Criminal Justice System in a Global World

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Emphasizing the impact of globalization on the criminal justice system is now a common place. Globalization is presented to an extent as a mere process of intensification of economic and commercial exchanges and expansion of all the possibilities of real time communication; in fact, it already affects all levels of society. In this light capitalization by criminal organizations on the improvement and generalization of the international means of transport and communication to benefit their many illicit operations is mentioned repeatedly as a paradigmatic example of the need for criminal justice systems to adapt extensively to this new situation.; This is necessary, particularly if we do not want organized crime to continue easily mocking at public prevention and prosecution efforts, which, as a manifestation of state sovereignty, still have in the territory the principal frame of application.

But the challenge that globalization poses for the criminal justice system goes far beyond the debate over the territoriality principle, its limits and exceptions. Facing this challenge properly should lead in the end to reflection on the meaning and function of a criminal justice system, in which global agencies try to push increasingly dense regulatory framework and forms of cooperation as their means to provide an answer to those criminal manifestations deemed more "typical" of the globalized

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This contribution is dedicated to my dear colleague, Füsun Sokullu-Akinci, Em.Professor at the Law Faculty of the University of Istanbul and Former Director of the Research Center for Criminal Law and Criminology.

world; these manifestations, however, are not however precisely identified with those traditionally considered as international crimes in a strict sense[1].

International Crimes and the Rome Statute

Even though there are numerous areas in which both phenomena overlap, it is indeed advisable not to confuse the internationalization of the criminal justice system with globalization.

The history of International Criminal Law and extradition reveals the distance in time of the first experiences of international criminal cooperation[2]. Leaving aside other precedents, the last century has been a privileged witness to the gradual development and intensification of international efforts in this area, and not only with regard to the most aggressive conducts against significant legal values of the international community as a whole: aggression as a crime against peace, war crimes, genocide and crimes against humanity.

These are indeed the crimes subject to the jurisdiction of the International Criminal Court. Going "from utopia to reality"[3], the ICC Statute was adopted on July 17th, 1998, at the Diplomatic Conference in Rome, and entered into force on July 1st, 2002. Its creation –as complementary jurisdiction of the respective national jurisdictions, which retain the priority (principle of complementarity: Article 1)– is, without a doubt, and notwithstanding the various initial limitations, "a true historical milestone in the development of human rights protection by and through International Criminal Law"[4]. In fact, the entrance in force of the ICC

[1] Cfr. J.L.de la Cuesta, "Mundialización y Justicia Penal", *Annales Internationales de Criminologie / International Annals of Criminology / Anales Internacionales de Criminología*, vol.41, ½, 2003, p. 45 ff.

[2] M.Ch.Bassiouni, *International Criminal Law. A Draft International Criminal Code*, Alpen aan den Rijn, 1980, p.1 ff.

[3] R.Ottenhof, "L'Association Internationale de Droit Pénal et la création de la Cour Pénale internationale: De l'utopie à la réalité", *Revue Internationale de Droit Pénal,* 73, 1-2, 2002, p.15 ff.

[4] J.L.de la Cuesta, "Retos y perspectivas del sistema penal en un mundo globalizado", *Re-*

Statute ended, at least for the most serious crimes, with the traditional absence (in international criminal law) [5] of direct and permanent enforcement mechanisms; a dearth in some way remedied punctually by the provision of *ad hoc*[6] Courts, which was not always applied effectively[7].

In this regard, Article 5.1 of the Statute of the International Criminal Court provides**:**

The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) The crime of genocide;

(b) Crimes against humanity;

(c) War crimes;

(d) The crime of aggression.

Therefore, Article 6 and ff. of the Statute respectively give the definitions of the following international crimes:

- *Genocide* (Article 6), following the 1948 Genocide Convention;
- *Crimes against humanity* (article 7), identified with murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty, torture, rape, sexual slavery, enforced pros-

vista Académica. Facultad de Derecho de la Universidad de La Salle, IV, 7, julio 2006, p. 271.

5 J.L.de la Cuesta, *ibidem*, p. 271.

6 The courts created, after the Second World War, the Nuremberg International Military Tribunal and the International Military Tribunal for the Far East-specific bodies in charge of prosecutiing crimes against peace, war crimes and crimes against humanity. Then, in the final decade of the twentieth century, the by the Security Council of the United Nations created international tribunals to prosecute serious violations of international and individual human rights committed in the former Yugoslavia (Res. 827, May 25 1993) and Rwanda (Res 995. November, 8 1994).

7 Ad hoc tribunals provided by the Treaty of Versailles and the 1937 Convention for the prevention and suppression of terrorism could not be established.

titution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity, persecution against any group or collectivity with its own identity, enforced disappearance of persons, *apartheid,* and other inhumane acts of a similar character intentionally causing great suffering or serious injury to the physical integrity or to mental or physical health, all of them if they are part of a widespread or systematic attack against civilian population and committed pursuant to or in furtherance of a State or organizational policy;

- *War crimes* (Art. 8), defined in the line of the grave breaches of the Geneva Conventions of 1949.

Concerning the crime of *Aggression*, the lack of sufficient agreement on its definition led in 1998 to draft Article 5.2 as follows:

> *The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.*

Therefore, the effectiveness of this provision to the agreement was submitted by the Assembly of States Parties or a Review Conference either by consent or by two-thirds majority (article 121 and 123)[8], in June 2010 the Review Conference held in Kampala[9] adopted in this regard new Articles 8 bis, 15 bis and 15 ter, regulating the definition of the crime of aggression and the establishment of conditions for its prosecution by the International Criminal Court.

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[8] The analysis on the inclusion of terrorism and drugs in the jurisdiction *ratione materiae* of the International Criminal Court also referred to the Review Conference.

[9] For the contributions of the AIDP-IAPL to the Review Conference, *Revue Internationale de Droit Pénal / International Review of Penal Law / Revista Internacional de Derecho Penal*, vol.80 1-2, 2010, p.9 ff.

In accordance with the approved text, the term, "act of aggression" nowadays is identified with

> *"the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations" (art. 8 bis.2)*

The provision necessarily refers to the content of the United Nations General Assembly Resolution 3314/74, adopted on December 14, 1974, which included seven distinctive forms of aggression, regardless of the declaration of war:

> *"(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;*
>
> *(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;*
>
> *(c) The blockade of the ports or coasts of a State by the armed forces of another State;*
>
> *(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;*
>
> *(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;*
>
> *(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;*
>
> *(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against*

> *another State of such gravity as to amount to the acts listed above, or its substantial involvement therein."*

In any case, the crime of aggression is defined as follows:

> *"For the purpose of this Statute, "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations" (art. 8 bis.1, ER).*

However, the agreement on the definition of aggression does not mean the direct or immediate beginning of its effective prosecution. Along with the requirement of respecting the *vacatio* year, and once the amendments are ratified or accepted by thirty States Parties (Articles 15 bis and 15 ter 2), the approval of the amendment by two thirds of the States Parties is required, subsequent to January 1, 2017 (Art. 15 and bis.3 15ter.3). In any case, bearing in mind the difficulties that the definition of aggression has always posed at the United Nations, despite the issues and restrictions resulting from the approved rules of prosecution, the agreement merits being greeted positively.

Other International Crimes

The criminal behaviors envisaged in the Rome Statute are certainly "the hard core" [10] of International Criminal Law, and are universally recognized as international crimes, in view of their attack on the legal rights of greater importance for global coexistence and their rejection by the international community as a whole.

Nevertheless, in addition to this, many international instruments have progressively regulated various cooperation systems related to other criminal figures. The review of these international instruments with criminal incidence (close in number to 300) leads Bassiouni[11] to

[10] J.L.de la Cuesta, "Retos…", *cit.*, p. 267.

[11] *Introduction au Droit Pénal International*, Bruxelles, 2002, p. 88 ff.

advocate for an international Criminal Law focused not exclusively on the crimes of aggression, genocide, war crimes and crimes against humanity, and to propose a broader concept of international crime where, along with these, other behaviors, although never expressly and formally declared as international crimes by the global community, should be included. Many other behaviors also constitute in fact:

(1) Serious aggressions:

a. against the international peace and security or

b. against fundamental human rights standards aimed at protecting life, liberty or personal security, and whose execution strikes the conscience of mankind, or

c. of transnational character, as affecting the interests of more than one State or requiring an intense international cooperation for their prevention or punishment;

(1) and receive a penal treatment by the international texts, manifested in the concurrence of any of the following features[12]:

a. Explicit recognition of the conduct proscribed as constituting an international crime / crime under international law / crime.

b. Implicit recognition of the criminal nature of the act by establishing the duty to prohibit, prevent, prosecute, punish or the like.

c. Criminalization of the proscribed behavior.

d. Establishment of a duty or right to prosecute or punish the proscribed conduct / extradite / cooperate in prosecution or punishment (including judicial assistance in criminal proceeding).

e. Establishment of bases / criteria of jurisdiction

[12] M.C.Bassiouni, *ibidem*, p.61

f. Reference to an international jurisdiction / international criminal court.

g. Prohibition of obedience to superior orders.

Following these criteria Bassiouni identifies the following criminal offenses in the present international criminal law: Aggression; Mercenarism; Crimes against humanity; War Crimes including storage / use / production of certain illicit or prohibited weapons; Nuclear terrorism; Theft of nuclear materials; Apartheid; Slavery and slavery-related practices; Torture and other forms of punishment or cruel, inhumane or degrading treatments; Unlawful human experimentation; Piracy; Attacks on the security of international air navigation; Attacks against maritime navigation and safety of offshore platforms; Attacks against internationally protected persons; Crimes against the UN and associated personnel; Taking of civilian hostages; Unlawful use of the mail; Bombings; Financing of international terrorism; Drug-related crimes; Organized crime; Destruction or/and theft of historic, artistic, cultural or archaeological heritage; Unlawful acts against the environment; International trafficking of obscene materials; Counterfeiting of currency; Unlawful interference with international submarine cables; Bribery of foreign public officials.

Certainly, the position of the Honorary President of the International Association of Penal Law is not dominant in the doctrine. Prevailing opinion prefers to follow a tighter line. However, he is not the only one proposing the inclusion in the category of international crimes, in the strict sense, of conducts that go beyond those specifically classified as such by the ICC Statute. Thus, Antonio Cassese[13], taking into account international proscriptions, also includes in the category of international crimes torture (not constituting crime against humanity or war crimes) and some extreme forms of terrorism (serious international terrorism encouraged or tolerated by States); piracy, illegal trafficking of drugs and psychotropic substances, traffic of weapons, of nuclear and other radioactive materials and money laundering, are nevertheless excluded and

[13] *International Criminal Law,* Oxford, 2003, p. 110 ff.

Cassese does not hide his concerns regarding the most appropriate way of addressing the crime of *Apartheid*.

Globalization and the International Criminal Justice System

Proposals like the one made by Bassiouni allow us the opportunity to achieve a better international criminal justice system in which the main efforts devoted to the prevention and prosecution of crimes, on a global scale, embrace also serious behaviors even if they are not considered strictly as international crimes by the majority of the doctrine.

In any case, it should be noted that, despite being used several times as synonyms, the terms "internationalization" and "globalization" refer to very different realities; similarly, the main concerns and developments of global agencies, notwithstanding their support to the ICC, really go along other lines.

According to M.Castells[14], globalization cannot simply be identified with the increase of economic and commercial exchanges that have accompanied the opening-up of capital markets and the technological development of communications and transport in the late 20th century. In fact, if this surely is clear proof of the present high level of internationalization, globalization supposes much more: the possibility of working as a whole, in real time on a global scale; something new and of a transcendental relevance in the future management of the individuals', countries' and world life. Globalization, thus, broadly exceeds internationalization, and appears as an extensive and essential change in the global operation in which inflexibility, territoriality and hierarchy (characteristics of the systems and structures of the Nation-state and traditional international law) are replaced by fluidity, non-territoriality and even non-hierarchy of the new international networks' government[15].

This sense of globalization –basically economic for the time being, but everything is pointing to the fact that it will be accompanied by a pro-

[14] *The Information Age: Economy, Society and Culture*, vol. I: *The Rise of the Network Society*, Oxford, 1996, 92.

[15] S.Parmentier, "Cultural Integration and Globalization of Criminal Justice", *Eguzkilore. Cuaderno del Instituto Vasco de Criminología,* 17, 2003, p.100.

gressive political globalization– can only euphemistically be applied to any reality of a criminal justice system[16] that, even at a national state level, is far from functioning as a whole and in real time and still based upon the principles of the "Peace of Westphalia" at the international level.

However, looking at the latest international developments in criminal matters it is not difficult to find elements and features which can be considered to be a consequence of globalization. This is particularly evident in areas such as the struggle against what G. Picca called the "dark face"[17] of globalization: organized crime and its illegal trafficking; or in the prosecution of corruption, a real "terminal illness"[18] for democracies, and the fight against cybercrime. In all these areas, thanks to the initiative of global agencies, internationalization and strengthening the closely coordinated joint action of States (reciprocally among themselves and with international bodies) are more and more evident.

The same applies, particularly, to terrorism. Since September 11, 2001, an important change of direction in international action and coordination has clearly taken place, promoting the quick increase in signing and ratification of existing international instruments and the adoption of new texts. On the other hand, after United Nations Resolutions 1373 (September 28, 2001) and 1456 (January 20, 2003) –adopted by the Security Council, "acting within the framework of Chapter VII of the Charter of the United Nations"– any act of international terrorism is considered a threat to international peace and security and States must work together to prevent and suppress terrorist acts, through, among others, greater cooperation and fulfillment of relevant international agreements, as well as complementing international cooperation with additional measures aimed at preventing and suppressing, by all legal means, the financing and preparation of any act of terrorism in their territories. Furthermore, Resolution 1373 established a committee in

[16] S.Parmentier, *ibidem*, p.100.

[17] G.Picca, "Transnational organised crime", *Annales Internationales de Criminologie*, 39, 1-2, 2001, p.20.

[18] D.Szabo, "La corruption: aspects socio-culturels et études comparées des stratégies de prévention et de repression", *Annales Internationales de Criminologie / International Annals of Criminology / Anales Internacionales de Criminología*, 39, 1-2, 2001, p.43.

charge of monitoring its execution and working in close contact with the United Nations Office on Drugs and Crime, within the framework of the Global Program against terrorism[19].This Resolution also forced the States to incriminate the financing of terrorism; to freeze the assets of terrorists and to forbid nationals or any person or entity in their territory to lend directly or indirectly any type of economic or financial funds, goods or resources or other type of service either to those committing or facilitating or participating in terrorist acts, or to any entities owned or controlled directly or indirectly by them, or acting with their help or under their direction. Moreover, Resolution 1456 urged the States to take urgent measures to prevent and suppress any active or passive support of terrorism, and to incorporate them into all relevant agreements and protocols in the sphere of terrorism, assuring mutual assistance in order to provide a more effective system of prevention, research, prosecution and punishment.

In all these and other relevant areas, international (and regional) agencies, through global programs of action, end up promoting, supporting and coordinating plans and actions aimed to prevent and prosecute criminal conducts of greater seriousness. However a fundamental characteristic of intervention, regrettably, is the prevailing (sometimes exclusive) punitive point of view: based on the harmonization of incrimination standards and trying to establish solid starting points for police and judicial cooperation, the nearly exclusive scope becomes ensuring the greatest efficiency in the prosecution and punishment of those criminal acts clearly rejected by the global community. Thus, few references (or none) can be found to the criminal prevention of these phenomena, to the treatment of criminals or even (exceptions apart: such as 1999 International **Convention** for the Suppression of the Financing of Terrorism or the Palermo Convention against transnational organized crime and its Protocol in terms of human trafficking) to the rights and interests of victims, aspects that are supposed to be specifically dealt with by other means[20].

[19] http://www.unodc.org/unodc/es/terrorism.html

[20] Regarding victims, see, among others, the important Resolution of the Commission on Human Rights (2002/44) about the right to restitution, compensation and rehabilita-

Progress of punitivism

The predominance of punitivism when dealing with certain criminal phenomena is not only present in the international sphere. It has also important signs at a national level: in particular, in connection to the consequences of those intense population movements provoked by globalization and where, paradoxically, as opposed to the liberalization of capital and movement of goods, strict regulation and intense control prevail.

The repetition of media-messages attributing a cause-effect relationship to immigration and crime generates a "virtual reality"[21] whose demands are added to the criminological and criminal-policy challenges caused by the increasing number of refugees, by exploitation and human trafficking and by the increase in criminal acts of a racist and xenophobic nature. In this context, as Garland points out, the neglect of the criminology of everyday[22] paves the way for the "punitive society"[23]. Forgetting the "criminogenic"[24] nature of society that, therefore, not only suffers but also creates the crime –a real social (and not only individual) problem that must be controlled and minimized[25]–, the punitive society proposes eradicating it simply through punishment and neutralization of criminals: as the latest penal reforms reflect[26], enlargement of facilities and investment in security and segregation of criminals thus gain ground to the detriment of resocialization, treatment and reeducation, punishment

tion of victims of grave violations of human rights and basic freedoms. *Revue Internationale de Droit Pénal / International Review of Penal Law / Revista Internacional de Derecho Penal*, 73, 1-2, 2002, p.339 ff.

21 E.R.Zaffaroni / A. Plagia / A. Blocar, *Derecho Penal. Parte general*, 2nd ed., Buenos Aires, 2002, 164.

22 "As contradições da 'sociedade punitiva': o caso britânico", *Revista de Sociología e Política*, 13, 1999, p. 64 ff.

23 "The Punitive Society: Penology, Criminology and the History of the Present", *The Edinburgh Law Review*, I, 2, 1997.

24 J.Pinatel, *La société criminogène*, Paris, 1971.

25 H.J.Kerner, "The global growth of Criminology", *Annales Internationales de Criminologie / International Annals of Criminology / Anales Internacionales de Criminología,* 36, 1-2, 1998, p.39.

26 Notwithstanding to a certain "ambivalence", D.Garland, "As contradições …", *cit.*, p.74 s.

and neutralization being considered the more effective means of prevention and social defense.

The convergence of the punitive lines, both at international and national level, is particularly dangerous at a time in which the establishment of an internationalized criminal justice system is progressively taking place. In the same sense as "civilizing globalization"[27] appears to be a real need on the political level, in order to guarantee social justice and the correction of the market system defects[28], in the criminal framework, if we do not want to leave the field open to the prevalence of blind, public punitive security criteria, it is equally necessary to reaffirm those common sets of norms, beliefs and cultures - those shared bases and principles that must constitute the pillars of the new internationalized criminal justice system.

In this respect, it is good to remember that criminological (and historical) knowledge widely show how the appropriate medium- and long-term containment of crime (and the minimization of its more serious effects) will unlikely be the result of mere punitivism, repression and restriction or denial of fundamental rights: in fact, as everyday's life clearly proves, criminal policy is much more complex and difficult and cannot be confused with the penal and penitentiary intervention. On the contrary, the appropriate treatment of criminal phenomena requires a multi-level intervention which –starting with the results of criminological research into individual and social factors that have a bearing on crime– ensures the protection of fundamental legal interests through the application of appropriate measures of prevention of crime and delinquency, as well as treatment of the criminal and victims; all this in the frame of a continuous evaluation, innovation and improvement of the social intervention mechanisms and juridical guarantees.

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[27] E.Barón, "Civilizar la globalización", http://www.el-mundo.es/especiales/2001/07/sociedad/globalizacion/analisis_ts.html

[28] F.Sahagún, "El tren de Kofi Annan", http://www.el-mundo.es/especiales/2001/07/sociedad/globalizacion/analisis_sahagun.html

Simultaneously, in front of those simplified and widespread messages, typical of the punitive society, it is worth insisting[29] on the need to promote and extend the criminological research, that shows us, for example, the importance and utility of restorative justice[30] and mediation, as strategies of social control[31] with a non neglectable punitive content[32]; and structuring criminal policy lines respectful of the traditions of the respective systems[33], as a departing point, but characterized by its integral commitment to human rights[34]; and firmly devoted to serving the individual persons, social justice, and peace.

Central position of the principle of humanity

In this frame, guaranteeing and respecting the principle of humanity[35] appears as an essential element.

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[29] J.L.de la Cuesta, "Mundialización…", *cit.,* p. 77 s; y, del mismo autor, "Retos…", *cit.,* p. 283 y s.

[30] T.Peters & I.Arresten, "Towards 'Restaurative Justice?: Victimisations, Victim support and trends in criminal justice", in *Crime and Criminal Justice in Europe ,*Strasbourg, 2000, p.35 ff.

[31] G.Varona Martínez, *La mediación reparadora como estrategia de control social. Una perspectiva criminológica*, Granada, 1998.

[32] In not a few occasions they are very efficient and able to avoid fostering a reaction which not only does not help to prevent victimization but also i sable to assure treatment and assistance to victims. (T.Peters, "Victimisation, mediation et pratiques orientées vers la réparation", *Annales Internationales de Criminologie / International Annals of Criminology / Anales Internacionales de Criminología*, 2000, p., but also channel properly the natural punitive demands generated by criminal infractions (K.Daly, "Restaurative Justice: the real story", *Punishment & Society*, 4(1), 2002, p. 55 ff. http://www.gu.edu.au/school/ccj/kdaly_docs/kdpaper 12.pdf. This is why A. Beristain suggested integrating both aspects in a new "Recreative penal justice". Recreative penal justice: contrasting retributive and recreative worldview", in E.Fattah & T.Peters (eds.), *Support for crime victims in a comparative perspective. A collection of essays dedicated to the memory of Prof.Frederic McClintock*, Leuven, 1998, p.111 ff.)

[33] P.H.Bolle, "Politiques criminelles, conflits de cultures et choc des civilisations", *Annales Internationales de Criminologie / International Annals of Criminology / Anales Internacionales de Criminología*, 36, 1-2, 1998, p.89.

[34] S.Parmentier, "Cultural Integration…", *cit.*, p.103.

[35] J.L.de la Cuesta, "El principio de humanidad en Derecho Penal", *Eguzkilore, XXX Aniversario de la Fundación del IVAC/KREI. Homenaje a nuestro fundador el Profesor Dr. Dr. h.c. Antonio Beristain,* núm. 23, 2009, p. 209 ff.

Considered by Antonio Beristain, as one of the "basic axioms of the Criminology in face of the globalization and multiculturalism"[36], the principle of humanity constitutes a fundamental postulate in Criminal Law. Although certainly less studied than the traditional principles of necessity, legality, culpability, this principle should not be considered "less important"[37] than those, due to its key position in the criminal law and policy of any democratic society[38], where "human, personal and social relationships, originated from justice generally and from criminal justice particularly" and should never ignore "the person's dignity"[39] and right to a "full development of his/her personality"[40]..

In my opinion, there are (and should be) three main consequences and reflects of the principle of humanity in contemporary criminal law:

- the prohibition of torture and any inhuman or degrading punishment or treatment with its correlative corollaries:
    - o incrimination of torture;
    - o proscription of those punishments that purely annihilate the human being or are designed to cause suffering or humiliation (such as the capital punishment, life imprisonment and sentences of an excessive duration);
- the resocialization of the convicted, particularly if they are punished with deprivation of liberty; and last but not least;
- the assistance and care of the victims of any criminal act. Victims need, in effect, to pass "from obscurity to acknowledgement"[41], ensuring all their rights, granting them

[36] A.Beristain, "Axiomas fundamentales de la Criminología ante la globalización y la multiculturalidad", *Eguzkilore. Cuaderno del Instituto Vasco de Criminología,* 17, 2003, p.93

[37] A.Beristain, *Nueva Criminología desde el Derecho Penal y la Victimología*, Valencia, 1994, p.14.

[38] H. H. Jeschek / Th. Weigend, *Lehrbuch des Strafrechts. Allgemeiner Teil*, 5ª ed., Berlin, 1996, p. 27.

[39] A.Beristain, "Axiomas fundamentales…", *cit.,* p.93.

[40] E.Bloch*, Derecho natural y dignidad humana*, Madrid, 1980.

[41] I.J.Subijana Zunzunegui, *El principio de protección de las víctimas en el orden jurídico penal.*

the prominent role in the criminal law system and encouraging and contributing to their social participation.

- We all easily understand that respecting the dignity of the human being turns out to be incompatible with their subjection to offenses or humiliations, and we also share the prohibition of cruel, inhuman or degrading treatment under international texts.

The incrimination and punishment of **torture and any sentence and inhuman or degrading treatment** constitutes, in this respect, the first practical consequence that affirms the principle of humanity in Criminal Law and in this way many international text require individual states to adopt strict regulations in order to assure the criminal prosecution of those conducts. However, the incrimination of torture poses many problems: among them, the possibility or lack of possibility of a criminal justification for torture, that is again under debate[42]. Bentham already had analyzed this issue at the beginning of the 19th century, arriving to a negative conclusion[43]. In general, the debate is over the question, whether the international scenario rejects any practice of torture even in exceptional circumstances (state of war, etc), from the perspective the criminal law; whether validity, if any exists at all, of the arguments that some justification for torture can apply. Doubts relate to whether torture can be applied as self-defense or in a state of necessity, because unlike the claimed defense of obedience to superior orders, which is ruled out, these justification grounds are not explicitly ruled out in the Convention of 1984. Even so, since the Convention of Rome (1950) does not autho-

Del olvido al reconocimiento, Granada, 2006

[42] C.Roxin, "¿Puede admitirse o al menos quedar impune la tortura estatal en casos excepcionales?", *Nueva Doctrinal Penal*, 2004, p. 547 ss; asimismo, K.Ambos, *Terrorismo, Tortura y Derecho Penal. Respuestas en situaciones de emergencia*, Barcelona, 2009, p.19 ff. On the issue of torture under the Bush Administration, M.Ch.Bassiouni, *The Institutionalization of Torture by the Bush Administration. Is Anyone Responsible?* (Intersentia, 2010); Ch.L.Blakesley, *Terrorism and Anti-Terrorism: A Normative and Practical Assessment* (Brill 2006), p. 279-316; and "Ruminations on Terrorism. Expiation and Exposition", *New Criminal Law Review*, Vol. 10, Number 4, p. 554–581.

[43] J.L.de la Cuesta Arzamendi, "¿Justificación de la tortura? Insuficiencias de la normativa penal internacional", in *Criminología y Derecho Penal al servicio de la persona. Libro Homenaje al Profesor Antonio Beristain*, Donostia-San Sebastián, 1989, p. 695 ff.

rize any exception at all for torture or for inhumane and degrading treatment, the absolute prohibition of torture in the European framework can be declared, with the consequence of its rendering impossible any legal justification of any kind. [44] This is also the right solution in Spanish law, in accordance with the mandate of Article 15 of the Spanish Constitution. Nevertheless, as only unfair and guilty acts can legally be considered as crimes, the impossiblility of legal justification for torture does not impede the presence of excuses that could redound in exceptional circumstances to the reduction of punishment or even the absence of guilt, particularly if the concurrent circumstances reveal that in the concrete situation no other behavior of the author could rationally be required.

- The prohibition of torture and other inhumane or degrading treatment has important repercussions in the sphere of punishment other legal consequences of a crime. Article 1 of the 1984 Convention, when excluding from the torture scenario "the pains or sufferings as a result only from legal sanctions, or being inherent or incidental to them", seem not to allow legitimization of those sentences and concomitant punishments, which may possibly be "legal" from a formalistic point of view, but on the other hand, these punishments appear to be designed only to cause suffering or humiliation; due to their cruel, inhumane or degrading nature, thus, completely infringe the international prohibition.

If the contrariety of corporal punishment with the international prohibition is not anymore questioned, despite its survival in many places, the debate currently focuses on the application of the **death penalty,** subjected to restrictions[45] by Article 6 of the International Covenant on Civil and Political Rights (1966), and the question of its abolition being the subject of the Second Optional Protocol (1991). The nature of the instruments employed already highlights the limited rejection of the

[44] J.L.de la Cuesta Arzamendi, "Consideraciones acerca del delito de tortura a la luz del Convenio de Roma de 1950", in *Giza Eskubideak Europan / Los Derechos Humanos en Europa / Les droits de l'homme en Europe / The Human Rights in Europe (Donostia-San Sebastián, 12-14 diciembre 1988)*, Vitoria-Gasteiz, 1989, p.190 ff.

[45] Only applicable to the most grave crimes, with all due respect towards the principle of criminal, penal and procedural legality; there is the right to request amnesty or commutation; not applicable to people aged under 18 nor to women who are pregnant (art.6.2).

death penalty by International Law, where the prohibition of the death penalty is not fully accepted as a natural consequence of the international proscription of cruel, inhumane and degrading punishment and treatment.

However, the questioning of the death penalty is growing, both generally and regarding specific aspects of its execution[46]. The International Conference on abolition of the death penalty, organized by *Amnesty International* (Stockholm, 1977), qualified it as "the most cruel, inhumane and degrading punishment", exhorting governments to "take measures" to abolish it "completely and immediately".

Actually, the incompatibility of the death penalty (and not just the incompatibility of the wait on death row or of some of its forms of execution) with an appropriate understanding of the principle of humanity, focused on the respect for the human being as such, should not be questioned. However, despite the examples of the Statutes of the International Tribunal for the former Yugoslavia and for Rwanda, as well as the Rome Statute of the International Criminal Court[47], the abolition of the death penalty is still (and unfortunately) an important, yet unresolved matter at the international level. Even if the number of retentionist countries progressively decrease, executions still take place[48]: particularly in five

[46] Thus, the Committee of Human Rights– for which the death penalty must be executed causing the least possible "amount of suffering"(*Observation générale* 20 (44), 3 April1992)– has admitted that the execution method can constitute an inhumane or degrading treatment (*Kindler v. Canadá,* 1993); it considered that execution by lethal injection could comply with the International Covenant, unlike execution by gas asphyxiation, a method considered "particularly horrible"(*Charles Chitat Ng v. Canadá*, 1994).

[47] W.Schabas, "Life, Death and the Crime of Crimes. Supreme Penalties and the ICC Statute", *Punishment and Society*, 2, 2000, p.263 ff.

[48] In several of these countries, the death penalty obtains for even drug crimes. Moreover, if we pay attention to the existing reports, in these last twenty years, while the number of countries with death penalty has decreased, the ones with death penalty imposed on crimes related to drugs has increased (R.Lines, *Death penalty for drug offences: a violation of International Human Rights Law,* IHRA, London, 2007, p.7.), concluding that, as a complaint of the Anti-Death Penalty Asia Network (ADPAN) in places such as China or Indonesia, executions are carried out particularly on June 26th, "International Day Against Drug Abuse and Illicit Trafficking" (Amnesty International, *Acabar con la pena de muerte por delitos relacionados con drogas*, 22 junio 2009, http://www.amnesty.org/es/

countries –Saudi Arabia, China, United States, Iran and Pakistan– where, according to United Nations reports[49], 88% of the executions took place in 2007.

In this regard, it is important to underline the importance of the initiative of creating the International Academic Network for the Abolition of Capital Punishment[50], something which should be welcomed in the most enthusiastic and favorable way.

If from the retributive perspective, the most extreme schools of thought consider that applying the death penalty is the only way to restore the order violated by the most serious crimes, for those who defend prevention, death penalty would be necessary to dissuade citizens, in general, from committing these criminal acts[51]. In fact few instruments or entities turn out to be more privileged than this academic network to counteract these unfounded arguments by using scientific arguments and research.

The same should be said regarding the allegations made by retentionist countries against the international demands for suspension of executions and in favor of their abolition. They, indeed, often state not only that there is no international consensus on abolition, but also, by denying its relationship to human rights: according to them this is a matter of internal criminal justice, in which neither the UN nor the other States have the authority to intervene[52]. In this respect, the International Academic Network for the Abolition of Capital Punishment constitutes in the same way a privileged and especially good forum to argue and defend firmly and emphatically:

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for-media/press-releases/acabar-pena-muerte-delitos-relacionados-droga-20090622).

[49] Asamblea General de la ONU (2008). *Aplicación de una suspensión de las ejecuciones*, Septiembre 2008. http://www.amnesty.org/es/library/asset/ACT50/016/2008/es/7cdce390-7fd7-11dd-8e5e-43ea85d15a69/act500162008spa.pdf

[50] http://penademuerte.wordpreff.com/

[51] J.L.de la Cuesta, "¿Pena de muerte para los traficantes de drogas?", in R. Cario, *La pena de muerte en el umbral del tercer milenio*, Madrid, 1996, p.203 ff.

[52] Asamblea General de la ONU (2008). *Aplicación… , cit.*

- that the death penalty is a matter of human rights and not merely of internal criminal justice, and
- that there is an international consensus, at least on an academic level, regarding the necessity of globally abolishing the death penalty.

- The incompatibility of the predicated principle of humanity can also affect specific types of imprisonment, such as **life imprisonment** (and, in general, of those of very long-term sentences), whose inhumane nature has been discussed for more than two centuries[53] and whose admissibility unconditionally must result[54]. In accordance with Article 10 of the International Covenant on Civil and Political Rights, custodial sentences are to be applied "humanely and with the due respect to [human] dignity" (Section 1); moreover, the prison system must consist "of a treatment whose main purpose will be the social reform and rehabilitation of prisoners" (Section 3). However, the presence of the life sentence in comparative law is very important because it has almost habitually replaced the death penalty after its abolition[55]; it is the most serious punishment of those considered by the Statute of the International Criminal Court, applicable "when the extreme seriousness of the crime and the personal circumstances of the convicted person justify it". Anyway, multiple institutions –among them the Council of Europe in 1977[56] and the important sentence of the German Constitutional Court of 1977– have already declared that the imprisonment of a person for life without any hope of being released is not compatible with the principle of humanity. Thus, in order to assure the compatibility of life imprisonment (or a long-term imprisonment) with human dignity, there should always be a possibility of review or parole after the execution of a certain part of the

[53] D.Van Zyl Smit, "Life imprisonment as the ultimate penalty in International Law: a human rights perspective", *Criminal Law Forum*, 9, 1999, p.28 s.

[54] S.Verelst, "Life imprisonment and human rights in Belgium", *Human Rights Law Review,* 3-2, 2003, p.283.

[55] D.Van Zyl Smit, "Abolishing life imprisonment?", *Punishment and Society*, 2001, p.300.

[56] Council of Europe, *Treatment of long-term prisoners,* Strasburg, 1977, p.22

prison sentence that in practice should not exceed 20 years of imprisonment.

- The penitentiary system must also fully respect the principle of humanity and, in accordance with the International Covenant on Civil and Political Rights (and, in Spain, with the Spanish Constitution), should be oriented towards resocialization. This requires the deployment of important efforts in order:

  - to reduce the stigmatizing and separation that characterizes every imprisonment decision, which cannot merely result in the overcrowded containment of human beings. For this reason, an efficient and permanent control of penitentiary overpopulation is needed[57]; and

  - to take profit of the time in prison in order to create opportunities for the progressive reincorporation of the convicted into society.

- Traditionally, references of the principle of humanity in Criminal Law have mainly focused in criminals and incarcerated persons. Victimology has shown us the needs of the victims concerning assistance and satisfaction that any criminal justice system must also address. Nowadays it is therefore particularly important to pay special attention to the requirements that the principle of humanity imposes concerning the **victims of crime**, assuming as one of the most basic priorities of any public intervention the effort for their assistance and satisfaction. Victims, so often "forgotten", need to be "recognized"[58], by ensuring all their rights and providing them full participation in the criminal justice system and in the society as a whole.

Treating victims with humanity means fully acknowledging their condition, and particularly, their rights: the right to be informed and to know the truth; the right to have access to justice and to reparation, in a

[57] J.L.de la Cuesta Arzamendi, "Retos principales del actual sistema penitenciario", in *Jornadas en Homenaje al XXV Aniversario de la Ley Orgánica General Penitenciaria,* Madrid, 2005, p.134 s.

[58] I.J.Subijana Zunzunegui, *El principio… , cit.*

truly integral sense. Thus it is important to implement measures of assistance and information, as well as solidarity and public aid to overcome victimization. Protective measures against possible assaults, humiliations or attacks on intimacy are also needed, particularly concerning the macro-victimizations (such as terrorism)[59].

Likewise, and concerning Criminal law and policy, multiple channels, both procedural and substantive[60], should be open such as an adequate selection and classification of circumstances which, from the point of view of the victims, deserve either a privileged or an aggravated treatment and the promotion of a true restorative justice. This can be achieved by encouraging mediation, improving the regulation of civil responsibility, turning reparation into a third path in the penal system, and conferring to the community service orders a more reparatory content in favor of the victims.

In fact, considerations concerning the victims should occupy "the neurological centre of criminal penalties"[61],

- boosting criminal answers that really try to protect victims, producing barriers for ulterior victimization processes: such as the special disqualifications in the family sphere, prohibitions of residence and communication with the victim or participation by the offender in formative, cultural, educational, professional, sexual education or similar programs;
- giving a greater consideration in the judicial process of determining criminal sanctions to those factors relating to the victim's circumstances, as well as
- opening to the victims real possibilities to participate in the execution of the sentences.

[59] A.Beristain, *Protagonismo de las víctimas de hoy y mañana (Evolución en el campo jurídico penal, prisional y ético)*, Valencia, 2005, p.33 ff.

[60] I.J.Subijana Zunzunegui, *El principio… , cit.*, p.103 ff.

[61] I.J.Subijana Zunzunegui, *ibidem*, p.128.

Role of the International Association of Penal Law

The fight against punitivism and in favor of the global respect for the principle of humanity are fundamental postulates of the International Association of Penal Law.

1. Established in Paris in 1924, the International Association of Penal Law (AIDP-IAPL) finds its immediate precedent in the International Union of Penal Law, created in 1889 in Vienna by Franz von Liszt, Gerard van Hamel and Adolphe Prins, with a dual goal: to rationalize the criminal policy (at a time when criminality was increasing, and in which, like today, the temptation was to respond to it by extending and multiplying criminal figures and increasing punishments) and to ensure the most basic, individual and social criminal guarantees[62].

The efforts carried out by the International Union of Penal Law were cut short due to the outbreak of the First World War. Prior to this, on March 24th, 1924 the AIDP-IAPL is constituted and declared as the heir of the International Union of Penal Law as a criminal justice forum for colleagues, students and professionals. The forum's aim was to encourage and stimulate the contrast and debate among the different positions and perspectives trying to achieve a positive and constructive influence on the criminal policy of the respective countries.

Today, the AIDP-IAPL has a consulting statute before the United Nations and the Council of Europe and declares (Article 2 Statute), "that criminality and its prevention and the suppression of crime must be considered from the perspectives of scientific study of the causes of crime, of the offender and of those legal safeguards for society, and the offender". On that score, in the frame of its general orientation as a "purely scientific" association, "it does not adhere to any particular school of thought or theory of criminal law" (art. 3) and statutorily tends to promote

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[62] M.Ch. Bassiouni "AIDP: International Association of Penal Law: Over a Century of Dedication to Criminal Justice and Human Rights", *Recueil de l'Association Internationale de droit pénal / Compendium of the International Association of Penal Law,* Ramonville St. Agne, 1999, p. 39 ff. (trad. J.L.de la Cuesta).

- studying "all principal systems of law, those which are codified and those which follow the common law; and also substantive and procedural international criminal law" (art, 2,2); and

- "the development of legislation and institutions with a view towards improving a more humane and efficient administration of justice" (art. 2.1).

2. Since its creation, the AIDP-IAPL has been one of the first to be concerned about the development of the criminal reform, the establishment and development of true criminal reform, of the international criminal justice system, and the promotion of peace[63]; it has also contributed in an important way in the development and deployment of a great amount of international instruments in criminal matters, both substantive and procedural.

The AIDP-IAPL has also cared about the search for and the articulation of efficient systems for prosecuting perpetrators of the most serious international crimes: already in the First Congress of Penal Law (Brussels, 1926)[64] a declaration in favor of the establishment of a real international criminal jurisdiction was adopted. The Association has undertaken many efforts in order to create an International Criminal Court, by means of meetings, publications, as well as Congresses and Committees of Experts: among them merit to be highlighted those organized in collaboration with the International Institute of Higher Studies in Criminal Sciences (ISISC) in Syracuse (Italy), particularly under the presidency of Professor M. Cherif Bassiouni (1989-2004). Professor Bassiouni was designated as President of the Redaction Committee of the International

[63] J.L.de la Cuesta / R.Ottenhof, "Un effort centenaire au service de la réforme pénale, de la justice pénale internationale et de la paix : L'Association Internationale de Droit Pénal", in G.Kellens / M.Dantinne (eds.), *ONG scientifiques et politiques criminelles. Scientific NGOs and Crime Policy,* Nijmegen, 2009, p.9 ff.

[64] J.L.de la Cuesta / R.Ottenhof, "The *Association Internationale de Droit Pénal* and the Establishment of the International Criminal Court", in M.S.Groenhuijsen / T.Kooijmans / Th.A.de Roos (eds.), *Liber Amicorum Anton Van Kalmthout,* Apeldoorn/Antwerpen/ Portland, 2010, p.39 ff.

Criminal Court Statute[65] and had a relevant intervention at the Conference of Rome.

With the entrance into force of the Treaty of Rome, the establishment of the International Criminal Court has not put an end to these efforts. On the contrary, the AIDP-IAPL continues to support those States ready to ratify the Treaty and in order to prepare the necessary implementing legislation, as well as hosting many meetings and events about the International Criminal Court in particular, through the ISISC of Syracuse.

3. The entrance in force of a permanent international criminal jurisdiction constitutes a milestone without precedent in the history of the Criminal Justice System and can prove to be very useful and transcendental in the fight against the impunity of the most serious and repugnant international crimes in a globalized world.

However, as we have already seen, globalized agencies and international entities also take care, and probably with more intensity, of other criminal phenomena on which the globalization incidence seems to be present in a more important way.

These issues also have a relevant place in the field of activities of the AIDP-IAPL. In fact, the study and approach to the most suitable ways to fight terrorism, organized delinquency, corruption and cyber criminality, has been on the scientific activities agenda of the AIDP-IAPL[66] for a long time, occupying important spaces in the debates of the AIDP's quinquennial Congresses[67].

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[65] R.Ottenhof, "L'Association Internationale de Droit Pénal et la création de la Cour Pénale internationale: de l'utopie à la réalité", *Revue Internationale de Droit Pénal,* 73, 1-2, 2002, p.15 ff.

[66] J.L.de la Cuesta, "Principios y directrices político-criminales de la Asociación Internacional de Derecho Penal en un mundo globalizado", *Revue électronique de l'Association Internationale de Droit Pénal / electronic Review of the International Association of Penal Law / Revista electrónica de la Asociación Internacional de Derecho Penal*, 2008, C-01.

[67] J.L.de la Cuesta (ed.), *Resolutions of the Congresses of the International Association of Penal Law (1926-2004)* Toulouse, 2009; y *Résolutions des congrès de l'Association Internationale de Droit Pénal (1926-2004),* Toulouse, 2009; both volumes can be downloaded from the

According to the resolutions approved in those Congresses, which represent the official position of the AIDP-IAPL, the main criminal-policy guidelines promoted by the International Association of Penal Law in a globalized world[68] take into account the increasing legal demands of coordinated international intervention versus the most serious threats coming from the globalized crime and affirm the convenience of working in the deepening extension and development of an efficient and accurate criminal justice system. Nevertheless, the risk is high that the international action, urged by the punitive exigencies derived from the current "out of focus debate" [69] on public security, does not duly consider the respect of human rights and the need for means of prevention other than punitive ones. Thus, the International Association of Penal Law's position emphasizes that criminal policy should always depart from the fullest knowledge of the reality of criminal phenomena (and of the personal and social factors that affect them) and, giving the priority to preventive lines, as proposed by the most solvent criminological perspectives, insists in noting the subsidiary nature of a penal intervention that should be always devoted to the service of a more and more humane and efficient justice peace, reinforcing the democratic profiles so that the rights and the most basic penal and procedural postulates can be fully guaranteed at all levels of the penal intervention.

website of the AIDP http://www.penal.org/?page=mainaidp&id_rubrique=18&id_article=15&lang=es

[68] J.L.de la Cuesta, "Principales lineamientos político-criminales de la Asociación Internacional de Derecho Penal en un mundo globalizado", *Eguzkilore. Cuaderno del Instituto Vasco de Criminología,* p. 5 ff.

[69] J.L. Díez Ripollés, "De la sociedad del riesgo a la seguridad ciudadana: un debate desenfocado", *Revista electrónica de ciencia penal y criminología*¸ 2005, 07:01.