

# Roundtable

## **The Significance of International Human Rights for Criminal Procedure**

STEFAN TRECHSEL\*

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## INTRODUCTION

The significance of international human rights for criminal procedure has become stronger in recent years. The guarantee of human rights in criminal procedure promises to both victims and defendants relief and justice. A great many of international and domestic courts, including the Taiwanese Constitutional Court, have often resorted to international human rights to provide procedural and substantive due process for criminal defendant. National Taiwan University College of Law is honored to have Professor Stefan Trechsel of Criminal Law and Procedure at the University of Zurich, who is also serving as *Ad Litem* Judge at the International Criminal Tribunal for the former Yugoslavia, to discuss this important issue. Based upon the case law of the European Court of Human Rights, Professor Trechsel discusses the right to a fair trial, the rights of the accused, and a few other fundamental issues related to criminal procedure. His insightful discussion surely sheds a new light on our understanding of the relevance of international human rights to the criminal procedure.

### I. OPENING REMARKS

#### PROFESSOR YU-HSIUNG LIN

Good afternoon, everyone. Today we are greatly honored to have Professor Stefan Trechsel of Criminal Law and Procedure at the University of Zurich, who is also serving as *Ad Litem* Judge at the International Criminal Tribunal for the former Yugoslavia, to deliver his speech for us. The title of his speech is “THE SIGNIFICANCE OF INTERNATIONAL HUMAN RIGHTS FOR CRIMINAL PROCEDURE.” Before his speech, I would like to briefly introduce him for you. As an expert in criminal law and procedure, Professor Trechsel has worked in many places. He served as a counsel in proceedings before Swiss Federal Criminal Court, a judge of the International Court of Justice, President of the European Commission of Human Rights from 1995 to 1999 and as an international expert for the reform of criminal procedure in Bulgaria, Russian Federation, Kosovo and Tajikistan. Based upon these experiences, he indeed stands in a better position to analyze various issues relating to domestic and international criminal law and procedure.

Besides these experiences in legal practice, Professor Trechsel also made a great many academic contributions to criminal law and procedure. He is the author of six books in English and German and of approximately a hundred articles in law journals in German, English, French, Portuguese and Italian. Of particular mentioning among his many publications is the one

entitled “Human Rights in Criminal Proceedings”, which bears a close relationship with our discussion today. I chose this book as the required reading material in my class. This book not only benefited me, but also helped my students understand issues relating to criminal law and procedure in the European Court of Human Rights. Thus, I appreciate Professor Trechsel very much for his wonderful academic works. Now I would like to invite Professor Trechsel to begin his lecture. Professor Trechsel, please.

## II. SPEECH

### THE SIGNIFICANCE OF INTERNATIONAL HUMAN RIGHTS FOR CRIMINAL PROCEDURE

#### A. JUDGE STEFAN TRECHSEL

##### 1. *The Importance of Human Rights in Criminal Proceedings*

Good afternoon, dear colleagues, I learned that this is your first lecture this term on criminal procedure. The influence of international human rights on criminal procedure is a new subject, and I find it befitting that at this starting point of your journey into the law of criminal procedure you are already made acquainted with the fact that the international influence on this branch of the law is felt at every step. I thank my colleague, Professor Yu-Hsiung Lin, for his very friendly introduction. He seems to have read with great attention and deep understanding some of the things I have published in this field, but I assume that this is not yet the case with you, dear students. I shall try to introduce you to this topic by giving you some information on salient issues, but sparing you the more intricate details. It would make me happy if I could succeed in quickening your appetite for more.

Why are human rights so important in criminal proceedings? What is so special about this field? If you analyze what happens when a person is pursued under the suspicion of having committed a crime, you will find that such a person enters in a more intimate contact with state power than in any other judicial or administrative field. Take, for example, arrest and detention. A long time ago I served for a short while as an investigating judge. In this function I had to decide whether suspects were to be arrested and held in detention on remand or not. It was a very impressive experience. A person arrested is suddenly torn from his or her ordinary life – it almost amounts to social death. You may have to arrest someone who is in fact innocent. This is what the administration of evidence may establish. Therefore, it is very important that procedural guarantees are respected and that the suspect is not

dealt with as if he or she were guilty. This is where human rights come in – they serve the purpose of reducing the risk of harming someone beyond what is strictly necessary for the purposes of the proceedings.

Let me comment briefly on that risk. In most police corps around the world there are elements that must be labeled thugs. Relatively brutal and aggressive people, generally male, who will be tempted to intimidate or harm defenseless detainees. However, this ought to be quite exceptional. The real problem arises with officers who are eager to succeed, i.e., to find out the truth. They may believe that the suspect is guilty, at any rate, that he knows more than he has revealed. They may be tempted to overstep limits in order to get him talking. A typical example can be found in the case of *Gäfgen v. Germany*<sup>1</sup>: Gäfgen was (rightly) suspected of having kidnapped a child and revealed the location of the latter under threat of being beaten.

In addition, another issue is the importance of procedural justice. In the criminal procedure, one can distinguish two aspects of justice: one is procedural justice, the other is outcome justice. Outcome justice means that the judgment is correct as to the facts. It is my belief that procedural justice is more important, because it can be controlled by judges.

The issue of substantive justice is whether the defendant is guilty, i.e., whether the crime alleged has been committed, whether the accused has realized all objective elements of the crime (*actus reus*), whether he had the required knowledge and intent (*mens rea*) and whether he was actually guilty, i.e., whether he could have decided to act in accordance with the law. This is not a description of what has actually happened in his mind, but an ascription – the judge decides whether these requirements are met. In doing so, he depends on the evidence which must be examined with great care, keeping in mind the presumption of innocence.

While the substantive aspect of criminal justice is undoubtedly of great importance, the protection of human rights is almost entirely focused upon the area of procedural justice. An accused who was convicted while considering himself to be innocent will naturally want to go before a court of human rights and shout: “Help! I have been convicted, but I am innocent.” Alas, this is not possible. International courts cannot repeat, like an appeals tribunal, the whole administration of evidence and arrive at a new judgment on the merits. Nor can it re-examine the question of whether the punishment is proportional. It can only examine whether the rights of the accused in criminal proceedings have been respected. Therefore, the accused will have to shout: “Help! My proceedings were not fair.” He will do this even if in fact he feels aggrieved by what he considers to be a wrongful conviction, because it is the only argument that will be heard.

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1. *Gäfgen v. Germany*, App. No. 22978/05 (2010), Eur.Ct.H.R. (GC).

Having realized that human rights have a certain, although somewhat limited relevance in the administration of criminal law, the next question would be: What are the rights that are important for criminal procedure? There are quite a number of such internationally guaranteed rights. Many of them are related to the fundamental right to a fair trial. This right guaranteed in Article 14 of the International Covenant on Civil and Political Rights of 1966, which now is the law of Taiwan as it has been integrated into the Taiwanese law<sup>2</sup>, and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>3</sup>

Then, there is the prohibition of torture, ill-treatment, cruel and inhuman treatment which is universally accepted and binding on for all states, irrespective of whether they have or have not ratified the relevant Conventions. In the terminology of international public law it is considered *ius cogens*. While today most states prohibit torture, unfortunately the practice is far from having disappeared – suffice it to read the reports of organizations such as *amnesty international* or Human Rights Watch.

Another very important right is the right to personal liberty, I have already mentioned arrest and detention as set out in Art. 9 of the ICCPR and 5 of the ECHR. The essence of that right is not so much that it limits the possibility of deprivation of liberty, but that it contains a number of important safeguards for persons who have been arrested.

Furthermore, the right to privacy may be at issue. This right has several aspects including the protection of the home, and of confidential communications by correspondence, telephone, e-mail or other means. As with personal liberty, the protection is not absolute, but interference must be according to the law and assorted by specific guarantees.

Finally, the European Convention for the Protection of Human Rights and Fundamental Freedoms also protects the right to property on which the states could not agree on the level of the United Nations. The link to criminal proceedings is evident, e.g., in connection with seizure or the blocking of assets when there is a suspicion that they are the proceeds of crime.

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2. “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. [...]” International Covenant on Civil and Political Rights, art. 14, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]. 42 years after the signing of the ICCPR, the Legislative Yuan of the Republic of China (Taiwan), on 31<sup>st</sup> March, 2010, adopted the Act Governing Execution of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Article 2 of that act prescribes that the provisions of the two covenants have the legal status of domestic law.

3. “In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. [...]” European Convention for the Protection of Human Rights and Fundamental Freedoms, para. 1, art. 6, *opened for signature* Nov. 4, 1950, 312 U.N.T.S. 221 [hereinafter the European Convention or ECHR].

2. *The Scope of Application of the Right to a Fair Trial in Criminal Matters*

(a) The Meaning of the Term “Criminal Charge”

The first issue I would like to address is the question as to what are criminal proceedings? Fair trial rights in the sense of article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>4</sup> are guaranteed to a person in proceedings aimed at determining a “criminal charge” against him; what does this really mean? At first sight, the question may not reveal its interest, but it has given rise to fierce controversies. A number of states have (or had) in their legislation various systems for sanctioning misbehavior. Special rules may apply to petty offences, violations of fiscal law or disciplinary proceedings against civil servants or the military. Another issue is whether the rules of fair trial apply throughout the proceedings, including preparatory investigations and appeals or only to the trial itself. I shall only give two examples.

(b) The Difference between Criminal and Disciplinary Matters

There can be no doubt that a number of elements distinguish disciplinary matters from criminal matters. The European Court had to deal with a number of cases – not only concerning disciplinary matters, but I shall limit my comments to these – where the rules of fair trial had not been respected and the government of the state argued that the guarantee did not apply in the first place. What, then, is the difference between the two systems of sanctioning? In the first place, the Court said something very important: The distinction cannot be based simply on the terminology of the domestic legal order. It would not be acceptable that a country could label certain proceedings as disciplinary and thereby deprive the accused of the protection afforded by the Convention.

The leading case on the issue is *Engel and Others v. The Netherlands*.<sup>5</sup> It concerned soldiers accused of having violated disciplinary rules. In this case, the disciplinary proceedings for soldiers were not in line with the guarantees for persons under a criminal charge. The soldiers complained to the ECtHR of various violations of the Convention, but the Dutch government objected that those rules were not applicable at all due to the disciplinary, i.e., non-penal character of the proceedings. This led the Court to develop criteria which would allow to draw the distinction between a disciplinary and a criminal charge. It identified three criteria.

The first is the classification of the offense under national law. If the

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4. “In the determination of his civil rights and obligations or of any criminal charge against him [...]” Art. 6, the European Convention, *id.*

5. *Engel v. Neth.*, App. No. 5100/71, 5101/71, 5102/71, 5354/72 & 5370/72, 1 Eur. H.R. Rep. 647 (1979-1980).

misbehavior concerned is classified as criminal in domestic law, it will never be disciplinary under the Convention; however, the reverse is not true – the fact that the act is labeled a disciplinary offence does not automatically exclude the right to fair trial. If it were otherwise, the domestic legal order could manipulate the applicability of the right to a fair trial and exclude it arbitrarily. This would not only weaken the effect of the guarantee but also create an inequality between different states.

The second point concerns the character of the offence. Is it a rule which is binding in the same way for everyone? Or does it form part of a regulation addressed at a specific class of people such as civil servants, policemen, soldiers, or students? This is an essential point. The state legitimately demands that everyone respects the law, it does not exercise disciplinary control over citizens unless they are in a special position, subject to specific duties.

The third element is the most important, it concerns the severity of the sanction, the gravity of the punishment incurred, not that which was actually imposed. There is quite a number of cases dealing with this question, but I shall limit myself to the essential finding that any sanction involving deprivation of liberty reaches the degree of severity that qualifies the offence as “criminal” within the meaning of Art. 6 ECHR, even if it is labeled “disciplinary” in domestic law.

Similar problems arose with other types of misbehavior in the vicinity of the core criminal law – I do not have the time to elaborate further.

(c) An Autonomous Notion of “Charge”

The guarantee of a fair trial is to protect everyone “charged” with a criminal offence. The term “charge” can be given a substantive and a formal meaning. Criminal proceedings are at first directed against a suspect against whom an investigation is carried out by the police, an investigating judge or the public prosecutor. Once the investigation is terminated, an authority, normally the prosecutor’s office, will decide whether the suspicion is supported with enough evidence to bring the accused to trial. At this moment, an indictment is drafted. However, there are also systems under which a charge is drafted before the investigation against the accused really begins. Again, if the formal notion of “charge” were followed by the Court, there would be no general rule on the application of the guarantee, it would depend on the specific legal order. It follows that the Court must develop an autonomous notion of “charge”.<sup>6</sup> In fact, someone is charged, in the sense of the Convention, as soon as this person is “substantially affected” by criminal proceedings.<sup>7</sup> When is someone “substantially affected”? Generally, when

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6. *Adolf v. Austria*, 4 Eur. Ct. H.R. (ser. A) 313, 322 (1982) (“These expressions [‘criminal charge’ and ‘charged with a criminal offence’] are to be interpreted as having an ‘autonomous’ meaning in the context of the Convention and not on the basis of their meaning in domestic law.”).

7. *Corigliano v. Italy*, 5 Eur. Ct. H.R. (ser. A) 334, 342 (1983) (“[C]harge”, for the purposes of

he or she is arrested, or officially told “you are a suspect”.<sup>8</sup> However, these are only two indicia. A person is also “substantially affected” when other actions are taken by state organs, such as a search of his house or office, or any other condition which creates the feeling that he is under suspicion.<sup>9</sup> From that moment on, the person concerned is “charged” in the sense of the Convention.<sup>10</sup>

A leading case is *Can v. Austria*.<sup>11</sup> The main issue was whether an arrested person under suspicion of arson has the right to talk to his lawyer in private? The Austrian authority said: “No. You are still under investigation. Because you are not charged yet, you can not talk to your lawyer.” The European Commission of Human Rights and the Court said that Mr. Can was definitely charged, because he was very strongly affected by the suspicion against him. The rights of the defendants do not only begin after the end of the investigation, the proceedings must be regarded as a whole.<sup>12</sup>

### 3. *The General Fair Trial Guarantee*

Article 6 of the Convention has an interesting structure.<sup>13</sup> It sets out a

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Article 6(1) [...] may in some instances take the form of [...] measures which [...] *substantially affect the situation of the suspect.*”) (emphasis added).

8. *Deweere v. Belgium*, 2 Eur. Ct. H.R. (ser. A) 439, 459 (1980) (“The ‘charge’ could, for the purposes of Article 6 (1), be defined as *the official notification* given to an individual by the competent authority of an allegation that he has committed a criminal offence.”) (emphasis added);

9. *Eckle v. Germany*, 5 Eur. Ct. H.R. 1, 27-28 (1983) (“[A]lthough the investigation does not appear to have been directed against Mrs. Eckle from the outset, she must have *felt the repercussions* to the same extent as her husband.”) (emphasis added).

10. *See also Serves v. France*, 28 Eur. Ct. H.R. 265, 283 (1999) (Considering the specific inquiries of the authorities, “the Court accepts that when Mr. Serves was summoned to appear as a witness and fined under Article 109 of the Code of Criminal Procedure, he could be considered the subject of a ‘charge’ within the autonomous meaning of Article 6(1).”).

11. *Can v. Austria*, 8 Eur. Ct. H.R. (ser. A) 14 (1986).

12. *Can v. Austria*, App. No. 9300/81, Eur. Comm’n H.R. (1985) (¶ 45: “[T]he compliance with the requirements of fair trial must be examined in each case having regard to the development of the proceedings *as a whole* and not on the basis of an isolated consideration of one particular aspect [...]”) (emphasis added); *Can v. Austria*, *supra* note 11, 18-19 (confirming the Report of the European Commission of Human Rights on this point).

13. Article 6, the European Convention, *supra* note 3. (Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
  - a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
  - b. to have adequate time and facilities for the preparation of his defence;

number of guarantees for both civil and criminal trials which I shall come back to later. Paragraph 2 is a separate guarantee, the so-called presumption of innocence. In the third part there are a number of guarantees which specify the notion of fair trial. The Convention asserts that someone who is accused is guaranteed *in particular* these rights. The list is not conclusive or complete. Actually, the Convention speaks of *minimum* rights: the right to be informed of the charge, the right for adequate time and facilities for the preparation of defense, the right to be assisted by a counsel (which is itself structured in a complex way), the right to summon witnesses and to examine witnesses under the same condition as the prosecutor, although it is not a right to proper cross examination, and the right to have the services of an interpreter, if needed, free of charge.

The Convention was passed in the 1950s. It is the oldest of its kind. Work on the International Covenant on Civil and Political Rights began at the same time within the framework of the United Nations. Actually, a number of influential personalities worked on both texts, but, understandably, it took more time to reach global agreement, therefore it was only in 1966 that the Covenant was adopted. The additional time, however, was also used to complement the text. This explains that, later on, the European Convention had to be brought up to the same level, which was reached through the adoption of Additional Protocol Nr. 7. They are the right to appeal, the right to compensation for wrongful conviction, and the right not to be accused of the same offense twice (the guarantee against double jeopardy).

I shall now address some of the general rights first.

(a) The Right to an Independent and Impartial Tribunal

The first guarantee of Article 6 is that to be tried by an independent and impartial tribunal. This, my dear friends, is a guarantee of paramount importance. If the court is not truly independent and the judges are not impartial, the whole proceedings are flawed from the very beginning. If there is no independent and impartial tribunal, it is irrelevant whether the proceedings are fair or not. It is not possible to have fair proceedings if the tribunal itself is deficient.

Independence means that there should be no control by any authorities over the judges. No one has the authority to tell the judges how to judge. When the decision of a tribunal is made, all other authorities are bound by it.

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- c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
  - d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
  - e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.)

The independence of the court requires that the court's authority be respected by all, including the highest political power.

How is this independence assured? There is a plethora of elements in the service of this value. One important point is (you hear a judge speaking!) that judges should be *properly* paid. They must be economically independent so that they are not seduced to take bribes.

Let me tell you a little anecdote: When Georgia applied for membership of the Council of Europe, I was one of the Jurists mandated to file a report on the respect for human rights in that country. Having heard complaints about the corruptibility of judges, I raised this issue in our final meeting with the then President of Georgia, Edward Schewardnadze. He smiled broadly and started saying: "Oh yes, I know, there are one or two ... " Having heard such replies before, I expected him to continue by saying that there were a few black sheep, but ... Instead, he continued "... who are not corrupt, but they are the exception. In fact judges cannot by far cover their living expenses with their salary, so they are bound to have an additional income."

Another, more important issue is how judges are elected or appointed. There are many different systems around the world. For example, the appointment can be made by the head of state (e.g. upon the recommendation of a superior council for the judiciary, as in Italy or in France), or there may be election by the parliament (as for Judges of the Swiss Federal Court) or a popular referendum (a method popular in Switzerland which, however, I would definitely not recommend).

Another important element is tenure. For how long must judges enjoy job-security? Many think that judges must be appointed for life in order to be truly independent (nomination for life is typical for Germany, except for the Federal Constitutional Court, and also applies to judges of the Supreme Court in the United States). There are certainly some merits to this solution, but there are also disadvantages. It may be helpful to have a possibility of getting rid of judges who perform very badly and an age-limit is also acceptable. At any rate, it cannot be said that only nomination for life is required by international human rights' law.

Let me now address impartiality. Judges ought to approach cases without any bias; their decisions must be guided exclusively by legal considerations. A judge is not impartial if he or she prefers or rejects one of the parties involved. This is easily said and everyone will agree to it. You will often hear a judge saying that she or he is absolutely impartial. In reality, however, things are more complicated. We are all human beings, and

that includes judges. We all have emotions some of which may be hidden but have an influence on our thoughts and acts. I do not regard it as realistic to think that judges will always be really impartial – usually they will have certain feelings for or against a party. I find it very important for judges to develop a high degree of sensitivity, and the ability to ask themselves: what are my feelings in this case? Where are my sympathies and my antipathies? This will help him realize where the danger of bias lies and allow him to take that into account and at the same time remain careful not to overcompensate.

The Court distinguishes two aspects of impartiality: one it calls “objective”, the other “subjective”. Subjective impartiality means actual attitude of a judge, his psychological balance. The Court does not tire to repeat that in this respect impartiality is to be presumed. One example is *Remli v. France*.<sup>14</sup> In this case, the accused was of North-African origin; one of the jurors of the trial said during a break outside the court-room: “By the way, I’m a racist”. The Court held that it could not find bias in the subjective sense.<sup>15</sup> A different result was obtained in *Kyprianou v. Cyprus*,<sup>16</sup> which concerned a lawyer who was charged with contempt of the court because of a dispute with the judges during the trial. Here, the Court came to the conclusion that these judges were in fact personally offended by the criticism voiced by the lawyer. The judges obviously felt that there had been a lack of respect in their regard and that this might have influenced the decision in the contempt of court proceedings.<sup>17</sup>

The objective approach is far more important because it is hard to find a case where subjective partiality can be clearly recognized. The objective approach is called “*Anschein der Befangenheit*” (“appearance of bias”) in German, which is a fitting expression to mark the gist of this approach. Impartiality is already lacking if there are reasons for an objective observer to doubt the impartiality of the judge. In this context the Court likes to stress that “appearances matter”. I think this is a correct approach. In *Remli v. France*, the Court concluded that there had been a lack of impartiality because an objective observer would have been justified to conclude that the juror, being a self-declared racist, would have a bias against the accused.<sup>18</sup>

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14. *Remli v. France*, 22 Eur. Ct. H.R. 253 (1996).

15. “It is not for the Court to rule on the evidential value of Mrs M’s written statement or on whether the racist remark attributed to the juror in question was actually made.” *Id.* at 271.

16. *Kyprianou v. Cyprus*, 44 Eur. Ct. H.R. 27 (2007).

17. “[The judges in the present case] had been the direct object of the applicant’s criticisms [...]. The same judges then took the decision to prosecute [the applicant], determined his guilt and imposed the sanction [...]. [...] [T]he confusion of roles between complainant, witness, prosecutor and judge could self-evidently prompt *objectively justified fears* [...] as to the impartiality of the bench.” *Id.* ¶ 127 (emphasis added).

18. “[T]he principles [concerning] the independence and impartiality of tribunals [...] apply to jurors as they do to [...] judges. When it is being decided whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the accused is important but

In *Borgers v. Belgium*<sup>19</sup> the doubts concerning the impartiality of the Belgian *Cour de cassation* was triggered by an institutional rather than a personal particularity. When the Court was deliberating the case, a member from the *procureur général*'s office, the highest instance of the Prosecution, was present, but not a representative of the defense, in accordance with domestic law. The Belgian government claimed that the practice of this office was neutral, but the Court still found a violation of the requirement of impartiality because no other instance had opposed the applicant's appeal.<sup>20</sup> What was remarkable in *Borgers* is the fact that there had been a previous case, *Delcourt v. Belgium*,<sup>21</sup> which concerned exactly the same issue. In *Delcourt*, the Court had found no violation of the requirement of impartiality and had accepted the argument of the Belgian government.<sup>22</sup> In *Borgers*, the Court did not openly state that the decision constituted a departure from previous case-law, but it is not possible, in my view, to deny this fact.

(b) The General Elements of the Right to a Fair Trial

(i) The right to adversarial proceedings

There are two important elements in the notion of a fair trial which are very similar. One is the *adversarial character* of the proceedings and the other is *equality of arms*. The Anglo-Saxon system is not the only one to require that proceedings be adversarial, although it is in that system where the element is particularly visible as it is the parties which present their evidence. But in proceedings of the continental type there is also room for a dialectic process in which the defense has the possibility to object to every move of the prosecution.

A particularly impressive example for what the adversarial character of proceedings requires is to be found in the case of *Thorgeir Thorgeirson v. Iceland*.<sup>23</sup> The applicant was a journalist accused of libel. His trial lasted for seven days. He complained that the prosecutor had been absent for two days and concluded that, therefore, the trial had not been adversarial. The Court

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not decisive. What is decisive is *whether this fear can be held to be objectively justified*." *Remli v. France*, *supra* note 14 at 271.

19. *Borgers v. Belgium*, 15 Eur. Ct. H.R. (ser. A) 92 (1993).

20. "By recommending that an accused's appeal be allowed or dismissed, the official of the *procureur général*'s department becomes *objectively speaking* his ally or his opponent. In the latter event, Article 6 para. 1 (art. 6-1) requires that the rights of the defence and the principle of equality of arms be respected." *Id.* at 108 (emphasis added).

21. *Delcourt v. Belgium*, 1 Eur. Ct. H.R. 355 (1993).

22. "The fact that the *Procureur général*'s department at the Court of Cassation expresses its opinion at the end of the hearing, without having communicated it in advance to the parties, is explained by the very nature of its task as already described by the Court in pronouncing upon *Delcourt*'s principal complaint. Article 6 of the Convention does not require, even by implication, that an accused should have the possibility of replying to *the purely legal submissions of an independent official* attached to the highest court in Belgium as its assistant and adviser." *Id.* at 372 (emphasis added).

23. *Thorgeir Thorgeirson v. Iceland*, 1992 Eur. Ct. H.R. (ser. A) 51.

did not find a violation on this point, but it indicated clearly that in principle it agreed with the view that the presence of the prosecutor at the trial is a prerequisite of fair proceedings. In the present case, during the sessions held in the absence of the prosecutor, however, his presence was not required because the proceedings were limited to the reading of documents which the prosecution knew. Therefore the fairness was not impaired.

Why is it so important that the prosecution actively participates in the trial? The answer requires psychological thinking. The judge has to decide whether the accused is guilty or not. The starting point is the indictment – the accused will present arguments that cast some doubt on whether the facts are proven and whether they constitute an offence. Who is going to answer these arguments when the prosecutor is absent? One could imagine the judge simply to accept the non-contradicted allegations of the defendant. However, this is not what normally happens. The judge will, in his mind, develop counter-arguments which, however, will not come to the open. The judge is compelled, as it were, to wear two hats – that of a judge, but also, at least mentally, that of a prosecutor. That demands mental acrobatics – a judge cannot be expected to have such extraordinary psychological skills.

(ii) The principle of equality of arms

The principle of *equality of arms*, even more clearly than the adversarial character of proceedings, “smells” of the common law system of criminal procedure. One may think of a medieval tournament where the adversaries are on horseback, protected by armor, holding a lance. Of course, both lances must have the same length otherwise the holder of the shorter weapon may be swept out of the saddle before he even gets a chance to touch his adversary.

This is in fact a misleading metaphor. In criminal proceedings the parties are not equal at all. The prosecutor has the burden of proof and can request coercive measures to be taken against a suspect such as search and seizure, wire-tapping or arrest.

The Court has recognized this situation. In its jurisprudence equality of arms only means that the defense must have the possibility to fully present its case and not to be put at a substantial disadvantage vis-à-vis his opponent.<sup>24</sup>

(c) The Right to a Public Hearing

The defendant has a right to a *public* hearing. It is universally recognized that judges should not sit behind curtains or walls. There are, however, certain exceptions. Hardly controversial examples are cases concerning sexual offences where the victim must be spared from having intimate details discussed in public, or cases where it is necessary to protect

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24. Bulut v. Austria 1996 Eur. Ct. H.R. 10.

witnesses against possible reprisals by supporters of the accused, particularly in proceedings before international tribunals. The question of whether television ought to be allowed to report live from courtrooms is controversial – I am not very favorable to the issue.

Can this right be waived? I think the answer is “yes”. The further question is whether the defendant has a right to a non-public hearing. My answer is “no”, because it is not just the interests of the accused which are at stake, but also the interests of the public and the press. The judgment must always be read in public.

(d) The Right to Be Tried within Reasonable Time

This is a right that most of you must have heard about recently.<sup>25</sup> In practice, this right and the right not to be detained on remand beyond reasonable time are those which are most frequently invoked before the European Court. There are thousands of judgments on this issue. The guarantee of “speedy trial” is not confined to the trial proper, but covers the whole period of the proceeding, that is to say, from the very beginning of the defendant being *substantially affected* to the final judgment in last instance.

There are various criteria for the determination of whether the length of proceedings is reasonable. Generally, the decisive question is whether the authorities acted with the required diligence or, to put it the other way round, whether there were any unjustified delay.

There is no absolute time limit. Even if a case has lasted for eight years, this will not lead automatically to a finding of a violation. The Court will, however, assume that the length could be excessive and ask the authorities to explain the reasons for that length. Practically this amounts to a shifting of the burden of proof. On the other hand, there may be a violation even in cases which have lasted less than one year if nothing was done during the period.

4. *The Specific Rights of the Defense*

(a) The Right to be Presumed not Guilty

This is the right to be presumed innocent. I would like to discuss two special aspects of this guarantee as interpreted by the European Court. The first concerns cases of defamation.<sup>26</sup> When someone is accused of libel, there is usually enough evidence to show that the accused made a certain statement. If the statement concerns a fact, e.g., that the victim had behaved in a dishonorable way, the guarantee of freedom of expression (Art. 10 ECHR) will require that the accused gets the possibility to prove that what

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25. Around the time at which this speech was given, the Legislative Yuan of Taiwan passed the Criminal Speedy Trial Act.

26. *Lingens and Leitgeb v. Austria*, App. No. 8803/79, Eur. Comm’n H.R. (1981).

he has stated is true. It will be for him to bring the evidence which confirms his allegation, he bears the burden of proof. This seems to be in contradiction of the presumption of innocence, but this conclusion would be wrong.

By affirming that another person behaved in a dishonorable way, the author created the danger of damaging that person's reputation. It is only fair that, as a corollary to the freedom of speech, the person concerned establish the truth of his or her allegation.<sup>27</sup>

The second aspect I want to address in connection with the presumption of innocence concerns the scope of this right. It forms part of the rights of an accused in criminal proceedings. Obviously, its most popular emanation is that expressed in the Latin motto *in dubio pro reo*, if there is doubt, the decision must fall in favor of the accused. In a number of cases the question arose whether the protection also benefits persons which are not, not yet or not any more "charged with a criminal offence.

The answer is clearly positive. In fact, the European Court of Human Rights has gone a long way to strengthen this guarantee and give it a very broad scope of application. The leading case is *Minelli v. Switzerland*.<sup>28</sup> Ludwig A. Minelli, a journalist, had written about a business which had mailed to many persons a publicity which invited them to buy entries in a private telephone directory. The paper they sent around, however, looked similar to that sent out by the (public) telecommunications enterprise inviting recipients to pay their telephone bill. Many people in fact thought it was that bill and paid the sum claimed. Minelli told this story and claimed that the practice constituted fraud. Thereupon he was charged with libel.

However, the proceedings were stayed because another journalist had maintained the same allegation in another newspaper. The court wanted to await the outcome of the other trial. When the other journalist was finally convicted, the court resumed the proceedings. However, it found that the offence had become time-barred. Although it was not possible to prosecute Minelli in view of this development, the court decided that he should bear the cost of the proceedings and compensate the private prosecutor as, had it not been for the statutory limitation, he would most probably have been convicted. The Court in Strasbourg found that this was in violation of the right to be presumed innocent.

This judgment which was upheld in many similar cases leads to the

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27. "[In a defamation case the] burden of proof is, however, shifted to the defence as regards the establishment of the truth of the statement at issue. *This in no way means that the accused has to prove his innocence* because he can only be considered as innocent if he has not committed the offence. [...] What exculpates is not the objective truth of a defamatory statement, but ability to prove its truth. In this way the law intends to compel the author of such statements to make sure in advance that what is being said can also be proven as true, i.e. it imposes a particular standard of care on everybody who makes defamatory statements in the press." *Id.* at 178 (emphasis added).

28. *Minelli v. Switzerland*, 5 Eur. Ct. H.R. 554 (1983).

conclusion that an acquittal of second class is not compatible with the presumption of innocence. An acquittal is called “second class” when it expressly avoids saying that the accused is innocent and affirms in the operative part that he is acquitted for lack of evidence. You still find this in Italy, earlier on in was customary in many other countries. The second-class acquittal means that the accused is released under suspicion. However, the presumption of innocence means that unless an accused is acquitted, he or she is considered innocent.<sup>29</sup>

(b) The Right to be Assisted by Defense Counsel

Every accused has the right to choose a lawyer to assist him in his defense. If someone who does not have the means to pay for counsel and if his case is serious or complicated, and if the assistance is necessary in the interest of justice, he has the right to have legal counsel free of charge, which means normally at the expense of the state.

Of the various problems connected to the right to be assisted by counsel I wish to pick one for further discussion which is controversial, in particular in proceedings before the ICTY. If you look at the texts of Art. 6 (3)(c) ECHR, 14 (3)(d) ICCPR or 21 (4)(d) ICTY Statute, you find the same words<sup>30</sup>: The accused has “the right to defend himself in person or through legal assistance of his own choosing”.<sup>31</sup> If we focus on the word “or”, we come to the conclusion that there is a clear alternative, which would mean that there is a right to have, but also a right not to have the assistance of counsel. At the ICTY this is how this text is understood. In fact, there is not a clear alternative in the sense that even if an accused has retained counsel, he still has the right to play an active role in his defense, e.g. by personally asking questions to a witness.

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29. “[T]he presumption of innocence will be violated if, without the accused’s having previously been proved guilty according to law and, notably, without his having had the opportunity of exercising his rights of defence, a judicial decision concerning him reflects an opinion that he is guilty. This may be so even in the absence of any formal finding; it suffices that there is some reasoning *suggesting* that the court regards the accused as guilty.” *Id.* at 567 (emphasis added).

30. Art.14 (3) (d), ICCPR, *supra* note 2. (“To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.”); Art. 21 (4) (d), Statute of the International Tribunal for the Former Yugoslavia, (“In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:[...] to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it [...]”)

31. Art. 6(3) c, *supra* note 13. (“[Everyone charged with a criminal offence has the minimum rights] to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require [...]”)

I have come to the conclusion, shared, e.g., by the former Judge Wolfgang Schomburg,<sup>32</sup> that it is not a good solution to let an accused before an international criminal tribunal defend himself without the assistance of counsel. Most of the accused who avail themselves of this possibility are political leaders whose interests are not primarily focused on the proceedings but on the public at large, their own supporters who watch the trial on the internet or on television. While they may seem to address the Chamber, they in fact speak to their constituency. Instead of just asking questions, they comment and plead. They also need extra time to prepare for their defense. Furthermore, it is not true that they defend themselves alone – that would not be possible in these proceedings. They are assisted by persons outside (the control of) the Tribunal which, nevertheless, pays a considerable amount of money to support their defendants.<sup>33</sup> A detailed analysis of the case-law of the ECtHR reveals that under the Convention the state would be obliged to assign counsel even if the accused would prefer to have none.<sup>34</sup> However, this is not the prevalent view of the ICTY.<sup>35</sup>

More recently the ICTY has introduced in its Rules of Procedure and Evidence an amendment which provides for the assignment of counsel against the will of an accused in the interest of justice.<sup>36</sup>

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32. Prosecutor v. Krajišnik, Case No. IT-00-39-A, Decision on Momcilo Krajišnik's request to self-represent, on Counsel's motions in relation to appointment of amicus curiae, and on the Prosecution motion of 16 February 2007 (Int'l Crim. Trib. for the Former Yugoslavia May 11, 2007) (Schomburg, J., "Fundamentally" dissenting opinion); Wolfgang Schomburg, *The Role of International Criminal Tribunals in Promoting Respect for Fair Trial Rights*, 8 NW. U. J. INT'L HUM. RTS. 1, 16 (2009). See also PATRICIA M. WALD, TYRANTS ON TRIAL, KEEPING ORDER IN THE COURTROOM (2009); Alexander Zahar, *Legal aid, self-representation, and the crisis at the Hague Tribunal*, 9 CRIM. L. FORUM 241 (2008).

33. I want to report, however, that the Accused Zdravko Tolimir pursues his own defense absolutely correctly.

34. For the whole argument, see Stefan Trechsel, *Rights in Criminal Proceedings under the ECHR and the ICTY Statute - A Precarious Comparison*, in THE LEGACY OF THE ICTY 174 (Bert Swart, Alexander Zahar & Göran Sluiter eds., forthcoming May 2011).

35. Prosecutor v. Karadžić, Case No. IT-95-5/18-AR73.6, Decision on Radovan Karadžić's appeal from decision on motion to vacate appointment of Richard Harvey, ¶ 26 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 12, 2010) ("[T]he Statute does not provide an accused with the minimum guarantee of *both* the right to self-represent *and* the right to counsel of his own choosing; only the right to one *or* the other.") (original emphasis). Though the Tribunal did not allow the accused to exercise the right to self-represent and the right to counsel at the same time, it did view self-representation as a *right*.

36. Rule 45 *ter* (Assignment of Counsel in the Interests of Justice). "The Trial Chamber may, if it decides that it is in the interests of justice, instruct the Registrar to assign a counsel to represent the interests of the accused." Rules of Procedure and Evidence, IT/32/Rev. 43 (Int'l Crim. Trib. for the Former Yugoslavia).

### 5. *Measures of Coercion*

#### (a) The Protection of Personal Liberty

The protection of personal liberty is set out in more detail in the European Convention than in the Covenant. Article 5 (1) of the Convention sets out six different situations in which someone can be arrested or detained. Paragraph 1(c), arrest and detention based on the suspicion that the person has committed an offence, is relevant for the field of criminal procedure.<sup>37</sup> The arrest of the suspect must have the purpose of bringing him before a court which will try him.

There are consecutive stages of deprivation of liberty. The minimum interference which does not yet properly constitute a deprivation of liberty, is stopping someone in order to verify his identity and to check, as the case may be, whether he carries with him weapons or drugs. The first step in the course of criminal proceedings is the arrest which means that the suspect is stopped and taken into police custody. The police will try to find out whether it is justified to initiate an investigation. Within a short while the suspect must be brought before a judge or other officer authorized to exercise judicial power. In some European countries, France is an example, the suspect used to be brought before the public prosecutor. The Strasbourg case law has made it clear, however, that the “magistrate” must always be a judge. This judge will hear the suspect in person and decide whether it is justified to keep him in custody which will then be “detention on remand”.<sup>38</sup>

The time-span within which the judge must intervene is circumscribed in both the ECHR and the ICCPR by the term “promptly”.<sup>39</sup> The Court, in the case of *Brogan and others v. United Kingdom*, held that the period can never be longer than four days, even if there are connections with terrorism.<sup>40</sup>

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37. “Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: [...] c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; [...]” European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 3, para. 1 (c), art. 5.

38. “Everyone arrested or detained in accordance with the provisions of para. 1.c of this article shall be brought *promptly* before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.” European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 3, para. 3, art. 5 (emphasis added).

39. ECHR Art. 5(3). ICCPR Art. 9 (3).

40. *Brogan & Ors v. United Kingdom*, 11 Eur. Ct. H.R. 117, 135-136 (1989) (“[T]he scope for flexibility in interpreting and applying the notion of ‘promptness’ is very limited. In the Court’s view, even the shortest of the four periods of detention, namely the four days and six hours spent in police custody by Mr. McFadden, falls outside the strict constraints as to time permitted by the first part of Art. 5 para. 3.”).

The European Court, particularly in three cases against Germany<sup>41</sup>, has been very demanding with regard to these proceedings before the judge. The arrestee must have a fair chance to defend himself and cast doubts as to whether the suspicion against him is strong enough. In order to be able to do that, he has a right to see the file, to consult all the documents relied upon by the prosecution. Police and prosecutors do not like this at all because they want to surprise the suspect, and they want to avoid that he can prepare clever explanations or excuses or “prepare” potential witnesses. However, they will have to put up with the rule.

(b) The Rights of Persons Deprived of their Liberty

I have already hinted that the persons deprived of their liberty have certain rights. Some of these rights are for *all* persons deprived of their liberty. One of them is the right to be informed of the reason for their arrest and detention,<sup>42</sup> another one, of paramount importance, is the right to take *habeas corpus* proceedings.<sup>43</sup> The name of these proceedings relates to the English *Habeas Corpus Act 1679*.<sup>44</sup> It means that a person deprived by his liberty can demand to be physically brought before a judge and ask him to decide whether his continued detention is lawful. If this is not the case, the judge will order his immediate release.

A particularly interesting example for how thorough these proceedings may be is the case of *A. and others v. United Kingdom*.<sup>45</sup> It is a relatively recent case. It concerns detentions with a view to extradition. The persons concerned were suspected of being involved in terrorist activities; therefore the file contained a number of very secret documents which could not be shown to the defendants without revealing the working of intelligence organs. The domestic authorities had solved this problem by having recourse to so-called “special advocates”, a system also used in Canada. These special advocates are not mandated by or linked in some other way to the defendant, the public prosecutor’s office or the court. They are total outsiders. As a proxy for the person concerned special advocates are allowed to inspect the entire file. Thereupon they report about their contents without revealing secret information. It is a complex, delicate, and somewhat contested way of

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41. Lutz v. Germany, 123-A Eur. Ct. H.R. (ser. A) (1987); Englert v. Germany, 123-B Eur. Ct. H.R. (ser. A) (1987); Nölkenbockhoff v. Germany, 123-C Eur. Ct. H.R. (ser. A) (1987).

42. “Everyone who is arrested shall *be informed promptly*, in a language which he understands, of the reasons for his arrest and of any charge against him.” European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 3, para. 2, art. 5 (emphasis added).

43. “Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily *by a court* and his release ordered if the detention is not lawful.” European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 3, para. 4, art. 5 (emphasis added).

44. Habeas Corpus Act, 1679, 31 Car. 2, c. 2 (Eng.).

45. A. & Ors v. United Kingdom, 49 Eur. Ct. H.R. 29 (2009).

proceeding, but I regard it as a very important valuable solution.<sup>46</sup>

There are two rights specifically designed to protect persons arrested under the suspicion of having committed an offence: the right to be brought promptly before a judge, which I have already discussed, and the right not to be detained beyond reasonable time. The second guarantee is very similar to the right to be tried within reasonable time. The only difference is that an increased diligence is required in cases where the accused is detained. Again, there is no absolute time limit. In *W. v. Switzerland*<sup>47</sup> the accused had been detained for four years and three days. He had been charged with fraud. This case was very complicated and complex, with sixty-three corporations involved which had been active in a large number of countries, including some in Africa where it was difficult to obtain reliable answers to letters rogatory. By a vote of five against four, the Court came to the conclusion that there had been *no* violation of the detainee's right not to be detained beyond reasonable time.<sup>48</sup>

(c) The Protection of Private Life

The protection of private life which is guaranteed in Arts. 8 ECHR and 17 ICCPR concerns *inter alia* the confidentiality of correspondence.<sup>49</sup> An early case, *Silver and others v. The United Kingdom*,<sup>50</sup> concerned the censure of correspondence of prisoners. The United Kingdom imposed elaborate rules about what a prisoner was allowed or not allowed to write in letters. For example, it was prohibited to complain about the conditions of detention and the behavior of guards. Such a restriction definitely violated

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46. "The Court considers that SIAC, which was a fully independent court and which could examine all the relevant evidence, both closed and open, was best placed to ensure that no material was unnecessarily withheld from the detainee. In this connection, *the special advocate could provide an important, additional safeguard* through questioning the State's witnesses on the need for secrecy and through making submissions to the judge regarding the case for additional disclosure. [...] The Court further considers that *the special advocate could perform an important role in counterbalancing the lack of full disclosure and the lack of a full, open, adversarial hearing* by testing the evidence and putting arguments on behalf of the detainee during the closed hearings." *Id.* ¶ 219-220 (parenthetical explanation omitted, emphasis added).

47. *W. v. Switzerland*, 17 Eur. Ct. H.R. 60 (1994).

48. "[T]he right of an accused in detention to have his case examined with particular expedition must not hinder the efforts of the courts to carry out their tasks with proper care. [...] [I]t appears that the length of the detention in issue was essentially attributable to the exceptional complexity of the case and the conduct of the applicant. To be sure, [the applicant] was not obliged to co-operate with the authorities, but *he must bear the consequences which his attitude may have caused* for the progress of the investigation." *Id.* at 83-84 (parenthetical explanation omitted, emphasis added).

49. Article 8 (Right to respect for private and family life)

Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is *necessary in a democratic society* in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

European Convention, *supra* note 2, art. 8 (emphasis added).

50. *Silver & Ors v. The United Kingdom*, 5 Eur. Ct. H.R. 347 (1983).

the right to correspond.

In deciding whether an interference with this freedom is justified, the Court always asks whether it can be regarded as “necessary in a democratic society”, in other words, whether it corresponds to a “pressing social need”.<sup>51</sup> I fully agree that there was no need at all to interfere with such letters. It is understandable that prison personnel do not like prisoners writing bad things about them, particularly when criticism is not justified. However, prisoners are particularly isolated and solitary, they must have the possibility to empty their hearts and to speak and write their minds. Their interest must give way to that of the inmates.

Wire-tapping is another measure which interferes with the right to private life. *Klass et al. v. Germany* was an important case brought by several applicants. Mr. Klass himself was a member of the public prosecutor’s office. The complaint was directed against regulations which allowed the German government to secretly survey correspondence and telephone conversations of a large amount of people. These regulations had been introduced as an answer to the terrorist threat of the so-called “Red Army Faction” (RAF). The persons concerned could, of course, not know whether they were under surveillance and could, therefore, not take any legal action to challenge this interference. For this reason the application was accepted even though the applicants were unable to show that they were actually victims of the surveillance. There was even no right to be informed once the interference had ended. The Court very carefully examined the system of safeguards the legislator had established. This examination showed that there was a parliamentary commission which examined these cases and determined whether in a specific case the surveillance was justified. The Court’s conclusion was that normally, if someone was under secret surveillance, he must afterwards be informed. In exceptionally delicate cases, however, it was justified not even to inform at a later stage in order not to disclose information about the strategies of the intelligence services.

Finally, the right to respect for private life includes the protection of the home against unlawful intrusion. As an example taken from the Strasbourg case law I want to mention the case of *Niemietz v. Germany* which concerned the search of a lawyer’s offices.<sup>52</sup> The Court found that in this case the

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51. “It is clear - and indeed this was not disputed - that there were ‘interferences by a public authority’ with the exercise of the applicants’ right to respect for their correspondence, which is guaranteed by para. 1 of Article 8. Such interferences entail a violation of that Article if they do not fall within one of the exceptions provided for in para. 2. The Court therefore has to examine in turn whether the interferences in the present case were ‘in accordance with the law’, whether they had an aim or aims that is or are legitimate under Art. 8 § 2 and whether they were ‘*necessary in a democratic society*’ for the aforesaid aim or aims.” *Id.* ¶84 (parenthetical explanation omitted, emphasis added).

52. *Niemietz v. Germany*, 16 Eur. Ct. H.R. 97 (1993).

search had been carried out in such a sweeping way that it could not be justified.<sup>53</sup>

With this, I have come to the close of my lecture. I thank you very much for your kind attention, and I am prepared to answer all of your questions. Thank you.

### III. GENERAL DISCUSSIONS AND RESPONSE

*Question:* Do you think that death penalty is an acceptable punishment?

*Judge Trechsel:*

I have a very determined answer to that question. I am totally against capital punishment. First, I think there is no rational justification, and in particular, there is no evidence at all that it has any deterrent, preventive effect, it has not been shown that because of capital punishment fewer crimes are committed. Second, you might have read the news that in Japan, there was a man who was released recently. He was sentenced to seventeen years for rape and murder, but it has now turned out that he was innocent. The prosecutor had forged even the DNA evidence. Such risks always exist. Third, if you have capital punishment, you must have someone to execute them. You must ask a human being to kill another human being, who has done no harm to him personally. This is strange. Who would want to do this? A butcher? I have very bad feelings about the motives of someone who is prepared to kill unless it is in defense. Does the State want to be an accomplice and give someone who has a killer instinct the chance to realize his sick dreams?

Furthermore, the death penalty implies, as Camus has pointed out, a double punishment. One is the killing and the other is the fear of death which may be even worse. The person who is convicted to death knows the moment when he will die. This is contrary to the natural fate of mortals. One thing that most of us, including certainly myself, do *not* want to know is when our last hour will be, and how we will pass to the other side. The fear associated with capital punishment is something unimaginably terrible. There are more arguments, but I will leave it here for now.

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53. “[T]he warrant was drawn in *broad* terms, in that it ordered a search for and seizure of ‘documents,’ *without any limitation*, revealing the identity of the author of the offensive letter; [...] having regard to the materials that were in fact inspected, the search impinged on professional secrecy to an extent that appears *disproportionate* in the circumstances [...]” *Id.* ¶37 (emphasis added).

*Question:* You have demonstrated your arguments against capital punishment, but you did not refer to the question of public opinion, which is here in Taiwan a very important aspect of this dispute. Could you please elaborate more on this for us?

*Judge Trechsel:*

I am proud to say that Europe, the area of the Council of Europe which has forty-seven Member States with seven to eight hundreds million inhabitants, is a death penalty free zone. Some States, such as Russia, have not yet formally abolished capital punishment but they have *stopped executing* the death sentences.<sup>54</sup>

This does not mean that the majority is happy with the abolition. The preference of the people is a delicate measure. I am pretty sure, if today in Switzerland a particularly heinous murder would be committed, say, someone killed a child, or more than one child out of sexual motives, the next day you would have a majority in favor of capital punishment if you organized a referendum.

The relationship between democracy and human rights is a delicate and difficult one. Switzerland is a good country for bad examples. We have had several public initiatives and referenda on various subjects which led to results contrary to the European Convention's human rights law. The last widely publicized item was the initiative to ban the constructions of new minarets. All politicians thought that it was nonsense and they were right as to the merits of that initiative. But the propaganda was cleverly orchestrated, so that in the end there was a solid majority for this prohibition, which now is an amendment to our Constitution.<sup>55</sup> The problem has already been brought before the European Court of Human Rights, but in view that it has not been brought by someone who had actually applied for a construction permit and had been rejected, and the fact that domestic remedies have not been exhausted make me doubt whether the Court will enter into the merits of this case. If that would happen, however, I am pretty sure that the Court would come to the conclusion that there is a violation of religious freedom. I am personally of the firm opinion that democracy must respect human rights and the rule of law since on the long term they can alone guarantee a

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54. In Russia, since 1996 there has been a moratorium on executions decreed by the then-president Boris Yeltsin. In November 2009, the Constitutional Court of Russia extended the moratorium pending Russia's ratification of the Sixth Protocol to the European Convention on Human Rights, which had been signed by Russian government in 1996. *See Russia Extends Death Penalty Ban*, AL JAZEERA, Nov. 19, 2009, <http://english.aljazeera.net/news/europe/2009/11/200911191311439887.html> (last visited Jan. 31, 2011).

55. *Swiss Voters Back Ban on Minarets in Referendum*, REUTERS, Nov. 29, 2009, <http://www.reuters.com/article/idUSTRE5AS12D20091129> (last visited Jan. 31, 2011).

stability of a democratic system of government.

*Question:* For people who have committed a serious crime, the protection of personal rights may have allowed them to escape from punishment. Do you think this is the risk that one society should bear?

*Judge Trechsel:*

The interest of society to be protected against criminals is, of course, a very legitimate one. Persons who have committed serious crimes may be sentenced, in the most serious cases even to life imprisonment, and there can be certain measures of social security, which allow for detaining such persons as long as they are dangerous. But there must be a possibility for them to have a court examine whether a further detention is necessary. When is someone still a danger for the society? Experts will of course intervene to find an answer. If the result is that the person has developed in a positive way, that he is no longer dangerous, then that person must be released. But if the result is negative, it is possible to continue the detention, perhaps till he dies.

As to procedural guarantees, it is true that their respect may, in exceptional cases, lead to an acquittal which is not justified on the merits. I admit that this is an undesirable result. But it must be accepted, because the fairness of proceedings is a very important value. It is an essential foundation for the credibility not only of the administration of criminal justice but for the legitimacy of the State itself. Ultimately, (procedural) injustice cannot lead to (substantive) justice. But this is a question which merits deeper examination.

*Question:* Should the abolishment of capital punishment be a universal claim? Should every country abolish death penalty?

*Judge Trechsel:*

I take your question as being in the very broad skepticism for the universality of human rights. Do they apply everywhere? Or can one contend that there are first class, second class, and third class categories of states with regard to human rights? If you look to the reality, if you take a phenomenological approach, you may come to that conclusion. I am sure that Myanmar, North Korea, Somalia, and a number of other states are in the third class. But if you take a normative approach, it will appear that you must come to the conclusion that all human beings are born equal and must

have the same chance to develop their personality within the framework of the law. That is the basis of the idea of human rights: human rights must be applied everywhere and to everyone. Sometimes, perhaps, with some specificities, but basically they fall to be regarded, in my view, as universal. It is humiliating and conceited if you tell a state, “Ok, you are a childish, underdeveloped state, therefore you are entitled to violate the human rights of persons under your jurisdiction; while normally these rights are very important, your citizens will have to do without, you may deal with them in whatever way you regard as expedient.”

*Question:* Can we argue that the abolishment of capital punishment is an international law obligation?

*Judge Trechsel:*

Capital punishment is a rather special issue, because so far it cannot be said that it is contrary to international public law. Why? Because some very large and powerful states –one of which is not very far away from here and the other of which is on the other side of the globe (and we are speaking its language right now) – have capital punishment on their books and also practice it. In the absence of specific treaty laws, there ought to be a widespread conviction that this is unlawful. Unfortunately, we still cannot say that today.

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## 國際人權對刑事程序的重要性

Stefan Trechsel

### 摘 要

近年來國際人權對刑事程序的重要性已日趨強烈。刑事程序中的人權保障應允了受害者及被告的救濟與正義。許多國際與內國的法院，包括台灣憲法法院，經常性地援引國際人權以提供程序性與實質性的正當程序給刑事被告。臺灣大學法律學院非常榮幸邀請到蘇黎世大學刑事訴訟法的Stefan Trechsel教授，同時也是現任前南斯拉夫特別法庭的指定法官，來探討這個重要的議題。Trechsel教授在歐洲人權法院所做案例的基礎上，探討了公平審判的權利，受逮捕者的權利與其它刑事程序相關的基本權利。其具有洞察力的討論讓我們對刑事程序中的相關國際人權有了新的理解。