

EUROPEAN POLICE AND JUDICIAL COOPERATION IN CRIMINAL MATTERS AND THE CRIME OF GENOCIDE

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INTRODUCTION

The recent history of the European process of integration demonstrates a notable expansion of Union competence to criminal justice and policing, areas of law enforcement which have traditionally been seen as basic functions of sovereign states. Theoretically, the step-by-step emergence of supranational competence in these areas challenges the conventional state model of organising authority and raises sensitive questions about the *transformation* and *revolution* of the concepts of «sovereignty» and «authority», on which modern legal science based the legitimacy of the Westphalian state as «*the sole agency in society with a monopoly on the legitimate use of force*»,¹ before power interaction developed on a supra-national scale within the European constitutional system.

On the grounds of how resistant the member countries are, to assign competences to the supranational EU system, or to ‘accept’ the interaction with other actors, dealing with subjects traditionally considered as an undisputed expression of one’s own sole sovereign power, till the signature of the Treaty on the European Union, also known as Maastricht Treaty², the EC integration project evaded the institutionalisation of any form of collaboration within the aforesaid policies. At the beginning of the

1 See M. Weber, in «*Economia e società*», vol. I, Edizioni di Comunità, Milan 1981.

2 Treaty on European Union, become effective on 1st/11/1993, in GU C 191 of 29th/07/1992.

Nineties, the need for justice and safety beyond the limited national competences, claimed by the «citizens» of theneo-institutionalised EU in comparison with the transnationalisation of crime, in consequence of the liberalisation of the frontiers, put, *actually*, the member countries in a position to accept the establishment of real forms of co-operation among them within criminal justice and police sectors. Equally important, as a *push factor*, towards the Europeanisation of police and criminal justice, needed to give EU one voice only as an EC answer to the need for peace and to the questions raised by an unfortunately, large number of hotbeds of crisis and heinous crimes, recently delineated, within the international context, which, lacking in a common position, the EU has, too often, watched as mute spectator.

In 1992, stimulated by the aforesaid factors, thanks to the European political union, European Cooperation in criminal justice and policing was, finally, institutionalised. Even though, again in obedience to the bulwark of national sovereignty, such a Cooperation is conceived as an intergovernmental Cooperation rather than as *supranational* action, that would mean the subjection of the states to the decisions of a predominant authority.

Despite the restraints imposed by the intergovernmental method, based on a decisional process founded on a political negotiation rather than on the institutional dialectics through which the European activity performs within the policies of the becoming EC³, United Europe have succeeded, however, in adopting important initiatives and process mechanisms of mutual judicial and police Aid in the prevention and repression of transnational particular impact crimes, such as genocide. Before the real, dreadful and repeated manifestation of this crime during the last century, the EU, that proclaims itself an institution based on human rights⁴, had to get qualified means to prevent it and to repress it. This contribution is dedicated

3 It is common knowledge that the DDL European Union consists, today, within the set-up that the Treaty of Maastricht decided, according to the amendment of the following reforms, of three «Pillars», among which the first one concerning the so called EC process of constitution policies and the second and the third ones regulate, intergovernmental foreign policy cooperation and police and justice policies in criminal subject, respectively, that are subjected to the intergovernmental decisional method. The intergovernmental method, differently from the EC method, through which it performs the EC action in first pillar competence areas, is based on a decisional process founded on diplomatic negotiation among Member States. Therefore, within these aforesaid policies, the European Commission shares the right of initiative with the Member States; you need unanimity during Council for the adoption of decisions of considerable importance, and the Court of Justice jurisdictional competence is limited. But above all, the intergovernmental method performs through legislative and executive instruments tendentially without binding effectiveness. In a different way, the EC process of constitution subjects, such as the European citizenship, the EC policies, the economic and monetary Union, are subjected to the so called «EC method», based on the devolution of important powers to EC Institutions (Commission, European Union Council, and European Parliament) containing the national governments role.

4 See Art.6 Treaty of European Union according to which «The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of

to the examination of the aforesaid means, as well as to their importance for the progressive «Europeanisation» of the criminal law. In order to deal with these issues adequately, it is more appropriate first to dwell upon constituent and characteristic elements of the crime of genocide and the real manifestations this crime before a Europe that, till now, it has shown itself to be politically and institutionally unsuited in order to repress it and to oppose it.

1. THE CRIME OF GENOCIDE

It is well known that the term genocide, from the Greek *genos*-family, tribe or race—with Latin suffix *cidio*-killing—own its origins to the Polish lawyer and jurist Raphael Lemkin who, in the aftermath of the second world war, introduced it in the work *Axis Rule in Occupied Europe: Laws of Occupation – Analysis of Government – Proposals for Redress*,⁵ in order to define such brutal acts, against the human conscience principles, universally shared, so brutal that until then, it had not existed in the dictionary.

It was inspired by the massacre of the Armenians at the beginning of the XX century, to which Lemkin dedicated a scientific attention and by the extermination of the Jewish people and of the other ethnic minorities resident in Germany, from the Nazi genocide insanity that touched the researcher personally. Born during imperial Russia, in the region that has become today's Poland, where he fled from, not long after the 1939 Nazi invasion, Lemkin lost nearly 49 of his relatives during the Shoah.

In both cases, the international community could see a completely new reality in comparison to the well-known barbarism of the modern and pre-modern history.

The story of mankind and of the States is pervaded with violence campaign committed by individuals; by collective entities and states to the detriment of men; but before the genocide of the Armenians and of the Jewish people, as it will be later defined, violence and even collective massacre, were classifiable, as *means* or *effect*, respectively, of other crimes or factual realities, such as the conquest of regions. Genocide, on the contrary, in its dreadful and recent peculiarity, has its main purpose in the extermination of a people or race in itself. The aforesaid peculiarity is expressed with skilful clearness from Lemkin in the above-mentioned work *Axis Rule in Occupied Europe: Laws of Occupation – Analysis of Government*

law, principles which are common to the Member States ... The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4th November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law ...».

5 See R. Lemkin, «*Axis Rule in Occupied Europe: Laws of Occupation – Analysis of Government – Proposals for Redress*», (Lawbook Exchange: 2005).

– *Proposals for Redress*, in which the author defined genocide as «*the destruction of a nation or an ethnic group (that) intends to designate a coordinated plan of different actions aiming at destroying the national groups human life basic foundations in order to destroy the groups themselves. The disintegration of political and social institutions, of national culture, language, feelings, religion and of national groups economic life, and the destruction of personal safety, liberty, health, dignity and even of individuals lives belonging to these groups would be the aims of such a plan. Genocide is directed against the national group understood as entity, and the actions that it causes are conducted by individuals, not because of their personal qualities, but as members of the national group.*»⁶

Lemkin's definition of the crime was substantially acknowledged in the *Agreement about Prevention and Punishment of the Crime of genocide*, approved on 9th December 1948 by the United Nations General Assembly and come into force on 12th January 1951⁷, whose drawing up Lemkin wanted personally very deeply, and that, up till now, it represents the most significant international means for the prevention and repression of the genocide practices. With the aforesaid Agreement, the contracting Parties «*recognizing that the genocide in all the historical ages has inflicted heavy losses on mankind*»⁸ and «*convinced that an international cooperation is necessary to free mankind from such a hateful scourge*» they agree that «*the genocide, if it is committed during peacetime or it is committed in wartime, it is a crime under the international law and that they undertake to prevent it and to punish it*»⁹, they state that «*by genocide they intend each one of the following actions, committed with the intention to destroy, wholly or partly, a national, ethnic, racial or religious group, such as: (a) killing of members of the group; (b) serious bodily and mental harm to the members of the group; (c) to subject deliberately the group to life conditions which cause its whole or partial physical destruction; (d) measures aiming at preventing births within the group; (e) forcible transfer of young boys from a group to another*»¹⁰ Therefore, in the 1948 Agreement, the existence of crime of genocide implies the presence of the following constituent elements: a) material element (*actus reus*), or objective element, corresponding to five criminal acts considered by the art. 2 according to which the offence may

6 *Ibid.*

7 *Convention on the Prevention and Punishment of the Crime of Genocide*, adopted on 9th December 1948 by the United Nation General Assembly, come into force on 12th January 1951, ratified in Italy according to the Law n° 962/1967. For an analytic examination of the Convention Dispositions, see J. Quigley, «*The Genocide Convention: an international law analysis*» (Ashgate Publ. – Aldershot, 2006).

8 *Ibid.* Preface.

9 *Ibid.*

10 See Art. 2 *Convention on the Prevention and Punishment of the Crime of Genocide*.

be expressed; b) the subjective element, (*mens rea*) wilfulness, which consists in the intention of the person who acts to act in order to destroy a national, racial, religious or ethnic group. The subjective element required by the Agreement for the existence of the crime of genocide is, therefore, the specific intent which consists in the will of destruction as in the above-mentioned terms. The description of the genocide as a specific crime requiring *mens rea* was, from various commentators, strongly criticized insofar as it precludes that unpremeditated extermination may be considered as genocide practices. Grounds for critical consideration of the contents of the Agreement, concerns the exclusion from the sphere of enforcement of it itself, as for the victims of the crime, the exclusion of the political, ideological, social, economic and cultural groups. The reasons for the exclusion have pragmatic motives, having been determined by the opportunity, noticed by the negotiators, to achieve the consent to the Agreement, consent that, as for the cultural or political genocide, they would not have achieved it in other Countries such as the Union of Socialist Soviet Republics. On the basis of what is set out above, the Agreement identifies, therefore, as legal offence, not only the genocide, but also the mutual consent to commit a genocide; the public and direct inducement to genocide; the attempt at genocide and the complicity in genocide¹¹. Very significant are the arts. 4 and 6 which specify that people who have committed genocide or one of any of the listed acts in Article 3, are liable to be punished, whether they are rulers, government officials or citizens, and they must be taken to competent courts of the State where the act was committed, or to the competent international criminal court, towards the contracting parties that will have recognized the jurisdiction of it. The jurisdictional competence law acknowledged in the Agreement is the result of strongly compromise negotiations. Indeed, on one hand the contracting parties, in obedience to the state sovereignty and connected principle of territoriality, according to which whoever commits a crime in the State territory they are liable to be punished according to the law and before the authorities of the aforesaid state, they had to consider that people charged with genocide have to be subjected to the *lex fori* where the fact has been committed, on the other, conscious of intrinsic difficulty in assuring (everybody) of justice resorting to the traditional territoriality rules as to the considered offences, they provided for the institution of a *super partes* organ, the International Criminal Court, to which they remit the competence to judge the genocide practices, where the jurisdiction of the aforesaid Court is approved by the Agreement signatories. Though the Charter was adopted in Rome by the United Nations on July 17th 1998, the Charter of the aforesaid Court came into force only on 1st July 2002¹².

11 See Art. 3 *Convention on the Prevention and Punishment of the Crime of Genocide*.

12 See Statute of the International Criminal Court adopted by the UN Conference of Plenipotentiaries on 17.07.98 in Rome and ratified in Italy according to the Law n° 232 of 12.07.99.

Having summarily examined the constituent elements of the crime of genocide in the light of Lemkin's definition as well as of the 1948 Agreement, before that moment, as already said, it did not have existed terminologically and juridically as a specific criminal figure, it is important to notice that the genocide history of the XX century does not exhaust with the massacre of the Armenians and with the Nazi criminal machine. Although after the Second World War they wished they would not have to be present anymore at genocide practices, former Yugoslavia and Rwanda have been scenes of the renewed demonstrations of the aforesaid crimes in the last decades.

Before the tragedies offered by a world in continuous transformation, where dramatic human rights violations take place every day before the European Union which is too often considered incapable of carving out a space for itself taking responsibility upon itself, United Europe, in the institutional pillar governing the intra-state police and judicial cooperation in criminal matters, has recently and finally taken legislative measures directed towards the emergence of supranational action in the struggle against crime of genocides commission. It is advisable to mention the genocides during the XX century to point out, on one hand, what kind of impact they had and they have had so far, within the European integration course, and, on the other hand, the importance that gives the EU, in memory of the victims of crimes, a real role in the fight against genocide, in order that the moral, ethical, political and juridical importance of the adoption of the aforesaid measures can be adequately appreciated.

1.a) The genocide of the Armenians

The genocide of the Armenian people was carried out in two bloody phases at first, by the Ottoman sultan Abdul-Hamid II, between 1894 and 1896, and by the government led by the Young Turks between 1915 and 1916¹³. In the first case, the planned extermination of the Armenians, at that time there were nearly 2,5million subjects of the Ottoman Empire, it was committed in order to extirpate every autonomist ambition of the aforesaid population. Subsequently, when the Young Turks succeeded the Ottoman empire, the day after the First World War, the former, fearing that the Armenians could conspire against the rising republican power thanks

13 There is, actually, among the researchers who identify the Armenian genocide with that committed only by the government of the Young Turks, distinguishing it from the massacre during the kingdom of the Ottoman sultan at the end of the XIX century. The present contribution shares the unitary assessment of the extermination of the Armenians from the Ottoman sultan first, and the Young Turks then, dealing with crimes inspired to the same intolerance towards the Armenian autonomist and independence aspirations.

to the alliance with the Russians, executed immediately Armenian nationalists and another part of the Anatolian population, who had established themselves there millenniums ago, was deported towards the deserts of Syria and of Mesopotamia.

For reasons of respect for a tragic historical event worthy of the greatest scientific attention, difficult to fulfil by such a short space of this contribution, but whose bibliography is excellent and to which we refer in order to get an in-depth knowledge of the events¹⁴, they prevent us, in this place, from dwelling, in details, upon the history of the genocide of the Armenians, as well as, further on, upon the history of the other genocides in question. What matters to us, on the contrary, is to investigate the reactions and the importance for the European Union of the aforesaid crimes which took place in Turkey, and precisely against the population settled in today's north-eastern region of Turkey, as well as in the north of the Persian Empire. From the population's descent survived of the beginning of the XX century massacre, was born the Armenian Republic in consequence of the dissolution of the Union of Socialist Soviet Republics.

It is common knowledge that the genocide of the Armenians unlike the holocaust, the Rwandan genocide of the Tutsis, as well as the Kosovar people, is, traditionally, object of controversy, that is to say, not only the Turkish government, but also among the researchers, there are those who think that to the detriment of the Armenians had not been committed a real genocide, at least in the juridical meaning of the word, whose description is excluded by the negationists, claiming the fact that not all the Armenians of Istanbul were involved in the massacre, but only those who were considered *dangerous* for the government. But the historical truth is evidence of something else. In 1896 it was committed the big massacre of Constantinople: in two days, by command of the Ottoman government, the Armenians were killed indiscriminately in the streets. In 1914, when the Young Turks climbed to power, decided contextually the disarmament of the Armenians and the distribution of weapons among the Moslem residents. In 1915, the intolerance towards the Armenians rises at the same rate with the proclamation of the Turkish leader Talaat who declared: «*kill every Armenian woman, child and man without worrying about it*», starting the planned extermination of the Armenian people, that ended pitilessly in catastrophe, «*aghet*» in Armenian¹⁵. In spite of all previously said, the genocide of the Armenians has been recognized by the international community only in 1984,

14 See, inter alia, M. Flores, «*Il Genocidio degli Armeni*», Bologna: Il Mulino, 2006.

15 Mehmet Talaat Pasha (1874-1921), known as Talaat Bey, he was the main author of Armenian genocide. Born in Edirne (Adrianople), he was active in the Young Turk movement seeking to overthrow Sultan Abdul Hamid (Abdulhamit), after the 1908 Young Turk revolution he became one of the most influential politicians of the Ottoman Empire, in 1909 he was appointed Minister of the Interior and then Minister of Post, he was one of the main advocates of the «Turkification» of the Ottoman Empire.

when the «Permanent Peoples' Tribunal» asserted explicitly that «*the extermination of the Armenian populations with the deportation and the massacre constitutes an imprescriptible crime of genocide according to the 9th/12/1948 Agreement for the prevention and the repression of the crime of genocide*»¹⁶. It followed the formal recognition of the aforesaid dreadful crime, on 29th/08/1985 from the United Nations Organization, and on 18th/06/1997 from the European Parliament, and also many American States joined it, starting from Uruguay to end with Virginia and Illinois between 1978 and 1995. Subsequently, on April 14th1995 the Armenian genocide has been recognized by the Russian Duma, followed by the Parliaments of Bulgaria and Cyprus, as well as from the Israeli Parliament, according to the vice-minister for Foreign Affairs, Iosi Beilli, during the session of April 27th1994, and Greece; Lebanon; Belgium; Argentina; French National Assembly and Swedish Parliament. In Italy, between 1997 and 1998, the Armenian genocide has been recognized by 21 Town Councils of various cities.

The reason why the destruction of the Armenians did not have recognition from the international community not before sixty years after it had been committed, is to be connected with the absenteeism and with the political opportunism typical of the warlike contexts at first, and with the insufficient echo of the events in question then, on which they had it in a very clear way only some years later. Besides this, it is important to consider that the testimony of the Armenian genocide has been given, for long time, to documental sources written in languages hard to be comprehensible by the Western Countries, even if this fact is not a justification for the primary and extended indifference of the international actors, EU included, before the tragedy suffered by the Armenian people. Even if the international community has formally recognized it, celebrating it on April 24th in memory of the night of 1915 when, in Constantinople, started the purge of the Armenian people from the Young Turks, the government of Ankara keeps on refusing not to recognize as 'genocide' the atrocities committed against the Armenian victims, it asserts it ended with in nothing more than a series of homicides which took place during and because of a civil rebellion, without persecutory intention or ethnic cleaning. Substantially, the Turkish government claims the inexistence of the subjective element of the genocide intention in comparison to the killings of the Armenians, whose numerical entity of the victims it does not agree with¹⁷.

16 On www.internazionaleleliobasso.it.

17 On Turkish opinion about the Armenian Genocide See, Flores cit., Mehmet NEcef «The Turkish media debate on the Armenian Genocide» I: Jensen, Steven (ed.) and «*Genocide: Cases, Comparisons and Contemporary Debates*» (Copenhagen: The Danish Center for Holocaust and Genocide Studies) pp. 225-263.

What is really important here is that the Turkish negationism, in comparison to the Armenian genocide, constitutes an element of hindrance in the process of negotiation directed towards the entry of Turkey in the EU, formally open from the contracting parties on the 3rd October 2005. In particular, the European Parliament, with a motion amended on September 27th 2006, has formally required that the recognition of the Armenian genocide must be an indefectible condition for the entry of Turkey in the EU. As for the government of Ankara, it contests such position asserting that no negotiation conducted with other Countries by the EU, has imposed, among the conditions of entry, the recognition of historical liability.

The European Union is in a dilemma, it implies the attempt to reconcile the aspiration of European Union to celebrate human rights protection with the acceptance, among its members, of a state that, according to the European Parliament, the only EC institution elected directly from the EU Citizens, has committed deplorable crimes as violation of every human right. Furthermore, what is its position in the EC integration process, resulted in, as thereafter, the approval of measures specifically directed towards the fight against genocide, the acceptance from the EU member countries of a Country that, not recognizing itself responsible for genocide practices, exactly the way they are intended by the European Union to the same standards of the definition of genocide, accepted by the supranational legislation, (it) shows not to agree to such definition? Substantially, the Turkish negationism compared to the genocide of the Armenians, as well as the ethical and moral questions, put the Union before the alternative to negotiate the entry in a State that shows not to share the constituent elements and the principles elaborated on supranational scale for the fight and the prevention of a crime which is considered among the most violent that can be committed by and against mankind.

1.b) Nazi genocide responsibilities

It is common knowledge that the escalation of Adolf Hitler, and with him, of the Nazism, to lead Germany, just back from the defeat suffered during the First World War, has been pursued by offering to the German people, discouraged by economic instability as well as by political defeat, a wise acting of nationalist propaganda, for which the nation thirsted. He joined the army to serve Germany during the First World War, after the conflict, in a State that wanted only to identify a scapegoat on which he pinned the blame and responsibilities of his own failure, Hitler offered to the post-war situation a political manifesto inspired by nationalism, anticommunism and anti-Semitism, claiming the superiority of his own people, and holding the races inbreeding responsible for the decline and errors which the German superior race could incur, races inbreeding that had to be in any way limited and hard won, in order not to compromise its superiority. Being these, the bases

for Hitler nationalistic ideology, mother of the Nazi thought, nationalism keeps up with anti-Semitism and racism against ethnic and racial minorities considered to be genetically inferior. Nationalism, implying indeed, according to Hitler thought expressed in a clear-headed way in his work *Mein Kampf*, the central position, among the political-demographic aims of the state, of the assertion and preservation of the Aryan race, the direct consequence of the aforesaid axiom was, according to the hitlerian vision, the extermination in the German State at first, and in Europe then, of those ethnic minorities whose existence itself could compromise the purity of his own people. Hence the campaign for the extermination of all the individuals considered to be inferior, such as sick people, Slavs, gypsies, homosexuals and Hebrews. Especially towards the Hebrews, Nazi racism became particularly violent, and this ferociousness expresses itself through the elaboration of a real anti-Semitic manifesto. Nazi anti-Semitism, «Judenhass», literally: «hate towards the Hebrews», develops in the economical successful moment that Jewish people kept on achieving during post-war Germany in comparison to the economic depression that tormented German people. In such context, according to Hitler Nazism, anti-Semitism becomes the sacrificial victim on which he pinned the frustrations as results of failures of a people subjugated by political-economic problems, for which well soon the Hebrews, according to the hitlerian propaganda, were hold responsible. As a result of the aforesaid ideological bases, the Nazi racial politics, that starts in 1933, develops itself first of all through the division of the German population in two great categories, the *Volksgemeinschaft*, (German pure people), and the *Gemeinschaftsfremde* (foreigners in the community), with inner divisions. Subsequently, the adoption of racial laws directed to deny the ethnic minorities of civil, political rights and of the economic goods and, after all, the planned and systematic extermination of the aforesaid subjects by deportation of themselves to concentration camps, built on purpose in order there to exploit convicts hard labour, to perform mass-executions and to carry out medical experiments on cadavers¹⁸.

How it was committed and its wilfulness, the annihilation from the Nazi of the Jewish people, who would refer to the horrors committed in Nazi Germany using the word Shoah, a biblical term synonymous of «catastrophe», as well as of the gypsies, homosexuals and Slavs, it expresses a typical demonstration of crime of genocide in Lemkin's definition, received in the 1948 Agreement. The day after the Second World War, when the international community had to ascertain the dramatic foundation of the Nazi genocide practices, the winning Countries of the conflict

18 On Nazi racial politics See H. Friedlander «*The Origins of Nazi Genocide from Euthanasia to the Final Solution*» (Chapel Hill: University of North Carolina Press, 1995). See also, on ideology as base of holocaust, L. Newman e Eber R. «*Understanding Genocidi: the social psychology of the Holocaust*» (N.Y.: Oxford University Press, 2002).

agreed on August 8th 1945 to the institution of the International Military Tribunal in Nuremberg, to sentence those who had committed the aforesaid dreadful crimes, in order to avoid that the persecutors could remain unpunished. The Nuremberg Trial, in spite of criticism due to violation of some penal law basic principles such as the principle of legality, as the trial held before an ad hoc set up court *after* the board of the judged crimes, against the principle *nullum crimen sine praevia lege*, which expresses, till today, one of the most significant genocide trial, considering any possible aspect¹⁹. And even though at that time, as above-mentioned said, such a crime had not yet legally existed. The Nazi genocide practices were judged by the International Tribunal as part of the largest *genus* of the subject submitted to the jurisdictional competence of the aforesaid institution, that were according to the art. 6 of the Tribunal Charter, the offences of: 1) conspiracy in order to commit crimes against peace; 2) planning and putting into effect war assaults; 3) war crimes; 4) crimes against mankind, whose term was coined on the occasion of the Nuremberg Trial, where Nazi genocide acts were judged. The Nuremberg Trial, where 21 people were accused, ended with 11 hanging death penalties; 7 prison sentences and 3 verdicts of acquittal. Quite remarkable is that the Court of Nuremberg condemned not only political and military leaders but also business managers who had supported Hitler's rise to power, among them 24 executives and managers of the IG Farben, a group of firms holding the German chemical industry monopoly that represented the financial core of hitlerian Germany. In the opening report of the prosecutor's closing arguments, the Key U.S. Prosecutor Telford Taylor, as far as the aforesaid defendants, asserted: «*The Indictment accuses these men of mature responsibility of having inflicted on mankind the most devastating and catastrophic war of the history of mankind. It accuses them of slavery, pillage and mass-execution. These are serious charges*»²⁰.

For this contribution, the Nazi genocide horror that caused to post-hitlerian Germany, international moral sentences for which, up till now, the nation faces the consequences by keeping in the capital city firstly, the testimonies of what the Germans themselves remember as «*Topographie du Terreur*», it means that in Europe, during the first half of the last century, have been committed crimes of incomparable ferociousness and inhumanity.

On the other hand, the ruins of Europe, torn apart by the Second World War, started the integration community project. «*We will be able to safeguard Worldwide peace*» asserted the French Foreign Minister Robert Schuman in 1950, together with human rights violated during each military event «*only if we make an effort fruit of*

19 On Nuremberg Trial See, T. Telford, «*Anatomia dei processi di Norimberga*» (Milano: Rizzoli, 1996).

20 See T. Taylor cit.

*our creativeness, proportional to dangers that threaten it. European aid as a result of a well-organized and vital Europe is absolutely necessary to civilization in order to preserve a peaceful coexistence among peoples.»*²¹. Such an EU aim, after sixty years, is to be proposed today, by providing Europe own institutions with suitable means in order to stop recurring genocide practices.

1.c) The genocide in former Yugoslavia

Wars imply, in the dynamics of the massacres and mass-deportations, *acti rei* through which develops genocide, objective importance. The fact that in the context of military events happen daily violent episodes «legitimated» by the circumstances, it represents fertile ground to recurring crimes which history define as an ignominious genocide act. Not by chance the genocide of the Armenians and the Nazi practices belong to two World Wars. Genocide in former Yugoslavia, in its turn, was committed during the war that tormented the Balkan region in the last decade of last century, after the death of the leader Tito, whose death caused the fall in stability and in balance elements these that under the government of the leader had assured the heterogeneous regions, which formed the Yugoslav federal state, of temporary peace and cohabitation. Under the communist government of Tito, based on the political hegemony of the only party and of the army, the various regions of the ex Yugoslav federal state, Slovenia, Croatia, Serbia, Bosnia-Herzegovina, Macedonia, enjoyed the production decentralization and the different religions joint recognition. Serbia consisted of independent administrative agency of Montenegro and Kosovo. During the government of Tito, the peaceful cohabitation among the States of the federation had been guaranteed by the sole political charisma of the leader, but, under the appearance of stability brooded the first signs of what will cause the break out of the war in Yugoslavia that is the independence movement of the members of the federation, that will show them openly when the guide of the State and of the communist party was assumed, at dawn of 1990, by Slobodan Milosevic, whose political action found the opposition of the richest and occidental provinces and of the federation, Croatia and Slovenia. In 1991, the declaration of independence of the aforesaid States, recognized by the EU, caused the outbreak of the war in the Balkan region²². To the aforesaid declaration followed the military assault of the Yugoslavian federal army which had become a Serb army. It starts therefore a tragic mechanism that, through the Serb nationalistic propaganda, exalted by the leader

21 See Schuman Declaration on P. Fontane, «*Una Proposta nuova dell'Europa: La dichiarazione Schuman, 1950-2000*» (Luxembourg: Office for Official Publication of the EC, 2000).

22 On the cause of the break out of war in ex Yugoslavia, See T. Gallagher, «*The Balkans after the cold war: from Tyranny to Tragedy*» (London: Routledge, 2003).

Milosevic, will torture the Balkans in order to subject them to the Serb hegemony within a conflict that well soon became a war of «all against all», in which every region of the federation fought against each other to claim their own autonomy. The conflict became extremely ferocious and within it some battles such as that one of Dubrovnik, Vukovar and the siege of Sarajevo from the Serbs the day after the self-proclamation of independence of the Bosnia-Herzegovina, these battles constitute tragic examples. In such context developed the genocide of the Bosnian population by the Serb nationalists that was committed through the most degrading methods such as the institution of concentration camps, collective rapes and tortures. At the end of the conflict it has been documented that in the genocide of the Bosnian population from the Serbs died 200.000 individuals; it also caused 500.000 cases of torture and 20.000 cases of rape and sexual assault. 187 common graves have been discovered²³.

Before the dramatic events that were happening in the close Balkan region, the EU showed its own political weakness, as a result of the incapability of the member countries to intervene unanimous in the crisis of former Yugoslavia, which was precluded by the intergovernmental plots in which foreign politics and European safety, in the same way as cooperation between police and justice, were involved. In the aforesaid sectors, sacrificed for the national sovereignty, the adoption of decisions from the EU implied, at that moment the unanimity of the voters. This unanimity could be compromised by the discordance of only one of the members, and in absence of the achievement of itself, the European political union was not able, and in fact it did not do it, to express itself through a uniform voice in an international context. With the lack of the EU it made up for the interventionism of the United States that, since 1995, when the war was still in progress for five years, with its tragic body-count, they convened the leaders of Serbia, Croatia and Bosnia-Herzegovina in Dayton to induce them to start a peace process that resulted in the institution, within Bosnia-Herzegovina, of two entities, the Croatian-Moslem Federation and the Serb Republic. But the conflict did not end here. The day after the end of the war in Bosnia-Herzegovina, in Kosovo were born guerrilla actions from the Albanian separatists of the UCK (*Ushtria Çlirimtare and Kosovës* or *KLA Kosovo Liberation Army*). So it broke out a new and bloody conflict, extended till 1999, between the Kosovar autonomists and Serbia, during which it took place the well-known and contested NATO military intervention that, considered as a means of persuading Serbia into negotiating and the belligerents into peace, became actually, real military operations, in order to «dissuade», and that implied the fall of the Serb government as well. It was adopted therefore the Resolution of the

23 On ex Yugoslavia genocide See S. Weine, «*When History is a nightmare: lives and memories of ethnic cleansing in Bosnia Erzegovina*» (New Brunswick: Rutgers University Press, 1999).

United Nations Security Council number 1244 of 1999 through which they gave Kosovo a provisional government and a provisional parliament under Unmik and Nato international protection²⁴. The question about the state of independence of Kosovo is, up till today, still open and continues being a reason of tension in that part of the world that, due to its tragic events before said, is called «the black hole of Europe.» The aforesaid definition evokes, besides the bloody events of the conflict, the horrors of the genocide practices within it, that the day after the war, have been transferred to the authority of the Aja International Court of Justice, an ad hoc institute to prosecute the individuals responsible for serious violations of the humanitarian international law in the former Yugoslavia region since 1991²⁵.

As for what was said previously, the incapacity from the EU, to take up a definite position and to take a responsibility regarding the Balkan matter, constituted a missed opportunity and the dishonour of facing again the recurring of genocide horrors, just a few decades after that the same crimes had been committed within Nazi concentration camps. Before so much horror, it is very important that the United Europe has finally taken the initiatives that, as said below, for the prevention and fight against the genocide practices.

1.d) The genocide in Rwanda

The extermination in the period between April and July in 1994, of nearly one million Tutsi of the Rwanda State from the ethnic group Hutu constitutes one of the bloodiest events of contemporary history and most disgraceful for the international community. The race-hatred between the two factions, that actually belong to the same cultural ethnic stock Bantu, originates from the opportunistic and persecutor politics of the European colonizers, first the Germans, and the Belgians then, who,

24 On the set-up of the States of former Yugoslavia after the conflict See N. Pavle, «*I sistemi costituzionali dei nuovi stati dell'ex Jugoslavia*» (Torino: Giappichelli, 2002).

25 The International Penal Tribunal for the former Yugoslavia, established by UN Security Council Resolution n.827 of 25th May 1993, that adopted the Charter, amended on 13th May 1998 Res.n.1166, and on 30th November 2000, Res.n.1329; in L'Aja, in Holland; financed with expenses to be charged to UN Balance, according to the art. 17 UN Charter, is competent to judge: a) Grave breaches of the Genevre Convention of 1949 on war right (art.2); b) Violations of the laws or customs of war (art. 3); 3) Genocide (art. 4); 4) Crimes against humanity (art. 5). *Ratione personae*, according to the art. 1 proper charter, the International Tribunal shall have the power to prosecute persons responsible for serious violations, of International Humanitarian Law committed in the territory of the former Yugoslavia since 1° January 1991. Art.7, paragraph 1 describes individual criminal responsibility in terms of planning, preparation or execution and instigation. *Ratione loci e ratione temporis* the territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, air space and territorial waters since 1st January 1991.

in order to simplify the management of the colonized territories, «bought» services and greater favour from part of the population who considered more exploitable as for their wealth: the Tutsis, damaging the Hutus. In particular, the aforesaid politics ended with granting privileges to the Tutsis who caused in the Hutus an increasing intolerance towards the opposite faction, dormant for years and finally come out when, in 1961, was born the Rwandan Republic, rapidly transformed into Hutu dictatorship, consolidated in 1973, with the rise to power of the Hutu leader Habyarimana.

Under the government of Habyarimana, Rwanda lived moments of obscurantism and decline which induced not only the Tutsis but also the liberal Hutus to go into exile. The crisis raged in the Country and induced Habyarimana to start negotiations with the political oppositions: anyway, the aforesaid attempt revealed itself disastrous, and had as a result to foment the extremist position of the Hutu government against the Tutsis, fomented by the racial propaganda that started to be supported by Rwanda Radio and by the journalistic headings against the Tutsis. Such aspect deserves particular attention. In Rwanda, really, for the first time, the executioners, conscious of the impact of mass media on the population, set up a self-governing radio, that will become the symbol of Rwandan horror, *Radio Télévision Libre des Mille Collines* (RTL) in order to use it to spread and foment the race-hatred. It was in the aforesaid context that, in order to avoid the civil war in Rwanda directed towards more dramatic consequences, Habyarimana, in 1993, stipulated peace agreements that provided the installation of a transition government and of the UN mission in Rwanda called Minuar, with the mission to supervise in order to avoid that crimes against mankind could be committed in the regions in utter confusion. The mirage of peace did not last long: to the time lags in the realization of the agreements, and to the threat of the UN mission withdrawal, it was added, since April 1994, indifferently to the foreign power, the realization of extermination programs of the Tutsis, that were fulfilled when the expedient for the cessation of the supposed peace was offered to the Hutus by the murder of Habyarimana, on 6th October 1994. Since then, genocide had been committed with a surprising planning; organization and violence, expressed in massacres, rapes, mutilations and tortures²⁶. But what is worse is that the aforesaid horrors were freely committed under the eyes of the international community who watched everything indifferently. About the responsibilities of the international community for the massacre committed in Rwanda, the Canadian commander of the UN contingent in the aforesaid place, Romeo Dallaire, in the book «Shake hands with the devil» bore witness to it²⁷.

26 On Rwandan Genocide methods and historical origins See P. J. Magnerella, «*Justice in Africa: Ruanda's genocidi, its Courts and the UN Criminal Tribunal*» (Aldershot: Ashgate, 2000).

27 R. Dallaire, «*Shake hands with the Devil*», Random House Canada, 2003.

The book, that does not spare his disagreement towards the U.N. first, for been insensitive to the requests for help from the General, when he started to suspect the genocide of the Tutsis in Rwanda, he contests the United States and the European Countries for protecting only their own affairs in Africa leaving the local population falling into executioners' hands. The international community felt the sense of guilt due to its absenteeism and the day after the Rwandan civil war, it was at least determined to bring to justice the people responsible for genocide, instituting, once more with resolution of the United Nations Security Council, a new ad hoc International Criminal Court to judge people responsible for genocide and other serious violations of human rights committed in the Rwandan region or by Rwandan citizens in the bordering states from January 1st to January 31st 1994²⁸. During the trial held before this Court has been delivered a judgment, (since 1948), the first conviction for genocide versus Jean Kambanda, Hutu political leader at the time of the massacre²⁹. In 2004, the European Union presidency, that did nothing, like the whole community, to avoid the Rwandan genocide happen in all its wickedness, on the occasion of the X Anniversary of the genocide, made the following declaration *«The commemoration of the X Anniversary of the genocide in Rwanda represents for all the members of the international community a moment of meditation and sadness. The European Union wants to pay tribute to those who died and render homage to the strength and courage of the survivors. The European Union also salutes the efforts and success of the Rwandan people in re-building their Country after the horrific events of 1994. The progress which has been achieved in Rwanda over the last decade and the efforts under way to achieve national reconciliation demonstrate the strength of purpose of the Rwandan people to ensure that there is 'never again' a re-occurrence of such atrocities to the Rwandan people.»*

2. EUROPEAN POLICE AND JUDICIAL COOPERATION IN CRIMINAL MATTERS AND THE CRIME OF GENOCIDE

The foregoing paragraphs have tried to offer, in a short available space, the representation of that what have been the most evident demonstration of the genocide

28 The International Criminal Tribunal for Rwanda was created on 8th November 1994 by the UN Security Council in order to judge those people responsible for the acts of genocide and other serious violations of human rights performed in Rwanda, or by Rwandan citizens in nearby states, between 1st January and 31st January 1994. The Tribunal is located in Arusha, Tanzania.

29 He was an *«ad interim»* Prime Minister on 9th April 1994, two days after the outrage against the plane of the president Habyarimana, Kambanda was arrested in Nairobi on 18th July 1997 for direct genocide complicity for not stopping the massacre. Kambanda confessed he distributed weapons and munitions to the prefectures of Butare e Gitarama conscious of their improper use that is to perpetrate massacres against civilians; on 4th September 1998 Kambanda was found guilty of all charges towards him.

practices the world had to assist during the last century. It was pointed out, also, the absenteeism of the European Union before the aforesaid crimes, despite, after the dramatic historical precedent of the Nazi genocide folly; the rising European Community was determined to assist at such horrors never again.

The fact that the European absenteeism has been determined by the immaturity of the integration process that, during the Rwandan and the Balkan region genocide, was not ready to offer a proper serious voice to prevent or to stop the committing of the aforesaid crimes, can be certainly asserted considering that the historical fulfilment of themselves is contemporaneous to the institution of the European Political Union.

But today, fifteen years later after the institutionalization, the European Political Union, that desires to welcome a Country as Turkey that was the inauspicious scene of genocide practices, has the historical duty to reflect intensely and to acquire a necessary means to prevent the recurring of the aforesaid dreadful crimes. And all this at the cost of limiting their own competences in criminal justice and policing in favour of the emergence of the supranational action, for lack of which the EU revealed totally unable to act in defence of supreme human rights.

And for such reasons it must be welcome the recent adoption, in the context of the European Union Third Pillar, of a supranational means for the prevention and repression of the crime of genocide, first of all the Council Decision 2003/335/GAI of May 8th 2003 on investigation and prosecution of genocide, crimes against humanity and war crimes³⁰.

With the aforesaid decision, the European Union Council, granted that «*The Rome Statute of the International Criminal Court of 17th July 1998, which has been ratified by all Member States of the European Union, affirms that the most serious crimes of concern to the International Community as a whole, in particular genocide, crimes against humanity and war crimes, must not go unpunished and that their effective prosecution must be ensured by taking measures at national level and by enhancing international cooperation*», and that «*The successful outcome of effective investigation and prosecution of such crimes requires close cooperation at transnational level between authorities of the States Parties to the Rome Statute, including the Member States*», as well as that «*The Member State declared that the crimes within the jurisdiction of the International Criminal Court are of concern for all Member States, which are determined to cooperate for the prevention of those crimes and for putting an end to the impunity of the perpetrators*», that being stated, the UE Council, according to the before showed act «*the aim of this decision is to increase cooperation between national units in order to maximize the ability of law enforcement authorities in different Member States to cooperate effectively*

30 In GU L 167 of 26.06.2002, p. 1.

in the field of investigation and prosecution of persons who have committed or participated in the commission of genocide, crimes against humanity or war crimes as defined in articles 6,7 and 8 of the Rome Statute of the International Criminal Court of 17th July 1998»³¹. So, the act under examination intends to develop within the EU an effective transnational Cooperation at the stage of investigation and exercise of the prosecution towards the persons responsible for the crime of genocide. Meaningfully, in order not to make the Cooperation aim fruitless, that otherwise would be thwarted in itself, due to the lack of a common and shared definition of the crime they intend to persecute, the Decision provides for an «EC» definition of genocide, accepting that one contained in the art. 6 of the Statute of the International Criminal Court that, on the guidelines of the art. 2 of the 1948 Agreement, asserts that «genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group such as: a) killing members of the group; b) causing serious bodily or mental harm to members of the group; c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; d) imposing measures intended to prevent births within the group; e) forcibly transferring children of the group to another group».

So, it is born the first EC definition of the crime of genocide in order to investigate and to persecute by which member countries aid each other³², through operations of coordination and regular meetings³³. The aforesaid aspect of Cooperation activities planning is particularly meaningful in view of granting a real content the supranational common action in the aforesaid subjects. As far as this point is concerned, through an important strategic direction, the decision provides that «at the Presidency's initiative, the contact points designated under Article 1 of decision 2002/494/GAI, shall meet at regular intervals, with a view to exchanging information about experiences, practice and method. These meetings may take place in conjunction with meeting within the European Judicial Network»³⁴. In order that the importance of the aforesaid rule can be as clear as possible it is necessary to say a few words on the Decision 2002/494/GAI of the Council, of June 13th 2002, that institute an European contact points network about people responsible of genocide, crimes against mankind and war crimes³⁵. With the aforesaid decision, the EU instructs each Member Country to designate a national contact point on purpose to exchange all the pieces of information regarding the crimes of genocide, crimes

31 Art. 1 Decision 2003/335/GAI.

32 See Art. 2 Decision 2003/335/GAI.

33 See Art. 5 Decision 2003/335/GAI.

34 See Art. 5, paragraph 2, Decision 2003/335/GAI.

35 In *Gazzetta ufficiale (Official Gazette)* n. L 167/1 del 26/06/2002

against mankind and war crimes³⁶. Contact points are notified the General Secretariat of the Council who passes them to other States³⁷. In the picture of the annual debate, as provided in Article 39 of the EU Treaty, about the progress in the Cooperation between justice and police in criminal matters, the Council informs, therefore, the European Parliament of the activities developed by contact points³⁸.

So, with the Decision 2003/335/GAI, insofar as it intends to persecute the crime of genocide using judicial and transnational police cooperation mechanisms already established with the Decision 2002/494/GAI, the EU facilitates the institution, in the supranational context, of an appreciable system of means coordination for the fight against crimes of particular ferocity based on the utilization of structures and institutional mechanisms already tested, with positive repercussions in terms of «European» resources concentration for the adoption of common initiatives to prevent the crimes that represent a threat to EU itself, and to its member countries as well. It is meaningful that the Decision 2003/335/GAI provides also, on purpose to coordinate the initiatives to investigate and to persecute those people who have perpetrated or took part in genocide, the possibility for the Union to make use of contact points designated according to Article 1 of the Decision 2002/494/GAI during meetings within the European Judicial Network, with the possible participation of representatives of the International Criminal Tribunals of former Yugoslavia and Rwanda³⁹. After they have set out these terms, member countries agree on placing at supranational action for repression of the crime of genocide disposal, the European Judicial network that up till today represents one of the most useful supranational means in order to serve the Justice Cooperation in penal subject. The European Judicial Network established with common action of June 29th 1998⁴⁰, adopted by the Council according to Article K.3 of the European Union Treaty, to «*facilitate the Judicial Cooperation among member countries of the European Union, particularly as far as the fight against serious forms of crime is concerned*»⁴¹, that can be realized only through «*the adoption of structural measures on European Union scale that allow direct contacts between judicial authorities and other authorities responsible for the Judicial Cooperation and for Judicial action against forms of crime*»⁴², this European Judicial Network, consisting of central authorities responsible for the International Judicial Cooperation, judicial authorities or other competent authorities

36 See Art. 1, paragraph 1, Decision 2002/494/GAI.

37 See Art. 1, paragraph 2, Decision 2002/494/GAI.

38 See Art.3 Decision 2002/494/GAI.

39 See Art. 5 Decision 2003/335/GAI.

40 In *GU L 191 of 7.7.1998, pp. 4-7*.

41 See Preface Common Action of 29th June 1998.

42 *Ibid.*

with specific responsibilities within the International Cooperation⁴³, it represents the means through which EU member countries regulate the sensitive information and practices exchange.

If in addition to what aforesaid asserted, we consider that among the means through which the Cooperation between police and justice in criminal matters is explained, the European Union has, today, also an European Police College with the mission to develop, among the national investigators, a common approach to the prevention and fight against transnational crimes⁴⁴, as well as an Eurojust, an Agency of the European Union dealing with judicial co-operation established in 2002 to institutionalize the penal justice Cooperation through the power of a permanent authority⁴⁵, it is possible to assert that the EU, in comparison to the time when genocides were committed, it provided itself progressively with structures and mechanisms for a reliable Cooperation in the prevention and repression of crimes against mankind. Certainly these are means conceived on purpose to facilitate, mainly the cooperation among states rather than the explication of a common action. However, essential requirement for the fulfilment of a real European prosecution is the elaboration of a common criminal substantial law that implies a sharing among the States of juridical assets protected by criminal law. So the same introduction with the Decision 2003/335/GAI of a «European» definition of the crime of genocide constitutes a meaningful step directed to harmonize national criminal systems on which the EC integration process is based. The aforesaid step was realized subject to agreement about constituent elements of the crime of genocide and the values that thanks to its repression and persecution it intends to preserve.

43 Art. 2 Common Action of 29.06.98.

44 See Decision 2005/681/GAI.

45 See Decision 2002/187/GAI of Council, of 28th February 2002 (n GU L 63 of 6.3.2002), modified by Decision 2003/659/GAI of Council of 18th June 2003.