COUNTERTERRORISM: NET WIDENING AND FUNCTION CREEP IN CRIMINAL JUSTICE

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SUMMARY: *1. Internationalization/globalization/integration and criminal justice in the post-industrial information society. 2. Transformation of the criminal justice system. 3. Redefinition of players (Authorities). 4. Redefinition of their competences and their techniques (the Sword). 5. Redefining the safeguards and the constitutional and human rights dimension (the Shield). 6. Consequences for the architecture (checks and balances, trias politica, constitutional dimension). 7. Constitutional and human rights standards: striking the right balance between justice and security? 8. Conclusion.*

1. Internationalization/globalization/integration and criminal justice in the post-industrial information society

The internationalization of criminal justice is not new, in particular where internationalization is defined as a process of increasing cooperation between States and where States are influenced or controlled by international organizations. International public law conventions that prescribe binding substantive criminal law rules have been in existence for a century now, although their number and their impact have increased significantly. What is new is, I would say, twofold. Firstly, in the field of criminal justice, international organizations, such as the UN, the Council of Europe, the OECD and the FATF are monitoring the compliance process with international obligations, mostly through very detailed and politically binding evaluation mechanisms. We can find clear examples in the field of money laundering, corruption and terrorism. Secondly, international organizations as the UN Security Council or the international human rights courts are imposing international obligations upon Member States in criminal matters, without any specific conventional source and, thus, bypassing the signature and ratification process. In the aftermath of 9/11, the Security Council made the con-

ventional UN *acquis* in terrorism matters binding, regardless of signature or ratification by Party States. International human rights courts are moving towards prescription of offences, solely based on customary law and *ius cogens*, when it comes to serious human rights violations. Furthermore, international human rights courts are imposing far-reaching positive obligations upon States to protect human rights, including mandatory duties to investigate, to prosecute and to punish crimes.

The globalization of society is considerably more recent than the process of internationalization. Since the 1970s there has been a significant increase of standardization and unification of social processes (i.a. economic and cultural) by which they have become global. The idea of a global city[1] is the result of this process of internationalization. The globalizing society is based upon a worldwide increasing mobility of persons, goods, services and capital. Globalization of criminal justice is exceptional. However, the development of international criminal law and the establishment of international criminal courts, especially the ICC, can be considered as a very good example of dealing with globalized standards and institutions for the prosecution of war crimes and crimes against humanity and, in fact, also for dealing with justice and peace in situations of transnational justice.

Integration is a post-World War II phenomenon, by which policies of Member States are combined to form a whole (in Latin, *integer* means whole or entire). In other words, regional integration aims at common policies in a common area. This integration process is regional and goes hand in hand with the creation of supranational regional bodies, producing integration law and providing for regional adjudication in integration matters by a supranational Court of Justice. The integration process under the European Communities and since the Treaty of Maastricht under the European Union is a clear example. Quite unique in Europe[2] is the integration of justice matters, including criminal justice matters, in this process.

[1] S. SASSEN, *The global city: New York, London, Tokyo*, Princeton, updated 2nd edition, 2001.

[2] J.A.E. VERVAELE, *Mercosur and regional integration in South America*, in *International and Comparative Law Quarterly*, vol. 54, 2005, 387-410.

These processes of internationalization, globalization and integration in our societies have been combined in the past decades with the transformation of our societies into post-industrial information societies. The e-society or online society has completely reshaped social behaviour and social structure. A single information society concept does not exist. Scientists are struggling about definitions and values of the concept and focus on economic, technical, sociological and cultural patterns. Postmodern society is often characterized as an «information society», because of the widely spread availability and usage of Information and Communication Technology (ICT). The most common definition of information society indeed emphasizes the technological innovation. Information processing, storage and transmission have led to the application of information and communication technology (ICT), and related biotechnology and nanotechnology, in virtually all corners of society. The information society is a post-industrial society in which information and knowledge are key-resources and are playing a pivotal role[3].

However, information societies are not solely defined by the technological infrastructure in place, but rather as multidimensional phenomena. Any information society is a complex web, not only of technological infrastructure, but also as an economic structure, a pattern of social relations, organizational patterns, and other facets of social organization. Therefore, it is important to focus not only on the technological side, but also on the social attributes of the information society, which include the social impact of the information revolution on social organizations, such as the criminal justice system.

Moreover, the postmodern age of information technology transforms the content, accessibility and utilization of information and knowledge in the social organizations, including the criminal justice system. The relationship between knowledge and order has fundamentally changed. The transformation of communications into instantaneous information-making technology has changed the way society values knowledge. In this rapidly changing age, the structure of traditional authority is being undermined and replaced by an alternative method of societal control.

[3] D. BELL, *The Coming of Post-Industrial Society*, New York, 1976.

The emergence of a new technological paradigm based on ICT has resulted in a network society[4], in which the key social structures and activities are organized around electronically processed information networks. There is an even deeper transformation of political institutions in the network society: the rise of a new form of State (network-State) that gradually replaces the nation-States of the industrial era. In this rapidly changing age, the structure of traditional authority is being undermined and replaced by an alternative method of societal control (surveillance society). The transition from the nation-State to the network-State is an organizational and political process prompted by the transformation of political management, representation and domination in the conditions of the network society. All these transformations require the diffusion of interactive, multi-layered networking as the organizational form of the public sector. Information and knowledge are key-resources of the information society, affecting the social and political structure of society and State and affecting the function, structure and content of the criminal justice system.

2. Transformation of the criminal justice system

What is the impact of these developments on the domestic criminal justice system? It is quite clear that the domestic criminal justice system has not been replaced by a global one, in the global city. Societal globalization does not automatically lead to legal globalization or globalization of criminal justice and not even to globalization of political authority with regard to criminal justice. The birth of international criminal law adjudication is the exception and is the outcome of a process that has been going on for a century. Even though in place, this new system of justice is still building up its own concepts of criminal law and criminal procedure. However, the process of internationalization and globalization, both offline and online, does affect the domestic criminal justice system substantially. Domestic criminal justice is faced with socie-

[4] M. CASTELLS, *The Rise of the Network Society. The Information Age: Economy, Society and Culture. Volume 1*, Malden, Second Edition, 2000.

tal changes by which perpetrators are committing crimes and by which the crime, the perpetrators themselves and, *inter alia*, evidence are not always linked with the territory of the nation-State. As a consequence of the increasing mobility of persons, goods, services and capital, the domestic criminal justice systems have to protect new legal interests (*Rechtsgüter*), which usually have a strong transnational background (for example, protection against hate speech and xenophobia, protection against child pornography or protection against securities fraud or against ID theft). The domestic criminal justice system is internationalizing in a process of top-down internationalization and bottom-up internationalization. International and regional organizations are imposing new substantial and procedural obligations upon domestic criminal justice systems, but the domestic criminal justice systems are also increasing their international dimension in order to deal with criminality in a globalizing society. This means that the domestic criminal justice system is both at the user and the supply side of this process.

However, this renewal is not limited to some updating of offences based upon new or renewed legal interests to protect, nor limited to an increase of mutual legal assistance. In fact, the classical rationale for the use of criminal justice (starting with the primary criminalization by the definition of offences) – based upon *ultimum remedium*, strict conditions of harmful conduct that violates legally protected interests and concepts derived from the Enlightenment and Kantian philosophy – has been replaced in the past decades by a globalizing criminal policy concept, translated into criminal policy paradigms: combat/war against drugs, combat/war against organized crime, combat/ war against terrorism. I call them paradigms, because they function as a frame of reference for the perception of reality and thus for the definition of social constructs as crime, danger, risk and insecurity. These criminal policy paradigms have been used both at the domestic and at the international level in order to justify substantial changes in the relation between State-society and criminal justice and in the criminal justice system itself.

Modern criminal justice, with its roots in the Enlightenment, provides for an integrated system, offering both *protection* to individuals (not only suspects) (the shield dimension), *instruments* for the law en-

forcement community made up of the police, the Public Prosecutor's Office and the judiciary (the sword dimension), and providing for *checks and balances/trias politica* (the constitutional dimension). As mentioned, three paradigms, the combat/war on drugs, the combat/war on organized crime and the combat/war on terrorism swept like a tidal wave through the criminal justice system. All three dimensions of the criminal justice system have been affected by these three waves. These paradigms have transformed our criminal justice systems in its entirety, affecting general criminal law, special criminal law, criminal procedure and international criminal law. In 1999 the International Association of Penal Law (AIDP-IAPL) presented an excellent analysis of this transformation under the title *The Criminal Justice Systems Facing the Challenges of Organized Crime*[5].

There is no doubt that substantial and far-reaching changes have also occurred during the last decade. The new security paradigm and counterterrorism policy have resulted in transformations that go far beyond the field of terrorist offences. International pressure for a common approach to terrorist investigation, prosecution and judgment has been intense. Both at the UN and at the Council of Europe, an impressive set of international and regional Conventions have been elaborated on Organized Crime and Counterterrorism. After 9/11, the UN paved the way with Security Council resolutions and the establishment of a Counter-Terrorism Committee that is supervising the implementation of the resolutions, including the substance of the conventions[6]. The third wave of reforms of counterterrorism has evolved before the 9/11 events and the events in Madrid and London, but has certainly been intensified by these terrorist attacks.

Although there has been a substantial paradigm shift (from drugs to organized crime and to terrorism), the three paradigms have transformed, through a common and cumulative security-orientated approach, the objectives, nature and instruments of the criminal justice system. The objective of the criminal justice system has changed from

[5] See the Reports by T. WEIGEND, C. BLAKESLEY, J. PRADEL, C. VAN DEN WYNGAERT, in *International Review of Penal Law*, 1996, 527-638.

[6] See *www.un.org/sc/ctc/countryreports/reportA.shtml* for the comprehensive national reports.

punishment of guilty perpetrators of committed offences (with general and special preventive aims, including rehabilitation) towards a broader field of social control of danger and risk[7].

Based on these paradigms, general criminal law and special criminal law have been widened in order to include preparatory acts and incrimination of criminal organizations and terrorist organizations (or conspiracy variants of it). As a result, the commission of criminal conduct by a suspect is no longer the triggering threshold for the *ius puniendi* of the State. The threat of organized crime or terrorist crime by setting up organizations (with a very low threshold definition) is sufficient for criminalization. The criminalization of apology of terrorism or other apologies (xenophobia) demonstrates a similar trend. Such offenses concern the criminalization of the mind (and may touch upon the freedom of expression) of a person, instead of the criminalization of a criminal act, based upon conduct. By redefining the objective of criminal justice, its very nature has been converted. The greater the risk or the danger, which is based on a social construction and certainly not on empirical facts, the lower the threshold for using the *ius puniendi*, which means that criminal law turns into security law. Security law is not so much based on a legal definition of suspect and criminal conduct, linked to serious harm to a legal interest, but is based upon a preset definition of an enemy[8] that is associated with risk, danger and insecurity. The security approach in criminal law has led to an expansion of substantive criminal law (general part and special part) beyond the traditional boundaries and limits as defined by the Enlightenment. This raises the question whether harmonization or the mandatory criminalization of offences under international and regional European law

[7] In continental theories of criminal law, a basic distinction is made between the effects of punishment on the man being punished – individual prevention or special prevention – and the effects of punishment upon the members of society in general – general prevention. The characteristics of special prevention are termed «deterrence», «reformation» and «incapacitation». General prevention, on the other hand, may be described as the restraining influences emanating from the criminal law and the legal machinery. See: J. ANDENAES, *General Preventive Effects of Punishment*, in *University of Pennsylvania Law Review*, 114, 1965-66, 949-983.

[8] G. JAKOBS, *Bürgerstrafrecht und Feindstrafrecht*, in *HRRS*, III, 2004, 88-95.

should not be combined with the harmonization of obligations of general criminal law. The precise impact of the harmonization and mandatory criminalization could then be defined and, in addition, it could be avoided that the top-down internationalization and regionalization ends up in an atrophy of punitivism or penal inflation. If the international community and European community are acting as legislators, which concepts of *nulla poena sine culpa* and of criminal liability do they use?

The transformation of the criminal justice system, especially in the era of counter-terrorism (third wave), has had even more far-reaching consequences, especially for the field of criminal procedure[9], and has affected:

- the type of players/authorities;
- their powers and investigation techniques (including digital) – the sword dimension;
- the safeguards and constitutional and human rights to be respected – the shield dimension;
- the architecture (checks and balances, trias politica) – the constitutional dimension.

3. Redefinition of players (Authorities)

In the first place, traditionally, criminal investigation has been supervised by judicial authorities and coercive measures are authorized and/or are executed by members of the judiciary (investigating judges or pre-trial judges or trial judges). In many countries we can see a shift in the pre-trial phase from judicial investigation to prosecutorial and police investigation. We can clearly speak of a reshuffling of responsibilities in the law enforcement community. Magistrates are less and less involved in the pre-trial phase as such; there is a clear shift to the executive or to semi-executive branches of State power.

[9] For a more elaborated version, see J.A.E. VERVAELE, *Special procedural measures and respect of human rights, general report for the International Association of Criminal Law* (AIDP), in *Utrecht Law Review*, 2009, 66-109.

Secondly, there is not only a shift between the classic players; new players, such as administrative enforcement agencies, also play an increasing role in the field of fighting serious crime. The intelligence community is gaining ground in the criminal justice system, both as specialized police units dealing with police intelligence and as security agencies. These intelligence entities are responsible as the forerunners of police and intelligence-led investigations, and in some countries they have even obtained coercive and/or judicial competence. Furthermore, classic law enforcement agencies convert into intelligence agencies and change their culture and behaviour. Thirdly, many countries have increased the use of private service providers (telecom, business operators, financial service providers) and professions with information privileges (such as lawyers and journalists) as gatekeepers and as the long-arm collectors of enforcement information. Journalistic and legal privileges are no longer safe havens.

4. Redefinition of their competences and their techniques (the Sword)

Firstly, in most countries the paradigms of the drugs-trade, organized crime and terrorism are not only used to redefine investigative, coercive instruments, but also to introduce new special investigative techniques, such as wiretapping, infiltration and observation, which can only be applied to investigate serious crimes. The result is a set of coercive measures with a double use (for serious and less serious offences) and a set of coercive measures with a single use for certain serious crimes.

Secondly, in many countries the classic measures dealing with securing evidence and the confiscation of dangerous instruments or products in relation to crime have become an autonomous field of security measures concerning goods and persons (e.g. seizure and confiscation, detention orders and security orders). Related to that, investigations into the financial flows from the drugs trade, organized crime (financing, money laundering) and terrorism (financing) have been converted from a classic investigation for gathering evidence into an autonomous financial investigation, dealing with extensive seizure and confiscation of

the proceeds of crime (asset recovery) and/or into autonomous financial surveillance and investigations into the financing of serious crime.

Thirdly, the triggering mechanisms or minimum thresholds for the use of coercive measures to combat serious crimes are changing. Criminal investigation no longer starts with a reasonable suspicion that a crime or an offence has been committed or attempted, or with a reasonable suspicion that a preparatory act for committing a serious crime has been committed or attempted. Investigative techniques and coercive measures are also used in a proactive or anticipative way to investigate, *anti-delictum*, the existence and behaviour of potentially dangerous persons and organizations in order to prevent serious crimes. This proactive criminal investigation includes the situation in which there is not yet any reasonable suspicion that a crime has been committed, is about to be committed or that specific preparatory acts have taken place and in which, of course, there can be no suspect(s) legally speaking. The objective of proactive investigations is to reveal the organizational aspects in order to prevent the preparation or commission of a serious crime and to enable the initiation of criminal investigation against the organization and/or its members. This use of coercive measures for crime prevention can be realised by intelligence agencies, police authorities or judicial authorities. When doing so, they belong to the intelligence community, even if they are normally authorities belonging to the law enforcement community. In that time frame they might collect information and use certain coercive measures of criminal procedure in order to prevent the preparation or commission of the crime. In this area of criminal law without suspects we see a new combination of proactive or anticipative enforcement and coercive investigation (*Vorbeugende Verbrechensbekämpfung*, *Vorfeldaufklärung* and *Vorermittlung*). The conversion from a reactive punishment of crime into a proactive prevention of crime has far-reaching consequences. The distinction between police investigation and judicial investigation is under pressure. Coercive proactive enforcement becomes important for serious crimes. The intelligence community becomes a main actor in the law enforcement field. Preventive criminal law is not about suspects and suspicion, but about information gathering (information and criminal intelligence investigation) and procedures of exclusion against potentially danger-

ous persons. The criminal justice system is increasingly used as an instrument to regulate the present and the future and not to punish for behaviour in the past, and the criminal process is becoming a procedure in which the pre-trial investigation is not about truth-finding related to committed crime, but about construction and de-construction of social dangerousness.

Fourthly, the sword of criminal justice has changed substantially through the use of digital-led investigation (online criminal searches, the monitoring of data flow, data processing) and the use of advanced technology in judicial investigations (digital surveillance, detection devices, etc.). Information-led investigation replaces mere suspicions. The expansion of the judicial investigation into a proactive investigation and the increasing overlap between the law enforcement community and the intelligence community has been further increased by the technological developments in investigative devices: the sword of technology with far-reaching eyes and razor-sharp edges. Thanks to new technology, the methods of surveillance for communication, the physical surveillance of persons and their movements and activities and for transactional surveillance (of their services) have changed dramatically. Technology has completely changed not only the behaviour of citizens, but also, through the use of wiretapping, video surveillance, tracking devices, detection devices and see-through devices, data mining, remote digital searches, Trojan horses, and so forth, the environment of enforcement and proactive enforcement.

5. Redefining the safeguards and the constitutional and human rights dimension (the Shield)

In many countries, the legislator considered some procedural guarantees as burdens to the efficiency of serious crime prevention, serious crime investigation and serious crime prosecution. First of all, the use of existing instruments such as search and seizure and police detention is submitted to other parameters for serious offences than for less serious offences. Moreover, judicial authorization (in the form of warrants) is weakened or abolished for some coercive measures (warrantless co-

ercive measures). The role of the defence and of the judge as procedural guarantees is reduced. This means in practice that the police and prosecutors have more autonomy and are subjected to diminished supervision by the judiciary on their investigative work. We could speak of a two-fold expansion of the existing coercive measures: a general expansion of the powers of the police and prosecutors with relaxed safeguards, which trend is even stronger for the investigation of serious crimes because of the presence of a security interest. Generally speaking, we can say that the seriousness of the crimes under the aforementioned paradigms is used to justify raising the sword and lowering the shield. In many countries, in the case of serious crimes, the relationship between the intrusiveness of the measures and judicial control has changed: the greater the security interest, the less the judicial control and the procedural safeguards.

Secondly, by lowering the thresholds (reasonable suspicion or serious indications to simple indications, reversed burden of proof, legal presumptions of guilt) for triggering the criminal investigation and for imposing coercive measures, the presumption of innocence is undermined and replaced by objective security measures. The shields protecting the citizen against the *ius puniendi* of the State are put at the back of the stage in the theatre of criminal justice. This has, of course, direct consequences for habeas corpus, habeas data, fair trial rights, redefinition of evidence rules, public proceedings, etcetera.

In the third place, in many countries there is also a need to secure the functioning of the criminal justice system and its players. The protection of witnesses has also been converted into the protection of anonymous witnesses, including those from the police authorities and intelligence agencies involved in infiltration. The criminal justice system is increasingly shielding its agents against the defence through *ex parte* proceedings, forms of secret evidence-gathering and the use of secret evidence in the pre-trial and trial setting.

Fourthly, several countries have amended their mandate for intelligence forces and their powers. Their investigative competences now include coercive powers, parallel to the ones in the Code of Criminal procedure, and their objective also includes the prevention of serious crime, as this constitutes a threat to national security. In some countries

they need the authorisation for the use of these powers by a public prosecutor or by the executive branch of government. *De facto*, the intelligence community is using judicial coercive powers without being a judicial authority and without the guarantees of some form of judicial warrant and/or judicial supervision. We can see an overlapping competence between the intelligence agencies and the police authorities acting as intelligence community in the preliminary proactive or anticipative investigation.

In the fifth place, we see an increasing use of intelligence in the criminal justice system. As long as it is used as steering information or as data sharing or as triggering information for the opening of a judicial investigation it does not affect or infect the criminal justice system. However, when intelligence is used as triggering information, establishing probable cause for using coercive measures, or as evidence in criminal proceedings it does infect the classic rules of fair trial and equality of arms, as most of this type of intelligence can only be used in shielded and secret *in camera* and *ex parte* proceedings. This is even the case in international criminal justice.

It goes without saying that all these transformations affect the position of the defence lawyer in the criminal process. His legal privilege is under pressure. In certain countries, when dealing with secret evidence in cases of organized crime and terrorism, the defence lawyer has no full access to the file (limited disclosure) or only special security screened bar lawyers can act on behalf of the suspect. The defence lawyer's role and his duties and responsibilities are redefined.

6. Consequences for the architecture (checks and balances, trias politica, constitutional dimension)

The reforms result in a clear expansion of the punitive State[10], thereby disfavouring the Rule of Law. The focus on public security and preventive coercive investigation is clearly undermining the criminal

[10] N.A. FROST, *The Punitive State: Crime, Punishment and Imprisonment across the United States*, New York, 2006.

justice system and its balances between the sword and the shield. Administrative and preventive forms of punitive justice are expanding. The result is also that the equilibrium between the three branches of the trias politica is under great pressure in favour of the executive.

In the majority of European countries transformations have resulted in a distinction within the ordinary criminal justice system between a criminal procedural regime for serious offences and one for «petty» offences or in special legislation replacing substantial parts of the ordinary criminal justice system. In fact, criminal procedure is no longer organized in line with the general part of criminal law, but in line with the dual use in the special part of criminal law. The exceptional features for organized crime and terrorism changed from the exception into the main and common procedure for serious crimes, for which reason we can speak of the normalization of the exception.

7. Constitutional and human rights standards: striking the right balance between justice and security?

The three paradigms of criminal policy, based on a security approach have not only resulted in neo-punitivism but also in shifts in the criminal justice systems that undermine the basic concepts of the *ius puniendi* under the rule of law.

Although the criminal justice reforms have detached the criminal justice systems from some of its own fundamental values, at the same time, in the last decade, we can see in several countries an increasing process of constitutionalisation of criminal justice matters, both in law (including constitutional norms concerning the rule of law and fair trial) and in practice (by the case law of the higher courts and the supranational human rights courts). Special criminal procedures dealing with organized crime and counterterrorism are dealt with by Supreme Courts, Constitutional Courts and human rights Courts.

I am not convinced that this process is an intrinsic outcome of the criminal justice reforms themselves. It is true that in many countries reforms were introduced in favour of adversarial proceedings, based on accusatorial principles, such as immediacy, equality of arms, fair trial,

an independent and impartial judiciary. However, at the same time, parallel reforms have been introduced to reduce the scope and application of these principles when investigating, prosecuting and adjudicating serious offences.

Although the constitutional and human rights standards have become a mandatory framework for dealing with the effect in law and law in practice of these paradigms of crime, the panorama is, for the moment, rather a patchwork. The European Court of Human Rights has given a very broad margin of appreciation to the Member States when it comes to criminal justice and terrorism, certainly related issues such as fair trial, rights of the defence, protection of the privacy and freedom of expression. It took a tougher stand when it comes to inhuman treatment and torture. However, the European Court of Justice has imposed a high human rights standard in the area of blacklisting of terrorists and terrorist organizations. Nevertheless, this field is, of course, not representative for the classical field of procedural safeguards in criminal matters (a field in which the EU legislator has great difficulty to define common standards that do not violate the minimum denominator of the ECHR case law). Also at the level of the national Supreme and Constitutional Courts, we see an increasing case-load concerning important aspects of the basic concepts of criminal justice. However, as it stands, we cannot say that these Courts are producing common standards. Just to take two examples: the case law of these Courts on special investigative techniques and the use of secret evidence is quite diverging as is their case law on the digital investigative techniques and even on data retention by service providers.

8. Conclusion

We are living in a time in which many reforms of the criminal justice system are the result of a political instrumentalisation and mediatisation of crime and the fear of crime. These reforms are being justified by the criminal policy paradigms of combating drugs, organized crime and terrorism. The result is that the *ius puniendi* of the State (being one of the most repressive interferences in liberty on behalf of the State), is

being instrumentalised and put at service of danger and risk management. When prevention of dangerousness becomes the triggering mechanism for the use of very intrusive investigative techniques and criminal punishment, the criminal justice system is risking perverting into a security system. These developments result in a substantial expansion of the criminal justice system, through substantive and procedural criminal law, and thus of expanded interference with the liberty of citizens. The expansion of criminal justice goes hand in hand with the erosion of its basic principles (*nullum crimen sine iniuria*, *nulla poena sine culpa*, *ultimum remedium*, fair trial, etcetera). At the same time, criminal repression becomes a «passe-partout» formula for solving societal problems. The expectations about the problem-solving capacity of criminal justice are however in sharp contrast with the real performance. The expansion of criminal justice is very real in terms of social control, but very symbolic in terms of societal problem solving capacity.

The criminal policy paradigms (drugs, organized crime, and terrorism) are used as political justifications at the domestic, European and International level. We can certainly not conclude that the European and/or international dimension have unilaterally caused these shifts. The three levels are strongly interacting under the same paradigms. Nevertheless it is useful to have a closer look at the new international and European dimension. At first sight we could believe that the international criminal justice, dealing with war crimes and crimes against humanity, is a clear example of victory of justice over insecurity, as it is the expression of the international community to deal at a global level with the most severe violations of human rights. Global criminal justice as reaction against impunity is of course a noble ideal. At second sight, we see, however, that also international criminal justice is struggling with some of the same problems (mediatisation, political discretion for the prosecutor, symbolic function, etcetera). The international criminal justice system in action has also to deal with problems and shifts of responsibilities common to the domestic criminal justice system. To illustrate this, I refer to the definition of joint criminal enterprise, a form of organized criminal acting and the problems with the *nullum crimen sine lege* rule in international criminal justice, or the use of secret evidence and limited disclosure in international criminal justice. The European

dimension is a complete different one, as the integration model of criminal justice is limited to rule setting and in the future maybe to some supranational investigative tools, but the criminal adjudication continues to be the full competence of the Member States. Nevertheless the EU itself has been struggling in its criminal policy plans with striking the right balance between security and liberty. The EU Court of Justice has a good record when it comes to constitutional standards and human rights protection in the EU, but the criminal law legislation of the EU is rather running to the bottom of the lowest denominator. Recent legislative action to harmonize procedural safeguards in the framework of the mutual recognition instruments (such as the European arrest warrant and the European evidence warrant), dealing with the right to a lawyer, the right to translation, a letter of rights, etcetera have been accompanied with great reluctance from many Member States to agree upon equivalent common standards. Meanwhile the European Court of Justice had to elaborate human rights for the integrated area, such as the application of the transnational *ne bis in idem* principle[11] or the protection of the right to privacy[12]. The opportunities and threats of European integration in criminal matters should be highlighted. The new Lisbon Treaty offers the necessary political and legal tools to strike a right balance between liberty and security, between effective criminal law enforcement and procedural safeguards. To reach a good result, it will, however, be necessary that Member States are willing to further integrate their criminal justice systems. This includes the setting of equivalent standards and steering of their administration of justice, also in the sensitive area of counterterrorism.

[11] J.A.E. VERVAELE, *Schengen and Charter related* ne bis in idem *protection in the Area of Freedom, Security and Justice: M and Zoran Spasic*, in *Common Market Law Review*, 52, 2015, 1339-1360; ID., *Ne Bis In Idem: Towards a Transnational Constitutional Principle in the EU?*, in S. GLESS, J.A.E. VERVAELE (eds.), *Special on transnational criminal justice*, in *Utrecht Law Review*, 2013, 211-229.

[12] Case C-392/12, Digital Rights Ireland, ECJ Judgment of 16.05.2014 and Case C-362/14, Schrems (Safe Harbour), ECJ Judgment of 06.10.2015.