THE PROSECUTION AND PUNISHMENT OF CRIMES AGAINST HUMANITY; SOME RECENT THEORETICAL AND JURIDICAL DEVELOPMENTS[1]

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As it is widely known, the first instance of written definition in a legal instrument of the term "crimes against humanity" dates back in 8-8-1945, with the conclusion of art. 6 of the London Charter, which formed the legal basis for the indictment of the major World War II German criminals in Nuremberg. However, setting aside the need to stipulate a clear legal definition of crimes against humanity, as a distinct category of crimes both in national and international level, in order to facilitate their judicial prosecution and punishment, a number of vexed questions arises which have to be answered. First of all, what exactly constitutes the moral and normative basis for the formulation of this particular category of crimes? Why the existing penal provisions and juridical mechanisms in the national level are deemed insufficient for the effective suppression of crimes against humanity, thus leading the international community to the conclusion of special treaties and the creation of international enforcement mechanisms for the apprehension, prosecution and sentencing of the perpetrators? To what extent could be deemed permissible to overcome the obstacles set by the once considered as sacred and inviolable principle of national sovereignty?

[1]Περιλαμβάνεται στο συλλογικό τόμο: «Armed Conflict and International Humanitarian Law.150 years from Solferino ,Acquis and Prospects», εκδόσεις Αντ. Σάκκουλα-Bruyant, 2009.

Moreover, to what extent and in the name of which prevailing expediency may be accepted or at least be tolerated essential deflections from firmly established principles of our modern legal and juridical civilization, such as the prohibition of retroactive application of criminal provisions and the need to prove personal criminal responsibility as well as widely accepted and durable, in the course of time, institutions like the application of statute of limitations and amnesty?

It is claimed that the classification of certain heinous acts or omissions under the category of crimes against humanity is primarily justified from the fact that from such crimes, even if they seem to be directed against a given victim in a single or isolated context, in fact the whole humanity is affected by the victimization of a given person or human group. In such a circumstance, forgiveness cannot be considered as a victim's prerogative and punishment should not be motivated by reasons of hatred. The real issue in this type of crimes is the administration of retributive as well as symbolic justice. Although the first element (retributive) is firmly established in criminal law doctrine, the second one (symbolic) has seldom been argued because most authors who deal with this issue tend to approach it from the perspective of the traditional victim of the domestic crime; the individual. But when dealing with international crimes, that rise to the level of victimizing a large segment of a human society which forms part of the world community, the punishability of the perpetrator, irrespective of time and place constitutes an indispensable ingredient of international criminal responsibility. In such a circumstance, when the isolated crime constitutes a part of a wider pattern of criminal behavior, the traditional legal weaponry of

the established systems for the administration of criminal justice does not usually suffice.

Some scholars adopt the attitude that the principles which govern the purposes and targets of sentencing in the context of national criminal legislations applicable in peace-time are strongly tested and even reversed, if considered in the context of universal criminal law. This happens because individual criminal responsibility is unavoidably “collectivized”, “colored” and acquires the dimensions of the “macro-criminal” plan, of which it forms a part. For the eyes of the world community, it is not the individual who acts criminally but the whole collectivity (state, nation, organization) where he or she belongs or represents. Thus, the extremely strict and inflexible adherence to the doctrines and principles of classic criminal law (substantive and procedural), especially when it results to the essential hindrance or even thwarting of prosecution and punishment is justifiably considered as unacceptable scholasticism and the formalism of the criminal procedure as an affront to the honour and memory of the victims. The constitutionally sanctioned retributive character of the criminal sentence seems to claim preponderance over the reformative for the convicted person function, which is normally the prime aim of the penalties for usual crimes committed in peace-time.

The establishment and function of International Criminal Tribunals, especially those for serious international crimes committed in Former Yugoslavia and Rwanda, have marked a real cosmogony for he progress of international justice and the termination of the impunity regimes for the perpetrators of heinous crimes. Thanks to their abundant and well-reasoned

jurisprudence, they have contributed immensely to the clarification of very important substantive and procedural issues. At the same time, international jurisprudence has been and is still enriched, thanks to landmark judgments ands decisions of national courts, where the evolution of national and international theory concerning crimes against humanity is reflected with exquisite vividness and lucidity. On the other hand, we should not disregard and overcome without criticism instances of hesitations, wavers, inconsistencies and expediencies which sometimes are concealed behind impressive motions of judicial activism. These instances are indicative of the unavoidably strong and decisive influence of historical, political and social factors upon the interpretation and application of legal norms, sometimes to the detriment of established normative principles and the credibility of the judicial procedure as a whole.

A prominent example of direct and decisive influence of the social and political environment upon the judicial process concerning crimes against humanity may be found in the celebrated Claus Barbie cases, tried before the French courts , between 1984-7 .In the Barbie case, according to an initial judicial ruling by the *Cour d'Appel,*the defendant's crimes against the members of French Resistance could only fall under the category of war crimes and as such they were subject to the 20 year statute of limitation, as prescribed in the French Penal Code. Barbie could no longer stand trial for those crimes; he could only be prosecuted for the crime of deportation against the Jews, because it fell under the category of the not subject to the statute of limitations crimes against humanity. The ruling appalled French public opinion and was duly appealed, with various Resistance veterans groups presenting their case in court, since they too wished to be considered

as victims of crimes against humanity. The *Cour de Cassation* overturned the *Cour d'Appel* decision, ruling that Barbie should stand trial for torturing hundreds of members of the Resistance, considering that the latter does not constitute a war crime but a crime against humanity. The blurring of the line that separated the war crimes (committed against combatants, as obviously were the members of the Resistance) and crimes against humanity (committed only against civilian population) as enshrined in the Charter of the Nuremberg Tribunal in the above case is more than obvious, as are the reasons which dictated the adoption of this controversial line of reasoning.

The case against the former officer of the Argentinean Navy Adolfo Scilingo, adjudicated before the Spanish National Court (Audiencia National, AN) during the first months of 2005 provides a characteristic paradigm of the limits of national legislations and of the competence of national judicial mechanisms to deal effectively with international crimes. It also illustrates the delicate, multi-dimensional and highly controversial interdependence between general (especially customary) international law and national criminal provisions. Adolfo Scilingo traveled in Spain in 1997, in order to voluntarily testify before the Spanish judicial authorities (Judge B. *Garcon)* in the context of proceedings of an investigation launched, regarding the criminal activities of the military regime which held power in Argentina from March 1976 to December 1983.At that time, Scilingo testified not only as to his role to the system of repression , but also about the structures and procedures of that system, which had its territorial center in the *Escuela Mecanica de la Armada* in Buenos Aires-a naval mechanics school converted into a torture center- where thousands of persons believed to be "subversive elements" were tortured and assassinated. After hearing his

testimony, the judge ordered him to surrender his passport as a precautionary measure. Scilingo lodged an appeal against this decision with the Constitutional Court, which ruled in favor of him. Following the annulment of this measure, the investigating judge imposed unconditional temporary imprisonment on Scilingo. On 15 November 2004, the Supreme Court (*Tribunal Supremo)* confirmed the competence of AN to rule on the crimes of genocide, terrorism and torture that Scilingo was alleged to have committed. On 19r April 2005, AN reached a conviction and Scilingo was sentenced to 640 years; imprisonment for the perpetration of crimes against humanity. The AN varied the charges against Scilingo and instead of convicting him on the charges pressed upon him by the investigating judge, convicted him for crimes against humanity, pursuant to the new article 607*bis* of the Penal Code, which introduced this category of crimes in the Spanish legal system only in 2004. However, the AN maintained that this did not imply a violation of the principle of legality (*nullum crimen, nulla poena sine praevia lege*), since crimes against humanity already existed in customary international law at the time the events allegedly occurred. Besides, the AN asserted jurisdiction over this newly incorporated crime in the Spanish legal system, although there was no clear evidence that any of the victims of the attributed to the accused crimes was of Spanish nationality (passive personality jurisdiction) due to its international character, even though such competency, resulting from the principle of universal jurisdiction, was not expressly provided for by the Law on the Organization of the Judiciary and no obligation of exercising universal jurisdiction for the crimes at issue was stipulated in any international treaty.[2]

[2] See Richard Wilson "Spanish Supreme Court affirms conviction of Argentine former naval officer for crimes against humanity" at http://www.asil.org/insights/2008/01/insights080130.html, visited on March 13,

As it was expected, the judgment in the Scilingo case was subject to heavy criticism , even from commentators and scholars who support strongly the idea of maximum possible efficiency in the field of prosecuting international crimes[3]. The problematic aspects of the judgment focus firstly in the field of the specification of the charges (variation of the indictment from genocide and terrorism to crimes against humanity, conviction for a single crime against humanity instead of 32 separate crimes, as many as the alleged victims of the criminal behavior of the accused). Of course the most questionable aspect of the judgment is the application of penal rules introduced in 2004 for facts which occurred many years ago, arguing that the principle of legality should be relaxed in international law, as the rules expressed in customary law and the general principles are sufficient, even if they are considered ambiguous or uncertain. Since the Spanish legal system included a strict principle of legality, enshrined in art. 9 par. 3 of the Constitution, criminal tribunals should be precluded from applying directly customary international law, since it does not meet the formal and material requirements that the Spanish legal system and many other continental legal systems (including the Greek) ascribe to the principle of legality. The AN was acting in the particular case as a domestic court, applying domestic law in a state based on a civil-law system, which recognizes the rule of law, with no possible admission of any relaxation depending on the type of crime prosecuted or the accused.

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[3] See among others Christian Tomuschat: "Issues of universal jurisdiction in the Scilingo case", Journal of International Criminal Justice (JICJ) 3 (2005),PP. 1074-81, Alicia Gil Gil: "The flaws of Scilingo judgment" ,JICJ 3 (2005) ,PP. 1082-91.

In early November 2007, the Spanish Supreme Court's Criminal Chamber released its judgment upon the Scilingo case upholding, by a vote 11-4 the conviction passed by the AN. The most significant aspect of the Court's reasoning was its decision to uphold Scilingo's conviction for crimes against humanity. Reversing the usual order of analysis, the Chamber discussed the application of the statutory provision on crimes against humanity before it discussed jurisdiction over the matter. The key to the court's reasoning lies in the interpretation of art. 607*bis* of Spanish Criminal Code, which had not entered into force until 1st of October 2004, a fact which allowed Scilingo's lawyers to strenuously argue that his conviction for such crimes violated the principle of legality. The Chamber acknowledged that the principle of legality requires *lex previa, stricta, scripta et certa*-that is, a thorough written description and definition of the prescribed conduct adopted before this conduct took place. However, after the examination of the history of international criminal law from the Nuremberg Statute through the *ad hoc* international criminal tribunals, the ICC and national prosecutions like Barbie in France, Menton in the Netherlands and Finta in Canada, the Chamber found that art. 607*bis* incorporated previously, established rules of customary international law. The majority further noted that art. 10 par. 2 of the Spanish Constitution of 1978 required to interpret domestic law in the light of international human rights law. The Chamber concluded that although custom cannot create "a complete criminal offence" applicable in the Spanish courts, given this constitutional requirement the Court cannot "in the interpretation and application of internal law», ignore "the norms of customary International Criminal Law, insofar as they refer to offences against the hard core of essential human rights". This is especially so, the Court noted, where those

international norms have acquired the status of *jus cogens.* In this sense, the Court could not accept that the accused appellant could not foresee the criminal character of his acts in the moment of their commission and the consequent possibility that a penalty would be imposed. Scilingo could not be found guilty of torture, the Court reasoned, since this offence was not incorporated into Spanish penal legislation until July 1978 and his alleged tortuous acts all took place before that date. On the contrary, the conviction for crimes against humanity was adequately reasoned because art. 607*bis* is defined as an offence against international community, it contains the essential elements of the crimes of murder and illegal detention, which were well-established crimes under prior law; and it adds the statutory requirement that these crimes "be committed as part of a widespread and systematic attack against the civilian population or part of it, as well when they are committed by reason of the membership of the victim in a group or collective prosecuted on political, racial, national, ethnic, cultural or related grounds, or other grounds universally recognized as unacceptable in international law. Thus, the crime of murder and unlawful detention, which constitute ordinary crimes under domestic law, also constitute crimes against humanity under international criminal law.

Despite the justifiable serious reservations and objections which may be raised regarding the final outcome of the Scilingo case and the dubious theoretical and interpretative constructions upon which the Spanish courts based their judgment, one cannot ignore the serious contribution to the effort of ending the regime of impunity which perpetrators of heinous crimes enjoyed for decades, owing to amnesty laws passed after the fall of military governments in South America. The initiatives of the Spanish judiciary

undoubtedly paved the way and facilitated the revocation and abolishment of amnesty legislation in Argentina for crimes committed during the years of "the dirty war", allowing domestic courts to deal with relevant cases.

The case against A. Scilingo constitutes an illustrative paradigm of the difficulties arising in the process of harmonizing national and international norms. It also witnesses the sometimes deep and irreconcilable divergence between "nation-centric" and "ecumenical" schools of thought in the field of international criminal law. However, there are grounds for hope that many of the problems faced until today will be overcome, thanks to the entry into force of the Rome Statute of International Criminal Court, its forthcoming jurisprudence and the incorporation of penal provisions for the prosecution and punishment of international crimes in the domestic legislations of the countries who have ratified the ICC Statute.

As a closing remark, I would like to express my conviction that the realization of a viable and enduring perspective of the domestic and international mechanisms in the field of effective prosecution and punishment of international crimes is inextricably linked with the need for due respect to the rule of law. The lack of impartiality, the influence of motives and expediencies irrelevant to the merits of the case, the misinterpretation and selective application of widely acknowledged legal principles obviously undermine, in the long-term, the credibility of the institutions. The internationalization of criminal law in the field of crimes against humanity constitutes a turning point and a real historical challenge for an essential and conclusive exchange of views between the different legal systems of the world community. Therefore, the goal will be achieved

in the best possible way , by avoiding the adoption and sanction of procedures, practices and interpretative choices which create a sense of degeneration of the need for respect of the fundamental rights and privileges of the accused, as guaranteed by the international system of human rights protection.