

## A NATIONAL WAY TO INTERNATIONAL JUSTICE? INTERNATIONAL COURTS VS. NATIONAL PROCEEDINGS.

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**Abstract.-** This article examines the co-existence of national and international proceeding in the world of law, taking the cases of the Argentina dictatorial militaristic regime of the 70s against Italian citizens as the startpoint and going through other current similar cases.

**Keywords.-** *National proceedings, International Courts, international criminal jurisdiction.*

*"... I am about to reconstruct these cases, being completely aware that I will ask for symbolic punishment, symbolic justice for the second time ...assuming that justice is symbolic ...but I think that it is not symbolic ...because, even if it is only limited, is translated into the assertion of criminal liability, and not followed by the serving of the sentence, I believe that, before humanity, it is worth saying: "This person is guilty "..."*

From the closing speech of Public Prosecutor Dr. Caporale, 28 February 2007

In our *Segunda Patria* – Argentina –the dictatorial militaristic regime, established on 24 March 1976 by means of a coup d'état according to the standard practice, committed the genocide of an entire generation. 30,000 young people passed away. Many were Italians among them, *Tanos*<sup>1</sup>. In 1983, in the bunker courtroom of Rebibbia, in the Court of Assizes in Rome, the first proceedings against some military of the Argentinean junta started. A national court without universal jurisdiction had to judge eight cases of people coming from other countries, accused with crimes against Italian citizens who suffered gross violations of their human rights in Argentina. Several witnesses were called to give evidence on circumstances and individuals they knew at that time, and induced to recall horrendous facts occurred under the dictatorial regime. The proceedings ended on 6 December 2000. The judges of the Court of Assizes sentenced, in the name of the Italian people, those who were liable for the death of their co-nationals. The second proceedings, started in 2003, ended on 14 March 2007, with life sentence for five Argentinean military liable for the death of three Italian citizens. The result of these proceedings has great significance, not only because it confirms – for the first time at the legal stage – the practice of kidnapping, torture, and illegal suppression of thousands of people under the regime of military juntas, but also because it reaffirms the competence of a national jurisdiction for crimes prejudicial to fundamental rights of citizens abroad, legitimizing the possibility to prosecute crimes against humanity at the international stage. The juridical legitimacy of both proceedings is undisputed, both in international law and in national law. Under international law, since the International Criminal Court has not yet been established, the proceedings is certainly founded only on substantive criminal law, and is represented by the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, and the Convention against torture of 10

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<sup>1</sup> Nickname used to refer to our co-nationals in Argentina.

December 1984. Obviously, the foundation of this proceedings, initiated by Italian judges, essentially resides in Italian criminal and procedural law. Art. 8 of our criminal code, provides that “a citizen or a foreigner who commits a political crime abroad is punished in accordance with Italian law, at the request of the Minister of Justice”. For the first time, such an extension of the Italian jurisdiction is applied to all crimes against humanity, even though filtered by the Minister’s request, that represents a political act and choice. Another important affirmation of law within the framework of these proceedings is the competence of our judges – for certain gross crimes committed abroad against Italian citizens – to sentence (neglecting the general principle of *ne bis in idem*) accused who have already been judged in their country, and subsequently escaped from the execution of the sentence thanks to measures of impunity. The perpetrators’ as well as the instigators’ liability of these crimes has also been proved. Finally, the court, by partially applying a universal criminal law, despite the fact that the bodies of victims had never been found, as well as precise and concordant evidences, passed the sentence for kidnapping, torture, and homicide. This is an unexpected result, considering the difficulties faced in similar cases, i.e., in the absence of the body, the *locus commissi delicti*, and the motive.

Hence, the competence of our courts is unquestionable: law and ethics, legality, legitimacy, and justice overlap. The proceedings against Argentinean military represent not only a late – even if due - act to redress the horrors and atrocities suffered by victims of dictatorship, but also the affirmation of a significant general principle: universal justiciability of crimes against humanity committed by states and their rulers. Hence, subjection to law – or at least subjection to essential law that consists in safeguarding rights to life and personal integrity – also concerns dictators of past, present and future times, and, generally speaking rulers, who will no longer be able to shield behind sovereignty, seeking to disguise their atrocities and massacres as legal matters. Holding these proceedings implies the assertion of several principles of legal civilization. Firstly, it implies the principles of equality and legality, under which especially rulers are subject to law, hence they represent the seed of a world rule of law. Secondly, it entails the implementation of the Kantian principle, by which the gross violation of human rights – wherever it occurs - offends all people. Thirdly, it determines the affirmation of criminal law, under its guarantist model, as the survival of the weakest, against the survival of the fittest, which is in force when the former is missing. Finally, it enhances the affirmation – in this case, more than ever – of the function of general, negative, and positive prevention of criminal law. These proceedings serve – like any action to unveil truth – not to neglect the horrors of the past and to found transition to democracy on their unacceptance. The local dimension continues to provide responses - at a world level - to issues of universal jurisdiction, through the *principle of subsidiarity or complementarity*<sup>2</sup>. These responses are unlikely to be overcome, until the tools of global justice have become effective. The construction of an international order informed by principles of justice is implemented neither without the state, nor considering states as isolated monads. It is accomplished through states. On the one hand, the universality implicit in the concept of human rights implies that justice they are called to assert is an intrinsically inter-national, de-statalized justice. On the other hand, this international dimension of justice introduces some specific difficulties in the process of positivization and enforcement of international law.

However, until now legal and institutional universalism has proved to be unsuccessful. War seems to be completely “normalized”; this is proved by facts, and also by the legitimization explicitly granted to it by the major Western powers. Today, “preventive” global war, theorized and carried out by the United States and its closest allies, seems to be “a necessary prosthesis in order to develop globalization processes”<sup>3</sup>. In these circumstances, it is hard to conceive a reorganization of international institutions that enables them to impact on hegemonic strategies of Western powers led by the *ethos* of the United States, thus regulating and limiting the use of international power, instead of taking on only the restraining and legitimizing functions. Due to the concentration of power, that increasingly resembles a neo-imperial representation of the world that differs from Habermas’ concept of constitutionalization of international law<sup>4</sup>, supranational organizations still prove to be inadequate. An overview of the origin of international criminal jurisdiction shows that it coincides with the establishment of the Nuremberg Court in 1945, by the victors of World War II. For the first time in history, the war of aggression was not conceived as a general international criminal offence implying the State liability as such, but as a specific international crime for which individuals were accused. Heavy criticism expressed by intellectuals, such as Hannah Arendt, Hedley Bull and Hans Kelsen, are well-known

<sup>2</sup> From Luigi Ferrajoli, Proceedings of the International conference: “*Il caso Pinochet, i crimini contro l’umanità tra politica e diritto*”, Roma 20 novembre 1998, Fondazione internazionale Lelio Basso, pp. 57-62.

<sup>3</sup> From D. Zolo, *La giustizia dei vincitori*, Laterza, Roma- Bari 2006, pp. 11 e ss.

<sup>4</sup> J. Habermas, *L’occidente diviso*, Laterza, Roma – Bari, 2007.

and deal with the legitimacy of the Nuremberg court<sup>5</sup>. In particular, Kelsen regarded as unacceptable the fact that only the loser States had been obliged to submit their citizens to the jurisdiction of a Criminal Court. Also victors should have accepted that people liable for war crimes were tried by an International Court. This Court should have been an independent, impartial Assizes with wide jurisdiction, instead of a military occupation Court with highly selective competence, where the scope of the unbiased judge was highly compromised<sup>6</sup>.

Another element living rise to criticism is the quality of punishment inflicted by the Court, and, generally speaking, the philosophy of the punishment to which it refers: a money and expiatory punishment, following an idea of vindictive justice. For this reason, thanks to its relevance for the media, the Nuremberg trial became a sort of degradation ritual, a collective ceremony of symbolic stigmatization of the accused, in which the resocializing and rehabilitative functions of the sanction were missing<sup>7</sup>. Despite criticism so far synthetically presented, the Nuremberg paradigm has proposed and used as the only model of universal jurisdiction, when establishing subsequent Courts. Examples in this respect are the International Criminal Court for former-Yugoslavia, and more recently, the Iraqi Special Tribunal, where the dictator Saddam Hussein was tried and sentenced to death; his execution was broadcast live all over the world.

Therefore, the crucial element of this issue is to understand the crisis of International law in the light of these new scenarios. Accordingly, the main way to be followed is the establishment of an international criminal jurisdiction. The idea of creating an international court, with a jurisdiction enabling it to stand above National legal systems, was theorized in the first half of the 20<sup>th</sup> century by Kelsen, in his manifesto of "legal pacifism" *Peace through Law*<sup>8</sup>. In his work, Kelsen portrays a thorough institutional and legal strategy aimed at pursuing stable and universal peace between nations, only ensured by the establishment of an International Court of Justice operating as a superior and impartial Third party in disputes between states, and relying on international police force<sup>9</sup>. This way was followed by establishing in July 1998 in Rome the International Criminal Court, that envisages – though with several limitations - a compulsory, permanent and *post factum* jurisdiction for crimes against humanity identified by the statute as the four categories of genocide, crimes against humanity in the strict sense of the term (such as massacres, torture, deportations, disappearance of people), war crimes, and war itself as war of aggression.

It provides that the investigating magistrate of the Criminal Court can start an inquest *ex officio*, i.e., on his/her own initiative, and is independent from political influence by states, as well as by the Security Council of the United Nations. Moreover, death penalty cannot be inflicted; only life sentence or minor punishment can be given. Although this jurisdiction clearly represents an important step forward aiming at global criminal justice compared to previous International Courts due to its requirements of legitimacy, it is still far from being implemented. Although about 120 states – except for some countries such as the United States, China and Russia - have adhered to it, it will take years to obtain its ratification by 60 states, which is necessary in order to enter into force. At present, we must operate within this difficult situation as well as within these processes of change at a world level, seeking to pursue the "ordinary universal justice" admitted by each national legal system. And this is what Italian justice – even if hardly, especially during the execution of sentences – has been able to obtain during proceedings against the people liable of the Argentinean massacre, thanks to the courage, resolution, and patience of judges, lawyers, and relatives of victims.

Thanks to the courage of women and men who did not surrender to the slow wheels of global justice, that would not have obtained such an achievement in a relatively short time and with the same guarantees.

Even though much has still to be done in terms of law and interculturally-valuable and criminal justice actually in force – that would ensure human rights all over the world –, humanity cannot shuffle out of this task<sup>10</sup>.

<sup>5</sup> See in particular, for Hannah Arendt, *La banalità del male*, Feltrinelli, Milano 1999; for Hedley Bull, a cura di, *L'espansione della società internazionale. L'Europa e il mondo dalla fine del medioevo ai giorni nostri*, Jaca Book, Milano 1993; for Hans Kelsen *Peace through Law*, Garland Publishing, New York 1973, trad. it. *La pace attraverso il diritto*, Giappichelli, Torino 1990.

<sup>6</sup> Ibidem

<sup>7</sup> D. Zolo, op. cit. pp. 140 e ss. *Da Norimberga a Baghdad*.

<sup>8</sup> H.Kelsen, *Peace through Law*, op. cit.

<sup>9</sup> The issue of the Third party to guarantee International peace has been developed by Norberto Bobbio in the collection of essays *Il Terzo assente*, Edizioni Sonda, Torino 1989.

<sup>10</sup> Otfried Hoffe, *Globalizzazione e diritto penale*, Edizioni Comunità, Torino 2001, pp. 140-141.