

THE LEGAL INTEREST PROTECTED IN THE CRIMES AGAINST HUMANITY

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«Souhaitons vivement que les efforts des Nations Unies en vue de juger les criminels de guerre d’aujourd’hui deviennent le point de départ d’une organisation permanente de la justice pénale internationale.»

VESPASIEN v. PELLA, *La Guerre-crime et les Criminels de Guerre*, 1946, p. 30

1. INTRODUCTION

The concepts of international criminal law and of international crime have originated much doctrinal discussion. However, most part of the authors understand international criminal law, in a formal sense, as the set of international law rules, with criminal nature, that impose to certain conducts —international crimes— certain consequences reserved to criminal law¹. Such international crimes are analysed in a

1 Cf. TRIFFTERER, Otto, *Dogmatische Untersuchungen zur Entwicklung des materiellen Völkerstrafrechts seit Nürnberg*, 1966, apud AMBOS, Kai, «La construcción de una parte general del derecho penal internacional», *Temas Actuales del Derecho Penal Internacional*, Berlin: Konrad-Adenauer-Stiftung, 2005, p. 13.

three-fold way which was first coined in Nuremberg, more precisely in the article 6 of the Statute of the Criminal Military Court (annexed to the London Agreement of 1945): in this sense, crimes against peace, war crimes and crimes against humanity are international crimes. In this paper we investigate the crimes against humanity, particularly what gives the necessary substance to specific conducts, thus justifying and providing legitimacy to the intervention of the law field with the most serious and heavy sanctions: criminal law. It is therefore necessary to identify the concerns and the values that constitute the object of protection of these incriminations and that simultaneously bestow criminal dignity upon certain conducts – on those which violate them in the most serious way.

Although those internationally recognized values have been acquired in the course of the centuries, only in more recent times — due to the role performed by the Statute of the International Criminal Court (ICC) — have the conducts designated «international crimes» met more substantial formal and material consolidation. The path leading to this development stage has been hard and long, and although it remains far from a final result, it is nevertheless closer to achieving solid foundations for a new and autonomous law subdiscipline which has been described by means of several designations: interstate criminal law; universal criminal law, public international criminal law; international criminal law, law of the international crimes...² In this work we aim at analysing the crimes against humanity established in the Statute of the ICC and which are nowadays transposed to several national juridical orders³. Our purpose is essentially directed to the study of the protected legal interests (*Rechtsgüter*). The materialization of these interests represents a strong and powerful aid in the interpretation and application of the criminal rules by the national *praxis* which are (self-)submitted to the Statute. The protected interests are also fundamental to build a substantive criminal law, with an adequate international nature, by means of solid general principles.

The choice of this topic has been dictated by various reasons: firstly, there is strong disagreement among many authors about the individual or the collective nature of the interests protected by these crimes; secondly, the concretization of the protected interests necessarily imply a much desired clarification of the borders of criminal

2 See GIL GIL, Alicia, *Derecho Penal Internacional. Especial consideración del delito de genocidio*, Madrid: Tecnos, 1999, p. 26. Also PIPAÓN Y MENGES, Javier Sáenz de, «El poder y la legalidad en el derecho penal internacional», *Estudios Penales en Recuerdo del Profesor Ruiz Antón*, Valencia: Tirant lo Blanch, 2004, p. 996 ff.

3 Portugal adapted its national law to the Statute of Rome by means of the Law n.º 31/2004, issued on the 27th of July. The acceptance of the jurisdiction of the ICC required the modification, in 2001, of the constitutional text, by addition to its article 8th of a new number (n. 7), which establishes a generic clause for the reception of that Statute. About this constitutional modification see CANOTILHO, J.J. Gomes/MOREIRA, Vital, *Constituição da República Portuguesa Anotada*, Coimbra: Coimbra Editora, 2007, p. 248 ff.

conducts and, consequently, a clearer definition of the illicit (*Unrecht*) condensed in these crimes. Also, the study of the legal interests protected in the crimes against humanity is bound to enlighten the study of other substantive questions such as the attempted crime (*Versuch*) or the criminal treatment of a concurrence of crimes (*Konkurrenz*); finally, the need for a delimitation of what should be considered crime against humanity.

2. THE CRIMES AGAINST HUMANITY

The last centuries have testified the affirmation of universal human rights and its recognition by sovereign States. As Jescheck pointed out, human dignity, went, even before the Second World War, over the restricted dominion of the States, and has become a problem of international order⁴. As the human dignity was progressively affirmed, the limits of the state sovereignty were put under question. In the words of Anabela Rodrigues, «interference was born after the universality of the human rights. Sovereignty is then accomplished in the framework of an international law that restrains its discretionary manifestations»⁵. We live in the time of the affirmation of human rights, a time that is favourable to the construction of its necessary protection. If, in one hand, the battle of the recognition of human rights has been won, the fight to make them effective continues, and the time of a stable international justice remains far away. Paula Escarameia points out that our time is both the better of times since we have the opportunity to choose and to build solutions to the future of the international law, and consequently to the world in which we will live tomorrow, and the worst of times, expressed in the confrontation of different visions between the States that have ratified and included the law of the ICC in their juridical order and those which resist and oppose to its triumph. This Court is arguably the more perfect institutional example of a world of international law in transition, which combines characteristics of a past model and announces others of a model that is still to come, in a successful conciliation of the principles in conflict which have originated the compromises present in the rules of its Statute⁶.

One of the fundamental achievements in the fight for the recognition of human rights is the choice and definition of the crimes which are under the competence

4 JESCHECK, Hans-Heinrich, «Crimes du droit des gens», *RIDP*, 26^{ème} Année (1955), p. 546.

5 RODRIGUES, Anabela Miranda, «Princípio da jurisdição penal universal e Tribunal Penal Internacional – exclusão ou complementaridade», *Direito Penal Internacional. Para a Protecção dos Direitos Humanos*, org. Goethe-Institute de Lisboa, Lisboa: Fim de Século-Edições, 2003, p.58. See also MOREIRA, Adriano, «A Jurisdição Penal Internacional», *RFDUL*, Coimbra: Coimbra Editora, Vol. XLIV (2003), p. 500 ff.

6 ESCARAMEIA, Paula, «Prelúdios de uma nova ordem mundial: o Tribunal Penal Internacional», *Direito Penal Internacional. Para a Protecção dos Direitos Humanos*, op. cit., p. 123.

of the ICC. The article n. 5 of the ICC Statute – approved in Rome on the 17th of July of 1998, provided with the necessary number of ratifications on the 11th of April of 2002 and which entered into force in the 1st of July of 2002 – establishes the crimes under the jurisdiction of this court: genocide; crimes against humanity; war crimes and aggression. The following articles (articles 6 to 8) define each one of these crimes in a more precise way⁷. The article 7 of the Statute specifies the crimes against humanity: acts committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. These acts are: murder; extermination; enslavement; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity; persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3 of this article, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; the crime of apartheid and other inhumane acts of a similar character intentionally causing great suffering, or serious injury to the body or to the mental or physical health. The second and third paragraphs explain and define some of the concepts used in the first paragraph of this article.

The definition of crimes against humanity foreseen in the Statute represents the highest point of a widespread diplomatic process that kept going for more than 50 years⁸, and which occurred mainly in the history of the XX century. The Statute meant the peak «of a historical process began with the London Agreement of August 8th 1945, and the annexed Charter of the International Military Tribunal, which contains the first definition of crimes against humanity»⁹. Nevertheless, several previous documents make mention to acts against the laws of humankind. Of particular relevance are the «Martens Clause»¹⁰, included in The Hague Convention

7 With the exception of aggression, which was incorporated in the Statute with a reserve for a posterior definition, according with the article 5, n. 2. For further developments, AMBOS, Kai, «Sobre el fundamento jurídico de la corte penal internacional. Un análisis del Estatuto de Roma», *RDPC*, n. 5 (2000), p. 147 ff.

8 On the 11th of December of 1946, the General Assembly of the United Nations approved the Nuremberg Court by means of the Resolution 95. Afterwards, the International Law Commission began its work in order to draw a project of a Code of Crimes against Peace and Security of Mankind and a Statute of the International Criminal Court. About the work developed by this Commission and its projects, see TRIFFTERER, Otto, «Efforts to Recognize and Codify International Crimes», *RIDP*, Vol. 60, p. 31, *Commentary on...*, *op. cit.*, article 7, and GIL GIL, Alicia, *Derecho Penal Internacional*, *op. cit.*, 1999, p. 61.

9 For further developments, ASSUNÇÃO, Maria Leonor, «Apontamento sobre o crime contra a humanidade», *Estudos em Homenagem a Cunha Rodrigues*, Coimbra Editora, 2001, p. 83.

10 This clause means that the inhabitants and belligerents are considered to be under protection of the *ius gentium* principles and the laws of humankind. For further developments, BASSIOUNI, M. Cherif,

of 1907, and the Joint Declaration of France, Great Britain and Russia, signed in 1915, which qualified as crimes against humanity and civilization the extermination of the Armenian people by the Turkish Government. In the Paris Peace Conference (1919) the judgment of violations of war and humankind laws was proposed as well. However, the Treaty of Versailles would not incorporate this partition (war crimes and crimes against humanity). Only after the Second World War and the atrocities committed during the conflict, would begin a more vigorous diplomatic and doctrinal discussion about the concept and the substance of crimes against humanity. In the words of Alicia Gil Gil, it was in this context that the notion of crimes against humanity was developed in a technical sense, particularly due to the efforts of the United Nations War Crimes Commission, created in 20th of October 1943 in order to investigate the war crimes¹¹. The final text of the International Military Tribunal acknowledges crimes against humanity in its article 6 (c). However, a necessary condition was that those crimes were connected with a war situation: the court jurisdiction included «murder, extermination, enslavement, deportation and other inhuman acts committed against a civil population, before or during a war»¹². The competences of the Tribunal, in the matter of crimes against humanity, were thereby restricted. In this way, the crimes against humanity, in Nuremberg, were purely an extension of the war crimes to other passive subjects which were not protected by the rules and customs of war¹³. And, although many authors argued vigorously for the need of independence of the crimes against humanity from war situations, the article 5 of the ICC Statute for the former Yugoslavia continued to ask that those crimes occurred in the scope of an armed conflict. Nonetheless, the article 3 of the Statute of the ICC for Ruanda did not ask for this connexion, as well as the article 7 of the Statute of the ICC.

The concept of crime against humanity has evolve much, essentially due to the greater maturity of human rights law, to the conventions and treaties set in this field, to the principles and laws that have been established and went into force, to the decisions of international courts, and also to the investigation of many authors. This evolution

Crimes Against Humanity in International Criminal Law, Haya: Kluwer Law International, 1999, p. 62; GIL GIL, Alicia, *Derecho Penal Internacional*, *op. cit.*, p. 107. The Clause was based upon and took its name from a declaration read by Professor Fiodor von Martens, the Russian delegate at the Hague Peace Conferences 1899, cf. TICEHURST, Rupert, «La cláusula de Martens y el derecho de los conflictos armados», *RICR*, n. 140, pp. 131-141.

11 Cf. GIL GIL, Alicia, *Derecho Penal Internacional*, *op. cit.*, p. 110 ff. Also BASSIOUNI, M. Cherif, *Crimes Against Humanity*, *op. cit.*, p. 69 ff.

12 The Charter of the International Military Tribunal is available in www.icsl.de/dokumente/imt_statute.pdf.

13 For further developments BASSIOUNI, M. Cherif, *Crimes Against Humanity*, *op. cit.*, p. 69 ff; from the same author, *International Criminal Law*, vol. I, New York: Transnational Publishers, 1999, p. 521 ff; Gil GIL, Alicia, *Derecho Penal Internacional*, *op. cit.*, p. 117.

revealed an autonomous dignity of these crimes, now typified in the ICC's Statute. The article 7 of this Statute «represents, unquestionably, a moment of maturity in the process of codification, which began with the Nuremberg Charter and was continued, albeit tentatively, by the International Law Commission of the United Nations»¹⁴.

We think this autonomy is founded, immediately, in the object protected by these crimes, or, in other words, in the legal interest which they aim to protect. The analysis of the protected legal interest in crimes against humanity stimulates the development of two important segments of international law's study: it allows, in one way, the foundation of the autonomy of crimes against humanity and serves as a critic parameter in the interpretation, application and eventual enlargement of this category of crimes; in other way, it participates in the attempt of edifying a General Part of International Criminal Law – an effort that has been tried by some Jurisprudence and Literature¹⁵. Along these lines, it is sensible to dedicate some words to this dogmatic figure of criminal law, and to its functions. However, this operation is merely instrumental as it serves a further step: the study of the legal interest protected in the crimes against humanity.

3. THE LEGAL INTEREST

The exercise of the *ius puniendi* finds its legitimacy in the role, as acquainted by the criminal law, of the subsidiary protection of a legal interest. Both the systematic of the punishment acts and a material concept of crime as foundation of the criminal illicit revolve around this dogmatic element. The identification of a legal interest protected by means of the incrimination of some behaviours represents a *prius*, a precious criterion, in order to legitimate the punishment intervention of the state, implying the restriction of fundamental rights. A critic task, as well as a dogmatic task, are therefore recognised to the protected legal interest, as parameter of the incrimination, as it becomes the substratum which confers the necessary material to the substance of the infraction and which allows to classify it, *v. g.*, in a danger or a harm infraction; finally, this legal interest also performs an interpretative and a systematic function, which is fulfilled in the ordering of incriminations in the Special Part of a Penal Code¹⁶. The accomplishment of

14 ASSUNÇÃO, Maria Leonor, «Apontamentos...», *op. cit.*, p. 93.

15 See, for example, the work of AMBOS, Kai, *La Parte General del Derecho Penal Internacional. Bases para una Elaboración Dogmática*, Berlin: Konrad-Adenauer-Stiftung, 2005. And from the same author, AMBOS, Kai, «La construcción de una parte general del derecho penal internacional», *Temas Actuales del Derecho Penal Internacional*, Berlin: Konrad-Adenauer-Stiftung, 2005, p. 13-49.

16 About the tasks performed by the category of legal interest *vide* FIANDACA, Giovanni, «Il «bene giuridico» come problema teorico e come criterio di politica criminale», *RIDProcP*, ano XXV (1982), pp. 43 ff.

these tasks adds value to this instrument in a criminal law system, understood as fundamental and necessary to the human co-existence in society¹⁷.

However, to define a criminal legal interest is not an easy mission. Many authors have attempted to characterize this legal entity, either emphasizing a more personalistic view of this concept, or, in another perspective, conferring it a more functional nature. Criminal legal interests are, according to some authors, «those precious and necessary premises to the human existence»¹⁸; to others, they represent «those objects which men need to their self-realization»¹⁹; or a «a real connexion between a person and a concrete value recognized by the juridical community (...) in which a person, holder of rights, develops himself with the approval of the juridical order»²⁰; some authors identify legal interests with «interests of the community life which are protected by the criminal law»²¹; the criminal legal interests are also defined as «specific circumstances or aims that are helpful to the individual and to his free development in the context of a structured global social system»²²; they have been described as well as «social unities of functions», *i. e.*, instrumental items necessary to the correct functioning of the social system²³; in another point of view, legal interests are «essential expectations to the operation of social life, in the framework given and asked by the law»²⁴; they are also pointed as «an expression of the utility, for the person or for the community, in maintaining the integrity of a certain state, object or good which is socially important and is therefore recognized as juridically valuable»²⁵; or «as a part of the reality which is asserted in an axiological framework»²⁶; or even as an «object of a value which the community experiences as essential, from the view of the individual and of the social fulfilment»²⁷.

17 Further developments in SOUSA, Susana Aires de, *Os Crimes Fiscais: Análise Dogmática e Reflexão sobre a Legitimidade do Discurso Criminalizador*, Coimbra: Coimbra Editora, 2006, p. 171 ff.

18 MAYER, Hellmuth, *Strafrecht Allgemeiner Teil*, W. Kohlhammer Verlag: Stuttgart/Berlin/Köln/Mainz, 1967, p. 52.

19 MARX, MICHAEL, *Zur Definition des Begriffs «Rechtsgut». Prolegomena einer materialen Verbrechenlehre*, Köln/Berlin/Bonn/München: Carl Heymanns Verlag KG, 1972, pp. 84 ff and p. 89.

20 OTTO, «Rechtsgutsbegriff und Deliktstatbestand», *apud* FIANDACA, Giovanni, «Il «bene giuridico»...», *op. cit.*, p. 48.

21 JESCHECK, Hans-Heinrich, *Tratado de Derecho Penal*, Barcelona: Bosch, 1981, p. 350.

22 ROXIN, Claus, *Derecho penal*, Madrid: Civitas, reimp. 2000, p. 56.

23 RUDOLPHI, Hans-Joachim, «Die verschiedenen Aspekte des Rechtsgutbegriffs», *Festschrift für Richard M. Honig*, Göttingen: Verlag Otto Schwartz, 1970, p. 151.

24 JAKOBS, Günther, *Derecho Penal. Parte General. Fundamentos y teoría de la imputación*, Madrid: Marcial Pons, 1997, p. 45.

25 DIAS, Jorge de Figueiredo, *Temas Básicos da Doutrina Penal*, Coimbra: Coimbra Editora, 2001, p. 43.

26 COSTA, José de Faria, *Noções Fundamentais de Direito Penal (Fragmenta Iuris Poenalis)*, Coimbra: João Abrantes, 1999.

27 Cf. DIAS, Augusto Silva, «*Delicta in se*» e «*Delicta mere prohibita*»: *uma Análise das Descontinuidades do Ilícito Penal Moderno à Luz da Reconstrução de uma Distinção Clássica*, Lisboa, 2001, p. 669.

The diversity of the notions presented above expresses the difficulties in establishing a secure and definitive concept of legal interest able to serve, in an absolutely safe way, as an incrimination criterion²⁸. Asking to the concept of legal interest to point the precise conduct that should be criminalised is a misunderstanding which can lead to the end of this juridical instrument: either a very large concept is created — as in the theories that remit the content of legal interest to values intrinsic to the law, typified by the criminal legislator, and, in this way, retroceding in time as they make «the freedom of the citizens liberty dependent on the benevolence of laws»²⁹; or, on the contrary, a restricted concept is proposed, as in the theories which identify legal interests with individual interests and rights alone, which therefore become extremely reluctant and uneasy with respect to the acceptance of the prohibition of specific conducts against environment or terrorism, corruption or even tax evasion³⁰.

Being impossible to find a thorough definition of legal interest, we may nevertheless underline its negative role in legitimation: in spite the legal interest can not point the exact criminal conduct, it sets, when conjugated with the essential principles of criminal law (as the fragmentary, subsidiary and *ultima ratio* principles) and with the aims of criminal punishment, what can be protected by criminal law³¹. Consequently, the preservation of a legal interest is a necessary but not a sufficient condition in order to justify criminal prohibition and punishment. However, in order to accomplish this task and become helpful in establishing a material concept of crime³², the legal interest must be connected to the essential conditions necessary to human life, which are reflected in the constitutional values of the social law State. The preservation of these essential conditions in human society is the mainstay of the criminal intervention. This is also the case for international criminal law. Only in this way can the legal interest serve as a critical parameter for present and future rules and as a criterion for the legitimacy of a criminal punishment; something which is politically oriented but also recognized by the international community as an essential value that should be preserved.

The close connexion to social reality imprints the legal interest with a decisive importance in the limitation of the criminal illicit but also with a fundamental role

28 Cf. HEFENDEHL, Roland, «Debe ocuparse el Derecho Penal de Riesgos Futuros? Bienes Jurídicos Colectivos y Delitos de Peligro Abstracto», *Anales de Derecho*, n.º 19 (2001), p. 148. The difficulty in establishing a secure definition of legal interest is also evidenced by STRATENWERTH, Günter «Zum Begriff des «Rechthsgutes»», *Festschrift für Theodor Lenkner zum 70 Geburtstag*, München: C.H. Beck'sche Verlagsbuchhandlung, 1998, p. 378.

29 We use Montesquieu's words, cf. *De l'esprit des lois*, Paris: CF Flammarion, 1979, p. 328.

30 See FERRAJOLI, Luigi, *Diritto e Ragione*, Roma: Editori Laterza, 1990, p. 473.

31 Cf. ROXIN, Claus *Fragwürdige Tendenzen der Strafrechtreform*, apud MOCCIA, Sergio, *Il Diritto Penale tra Essere e Valore*, Napoli: Edizioni Scientifiche Italiane, 1992, p. 174.

32 Cf. DIAS, Jorge de Figueiredo, *Temas Básicos...*, op. cit., p. 45.

in establishing the guide-lines of the criminal law action. However, the reality is dynamic and the protected legal interests must therefore express the changes in reality as well. The protection of the essential conditions to human life in society, undertaken by criminal law, can not mean that criminal law is closed to the historic evolution and to the social changes³³. Criminal law, as all law, is in a relationship of (almost) concomitance or indivisible co-existence with social reality. The way used by criminal law to answer to the problems posed by social mutations, decides the confrontation between «guarantee» and «utility» in the context of the science of criminal law. To some authors, the profound transformations at the cultural, technological and structural levels, experienced by our civilization implied the appearance of new criminal phenomena which thus ask for new answers of the protection given by criminal law with respect to, for example, organized crimes, economic crimes, ecological crimes... These new realities ask frequently for anticipated criminal protection, v. g., by using the technique of abstract danger crimes (*abstrakte Gefährungsdelikte*). Other authors, by critical examination of this enlargement of the criminal rules, argue that criminal law – which was thought of as the limit to criminal politics – is now converted to a government *lunga manus*, or, in other words, is now functionalized to the criminal politics³⁴ and fulfilling a propulsive and symbolic task. The legal interest, once a legitimacy criterion for criminal intervention, becomes, according to these authors, the basis-criterion for that intervention.

History certifies that the more serious risk of a functional and promotional conception of criminal law is the transformation of criminal rules in an instrument of the government. However, the huge difficulties faced by the guarantee corset of neo-enlightenment theories in order to answer to contemporary criminal problems can not be ignored. Both theories, in their radicalism, conduce to the immobilization of criminal law science: the strict and exacerbated guarantees become an obstacle to resolve the new demands that are confronting criminal law; and an absolute functionalism of criminal rules transform criminal law in the mirror of politic practice³⁵.

We understand that the dutiful acknowledgement by criminal law of the subsidiary protection of a legal interest does not oppose to the openness of criminal law to the demands of social evolution. However, a new criminalization is always dependent

33 On this particular point see MORALES PRATS, Fermín, «Funciones del derecho penal y sociedad civil», *Il Diritto Penale alla svolta di fine millennio*, Torino: Giappichelli Editore, 1998, pp. 56 ff.

34 HASSEMER / MUÑOZ CONDE, *Introducción a la Criminología y al Derecho Penal*, p. 169, *apud* MORALES PRATS, Fermín, «Funciones...», *op. cit.*, pp. 58 and 59.

35 Cf. SCHÜNEMANN, Bernd «Consideraciones críticas sobre la situación espiritual de la ciencia jurídico-penal alemana», *ADPCP*, tomo XLIX (1996), p. 189.

on a previous legal interest which required already criminal protection. This means that criminal law can not emerge has propeller of the changes in social conventions, thus shaping new social and collective conscience with respect to deficiencies in criminal protection, and creating perchance imposing its legal interests. Criminal law is and should be imprinted by the «tragedy» of «always arriving to late»³⁶ and always pursues *a posteriori* the disregard of the protected legal interests.

We believe that criminal intervention is legitimate only when it becomes an answer to the safeguard of recognized legal interests, with an individual or a collective nature. This can be checked in both social and law perspectives. We nowadays assist to an assimilation process between laws of different countries, very diverse from a historical and a geographical perspective, but bound by common values to the same socio-political civilization in speedy cultural and social changing³⁷. On the other hand, we also assist to a more attentive consideration to criminal phenomena by citizens. Particularly, greater sensibility concerning human rights, environment and also economic issues must be emphasized. Some of these collective interests, taken by the community as important, deserve criminal protection: criminal law can be summoned, in conjunction with the respective surrounding principles and limits, to solve conflicts over these interests. The essential problem is the identification of the most proper way to fulfil this intervention, and to therefore protect the authentic legal interests. An analysis truly committed to this study deletes false problems induced by the voracity of social evolution³⁸.

We follow those authors who place together, with respect to similar level of protection, individual legal interests and trans-individual, or transpersonal, or supra-individual or social collective legal interests³⁹. A profound reflection about these «new» collective legal interests is therefore a much needed task⁴⁰. In order to set the limits of a collective legal interest, we propose a parameter imported from economic science which corresponds to the principle of non exclusion: collective legal goods are those whose benefits can be useful to everyone so that no one can be excluded from it (non-excludable). We must connect this note of non-excludability to the assertion that the interest is seen as valuable by the community. This valuableness may arise from it being vital to the human survival – v. g., environment – or, as

36 Cf. PAULUS, Andreas L., «Do Direito dos Estados...», *op. cit.*, p. 91, with respect to the «tragedy» that pursues international criminal law.

37 DIAS, Sergio, «De la tutela de bienes a la tutela de funciones: entre ilusiones postmodernas y reflujo liberal», *Política Criminal y Nuevo Derecho Penal*, Barcelona: José Maria Bosch Editor, 1997, p. 117.

38 Cf. SOUSA, Susana Aires de, *Os Crimes Fiscais...*, *op. cit.*, p. 201 ff.

39 DIAS, Jorge de Figueiredo, *Direito Penal*, 2.^a ed., 2007, p. 148 ff.

40 Cf. HEFENDEHL, *Kollektive Rechtsgüter im Strafrecht*, Köln/Berlin/Bonn/ München: Carl Heymanns Verlag KG, 2002.

some authors prefer, may originate as a value deduced from other fundamental legal interests which they serve as support – *v. g.*, the case of the criminal protection of the sovereignty of the State⁴¹. According to Figueiredo Dias, «the true characteristic of a collective or universal legal interest lies in its faculty of being used by all and each one, so that no one can be excluded from its use: the individual concern about the integrity of the collective legal interest lies in this possibility of use. Certainly, there is a *diffuse relationship* among the users, which does not mean any diffuse character of the universal legal interest»⁴². The protection of such legal interests is able to justify a subsidiary intervention of criminal law in order to react to the most serious attacks inflicted upon these interests.

Precisely, we believe that a collective legal interest is protected in the crimes against humanity, as we will try to explain below.

4. THE PROTECTED LEGAL INTEREST IN THE CRIMES AGAINST HUMANITY

Crimes against humanity are included in the article 7 of the Statute of the ICC. The corresponding protected legal interest has raised much discussion. The acts that are described in the first paragraph of article 7 must be, according to this article, «committed as part of a widespread or systematic attack directed against any civilian population». Bassiouni qualifies this element as an «international or jurisdictional element» of the crime against humanity, which is able to distinguish international crimes from those that should be considered as national crimes⁴³. In fact, each one of these acts is considered as an international crime if it is performed in the framework of a massive or a systematic attack, in the context of a state policy or by an organization that dominates the territory at stake⁴⁴.

41 Cf. COSTA, António Almeida, «Sobre o crime de Corrupção. Breve retrospectiva histórica. Corrupção e concussão. Autonomia «típica» das corrupções «activa» e «passiva». Análise dogmática destes dois delitos», *Estudos em homenagem ao Prof. Eduardo Correia*, Coimbra, 1984, pp. 81 ff.; «Artigo 217.º», *Comentário Conimbricense do Código Penal*, Tomo II, Coimbra: Coimbra Editora, 1999, pp. 748 ff.; «A propósito do novo Código do Trabalho: bem jurídico e pluralidade de infracções no âmbito das contra-ordenações relativas ao «trabalho suplementar». Subsídio para uma dogmática do direito de mera-ordenação-social-laboral», *Liber Discipulorum para Jorge de Figueiredo Dias*, Coimbra: Coimbra Editora, 2003, p. 1059.

42 DIAS, Jorge de Figueiredo, *Direito Penal*, *op. cit.*, p. 150.

43 BASSIOUNI, M. Cherif, *Crimes Against Humanity*, *op. cit.*, p. 243.

44 Maria Leonor Assunção considers that this element contains the necessary reference to a relationship between the organs of the state (or an organization) and a population. The violation of this relationship allows the qualification of the conduct as a crime against humanity, with the nature of an international crime, cf. «Apontamento...», *op. cit.*, p. 96.

There is therefore a broad consensus about the need for the active subject of these crimes to have the dominium of the politic situation, *de jure* or *de facto*. Acts of a government or acts of an organization or group that has achieved the governmental power or has the factual power over a territory or part of them constitute relevant examples. However, organizations that performed those conducts and can be subdued by national law, for instance, mafias or extremist organizations, are excluded⁴⁵. This solution implies the subsidiary nature of international criminal law: if the State authority to protect human rights has disappeared, this void due to suppression of a Law State must be fulfilled. In the fight against international crimes, the Statute of Rome also foresees, in articles 17, 18 and 19, the principle of complementarity, implying that the intervention of the ICC is dependent on the absence of a punishment authority of the States or on its inadequate exercise.

The conducts described in the article 7 of the Statute – murder, extermination, enslavement, torture, acts of sexual violence... – are forbidden as well by most national law systems, which protect individual legal interests such as life, physical integrity, freedom, sexual self-determination. Are these individual legal interests the same which are protected internationally by crimes against humanity, or, on the contrary, we are in the presence of new and autonomous protected legal interests?

With respect to the object of protection of crimes against humanity and, consequently, to its illicit, we find it possible to distinguish three different models, which respectively emphasize each one of the legal elements that draw up the boundaries of these crimes.

4.1. Protection of the international community

According to the first of these models, the essential characteristic of crimes against humanity is the occurrence of acts performed in the context of a widespread or systematic attack directed against any civilian population. The accent falls over the international element and it is possible to affirm that the international element grants to the crime against humanity an unitary or global nature which is able to reduce all the acts performed in the context of that systematic attack to a continued unity. The justification of the punishment of those acts as *one* crime against humanity would depend on the circumstance of the plurality of the acts occurring in the context of the same exterior situation. In this model, the object of protection would be much distant from the individual legal interest – life, physical integrity, freedom, or sexual

45 Cf. GIL GIL, Alicia, «Los crímenes contra la humanidad y el genocidio en el Estatuto de la Corte Penal Internacional a la luz de «Los Elementos de los Crímenes»», *La Nueva Justicia Penal Supranacional. Desarrollos Post-Roma*, Valencia: Tirant lo Blanch, 2001, pp. 73-74.

self-determination – offended with the practice of each act. The whole of those acts would constitute, in fact, an attack against the international community⁴⁶.

This model is taken with much reserve by many authors. According to Alicia Gil Gil, to take the crime against humanity as a single infraction instead of considering each one of the several acts, supposes a punishment paradox that benefits the author of the crimes, since the increase of illicit expressed by each one of the offences (*v. g.*, several deaths) would not be properly reflected upon the punishment – as it would happen if the agent of crimes were punished for the several offences committed (concurrence of crimes). Notwithstanding, this author also acknowledges that such disarrangement can be dissolved depending on the system adopted for the punishment of the concurrence of crimes, as well as by the limitation to a maximum punishment indicated in some juridical orders. In this way the punishment of this concurrence of offences can be almost similar to the maximum punishment foreseen with respect to crimes against humanity⁴⁷. Nevertheless, another criticism directed to this model remains: the model does not take into consideration all the illicit – *i.e.*, each death, rape or enslavement. In fact, this model can hardly accomplish the principle that the court must consider exhaustively all the criminal material that comes to it⁴⁸.

4.2. Protection of individual legal interests

A second model takes the crimes against humanity as another level of protection of individual legal interests, implying that the criminal court must take into consideration each action carried out by the agent of the crime. In this way, the protection of the individual person remains at the center of the legal interest protected in the crimes against humanity. At the international level, individual legal interests —human life, health, freedom... – can also be protected from massive and systematic attacks executed by those who have or dominate the government⁴⁹.

46 The ICC for former Yugoslavia followed this model closely in the case Erdemovic, who was condemned by the practice of crimes against humanity without taking into consideration each one of the single performed acts, cf. GIL GIL, Alicia, «Los crímenes», *op. cit.*, p. 77.

47 In the Portuguese criminal legal system, the article 77th, n. 2, of the Penal Code, establishes that the punishment of an effective concurrence of crimes can not exceed 25 years of imprisonment. According to the article 9th of Law n. 31/2004, 22 July, which adapted the Portuguese criminal system to the Statute of the ICC, crimes against humanity are punished with imprisonment from 12 to 25 years. Before this law, the Penal Code punished already crimes against humanity in articles 239th to 245th. About these articles see ANTUNES, Maria João, *Comentário Conimbricense ao Código Penal*, Tomo II, pp. 559-560 and 570 ff.

48 Leonor Assunção criticises this model as well, underlining the abstractness of the international community as the legal interest protected in crimes against humanity, cf. «Apontamento...», *op. cit.*, p. 101.

49 Cf. GIL GIL, Alicia, *Derecho Penal Internacional*, *op. cit.*, p. 27 e ss., *El Genocidio y Otros Crímenes Internacionales*, Valencia: Centro Francisco Tomás y Valiente, 1999, p. 17 e ss., «Los crímenes...», *op. cit.*, p. 75 e ss. See also ASSUNÇÃO, Leonor, «Apontamento...», *op. cit.*, p. 99 e ss.

Although this model has the advantage of not benefiting the agent of the crime, since each offence done to the protected legal interests is known and considered by the court, the doubt remains whether this will allow the court to attend to all the illicit matter performed by the criminal agent. In fact, we think that the sense of illicit revealed by a single act of murder is not equal to the sense of illicit associated to homicide in the context of a crime against humanity. If a crime against humanity implies a murder or a rape or enslavement, the opposite is not true. The act of homicide which is qualified as a crime against humanity implies a corresponding (and more severe) illicit. Thus, the individual legal interest is offended indeed, but also «something» more.

4.3. Protection of humanity: adopted position

We are finally arrived to the last model – which we defend consonantly with the reflections expressed above on the crimes against humanity (point 2) and on the legal interest as an element of criminal infractions (point 3).

We understand that the legal interest which is protected in the crimes against humanity is the human dignity. Much reticence has been expressed on the conception of human dignity as possible object of criminal protection. Firstly, its vague nature and also the difficulty to transform it into a more concrete and operative concept have been pointed out. We, nevertheless, believe that this value has been getting more concrete frames, and today can be considered as an authentic juridical/legal concept⁵⁰ due to the help of research studies, to the work of law makers, and to the decisions from Criminal Courts. This conclusion is supported by the historical evolution of the crimes against humanity, whose autonomy has been imposed progressively since the Nuremberg's definition up to their full recognition by the Statute of Rome in 1998. The crimes against humanity are now considered independently from war crimes and from armed conflicts and have their crucial elements typified in a formal source as well. Although the list of crimes against humanity has been enlarged in the Statute of Rome – in result, we think, of the weight and the consistence acquired by these crimes in the international community – their elements and circumstances have become more clear and more straight.

Among the elements and the conditions described in the article 7 of the Statute, the reference to a general and systematic attack against a civilian population assumes particular importance. This is an essential element in order to distinguish the protected legal interest from the individual legal interests protected in murder, rape, torture, enslavement... The context in which the crime is performed is an

50 Cf. DELMAS-MARTY, Mireille, *Crimes Internacionaux et Jurisdictions Internationales*, Paris: Puf, 2002, p. 63.

expression of a special and more severe illicit. The attack performed with respect to a single person stands as the mean to accomplish an even more severe illicit that offends the entire collective feeling of humankind. In fact, it is not only the human dignity of the individual victim that is offended. The way in which the crime is performed questions a common value that has been conquered with much effort: human dignity. To the offense to each human life, to each individual freedom which is restricted, we must add another offense which is experienced by the entire international community when those lives and freedoms are under attack. Mireille Delmas-Marty – who argues for the need to present a more concrete and tangible concept of humanity – has clarifying and brief words about this item, when she points out that such depersonalisation of the victim questions the singularity of each man as a unique human being and also its fit into the human community⁵¹.

To the individual dimension of human dignity, a collective aspect must be added: both make part of the global concept of human dignity. We can therefore understand that an isolated act of murder does not harm the humanity in its collective dimension, but an act of murder in the context of a general and systematic attack against a civilian population constitutes a crime against humanity.

Human dignity then stands over a collective foundation. We believe that this is a collective legal interest which belongs to the international community, where each one is included and from which no one can be excluded. In this sense, it is «the identity of the victim, i.e. Humankind, which gives substance to the crime against humanity».

A particularly important challenge is to specify the acts which attempt against the collective dimension of human dignity. The Statute tries to accomplish this task by describing the conducts which offend the human dignity (in its collective aspect) through the attack to individual legal interests. The offended individual legal interests (life, physical integrity, freedom...) make part of an autonomous interest which is the human dignity. The individual value that is also protected by these rules is a way of protecting the human dignity itself, giving its value in order to protect another interest: human dignity as a common value of all mankind. When an anonymous life is destroyed, depersonalized, destituted of any human value, in the context of a systematic attack to a civilian population, all humankind is offended.

In this way, there is something more to be protected through crimes against humanity beyond the individual interest which is directly offended; it is the common value which is owned and recognized by the international community and which can be considered a truly offended part. The protected legal interest is the collective element of human dignity. This legal interest must accomplish the necessary dogmatic tasks, in particular, it must function as a critical parameter of the incrimination: the

51 Cf. «O direito penal como ética da mundialização», *RPCC* (2004), p. 292.

incrimination will be legitimate, lawful and legal, if the conduct is able to offend, according to the international community, the collective dimension of humankind.

We are therefore arrived to some conclusions: on one hand, the crimes against humanity have a collective foundation which imprints them with a more severe degree of illegality in comparison with the offense of the individual legal interest; on the other hand, each attack directed to the individual legal interest constitutes by itself a crime against humanity.

The definition of humanity or human dignity is not a finished task but it is a gradual conquest. In the words of Mireille Delmas-Marty, we must accept the idea that this definition is a progressive process⁵². In fact, this is not even a new phenomenon: freedom, which is today a value consensually protected by criminal law, has been progressively ascertained for centuries, in its substance and materiality⁵³.

5. CONCLUSIONS

The subject of this work is the protected legal interest in the crimes against humanity. This dogmatic element was proposed by the authors of the XIX century, and has been object of utmost attention from the Literature in the last decades: the profound transformations in the social, economic, politic, and technological domains have given rise to the question whether criminal law can still be based upon the paradigm of the subsidiary protection of legal interests. We believe that the protection of a legal interest remains necessary in order to legitimate criminal punishment. Nevertheless, we find it necessary to adapt the concept of legal interest (created in the Enlightenment period) to the challenges and the changes brought up by the contemporary problems. In this context, particular importance is assumed by the concept and the role of collective legal interests, recognized as valuable by the society, which are owned by all and from which no one can be excluded.

The XX century has also assisted to the progressive affirmation of international criminal law, and in its context, to the incrimination of conducts taken against humanity. Vespasian Pella was clairvoyant when, in 1946, he hoped that the Nuremberg events would become a departure point in order to arrive at something better. It was in the XX century that the human dignity was assumed as a value to be protected by international criminal law, especially with the description of crimes against humanity on the article 7 of the Statute of the ICC.

52 Cf. DELMAS-MARTY, Mireille, *Trois Défis par un Droit Mondial*, Paris: Senil Essais, 1998, p. 187.

53 GARCÍA ARAN, Mercedes, «Esclavitud y tráfico de seres humanos», *Estudios Penales en recuerdo del Profesor Ruiz Antón*, Valencia: Tirant lo Blanch, 2004, p. 377, considers that freedom suffered the same abstractness problems as human dignity. However, it was the object of profound and considerable research, which is not the case, until now, with human dignity.

We believe that human dignity is composed, in its core, by different elements or dimensions: human dignity accomplishes itself in any fundamental human right recognized to an individual, but it contains as well a collective dimension which belongs to the international community and which is protected by the definition of crimes against humanity. Each aggression against the individual legal interests, in the context of a widespread and systematic attack against a civilian population, constitutes a violation of the individual human dignity of those who have suffered those acts personally, but it also affects the assurance of the international community in the protection of humanity, underlining the collective dimension of human dignity. We find this to be an authentic collective legal interest capable of accomplishing the functions asked to this element of a criminal infraction, notwithstanding the need for further research in this new field. In addition to individual legal interests, which are offended by the typified conducts, further protection is given to the portion of human dignity that transcends the individual person and which belongs to the international community: the humanity. It is this *plus* that qualifies the corresponding acts as a more severe illicit.

The human dignity is not, nonetheless, a finished concept or definition but a newborn conscience. Using the words of Mireille Delmas-Marty, international criminal law – and crimes against humanity – will be based on common values shared by an international community which is not a myth but which is becoming a reality, still fragile, that we must construct and reassure⁵⁴.

⁵⁴ Cf. *Crimes Internationaux...*, *op. cit.*, p. 63.

