

XIVth INTERNATIONAL CONGRESS OF PENAL LAW (Vienna, 2 – 7 October 1989)¹⁴

Topics:

1. The legal and practical problems posed by the difference between criminal law and administrative penal law.
2. Criminal Law and modern bio-medical techniques.
3. The relations between the organization of judiciary and criminal procedure.
4. International crimes and domestic criminal law.

Section I. The legal and practical problems posed by the difference between criminal law and administrative penal law

Introduction

1. The field of administrative penal law has expanded and thus gained increased relevance due mainly to two developments: first, the expansion of state intervention in more and more areas has led to a proliferation of administrative regulations frequently accompanied by ancillary norms of administrative penal law providing for sanctions as retributive reactions to violations of the primary regulations. Second, an international trend toward removing violations of minor social importance from the traditional criminal law has led legislatures to redefine such violations as administrative penal infractions.

2. The decriminalization of transgressions is in accord with the principle of subsidiarity of penal law and is thus welcomed. An inflation of administrative penal law is, however, not desirable; purely administrative measures should be used as an alternative. In any event, legislatures and legal science should devote increased care to defining the proper limits of as well as the guiding principles applicable to administrative penal law.

3. Whether or not certain conduct should properly be punished according to criminal law or to administrative penal law cannot be determined categorically. It is therefore in most cases for the legislature to decide what conduct is to be sanctioned criminally or by administrative penal law. In making that decision, legislatures should take into consideration several criteria, especially the importance of the social interest affected by the conduct in question, the gravity of endangerment or harm to that interest, and the kind and degree of fault on the part of the offender.

¹⁴ RIDP, vol. 61 3-4, 1990, pp. 86-110 (French); p.111-134 (English)

4. The difference between criminal law and administrative penal law implies limitations on the kind and severity of sanctions available as well as on the restrictions of individual rights permissible in the course of administrative penal procedure.

5. Administrative penal law resembles criminal law in that it provides for the imposition of retributive sanctions. This similarity requires application of the basic principles of criminal law and of due process to the field of administrative penal law (*Cf art. 14 of the International Covenant of Political and Civil Rights; art. 6 of the European Convention on Human Rights*).

On the basis of these considerations, the Congress makes the following recommendations

1. Limitations

a) Sanctions for administrative penal infractions should be reasonable and proportionate to the gravity of the infraction and the personal circumstances of the offender. Deprivation and restriction of personal liberty should not be available as a primary sanction or as an enforcement measure.

b) The amount of the administrative sanction, particularly of a pecuniary fine, shall not essentially exceed the maximum amount of a fine under criminal law.

c) Restrictions of individual rights in proceedings of administrative penal law must not be out of proportion to the gravity of the presumed offence. Pretrial detention, surveillance of mail and telephone lines as well as similar severe restrictions of individual rights should not be permissible in administrative penal proceedings.

2. Principles of substantive law

a) Definitions of administrative penal infractions as well as of administrative penal sanctions should be fixed in accordance with the principle of legality. The lines between criminal offenses and administrative penal infractions should be drawn, with sufficient clarity, by the legislature. The use of distinctive terms for administrative penal infractions and sanctions is recommended.

b) Administrative penal responsibility of physical persons should be based on personal fault (intent or negligence).

c) However, the nature of administrative penal sanctions makes the field of administrative penal law more than criminal law conducive to the recognition of corporate liability.

d) Defenses of justification and excuse recognized in criminal law, including unavoidable mistake of law and extenuating circumstances, should likewise be available in administrative penal law.

3. Principles of procedure

- a) The presumption of innocence and the principle that the defendant can be sanctioned only if the violation has been proved beyond a reasonable doubt should be respected in administrative penal law.
- b) In simple cases, the procedure can and should be expedited, but the defendant should retain the right to be informed of the charges and evidence brought against him, the right to be heard, including the right to present evidence, and the right to counsel.
- c) Proceedings in administrative penal cases can be conducted by administrative agencies or by other non-judicial bodies that can impose sanctions, but recourse to the judiciary and to adversary proceedings should be possible.
- d) If an act meets the definition both of a criminal offence and of an administrative penal infraction, the offender should not be punished twice; at a minimum, full credit should be given, in sentencing on a subsequent conviction, for any sanction already imposed in relation to the same act.

4. Access to Information and Legal and Empirical Research

- a) In administrative penal law, citizens should have the right and the means of full access to all information, data, and decisions of administrative agencies concerning them, provided that the right of privacy is properly respected.
- b) Research in the field of administrative penal law should be facilitated, encouraged, funded and pursued to provide essential information in this field of law.

Section II. Criminal law and modern bio-medical techniques

1. General considerations

1.1 - Revolutionary progress in modern medicine and biotechnology has produced appreciable success in the struggle against diseases and in the improvement of the human wellbeing. It has also brought undesired side effects and dangers to man and mankind. To solve these new individual and social problems a reappraisal of traditional ethical principles is required. New regulations may also have to be introduced.

1.2 - The most important activities creating new problems and therefore possibly demanding new regulations are research with human beings (born and unborn), transplantation of organs, human artificial procreation and gene technology. In these domains, colliding interests are even more apparent than in traditional medical therapy.

1.3 - On the one hand, especially in the field of human experimentation, the protection of the research subject's self-determination by means of "informed consent" has to be considered as well as the protection of his life and his physical integrity against unjustifiable risks and, in some circumstances, the protection of his human dignity against humiliating experiments or the exploitation of his particular vulnerability. Modern reproductive medicine might lead not only to ignoring the interest of the prospective child but also to endangering the institutional protection of marriage and family. Modern genetic screening technology could also lead to discrimination in employment and insurance, and cause damage to the environment.

1.4 - On the other hand, one has to consider the right to free development of personality (including the right to procreation) as well as the freedom of science and research not only in the individual interest of each researcher but also in the general interest of further medical progress, progress ultimately supposed to serve the prosperity of human beings and mankind.

1.5 - In balancing these colliding interests, different points of view and results are to be expected due to the influence of different religious, ethical and political convictions on different legal cultures and social structures. In view of the frontier crossing character of these problems and an increasing interdependence among the various countries, internationally uniform standards and rules should be achieved if possible binding laws are to be introduced on an international level.

1.6 - To take care of these different interests requires differentiated means ranging from rather "soft" professional guidelines in order to reach or maintain a rather high medical-ethical standard to legal rules with diverse enforcement models and sanctioning methods. A strategy which integrates private law damages schemes with administrative measures and criminal sanctions would seem most adequate.

1.7 - The appropriateness of different control mechanisms regarding bio-medical procedures depends also on the ways in which the activities of health care in general and of research personnel in particular are supervised by respective countries' national legislation. This can also include differences between criminal and mere administrative sanctions. A further alternative can be the law's providing only a regulatory framework, in connection with a license authority controlling the work in this field, with that authority possibly creating rules by itself and taking the necessary enforcement measures.

1.8 - The employment of criminal law as a control mechanism has to be done on the basis of rational argumentation. Criminalization of medical activity as well as the threatening of penalties has to remain a means of "last resort" (*ultima ratio*): the first pre-condition has to be the worthiness of the endangering good and the blameworthiness of the endangering action (*Strafwürdigkeit*). Furthermore on the basis of a cost efficiency comparison of different means, the employment of criminal punishment must prove both as necessary (*Strafbedürftigkeit*) and suitable (*Straftauglichkeit*).

2. Medical progress requires medical research

2.1 - New and hopefully better methods of treatment as well as new and hopefully better pharmaceuticals are not possible without having experimental tests performed on human beings prior to the techniques' general introduction into medical practice. Certainly, there already exist different national as well as international] principles and guidelines, in particular the Nuremberg Code, the Declaration of Helsinki (as adopted by the World Medical Assembly in 1964 and as revised in Tokyo 1975) and the Proposed International Guidelines for Bio-medical Research involving Human Subjects of the World Health Organization (WHO) and the Council for International Organization and Medical Science (CIOMS) of 1982. Since these declarations, however, are only statements of ethical principles, and rely on professional self-control, they are not easily sanctionable in case of breach. Therefore the protection of research subjects should also be clarified by law and, if necessary, violations should be made punishable by criminal law. When alternative methods of research and experimentation are available, such as computer simulation or animal research, they should be preferred to the use of human subjects.

2.2 - In the category of therapeutic research -that is research that has as its ambition the amelioration of the condition of the particular patient who is its subject- the ordinary rules for legitimating the provision of medical services apply. Even in this category, however, it seems appropriate that further protections -above and beyond the strict requirement of informed consent- be utilized, as for example, some institutional mechanism by which the risks (for the research subject) and benefits (for the medical treatment and for the research goal) of the proposed research can be evaluated by outside persons.

2.3 - Such a risk-benefit-evaluation is all the more necessary when a new technique or drug of still experimental character is to be used and where there is no prospect of immediate benefit for the research subject concerned, as for example, when a new drug is used on healthy subjects for the first time, or when a patient is included in a control group. Even if such trials may ultimately aim at medically prophylactic, diagnostic or therapeutic ends, nevertheless, we are still in the area of human experimentation (non-therapeutic research) for which - with perhaps the exception of some special rules for drug testing - there is a lack of express legal safeguards for research subjects in most countries.

2.4 - In cases of non-therapeutic research, whatever the anticipated scientific progress might be, the following obligations, in particular, should be strengthened by their express inclusion into criminal law:

- The researcher should be guided only by purely scientific purposes and not abuse his position vis-à-vis the research subject because of personal bias or political motives.
- In order to safeguard life and physical integrity, the research subject should never be exposed to any substantial danger of death or inappropriately serious risk to health.

- In order to safeguard self-determination, no one should be subjected to an experimental technique or drug testing without his express written and informed consent.

- In order to protect a research subject from possible damages, there should be some insurance scheme by which injured subjects may be adequately compensated.

2.5 - In order to protect research subjects and to secure a comprehensive benefit-risk-assessment, independent ethical committees should be installed with interdisciplinary composition including, in particular, legal expertise.

2.6 - Additional safeguards up to general prohibition should be provided for particularly vulnerable persons (such as minors, pregnant women, mentally or physically handicapped individuals, or any other people who are lacking ordinary capacity for insight and judgment). Such persons may at most participate in non-therapeutic research if the following conditions are met:

- When, as for example, with certain diseases of infancy or dementia in adults, the development or improvement of a treatment or drug cannot be accomplished without using the technique or treatment on persons of the same age or with the disease.

- Furthermore, in many cases of therapeutic or non-therapeutic research with impaired subjects a valid consent of the legal representative is required, subject to the review and approval of a competent authority. In the course of obtaining this consent, the individual himself shall be consulted to the maximum extent feasible. Nobody shall be included in non-therapeutic research against his express objection.

- In addition to the above requirements, minors and impaired adults shall be permitted to participate as research subjects in non-therapeutic research only when the research proposed involves minimal or no risk.

- Incarcerated or detained persons, including prisoners of war, should be exempted from non-therapeutic research.

2.7 - All factors for showing that all essential requirements mentioned before are met have to be comprehensively documented.

2.8 - Remuneration for participating in non-therapeutic research should be confined to expense allowance and to compensation for any injuries sustained; risk-oriented financial benefits should be excluded.

2.9 - In order to prevent a researcher or a research institution from carrying out human experimentation that would not be allowed in his own country which imposes less strict legal limitations, an internationalization of the legal rules should be attempted.

- National standards should at least be oriented to implementing principles which already have found international recognition in declarations, guidelines and conventions.

- Crimes against the rights of research subjects should be made international crimes on the basis of the principles of universality.

3. Organ transplants and artificial organs

3.1 - The traditional criminal law does not sufficiently take account of special problems and needs which are connected with organ transplantation and the use of human tissue.

- While the general provisions for assault and battery are in the first instance directed against involuntary invasions into physical integrity, organ transplantation from a living donor concerns cases where the donor is willfully giving away part of his body: so far most penal codes lack sufficiently clear rules for ascertaining free consent and protecting against inappropriate risk.

- To the extent that the criminal law does not protect the corpse, the tissue of the newly dead is at risk for being appropriated for any and all purposes.

- If on the other hand the corpse is protected against any invasion, or if it is subject to the absolute control of the deceased's family or proxy, the opportunity to perform organ transplantation for a possibly life-saving treatment of another patient will be substantially limited, if not completely excluded.

3.2 - If such deficiencies and a lack of clarity exist, legal regulations for the conditions and procedures of organ transplantations and the use of artificial organs are desirable not only to provide organs for recipients, but also to safeguard organ donors as well as physicians. In making new law, distinctions should be drawn between transplantation from live donors and corpses.

3.3 - In cases of organ transplantations from live donors, the following conditions are of particular importance:

- The donor should receive full information about the risks, and the procedures to be followed and should expressly consent to it. - A special risk-benefit evaluation should be made with regard to organs or substances which cannot regenerate and/or the loss of which would endanger life or cause a serious risk to health.

- These limitations require intensified attention with regard to children and other persons with a limited legal capacity. Even with consent of the legal representative those people may be permitted to donate organs or tissue only if it is necessary for rescuing a near relative or a close friend from a clear and present danger to life and if there is no other donor available, who is medically suitable. In the same sense, this shall also apply to prisoners. The necessary consent of the legal representative is subject to review and approval by a competent authority. In cases where the donation of an organ is carried out on behalf of the legal representative, he should be excluded from the decision whether the procedure should be authorized.

3.4 - In deciding whether an organ or tissue may be transplanted from a deceased person, his or her prior express or presumptive will is primarily decisive.

- In case the will of the deceased cannot be ascertained by sufficiently reliable declarations or other factors, the decision of the next of kin is to be respected.

- A feasible alternative might be to permit the transplantation of organs or tissue insofar as the

deceased had not expressly objected to such a procedure prior to death and nothing is known about a contradictory will of a near relative.

3.5 - Not least, in order to prevent premature removals or organs it seems necessary to declare by generally binding roles the criteria for ascertaining death, and to regulate the procedures to be followed for ascertaining the criteria in the individual case. This should be accomplished by complying with internationally agreed standards and practices. The ascertainment of death should be undertaken by a physician who does not belong to either of the teams of removal or implantation.

3.6 - The patient's right to die in human dignity may not be infringed because of his suitability as an organ donor.

3.7 - To the extent that organ transplantations or the use of artificial organs has to be perceived as therapeutic experimentation, the conditions required for this situation (infra 2.2.) have to be fulfilled.

3.8 - The transplantation of gonads (ovary or testis) should be prohibited.

3.9 - Removing and reusing artificial organs without consent or other lawful authority should be forbidden.

3.10 - Commercialization of human organs and tissues should be prevented, if necessary by penal sanctions. In particular, national and international measures should be adopted to prevent the utilization of organs and tissues obtained through the exploitation of the economic needs of the donors or their relatives.

4. Artificial human reproduction*

4.1 - Many of the legal questions which arise in connection with medically assisted procreation (artificial insemination, in vitro fertilization, embryo transfer, surrogate motherhood) are still to be resolved in many countries. This applies to questions of family laws (such as parent-child relationship in cases of gamete donation or the duty of maintenance of donors), to the eventual right of a person to know his or her own ancestry, and to the status of the embryo (see 5.2.). Consequently, the question as to how far criminal sanctions might be necessary in this area - at least so far as the system of artificial reproduction by donor is concerned - is still open in most countries. To the extent possible, international accords should be reached in solving these problems.

4.2 - Bio-medical techniques in pursuance of human reproduction are not legally impermissible per se. While some hesitation is therefore advisable, there could be certain techniques which may require penal sanctions. Any necessary regulations, however, should be differentiated on

* During the final session, the Egyptian national group made reservations with reference to sections concerning heterologous insemination, since the procreation of a child by any other person than the husband is contradictory to basic principles of Islamic Law. The chair of section II, however, pointed out that the resolution passed does not preclude a prohibition of certain methods for medically assisted reproduction.

the basis of the peculiarities of the various reproductive techniques and take account of the biological knowledge of the beginning of human life.

4.3 - In areas of reproductive medicine, penal provisions should, if used at all, be directed only against activities on the impropriety of which a broad social consensus exists.

4.4 - If necessary, prohibitions by criminal law should be supplied by introducing certain procedures and duties of documentation, the violation of which should at least carry with it ethical or administrative sanctions.

4.5 - Regulations and sanctions ranging up to penal provisions may, in particular, be found necessary to deal with these subjects:

- The protection of significant interests of children who are procreated by way of reproductive medicine, in particular interests such as (and in accordance with the national law of adoption) the right of not being cut off from any possibility of learning of his own ancestry.
- Safeguards of minimal standards for gamete donation, in particular through the duty of informing about characteristics which might be relevant for the health of the recipient and her offspring.
- Prohibition of conserving gametes or embryos beyond a certain period.
- The restriction of post-mortal fertilization.
- The prohibition of extracorporeal cultivation of embryos beyond the development stage reached by natural nidation.
- The prevention of trade in gametes and embryos and of a commercialization of pregnancies by so-called surrogate motherhood including advertisement directed at such arrangements.
- Safeguarding the rights of self-determination of all parties involved (including gamete donors) as well as of the freedom of conscience of the physician.
- The prohibition of producing embryos for purposes other than for human procreation.

4.6 - The professional's duty of confidentiality must also be complied with in the area of medically assisted procreation. Any rights or duties of disclosure, as they may be determined by the interests of the child concerned, should be expressly regulated.

5. Research with and on living embryos

5.1 - Apart from the more or less extensive abortion legislation enacted in most countries, special legal protections for the fertilized egg between conception and nidation (that is the point at which the embryo is fully embedded in the uterus) are lacking. As a result, researchers may do what they wish with extra-corporeally produced embryo that have not been implanted. They may simply allow them to die or remove them, for example by washing them away or using them for experimental purposes. The same freedom applies to embryos which have been removed from the woman before nidation is completed. If there exists ethical guidelines

on the interference with human embryos at all, usually they cannot be enforced or their breach sanctioned legally. This situation of under regulation is not satisfactory.

5.2 - The basis and scope legal protection of the as yet unimplanted human embryo depend to a great extent on the "moral status" attributed to it. Although no universal agreement exists on the issue of its moral status, and the international discussion is still going on, there is unanimity that -whatever may be said of possible restrictions- in principle human life is worthy of being protected from the very moment of conjugation of gametes, without regard to whether the early embryo has to be considered a "person" or as a being possessing its own fundamental rights.

5.3 - To the extent that an intervention with the embryo serves its own well-being as a therapeutic treatment, no particular legal objections can be made. In this case the rules for therapeutic research (see above 2.2.) are applicable. The rights and interest of other concerned parties, particularly those of the pregnant woman, are to be respected.

5.4 - On the other hand, very different opinions are expressed on the issue of non-therapeutic research on embryos.

- It is generally preferred that the production of embryos, for the sale purpose of research be subjected to state prohibition, if necessary by penal measures.

- It has been held desirable not to fertilize more human ova than needed for a single treatment.

- Apart from that, it is the prevailing opinion that manipulation of an embryo resulting in its intentional or unavoidable death is in any event admissible only if the embryo cannot be implanted in due course, if the research goal is strictly defined and oriented to achieve high ranking gains, which cannot be accomplished other than by research on human embryos, and if the embryo is not developed beyond the normal stage of nidation. This requirement, however, does not imply any assessment whether there are any present, research goals which would comply with the mentioned preconditions.

5.5 - Any sort of "ownership" or property rights of gamete donors in embryos is to be denied. This does not exclude the possibility of having to obtain the consent of the donor to authorize research on an embryo to which he or she is related.

5.6 - Manipulation of an embryo has to be subjected to special regulations setting out conditions and procedures. To the extent that this cannot be done by ethical rules and by safeguards against breaches (for instance by way of preventive control through ethics commission - see above 2.5.), penal law and its enforcement mechanisms should be taken into consideration.

6. Interference with human genotype (genome analysis, gene therapy)

6.1 - The inviolability of genetic inheritance against artificial intervention should be protected by law.

6.2 - The limits of permissible interventions into human inheritance have to be settled by law. There is a need not only for special regulations to protect the individual against non-

therapeutical application of such treatment but also to preserve public health interests. This especially concerns the protection of the environment against pollution possibly caused by biotechnological experiments.

6.3 - The use of prenatal genetic diagnosis should be limited to the suspicion of genetic diseases which appear to be particularly dangerous for the further pre - or post-natal development of the embryo.

Employing prenatal screening to determine the embryo's sex for the purpose of an abortion that is not justified by medical reasons has to be rejected. Medical advice on the basis of a prenatal diagnosis is to be restricted to dangers threatening the health of the expected child. The required consent of a pregnant woman to prenatal screening is not to be made dependent on her willingness to a later absorption of the damaged child.

6.4 - While doing epidemiological tests on genetic damage, genetic diagnostics including the documentation related to the individual can only be used (if at all) if the test has a clear medical goal and the collected genetic information is reliably safeguarded from misuse. It is necessary that the person has consented upon full information before such tests are done. The same is true for all further collection, storage or use of genetic information.

6.5 – Special legal protections should be introduced to guarantee data privacy and to prohibit wrongful discrimination (for example in employment and insurance) on the basis of genetic screening or analysis, and (if necessary) these protections should be supported by criminal law.

6.6 - The use of genetic diagnostic techniques as instruments of forensic medicine should be regulated by legislation.

6.7 - There is no reason now to limit gene transfer in somatic cells for therapeutic purposes, so long as the rules provided for medical treatment are adhered to (see above 2.2.).

6.8 - Gene transfer to germ line cells for other than therapeutic purposes is unacceptable without exception. Moreover, gene transfer into the human germ line must be forbidden until the reliability and the safety of the germ line therapy have been proved by prior somatic cell therapy and animal tests. This research moratorium must at least be ensured by professional guidelines and/or administrative approval restrictions.

6.9 - Cloning experiments on human beings must be made criminal.

6.10 - Experiments aimed at developing hybrids and chimera creatures by means of karyogamy of human cells with those of animals must be criminalized.

Section III. The relations between the organization of the judiciary and criminal procedure

There is an interdependence between the rules of criminal procedure and the organization of the judiciary which merits closer attention on the part of the researchers, both to doctrinal and empirical issues. Whenever consideration is given to modifying one or the other area, the legislator should bear this interdependence in mind. In making the adaptations, one must be particularly careful to maintain an equilibrium between protecting the fundamental rights of the parties and the efficiency of criminal justice.

1. The infrastructure of criminal justice

In order to better achieve the goals pursued by the administration of criminal justice, states must increase their financial resources and modernize their technical equipment. It should be noted that such economic measures regarding the administration of justice are to be directed towards qualitative improvement to the administration of criminal justice. For example, it would be impermissible to restrict the principle of collegiality for financial reasons.

2. The authorities and their function

2.1 - *The nomination and training of professional judges.* The quality of criminal justice, that is to say the capacity of the organs of criminal justice and of the rules of criminal procedure to achieve the principal objectives of the criminal process depends in large measure on the personal position and the professional qualifications of the judges.

It is therefore desirable that states

- direct their efforts in order that the selection, nomination, remuneration and conditions of work of the judges ensure to the fullest extent possible the acquisition of the requisite professional knowledge as well as the continuity of their professional education.
- adopt at the same time institutional (such as the Conseil Supérieur de la Magistrature) and procedural measures adequate to ensure, among other things, the independence and impartiality of the judges.
- ensure equality of treatment of all, without any discrimination based in particular on sex, in respect to entry into and treatment within the judicial profession.

2.2 - *Popular participation in the administration of justice.* The institution of popular participation in the administration of criminal justice, in the different forms in which it is found in different systems of criminal justice appears to be strongly anchored in their legal traditions and in their constitutional and political structures.

It would be desirable that jurisdictions of this sort apply all the ordinary rules of due process, including the right to appeal.

2.3 - *Specialized courts*. The establishment of specialized courts* is acceptable when their purpose is to improve the quality of justice which they dispense without, however, abandoning the guarantees of due process.

Special "ad hoc" courts are forbidden.

2.4 - *The Supreme Tribunal*. The different systems assign to the supreme courts, on the one hand, control over proper application of the law and the safeguarding of individual guarantees and, on the other hand, the implementation of a uniform interpretation and –if possible– evolution of the law.

Whatever may be the type of supreme court -court of cassation for the control of legality or ultimate appeal court (jurisdiction of the third degree in the French sense)- a contemporary and widespread phenomenon is that of an excessive judicial workload which affects numerous supreme courts and has a tendency to compromise their effectiveness.

In this respect it would be desirable if the legislator, having regard to the values contained in the constitutional system, proceeded to elaborate solutions to this problem, always respecting the essential task of the supreme court. Among these solutions one could envisage modifications in procedure or in substantive law (e.g. rejecting manifestly ill-founded appeals *ex officio*, or suspending periods of prescription applicable to criminal procedure), in the organization of the judiciary (e.g. introducing a filtering chamber), in the activity of the bar (e.g. specialization by advocates) and also the improvement of the assistance placed at the disposition of the judges (qualified auxiliary personnel, for example, research assistants) and modern equipment.

2.5 - *The prosecution service*. In a spirit of impartiality and objectivity, the prosecution service must comply fully with its double role as guarantor of the application of law and as promoter of criminal process.

In countries having such a possibility, the prosecution service can receive general directives of criminal policy. However, with regard to specific cases the prosecution service must exercise the administration of criminal justice in full independence.

In order to ensure the equal treatment of persons involved in the criminal process and of coherence in respect of action taken by the prosecution service, it would be desirable for the prosecution service to elaborate guidelines inside the institution.

* This resolution does not relate to juvenile courts, due to their specific nature.

2.6 - *Examining the sufficiency of the case.* The judiciary must protect the individual against illegal or unjustified indictment. This goal can be reached, for example, by establishing a judicial organ of indictment.

2.7 - *The defense.* Every person has the right to effective assistance of counsel in all phases of criminal procedure, from the very beginning of an investigation.

In order to guarantee the effective application of this right, assistance financed by public funds must be granted to an accused or a victim who lacks adequate financial means to defend himself, as it is required in the interest of proper administration of justice.

2.8 - *Investigative organs and judicial authorities**. In large measure the quality of criminal proceedings depends upon the quality of the organs entrusted with the investigation of crime and the research which they undertake.

It would therefore be desirable that each state pay particular attention to the recruitment and to the training of such personnel, to the provision of necessary equipment, and to the specification and regulation of the activities of such organs in order to ensure their effective operation and in order to safeguard the rights and interests of persons involved in the criminal process.

It is necessary that the organs operate under the direction and control of the prosecuting or other authority exercising judicial functions.

Any restriction of the fundamental rights must be put under the control of a judicial authority.

3. Differentiations and specialization in criminal procedure

The different forms of criminality, among which are: organized crime, economic crime, petty offences, and international and transnational crime, necessitate a revision of the system of relations between judicial organizations and criminal procedure in order to better ensure the prevention and control of crime.

In order to achieve the above goals consistent with the norms contained in the constitutions of different states and with fundamental human rights, it is desirable to take all necessary measures in order to deal effectively with:

- organized crime by "organized justice" coordinated with all the relevant organs of the state;
- economic criminality with an adequate degree of specialization at the relevant operational levels;
- petty offences with a balanced adaptation of means to ends adopting among other solutions procedures and measures as alternative to those traditionally employed in criminal justice;

* This includes prosecution services organized on the Anglo-Saxon model.

- international and transnational crime by the intensification of ancient and new forms of cooperation among states, crossing the barriers posed by considerations of national sovereignty, and by the development of new principles of international criminal law (*civitas maxima*).

Section IV. International crimes and domestic criminal law

Recognizing the endeavors of the United Nations and the Council of Europe, the International Association of Penal Law (A.I.D.P.), the International Law Association (I.L.A.) and many individual scholars to codify international crimes in order to assure their prevention, prosecution and their repression, as well as the procedural guarantees, especially those formulated in international conventions on human rights.

Taking into consideration besides others:

- the Nuremberg principles as formulated by the International Law Commission (I.L.C.),
- the Vienna Convention of 1969 on the Law of Treaties (articles 60, 64),
- the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (General Assembly Resolution 40/34),
- the Draft Code of Offences against the Peace and Security of Mankind as prepared by the I.L.C.,
- the League of Nations and the Draft Statutes for an International Criminal Court,
- the Drafts for an International Criminal Code and a Statute for an International Criminal Court, prepared by the "Foundation for the Establishment of an International Criminal Court" (Wingspread),
- the Model International Code presented by the A. I. D. P. 1925 and 1935 to the U. N. as well as its predecessors,
- the draft elaborated by the I.L.A., especially the Statutes for an International Commission of Criminal Inquiry and for an International Criminal Court (with five additional protocols),
- the latest report of the I. L. C. for the revision of the Draft Code of Offences against the Peace and Security of Mankind, and all private proposals to codify international crimes and to draft a statute for an International Criminal Court.

The participants of the XIVth International Congress on Criminal Law in Vienna 1989 adopt the following resolutions:

Part I: Efforts to recognize and to codify international crimes

1. In order to make international criminal law as effective as possible, international crimes should be divided into two categories, international crimes *stricto sensu* and *lato sensu*.

1. The first category should be defined as follows:

a) Such crimes shall be recognized by the international community according to the rules generally accepted for the creation of international law. Accordingly, direct criminal responsibility of individuals is based only on this recognition:

b) International crimes *stricto sensu* should be limited to violations of the highest values of the international community; if these requirements are met, other international crimes of the first category may be recognized in addition to those existing already.

2. The second category (international crimes *lato sensu*) could embrace international crimes which are recognized by rules of the international community not necessarily generally accepted and which deal with violations of values, the protection of which requires the cooperation of the states concerned.

The responsibility for such crimes is based on domestic law.

3. Heads of state and state officials are not excluded from criminal responsibility for international crimes. Neither the interest of a state nor any domestic legislation can justify international crimes *stricto sensu*.

The defense of having acted in compliance with superior orders shall excuse only this order if not manifestly illegal.

4. An international criminal court should be established by the international community in order to adjudicate international crimes *stricto sensu*. Nevertheless the states can request this court to also adjudicate cases concerning other international crimes falling within their jurisdiction. This proposal includes the possibility of the creation of a regional international criminal court.

Part II: Legal problems emerging from the implementation of international crime in domestic law

1. At present, the prosecution of international crimes is only possible before national courts (indirect enforcement model).

2. The states-parties to international conventions containing penal provisions should make all necessary efforts to incorporate these provisions into their domestic legislation. At the present stage of the development of international criminal law, the transformation of conventional provisions into domestic law by a specific act of national legislation is the most appropriate method. However, the direct application of international conventions is not excluded if they contain provisions of a sufficiently precise character.

3. The most important obligation resulting from international conventions containing penal provisions is to criminalize certain acts in domestic law. The explicit criminalization by creating new criminal provisions is the best method to fulfill this obligation. In doing so and as far as war crimes are concerned at least the "grave breaches" of the Geneva Conventions should be expressly formulated in domestic law.
4. The special character of the international crimes should not result in different principles of criminal liability. The special character of international crimes *stricto sensu* justifies that they are not subject to statutory limitation.
5. States should avoid jurisdictional gaps with regard to international crimes. However, multiple prosecutions before domestic courts of different states for the same offence should be avoided by the international recognition of the principle of *ne bis in idem*.
6. International cooperation in matters of international crimes should be improved. For example, the absence of a treaty, the absence of reciprocity, or the nationality of the offender should not be obstacles to such cooperation.
7. The improvement of international cooperation should not be to the detriment of the rights of the defendant. In particular, his rights under international human rights conventions should be respected.
8. The victims of international crimes, in particular those committed through abuse of power, should be assured access to justice, for example by giving them the possibility of initiating criminal proceedings.