, held in Río de Janeiro, September 4 -10, 1994 and attended by over 1,100 Jurists from 67 countries, hereby resolved the following which has been adopted by the General Assembly on 10 September 1994;

Recalling that throughout its 105-year history, the AIDP has promoted initiatives to establish international criminal justice under a system of law administered by an International Criminal Court;

Noting with appreciation the efforts of the International Law Commission to establish an International Criminal Court;

Expressing its satisfaction at the establishment of the International Criminal Tribunal for the former Yugoslavia and the parallel effort to establish a similar process for Rwanda;

Committed to ensuring the world community that major violators of international humanitarian law and international human rights law not be permitted to commit such violations with impunity;

Convinced that the establishment of a permanent international criminal court would significantly enhance observance of international law and respect for human rights;

Equally convinced that an international criminal justice system would contribute to respect to the effective enforcement of criminal law, particularly with respect to the control of organized crime, terrorism, illicit traffic in arms particularly weapons of mass destruction and nuclear material and violations of international humanitarian law ;

Envisaging a world order in which international criminal justice plays at the world level a role comparable to that national criminal justice plays at national levels;

Insisting that international criminal justice remains free from political influences and bias which might impede its integrity and effectiveness;

Concerned, however, that delays in the establishment of a permanent international criminal justice system exacerbate problems regarding the peaceful co-existence of nations, the peace and security of peoples everywhere and the quality of life of every human being;

Calls on the United Nations' organs, in particular the General Assembly and the Security Council, as well as the Secretary General, to devote the utmost effort to the speedy implementation of the above recommendations by calling for a plenipotentiary report for the establishment of a permanent International Criminal Court;

Also calls upon all governments to support the goals of international criminal justice and the work of the United Nations related thereto and to participate in the plenipotentiary conference called for above with a view to establish an effective international criminal justice system without delay;

To that end the International Association of Penal Law offers its full support and expertise to the United Nations and to interested governments.

Resolved at Rio de Janeiro, Brazil, on 10 September 1994