Avoiding a full criminal trial: Fair trial rights, diversions, and shortcuts in Dutch and international criminal proceedings

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6.1 Conclusion

The aim of this study was to analyse how the concept of fairness regulates and limits the use of avoidance mechanisms in the enforcement of criminal law. The archetypical trial context was explored and functioned as the starting point of the analysis. Any derogation from this ideal type must be accounted for in terms of fairness. In the Introduction, a distinction was made between avoidance mechanisms that operate outside the trial context (the diversions) and those that operate within the trial context (the shortcuts to proof). They have in common that they infringe on the concept of the full criminal trial in which incriminating evidence is both presented and discussed or challenged. The avoidance mechanisms were derived from the Dutch and international criminal justice systems. Avoidance mechanisms can be discerned in all types of criminal cases, including the handling of minor offences as well as cases involving the most serious violations of (international) criminal law. The systems discussed provided for a good overview of manners to avoid the full criminal trial. They also show the great diversity of these avoidance mechanisms.

Avoiding the full criminal trial can have detrimental consequences for accurate fact-finding. The accuracy of a judgement or out-of-court settlement is normally enhanced when the evidence has been contested by the accused. Therefore, it is vital that the accused can still challenge the evidence against him when the full criminal trial is avoided. As stated in the Introduction, the accuracy of the avoidance mecha-
nisms in terms of fact-finding was not chosen as the normative framework. Such an
analysis would require an objective standard of factual accuracy to which the avoid-
ance mechanisms are juxtaposed. Such a standard does not exist: we cannot, for ex-
ample, assess the factual accuracy of a punitive order or guilty plea. What we can do,
however, is assess the conditions under which such avoidance mechanisms operate.
Accurate fact-finding is improved in an adversarial setting in which the evidence is
critically assessed. The concept of fairness, in particular the ability of the accused to
participate effectively in his own case, was chosen as the proper normative frame-
work for this study.

In Chapter 2, the concept of fairness in criminal proceedings was explored in more
detail. Fairness in criminal proceedings is normally associated with the trial context
as such. When the accused is charged with a criminal offence and his case is handled
before the court, he is entitled to receive a fair trial. The interpretation of Article 6
of the European Convention on Human Rights is almost exclusively concerned with
matters in foro: the relevant case law addresses infringements of particular rights of
the accused within the archetypical setting of the criminal trial. This has resulted in
an unprecedented amount of case law in which the right to a fair trial has been de-
fined in great detail. Although the Court has, in a limited number of cases, addressed
the out-of-court context in relation to the waiver of particular fair trial rights, the
Court itself has not formulated a detailed normative framework for the enforcement
of criminal law outside the regular trial context.

The second chapter presented the normative framework of the study. The con-
cept of fairness was analysed, in particular the importance of effective participation
of the accused in criminal proceedings. In their analysis of the ECtHR case law on
fairness in criminal proceedings, Jackson and Summers argued that the Court has de-
veloped a normative framework to assess the fairness of the proceedings, which tran-
scends the dichotomy between common law and civil law criminal justice systems.
This model, the participatory model of proof, consists of four elements: non-compul-
sion, informed involvement, the ability to challenge the evidence and the right to a
reasoned opinion of the court. These aspects of the model were discussed in detail.

The normative framework applies without more to the shortcuts to proof: these
avoidance mechanisms operate within the trial context. This means that they cannot
escape the test of fairness, because the trial context entails that the fairness of such
avoidance mechanisms can be assessed. It was argued that the normative framework
applies to diversions as well. Avoidance mechanisms that operate outside the trial
context can also be evaluated in the light of fairness. Both from the perspective of
the Court’s autonomous interpretation of the concept of the criminal charge and the
perspective of the rule of law, the notion of fairness applies to diversions as well as to
shortcuts to proof.

In Chapter 3, diversions and shortcuts to proof in Dutch law of criminal proce-
dure were discussed. The chapter started with an outline of the characteristics of the
full criminal trial, followed by avoidance mechanisms that can be discerned in the Dutch criminal justice system. Three diversions were discussed: the punitive order, the transaction and the conditional dismissal. The prosecutor can issue a punitive order when he concludes that a particular offence (infractions and minor crimes) has been committed. The punitive order does not require the consent of the accused: when the accused does not file a notice of disagreement, the order becomes binding. This entails that no judicial supervision exists, unless the accused files a notice of disagreement. The other diversions (i.e. the transaction and the conditional dismissal) do require the consent of the accused and cannot be enforced without his cooperation. In the final part of the chapter, shortcuts to proof were discussed. The use of facts of common knowledge, chain evidence and confessions (including the cases *ad informandum*) was outlined. Finally, the chapter concluded with a discussion of the manner in which appeal proceedings are conducted.

Chapter 4 was concerned with the diversions and shortcuts to proof in international criminal proceedings. Similar to the previous chapter, the concept of the full criminal trial was explored first by exploring what this entails in the context of international criminal proceedings. Subsequently, the diversions from the full criminal trial were discussed. The legal framework and practice of guilty pleas before the ICTY and ICTR were outlined, followed by the analysis of the admission of guilt within the context of the ICC. These diversions are quite similar to each other, apart from the prominent position of victims at the ICC regarding the approval of such an admission of guilt. The shortcuts to proof concerned the use of agreed facts, facts of common knowledge, judicial notice of adjudicated facts and the manner in which appeal proceedings are conducted before the international courts.

In Chapter 5, the diversions and shortcuts to proof were critically assessed in light of the normative framework presented in Chapter 2. Regarding the diversions, three categories were discerned: diversions based on consensus which are not subject to judicial approval (the transaction and the conditional dismissal); diversions based on consensus which are subject to judicial approval (the guilty plea and the admission of guilt); and the diversion that can be imposed, regardless of any consensus between the parties (the punitive order). It was argued that, when judicial approval is absent or limited, it is vital that the accused is still able to participate effectively regarding the determination of his criminal responsibility. This provides the required legitimacy regarding these avoidance mechanisms. A similar argument was made regarding the use of shortcuts to proof. The different shortcuts operate in front of the court which guarantees judicial supervision. The court must ensure that when the full criminal trial is avoided the possibility for the accused to participate effectively is respected. This entails, *inter alia*, that the accused is sufficiently informed of his procedural rights and that he is able to challenge any incriminating evidence against him.
6.2 A Case for Fairness

The focus on the trial context in relation to fairness in criminal proceedings obscures the fact that the enforcement of criminal law in present-day criminal justice systems is, to a significant degree, conducted outside the archetypical trial context. Out-of-court settlements and the imposition of sentences occur regularly and are regarded as a necessary tool for efficient criminal law enforcement. The diversions discussed in this study exemplify this trend and show that the type or category of criminal offences that are diverted from the full criminal trial is immaterial: diversions are used in the handling of both minor offences as well as the most serious violations of international criminal law. When the case is handled by a court, shortcuts to proof can be discerned that aim to speed up the proceedings. These shortcuts are characterised by their great diversity. What they have in common is that they, to a greater or lesser extent, infringe on the full criminal trial in which the evidence is presented in order to enable the accused to effectively challenge the incriminating evidence.

The diversions and shortcuts to proof that were discussed are examples of ways to avoid a full criminal trial. The legitimacy of these avoidance mechanisms was assessed in light of the concept of fairness in criminal proceedings; in the examination, the ability of the accused to participate effectively regarding the handling of his own case provided the normative framework. The avoidance mechanisms have in common that the accused is expected to be able to take care of his interests and to be diligent and assertive regarding his procedural rights. It is evident that this can be a burdensome task for accused that are not assisted by defence counsel. In such circumstances, the prosecutor, in case of diversions, or the court, in case of shortcuts to proof, must consider carefully the procedural interests of the accused. It is important in this regard to emphasise that criminal proceedings are not a battle between equal opponents: the accused is confronted with the criminal enforcement apparatus of the state or the international prosecutor. When the accused is not able to effectively exercise his procedural rights, this should be of true concern to the court or the prosecutor.

In his contribution to The Trial on Trial, Thomas Weigend wrote:

> Will trials survive? Or will they become the dinosaurs of criminal procedure, eventually extinguished because they no longer fit into an environment geared toward efficient crime control rather than a dramatic presentation of guilt and punishment?1

Weigend observed that, over the last decades, the criminal trial is in decline: out-of-court settlements are on the rise and the efficient enforcement of criminal law has become more important. This to the detriment of due process considerations. He envisaged that the trial will remain but that it will lose much of its prominence. The trial context is no longer regarded as the exclusive or preferred context in which the guilt of the accused is determined; instead, the trial is but one of the options available within a criminal justice system.

The decline of the full criminal trial is worrying, both from an epistemological perspective and the perspective of fairness. Although a full criminal trial does not guarantee accurate factual outcomes, it does provide the best conditions to critically assess the evidence. A procedural context that promotes adversarial argument (‘un débat contradictoire’) is essential when it comes to accurate fact-finding. Avoiding this context has consequences for the fairness of the handling of the case as well: just as the trial context is the optimal context to conduct fact-finding, it also provides the proper context to ensure that the case is processed in a fair and decent manner. Criminal proceedings conducted before an independent and impartial court is the best guarantee that the fair trial rights of the accused are observed.

The Introduction explained that this study was based on the archetypical criminal trial in which the charges against the accused are examined, the evidence is presented and challenged and a reasoned judgement from the court represents the conclusion. It was argued that, when this archetypical setting is abandoned and the full criminal trial is avoided, it is important that the accused can still properly participate in the handling of his case. Avoiding the full criminal trial is, in fact, legitimate only when the accused is able or enabled to do so effectively. This entails that he is not compelled to waive his right to the full criminal trial, that he is properly informed about the procedural outlook of the diversion or shortcut to proof, that he is able to challenge the evidence that is presented against him and that he is provided with a reasoned decision or judgement that can be challenged.

Present-day criminal justice systems will continue to provide for ways to avoid the full criminal trial; for many different reasons, they simply must have mechanisms that administer criminal cases in a smooth and efficient manner. This study is not a plea for the unconditional re-instalment of full criminal proceedings. Instead, it signals the trend of the avoidance of the full criminal trial and the implications in terms of fairness. The desirability and legitimacy of diversions and shortcuts to proof should not be based on efficiency considerations, but on a proper normative framework. The concept of fairness in criminal proceedings transcends the trial context and permeates the criminal justice system as such: processing criminal cases must be conducted in a fair manner. In this regard, the concept of fairness has an autonomous meaning.

or scope, which is not limited to the full criminal trial. The notion of an ‘ethics of conflict’, adversarial proceedings and effective participation are important and indispensable standards in this respect. Criminal trials are typically a display of conflicting interests of the parties involved. Therefore, it is vital that the accused is able to present his arguments, to challenge the evidence and to be regarded as a participant whose interests must be taken seriously. This applies equally to the full criminal trial as well as to diversions and shortcuts to proof.

This study analysed the workings of these mechanisms and the proper normative framework for such avoidance mechanisms. The concept of fairness in its traditional meaning has been developed within the context of the full criminal trial. The European Court of Human Rights has, in its interpretation of Article 6 of the Convention, interpreted the right to a fair trial. It is not surprising that the concept of fairness is first and foremost associated with the trial context as such. However, the developments in terms of enforcement of criminal law and the rise of avoidance mechanisms have resulted in a paradox: the right to a fair trial has been interpreted and discussed in great detail, whereas the significance of the trial as such has gradually diminished.

The decline of the full criminal trial is generally perceived as an intolerable trend towards more efficiency in the handling of criminal cases. The old dichotomy between efficiency and due process considerations is often referenced, at times with a sort of nostalgia when arguing that proper and legitimate criminal law enforcement should be conducted before an independent and impartial court that takes the proceedings seriously, not hampered by any efficiency considerations. However, the decline of the full criminal trial does not have to result in a similar decline of due process or fairness. In this regard, it is essential that the concept of fairness in criminal proceedings is regarded as an autonomous concept that transcends the context of the full criminal trial. When the concept of fairness is regarded as a principle underlying the enforcement of criminal law, it regulates and limits the use of avoidance mechanisms. Moreover, it provides the required legitimacy when a case is handled in a diverted or abbreviated manner.

When the concept of fairness is regarded as a principle that applies, regardless of the procedural context in which the case is processed, the criticism on the decline of the full criminal trial can be properly addressed. In every case in which the full criminal trial is avoided, the consequences for the fair handling of the case must be assessed. The different elements of the participatory model of proof provide guidelines that have to be taken into account: can the accused still opt for a full criminal trial? Is he properly informed of the outlook of the proceedings? Is he able to effectively challenge the evidence? Is he provided with a reasoned decision that can be challenged? Questioning the desirability of avoidance mechanisms as such is obsolete because these mechanisms will remain. In fact, they are expected to become more prominent, particularly in uncontested cases. What is of interest is the question of how avoid-
ance mechanisms can be developed that are legitimate, in terms of fairness, in current criminal justice systems. This requires an approach in which fairness is regarded as a fundamental principle of criminal law enforcement, which has to be operationalised regarding particular diversions and shortcuts to proof. The diversions suffer from insufficient regulation in this respect; for obvious reasons, the focus has been on issues of fairness within the trial context. The analysis presented in this study provides useful guidelines with respect to an effective and legitimate way of processing criminal cases. In this sense, the search for more efficiency does not have to be detrimental for the participation rights of the accused. What is essential is that, when the full criminal trial is avoided, any possible consequences in terms of fairness are acknowledged and properly remedied by providing the accused the opportunity to participate effectively in the handling of his case.

6.3 Recommendations

If fairness is taken seriously in the enforcement of criminal law, the following recommendations must be made. A division is made between the Dutch and international context. Within the Dutch context, three diversions were discussed: the punitive order, the transaction and the conditional dismissal. When the accused files a notice of disagreement against the punitive order, regular first-instance proceedings will follow. The punitive order as such and the manner in which the punitive order was issued are normally not part of the deliberations of the court. It has been argued in the literature that any irregularities that have occurred in the imposition of the punitive order can be regarded as irregularities that have occurred during the pre-trial phase. As a result, the regular regime of addressing procedural violations applies. However, because the prosecutor can impose sentences unilaterally (traditionally the prerogative of the court), more robust and explicit safeguards are indispensable. This can be achieved by amending Article 257f (3) CCP, which concerns the manner in which proceedings are conducted after a notice of disagreement has been filed. The amendment should give the court the specific authority to include in its deliberations the manner in which the punitive order was imposed. This authority can be exercised proprio motu, or at the request of one of the parties.

Regarding the transaction, judicial approval of special transactions can be a useful safeguard for the fairness of the negotiating process that preceded the transaction. Party autonomy should be respected as much as possible in that the court should limit itself to determine whether the process resulting in the transaction has been conducted in a fair manner. The practice of plea-bargaining in the international criminal law context provides useful guidelines in this respect. The court can determine whether the accused has entered into the negotiations voluntarily, whether he has been informed properly of his procedural rights and incriminating evidence, whether he has agreed unequivocally to the terms in the transaction and whether the transaction has
a sufficient factual basis. Considering the character of the transaction, judicial approval should focus on the procedural aspects of this diversion: was the procedure, resulting in a transaction, fair? Similar safeguards can be envisaged regarding conditional dismissals. In cases in which no punitive order can be imposed, no transaction can be offered (the case concerns a crime punishable by more than 6 years’ imprisonment) and no regular first-instance proceedings are initiated by the prosecutor, a conditional dismissal can be an appropriate avoidance mechanism. Although the number of cases that fall into this category will be low, the extraordinary character of such cases warrants judicial approval. Similar to the special transactions, the court determines in these cases whether the procedural safeguards have been complied with, and whether the accused was treated fairly by the prosecutor.

Irrespective of which diversion is used by the prosecutor, he should enable the accused to participate as effectively as possible in the process that results in a particular diversion. It has been stated before: diverting a case from the full criminal trial, in which evidence is properly presented and challenged, comes at a price. The accused must be provided with a decent and fair out-of-court procedure in which he can determine freely to consent to the diversion of his case.

In respect of the shortcuts to proof, similar observations can be made: the accused must be provided with a fair trial in which he is enabled to participate effectively. In case of shortcuts, the main responsibility for providing the accused with this opportunity lies with the court. When the court considers the use of facts of common knowledge, it must determine whether such facts have to be discussed with the parties. The distinction made by the Dutch Supreme Court between patently indisputable facts of common knowledge and *prima facie* facts of common knowledge may be rather absurd from an epistemological point of view; however, procedurally this distinction makes sense. Discussing the latter category with the parties during the proceedings enables them to comment on such facts. Effective participation is then guaranteed.

Considering the use of chain evidence, a similar line of argument can be followed: when neither the prosecutor nor the defence has referred to the possible use of chain evidence, the court should invite the parties to share their view on this matter. This way, the parties, particularly the defence, are able to challenge any possible use of chain evidence during the proceedings.

The use of confessions and in particular the *ad informandum* cases have been categorised as a shortcut in the Dutch context. Confessing to the charges has significant consequences for the proceedings, although the case will not be diverted from the court. The right to challenge the evidence is (implicitly) waived when the accused confesses, and he will normally not be provided with a reasoned judgement. This is, as such, not problematic because a waiver of the right to challenge the evidence is
legitimate if, and only if, the accused acts out of his own free will and is properly informed of the consequences of his procedural choices.

Regarding appeal proceedings in the Dutch context, it is essential that the accused is aware of the specific procedural outlook of the appeal proceedings. The more active role that is required from the accused regarding challenging the evidence is of particular interest here. As was stated in Chapter 5, the court of appeal can direct the proceedings to any aspect of the case *proprio motu*. The accused is well-advised to be active and put forward his objections against the first-instance judgement as early as possible. In case of unrepresented accused, the court of appeal must ensure that the accused is informed of his rights and is given the opportunity to challenge any part of the first-instance judgement he wants. Such accused should be informed that aspects of the case that the accused does not challenge may be left undiscussed, if the court of appeal does not discuss them *proprio motu*.

The diversions discussed within the international context are the guilty plea and the admission of guilt. Both diversions, which are quite similar to each other, are embedded in a solid procedural framework that ensures that the accused is aware of the consequences of his choice to admit guilt. Only when the accused is well-informed and enters his plea voluntarily may the Chamber consider and accept the plea. The ICC Statute states explicitly that the accused may enter an admission of guilt only after sufficient consultation with defence counsel. Considering the protection the accused can derive from this legal framework, it is remarkable that no admission of guilt has been filed at the ICC so far. Combined with the length of regular proceedings before the ICC, it is advisable for both the prosecutor and the accused to seriously explore the possibilities of diverting the case from regular proceedings. This includes disclosure of incriminating evidence, or a summary thereof, by the prosecutor in order to convince the accused that the prosecutor has indeed a case against him.

The use of shortcuts can significantly shorten the proceedings, if applied properly and fairly. Particularly the use of agreed facts may speed up the proceedings considerably. Within the context of the ICC, the prosecutor and defence are encouraged by the Chamber to reach agreement on as many facts of the case as possible. Unlike the legal framework of the *ad hoc* Tribunals, the ICC legal framework does not provide for the possibility to take judicial notice of adjudicated facts. Therefore, the agreement of the parties on parts of the factual basis of the charges is an important tool to speed up the proceedings. As stated in Chapter 5, this is acceptable only if the accused agrees to particular facts on a voluntary and informed basis. The safeguards regarding guilty pleas and admissions of guilt apply by analogy. The use of judicial notice of adjudicated facts at the ICTY in particular has resulted in more expeditious trials in which the proceedings are focussed on the contested issues of the case. Although this shortcut has proven its potential at the ICTY, it is unlikely that an amendment of the Rules of Procedure and Evidence of the ICC to include this shortcut would be really helpful.
The ICC’s case-load differs considerably from the case-load at the ICTY; in particular, a significant number of cases at the ICTY concerned the same factual basis. In such cases, the use of judicial notice can indeed speed up the proceedings: the individual criminal responsibility of the accused has to be determined against the background of facts that have been established in other proceedings. At the ICC, the use of agreed facts is to be encouraged by the Chamber in order to provide for more expeditious trials.

Considering judicial notice of facts of common knowledge at the ICC, Chambers should carefully assess the character of the facts of common knowledge. When those facts concern or relate to contextual elements of the crimes alleged, the Chamber should make sure that the accused is able to comment upon those facts. Ideally, contextual elements of the crime are proven by ‘ordinary’ means of proof which the accused can challenge during the proceedings.

The particular procedural context in which appeal proceedings are conducted in international criminal law requires an active attitude from the accused. Appeal proceedings are not trials *de novo* but are normally concentrated on the objections of the parties against the judgement of the Trial Chamber. This entails that the accused must be sufficiently aware of the procedural outlook of the appeal proceedings and of the fact that he must formulate his objections as precisely and timely as possible.