**Towards a Theory of Criminal Law in International Context**

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Trying to discuss the issue of an new theory of criminal law raises a lot of complex problems, making necessary some preliminary observations. *First* of all, we have to reassure, that we need a better theory of criminal law and not a theory better than criminal law. Abandoning criminal law and facing the offender merely as an mentally ill person, needing help and protection, deprives him from the human right guarantees and opens the way to a totalitarian and oppressive criminal system. *Second*, it would be very risky to abandon the theory of *Plato*, according to which a rational punishment is inflicted not because the offender has committed an offence but in order not to commit another in the future[[1]](#footnote-2).

 *Third*, although the existing criminal law theories have not prevented a crisis of the criminal law in the era of globalization, the main problem arising today is not to find out an new theory for a better criminal law, but to maintain the principles guaranteeing the protection of human rights, such as the proportionality principle, the legality principle, the principle of legal certainty, the dignity principle, the guilt principle etc. *Last*, but not least, we must not forget the double function of criminal law, which consists not only in fighting the crime (either in the form of protection of legal interests or of the harm principle) but also in the protection of human rights. The criminal law has not the aim to force citizens to change their moral attitude, i.e. to transform their moral ideas, but to regulate their external behavior towards others. It is not a “Gessinnungsstarfrecht”.

All above observations are not arbitrary but they rely upon moral agreement elaborated in the course of the years and consequently they express an important side of our legal culture. Under these points of view, it is more than obvious, that the internationalization of the criminal law has caused numerous legitimacy problems, which are not always easily detectable.

In the field of the European criminal law we have a lot of examples. First of all, there is a clear discrepancy between the jurisprudence of the European Court of Justice and the European Court of Human Rights with regard to the conception and definition of the criminal offence (accusation en matière pénale) and the distinction between criminal and administrative offence. The question is serious, because on its answer depends the application of the fundamental guarantees of the rights of the accused provided for in Art. 6 ECHR. Although the ECHR recognizes quality of criminal offence and consequently the protection of the fundamental guarantees even to minor offences (s. cases Oztürk, Engel, Campbell & Fell etc.) the ECJ goes to the entirely opposite direction and refuses the criminal character of very severe sanctions, expressing the opinion that they are mere administrative offences[[2]](#footnote-3).

Thus, the problem of the distinction between original and covered criminal sanctions arises already at the level of the European criminal law[[3]](#footnote-4).

Another complex problem at the level of the European Criminal Law is that one of the legality principle in connection with the progressing abandonment of the double criminality principle. The double criminality principle is not a product of arbitrariness but a consequence of the principle of non intervention and, therefore, of the prohibition of abuse of rights in international law. Its derogation or restriction must take place with extreme care and caution. This is, unfortunately, not observed in the case of the European Arrest Warrant, where some categories (non even offences) of offences (32 all told) have been exempted from the principle of double criminality. This has the consequence, that a European state be obliged to surrender an offender (i.e. to execute a European arrest warrant) even if the latter has committed the act in its territory, where the perpetration of this act is not penalized. In this way the executing state contributes against the *nullum-crimen* principle to the sentencing of an act which, according to its legislation, may be committed without any criminal sanction[[4]](#footnote-5).

In the field of the statute of the International Criminal Tribunal many problems arise, too. One controversial issue is that one of the complementarity principle. As complementarity is used to be defined the possibility of the Court to intervene only if the state of origin of the offender or the state of the perpetration of the international offence cannot or are not willing to prosecute the crime. However, this is not a case of complementarity but a case of subsidiarity. Nevertheless, complementarity in the frame of the ICC does exist, but it has a totally different meaning. It means, that issues not explicitly regulated by the statute, may be covered by general law principles deriving from the law systems of the signatory states (under condition that they are not incompatible with the statute itself ). The place of the perpetration of an act of complicity, for example, may be determined with the help of the ubiquity principle on the one hand and the theory, that complicity is a corollary assault to a legal interest, having, consequently, a result-constituted offence (Erfolgsdelikt) on the other.

Another field of difficulties at the level of the statute of the ICC is the regulation of the mens rea, i.e. the treatment of the subjective side of the offence. Here we can see an ample use of the presumption of intent (presumtio doli) on the one hand and of the constructive malice on the other.

At the level of the European Criminal Law the problem of the so called *democratic deficit* also arises. This was linked with the formulation of primary criminal rules, i.e. rules describing just the prohibited or required behavior contained in framework decisions, issued by representatives of the administrative power, whist the power to establish the sanction was reserved to the member states. But nowadays, after the Lisbon Treaty, the European Union has the right to formulate itself the minimum criminal provisions to all their extend, i.e. with regard both to the primary rules and the criminal sanctions, through Directives (in some cases after approval of the European Parliament) or Regulations with direct effect in case of the protection of the financial interests of the European Union, which makes the features of the democratic deficit even more intense.

We see that the main characteristic in this process of the internationalization of the criminal law is a legitimacy deficit, which relies exactly on the lack of a theory of criminal law. Without a theory of criminal law is this legislative procedure uncontrolled, arbitrary and it can lead to an unbearable expand of criminalization, to the detriment of the fragmentary and democratic character of the criminal law. We could explain this procedure on the basis of the structural (new) realism of Kenneth Waltz, elaborated in the Public International Law, according to which the primary aim of the state consists in the maintenance of its security. This theory is based on the old realism of Hobbes, according to which the relation among states is a kind of anarchy, a kind of moral egoism, a natural situation analogous to the situation of the individuals before the establishment of the social contract.

This point of view shows immediately that at the level of the globalization of the criminal law the same anarchy is given: The rules of the Statute of ICC, the criminal law rules of the European Union but also many rules of international treaties rely upon no theory but they have a unique purpose, to assure security and to suppress transnational criminality at all costs. As Professor *Sieber* observed, this point of view leads towards a new Security Architecture of the Law system[[5]](#footnote-6).

So we are now at the core of our problem: Which are the criteria of a satisfactory theory of criminalization at the international level? These criteria are the following: Clarity, Coherence, Completeness and Comprehensiveness, Simplicity, Explanatory Power, Justificatory Power, Output Power and Practicability[[6]](#footnote-7).

However, in the course of the Internationalization of the Criminal Law no theory has been taken into consideration. On the contrary, its rules are exclusively based on the idea of the *security*. In the framework of international criminal rules none of these criteria is satisfied. We can see, i.g., that there is no *Coherence*, since the concept of criminal accusation is differently interpreted by the European Court of Justice and the European Court of Human Rights. Further, there is no Completeness, since the offences of the Statute of the ICC cannot be totally combined with the rules of the General Part, so that they neither belong to a complete system, nor can be integrated to a national penal system. There is no Comprehensiveness, since, i.g., the Convention for the Protection of the Financial Interests of the EU (Convention PIF of 26.7.1995) combines in one and only provision (s. Art. 1) rules concerning fraud, forgery and customs offences, confusing, in this way, internal and common legal interests. There is no Explanatory Power. Because the vagueness and variety of meanings (*polysemy*) of the criminal law terms used in the international law texts is so expanded, that insecurity about their meaning grows. Finally, there is no practicability. Since even the best theory cannot be useful and effective if its prerequisites are so demanding, that the social cost of its application is unacceptably high. This is the case in many international provisions, especially with regard to the suppression of terrorism and organized crime. The effectiveness against these forms of criminality requires the totally new orientation of our society, towards rather to security than to a balance between freedom and protection of legal interests, between human rights and security.

We could say, consequently, that the Anarchy dominating in the international relations have been transferred to the international Criminal Legislation, too. But this means an unbearable burden for the whole Criminal Law System, and it makes it less persuasive and therefore less efficient. The confidence of the people to the criminal law system, i.e. *the systemic confidence* (Systemvertrauen)[[7]](#footnote-8) is being weakened and the ultimate aim of this procedure, namely the total security, is not achieved. Such new, security-oriented provisions crate more insecurity than security[[8]](#footnote-9).

A theory of International Criminal Justice must therefore observe the above mentioned criteria and, additionally, it must be a Law theory, namely based on the principles of proportionality, human dignity, guilt and legality. A law system aiming to assure security at any cost is no law system anymore. And, since it creates no confidence, it cannot assure more security, either.

1. *Plato*, Protagoras, 324, a-b. Cf. *Seneca*, De ira 1, 19-7: “Nam, ut Plato ait, nemo prudens punit quia peccatum est, sed ne peccetur” [↑](#footnote-ref-2)
2. Rs C-240/90, NJW 1993, 47 [↑](#footnote-ref-3)
3. *Mylonopoulos*, Internationalisierung des Strafrechts und Strafrechtsdogmatik, ZStW 121 (2009) 68 ff., *of the same author*, Dogmatische Grunderfordernisse eines Allgemeinen Teils aus griechischer Sicht, in: *Hirsch* (ed.) Krise des Strafrechts und der Kriminalwissenschaften? Berlin 2001, 174. [↑](#footnote-ref-4)
4. S. *Mylonopoulos,* ZStW 121, p. 73. See also the important decision of the German Federal Constitutional Court, BVerfG 2 BvR 2236/04 of 18. July 2005. [↑](#footnote-ref-5)
5. *Sieber,* Die Zukunft des Europaischen Strafrechts, ZStW 121 (2009), 1 ff. [↑](#footnote-ref-6)
6. *Beauchamp &Childress*, Principles of Biomedical Ethics, 4 rth ed., Oxford 1994, p. 45, *Kagan*, The Limits of Morality, Oxford 1989, 11, *Mylonopoulos*, ZStW 121, 89. Also *Sieber*, Grenzen des Strafrechts, ZStW 119 (2007), 43 ff. speaks about the necessity of a Theory concerning “the functional limits of the criminal law”. [↑](#footnote-ref-7)
7. *Luhmann*, Rechtssoziologie I, 43. [↑](#footnote-ref-8)
8. *Kuehne*, Sicherheitsterrorismus, NJW 2005, 19. [↑](#footnote-ref-9)