

# Is an efficient criminal contribution possible to prevent crimes against humanity?<sup>1</sup>

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## **Riassunto**

L'autore si interroga sul ruolo che le scienze criminologiche possono svolgere per quanto concerne il giudizio e la punizione degli autori di crimini contro l'umanità. In particolare, compito delle scienze criminologiche dovrà essere quello di esercitare una funzione critica nei confronti delle azioni che precedono e preparano i genocidi, rappresentate dalla predisposizione di tecniche di neutralizzazione quali, ad esempio, le ideologie della superiorità razziale, la classificazione e gerarchizzazione degli esseri umani e della sicurezza nazionale, ideologie che arrivano a legittimare la tortura.

Il diritto penale internazionale può offrire palliativi o espedienti pragmatici, ma la vera prevenzione degli omicidi di massa può avvenire solo attraverso una conoscenza criminologica capace di criticare e di rifiutare sistematicamente la validità di tecniche di neutralizzazione preparate, in modo preciso e scrupoloso, da diversi teorici e diffuse nell'opinione pubblica come sollecitazioni alla vendetta. Se le scienze criminologiche, in nome di una pretesa ed impossibile neutralità ideologica, non si adopereranno per sconfiggere le tecniche di neutralizzazione impiegate negli omicidi di massa, la nostra conoscenza precipiterà in un vortice oscuro e diventerà "un'altra scienza che non pensa".

## **Résumé**

L'auteur réfléchit sur le rôle que les sciences criminelles peuvent jouer en ce qui concerne le jugement et la punition des auteurs de crimes contre l'humanité. En particulier, les sciences criminologiques devront exercer une fonction critique envers les phases préparatoires des génocides, c'est-à-dire l'élaboration des techniques de neutralisation (par exemple : les idéologies de supériorité raciale, la hiérarchisation des êtres humains et de la sécurité nationale qui peuvent légitimer la torture).

Le droit pénal international peut offrir des palliatifs ou des expédients pragmatiques, mais la véritable prévention des homicides de masse consiste d'une conscience criminologique capable de critiquer et de refuser systématiquement la validité des techniques de neutralisation, qui sont préparées de façon scrupuleuse par quelques théoriciens et diffusées intentionnellement dans l'opinion publique pour solliciter la vengeance. Si les sciences criminologiques, au nom d'une prétendue et impossible neutralité idéologique, n'œuvreraient pas pour battre les techniques de neutralisation utilisées dans les crimes contre l'humanité, la notre connaissance deviendra « une autre science qui ne réfléchit pas ».

## **Abstract**

The article considers the role of criminal sciences dealing with the judgement and the punishment of authors of crimes against humanity. In fact, criminal sciences have to criticize preparatory acts of mass homicides, such as the preparation of their neutralization techniques, that is to say, for instance, ideologies of racial superiority, of hierarchization of human beings and of national security that legitimate torture.

International criminal law may offer palliatives or possible pragmatic benefits, but the true prevention of mass murders consists in criminal judicial knowledge able to reject the values neutralization techniques, prepared by some theorists and spread over the public opinion as inducement to revenge: if criminal sciences, under the name of a pretended and impossible ideological neutrality, do not operate to fight neutralization techniques used in crimes against humanity our knowledge will be "another science that does not think".

<sup>1</sup> This work, destined to the celebration of Prof. Dr. Jorge de Figueiredo Dias, develops the subject we verbally exposed in the seminar "La dismisura del male. Il diritto di fronte ai crimini di massa", organized by Istituto Italiano di Scienze Umane at Palazzo Strozzi, Firenze, on March 3, 2008.

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1. (Punitive power is always selective). Intentional mass homicides committed from state power have been a recurrent phenomenon during the last century<sup>2</sup>. International law interweaves with criminal law so as to punish them. The outcome is the authorization to exercise a punitive power that cannot lose its structural selective character, which brings along similarly valid criticisms for such exercise at internal level<sup>3</sup>. Some sad procedural parodies contribute to discredit international juridical efforts<sup>4</sup>.

Although the clear objective pursues an incipient world citizenship<sup>5</sup> guaranteeing punishment for those who brutally injure it from the state power<sup>6</sup>, the risks that threaten that difficult path are well known.

2. (For this reason it is criticized from two opposite positions). Therefore, it is convenient to differentiate –at least- two critical tendencies: (a) On one hand, those who fear that the structural selectivity of punitive power may favour world hegemony of some powers. (b) On the other hand, those who fear that it may become an obstacle for the pretended defence needs of these powers

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<sup>2</sup> See: Y. Terner, *L'État criminel. Les Génocides au XXe. siècle*, Seuil, Paris, 1995.

<sup>3</sup> Almost all criminology of social reaction has seen this; A. Baratta, *Criminologia critica e critica del diritto penale*, il Mulino, Bologna, 1982.

<sup>4</sup> A clear demonstration is the judicial parody and outrageous execution of Saddam Hussein.

<sup>5</sup> Cf. K. Ambos, *La Parte General del Derecho Penal Internacional, Bases para una elaboración dogmática*, Montevideo, 2005, p. 62.

<sup>6</sup> Cf. G. Werle, *Tratado de Derecho Penal Internacional*, Valencia, 2005, page 81 and following; G. Mettraux, *International Crimes and "ad hoc" Tribunals*, Oxford, 2005, page 5 and following.; A. Huet, R. Koering-Joulin, *Droit pénal international*, PUF, Paris, 1994, page 104 and following.

against its *enemies*<sup>7</sup>. In common terms, one could commonly say that there are *criticisms from the left and from the right*, with some casual crossings in their arguments.

3. (The gestation of world citizenship is not linear). Notwithstanding the fact of acknowledging hegemonic disputes, the truth is that the idea of a world citizenship is praiseworthy<sup>8</sup>. Although it is true that what has been done evidences some flaws<sup>9</sup>, it is worth mentioning that no institution was born perfect nor did it develop in the linear and rational way in which jurists prefer, but according to political vicissitudes<sup>10</sup>.

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<sup>7</sup> This seems to be the republican policy of the United States of America, denying the ratification of any treaty that may limit its interventions or control its actions.

<sup>8</sup> The most extreme theoretical rejection to this idea belongs to Carl Schmitt, because from the perspective of his identification of the political with the paranoia of the absolute state, this would imply the abdication of sovereignty (waiver to arbitrarily elect the enemy). The people who reject this –according to Schmitt- will disappear due to their weakness (Carl Schmitt, *Der Begriff des Politischen*, 1932). According to this thesis, the assumption of the international commitment to punish the terrorism of state, mass murders and war crimes, implies a sign of weakness of the state that assumes it and announces its disappearance.

<sup>9</sup> About the difficult road covered from First World War until today, among many: A. La Rosa, *Juridictions pénales internationales. La procédure et la preuve*, PUF, Paris, 2003, page 11 and following.

<sup>10</sup> It is sufficient to think, for example, about the appearance and advance of the democratic representation or in the consecration of the fundamental rights. On the vicissitudes of vote in Great Britain, generally quoted as the cradle of political rights, one can see S. Schama, *Auge y caída del Imperio Británico, 1776-2000*, Madrid, 2002; the criticism to universal and secret vote in Argentina in the discriminatory publications of the then national senator Benjamín Villafaña, *La ley suicida*, Buenos Aires, 1936 and *Chusmocracia*, Buenos Aires, 1937. Social rights were incorporated to constitutional law in the Mexican Constitution of 1917 or *Carta de Querétaro*, in the middle of the worst Latin American civil war of the 20th century, and in the Constitution of Weimar, finally destroyed by Nazism.

4. (International punishment can avoid a chaotic application of the universal principle). Taking into account what was stated above, we are not fully *apocalyptic* and, *in principle, we believe that internationalization of punishment can be positive in practice, in what concerns the arrangement of the universal principle*, according to which any state can judge the authors of crimes against humanity if this was not done in accordance with territoriality. Although this is an old principle<sup>11</sup>, its application in modern times becomes complicated and can derive in chaotic situations. Therefore, an important practical solution for these cases would be an international competent court.

5. (Criminal law does not know which the object of the penalty is). But besides what has been stated, this punishment may offer another advantage that, in our opinion, is the one that definitely grants it legitimacy.

In order to explain this second positive aspect, it is necessary to state that we start with the premise of denying the legitimacy of all the so-called *positive theories of punishment*, because they respond to primary intuitions with which the *purpose, sense or essence of punishment is revealed* to the theorist, and from there on he infers the whole theory of criminal law<sup>12</sup>. Therefore, the positive theories on punishment carefully separate what *is*

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<sup>11</sup> The Argentine Constitution recognizes this since 1853 (section 102, current section 118), specially very ancient treaties consecrate it, as the one of International Criminal Law of Montevideo, 1889. Its records go back to the United States of America during the end of the 18th Century. A doctrinaire reference can be seen in the famous *Derecho de Gentes* of Vattel (E. de Vattel, *O Direito das Gentes*, Universidade de Brasília, 2004, paragraphs 232-233, pages 155-6).

<sup>12</sup> “The starting point of all idealist systems is the immediate intuition of the absolute and unconditional” (cf. M. de Rivacoba y Rivacoba, *Krausismo y Derecho*, Santa Fe, 1963, p. 29).

from what *should be*<sup>13</sup>, because social science demonstrates that punishment in the world –in reality- never *is* how theorists state it *should be*.

Although it is true that the ‘*is*’ does not determine the ‘*should be*’, it is not possible to deny that it limits it, because a ‘*should be*’ that cannot become an ‘*is*’, far from being the expression of a juridical value, is an absurdity. And the truth is that punishment, in most cases, cannot be what any of the theories pretend it *should be*, for which reason today the tendency is to abandon *preventivism* to return to a simple Hegelian reaffirmation of the validity of the rule<sup>14</sup>. In short, it is verifiable that criminal knowledge knows little about the function of punishment and uses multiple idealist constructions with an intuitionist basis.

6. (Mass homicides are committed by punitive power). Beyond any doubt, it is also verifiable that when the state’s punitive power loses control, the state of law disappears and its place is occupied by that of the police<sup>15</sup> and, besides, that *mass crimes are committed by this same*

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<sup>13</sup> It works by assigning the first one to a “natural” science and the second one to a “cultural” one, according to the neo-Kantian philosophic assumptions: H. Rickert, *Ciencia cultural y ciencia natural*, Madrid, 1965.

<sup>14</sup> Thus, G. Jakobs, *Norm, Person, Gesellschaft, Vorüberlegungen zu einer Rechtsphilosophie*, 1999.

<sup>15</sup> The inquisitive model, where all procedural functions are concentrated in the “court”, because it is not impartial but always acts for “the good”, makes them stop being judges and start being policemen. In a modern sense the inquisitors were not judges, as neither were the members of the “special” political courts, as the Nazi *Volksgesicht*. The courts of absolute states are always police courts, administrative entities because of their dependence and partiality. A police state –sociologically speaking- is a state where the police agencies operate without limitations, as Gestapo, KGB or the intelligence service of any dictatorship. In the best of cases these “courts” would be mere internal controls of the administration. Those who exercised judicial power in Latin American dictatorships were not judges, although the constitutional regimes were

*uncontrolled punitive power, that is to say, that the same punitive power agencies commit the most serious crimes when they operate without containment*<sup>16</sup>.

Therefore, the criminal doctrine of the state of law can well cease legitimating punishment and sincerely admit it does not know what its function is<sup>17</sup>, because it knows it must rationally contain the use of punitive power as far as its juridical control counter power to preserve the state of law and avoid mass crimes<sup>18</sup> allows it to. At political times, criminal law would be the equivalent to humanitarian law at war times: both would be useful to contain a *factum* as far as their limited juridical power of containment allows them to<sup>19</sup>.

7. (What makes international criminal law legitimate?). If internationalized punitive power loses control, it would turn into an hegemonic instrument of some sort of planetary police state, which seems to be what left-wing critics want to

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forced to recognize the value of their judgments due to elemental public order reasons.

<sup>16</sup> It is true that many of these crimes are attributed to military forces, but it is also true that, beyond the cases that are authentic war crimes, these forces have committed them by operating materially police functions and not war ones.

<sup>17</sup> Because of this we propose a criminal law based in a negative or “agnostic” theory of punishment (E.R. Zaffaroni, A. Alagia, A. Slokar, *Derecho Penal, Parte General*, Buenos Aires, 2000, page 35 and following).

<sup>18</sup> As long as the judicial power planned by criminal law contains the punitive power, the state of law operates better; when this one gives away containment space, the state of law is deteriorated. *In extenso* in: E. Zaffaroni, *Alla ricerca delle pene perdute, Delegittimazione e dommatica giuridico-penale*, Edizioni Scientifiche Italiane, Napoli, 1994 (translation of G. Seminara). This explains the fragility of the state of law and criminal law that is proper to it, which Wolfgang Naucke makes reference to (*Über die Zerbrechlichkeit des rechtsstaatlichen Strafrechts*, Nomos, 2000).

<sup>19</sup> Cf.: “La rinascita del diritto penale liberale o la Croce Rossa giudiziaria”, in L. Gianformaggio (a cura di), *Le ragioni del garantismo. Discutendo con Luigi*

avoid and right-wing critics try to provoke. In the face of this risk, it is advisable to ask oneself if internationalized punitive power, within less irrational limits, could be legitimated by some positive contribution –even a limited one– to the gradual evolution towards a better international coexistence.

8. (Mass criminals lose peace). Mass crimes have such a huge unfair content that they seriously limit the juridical power of containment of criminal law. The unpunished mass criminal is in practice subject to a *Friedlosigkeit* or loss of peace, he is excluded from the juridical community, and any damage caused to him is practically unpunished, because criminal law is incapable of condemning the person who executes it. Theorists do not admit this, but when it has occurred<sup>20</sup> executors have remained unpunished. This data from the real world obeys to the fact that criminal law loses its ethical strength to contain, being it of little importance if it pulls through inventing an incompetence<sup>21</sup> or an uncompleted state of war<sup>22</sup>.

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*Ferrajoli*, Giappichelli, Torino, 1993, page 383 and following.

<sup>20</sup> It can be objected that it has happened in few cases. Beyond the pretended “tyrannicide”, that is to say, when the criminal has lost power, in many cases the revengeful execution has not taken place because the victims themselves or their blood relatives chose the legal ways, but it must be observed that they do this, precisely, so they do not fall in the denial of the condition of person of the criminal, what would place them in their same ethical level and would not only delegitimize the fight for legal punishment, but would make the criminals “sacred”, offering themselves as candidates for future sacrifice victims.

<sup>21</sup> The young Armenian who executed Talât in Berlin, the direct responsible of the Armenian genocide, was acquitted by a German court due to transitory unindictability (cf. V. N. Dacrian, *The History of the Armenian Genocide. Ethnic Conflict from the Balkans to Anatolia to the Caucasus*, Oxford, 1997, page 288-9; M. Flores, *Il genocidio degli armeni*, il Mulino, Bologna, 2006, page 204 and following; G. Chaliand, Y. Ternon, *1915, le génocide des Arméniens*, Paris, 2002, pages 135-137; also A. Shiragian, *Condannato a*

These pretexts conceal a civilizing regression, because, in fact, we return to a declaration of Roman *hostis*<sup>23</sup> which deprives the subject from his condition of being a *person*, member of the human community, which is undoubtedly an extreme version of the *criminal law of the enemy*<sup>24</sup>.

9. (International criminal law redeems him as a person). International efforts to submit the criminal to a process are legitimated because they redeem him/her from the status of *hostis*, ratifying *that for the law he/she continues being a person, in spite of the terrible magnitude of the committed crime*.

This is the *maximum contribution and the legitimation of international criminal law*: it would avoid a degrading act of barbarism for the mass crime victims themselves, and would avoid falling within the enemy's criminal law; moreover, it would just be the opposite by avoiding the return to the *hostis*, which is the 'de

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*uccidere, Memorie di un patriota armeno*, Guerini, Milano, 2005).

<sup>22</sup> In the case of the execution of Mussolini, it was closed with the argument that the marionette republic of Salò had not subscribed the armistice and it was an act of war. The truth is that if the marionette republic ever existed, it no longer did, because its governors were escaping to Switzerland. The General Attorney of Milan's decision not to proceed due to this reason, in the appendix to G. Bianchi, "Per quali ragioni fu soppresso Benito Mussolini", in G. Rigamonti (a cura di), *La Seconda Guerra Mondiale nella prospettiva storica a trent'anni dall'epilogo*, Cairoli, Como, 1977, page 473 and following.

<sup>23</sup> About the "declared enemy", R. von Jhering, *L'esprit du Droit Romain dans les diverses phases de son développement*, Paris, 1877, I, p. 228; A. Du Boys, *Histoire du Droit Criminel des Peuples Anciens*, Paris, 1845, p. 245; G. Agamben, *Estado de excepcion*, Buenos Aires, 2004, p. 146.

<sup>24</sup> Leaving the mass criminal unpunished and released to any private revenge is much worse than what is proposed by the actual version of "criminal law of the enemy", that only proposes security measures.

facto' situation in which the unpunished mass criminal is<sup>25</sup>.

10. (But international punitive power does not prevent state mass homicides). By what has been previously stated, it is evident that we do not accept the supposedly preventive function of international punitive power in what concerns future mass crimes. Its legitimacy, provided it remains within limited channels, lies in the reestablishment of the criminal's personality, according to the juridical-humanist basic principle that states that *every human being is a person*.

11. (Is it possible to prevent mass crimes?). But if international punitive power does not prevent mass crimes, but it is criminal law the one in charge of limiting it so that it does not drift towards a reproductive planetary hegemony in that dimension of the state of police (and turns itself into active subject of mass crimes), it is necessary to ask oneself if there is any way explorable for law to prevent those crimes. To accomplish this, it is necessary to examine the deep roots of those crimes, where we reach the *Kernel*.

We move towards a much more complex field where idealist answers of traditional criminal law are not sufficient, and where criminology omits<sup>26</sup>, and where narcissism – that has trained us to

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<sup>25</sup> Against what was affirmed by G. Jakobs, who pretends that international criminal law is criminal law of the enemy (thus in *Bürgerstrafrecht und Feindstrafrecht*, in HRRS, March, 2004), its -main and possibly only- virtue is precisely to rescue the mass criminal from a real situation of "criminal law of the enemy" raised to the extreme.

<sup>26</sup> It is curious that being the crimes that have caused more deaths in the last century, there is a suspicious silence of criminology about them, very well pointed out by W. Morrison, *Criminology, Civilisation and the New World Order*, Oxon, New York, 2006. See the impressive chart with the number of victims in pages 93-94.

respond to the most varied conflict with punitive power<sup>27</sup> - must collect its colourful sails, if it does not wish to sink in the storm. Although the field may be tremendously difficult, we must explore it, *without any pretension of reaching any conclusive truth, but with the most absolute certainty as to the need of going through it*. We must explore a spot of depths we are not used to in criminal doctrine and criminology.

12. (Revenge has a wonderful political efficiency). Punitive power –with its structural selectivity- criminalizes a few persons and uses them to project itself as neutralizer of social evil which, as in the case of madness, appears as irrational<sup>28</sup>. It presents itself as the rational power that confines irrationality in prisons and mental hospitals. Thus adorned, it directs revenge impulses, which provides a wonderful political efficiency, currently verified when mass communication glorifies<sup>29</sup> the moral promoter<sup>30</sup> of revenge to neutralize limits to punitive power (i.e.,

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<sup>27</sup> To such point it is true that the concept of juridical interest, developed by criminal liberalism as requirement of offensiveness or harmfulness, suffers the effects of a curious alchemy, because the “injured juridical interest” turns to be a “tutelary juridical interest”, giving as true that the criminal rule “protects” it, when nothing verifies that this goal is actually achieved: the only verifiable thing is that criminal rule prohibits a conduct that may affect it.

<sup>28</sup> When dealing with this issue, one cannot forget the contributions made by Michel Foucault, for instance in “*Bisogna difendere la società*”, Feltrinelli, Milano, 1998.

<sup>29</sup> On the concept of “glorification” and its relevance through communication mass media, G. Agamben, *Il Regno e la Gloria, Per una genealogia teologica dell'economia e del governo*, Neri Pozza, Vicenza, 2007.

<sup>30</sup> The concept of the *moralpromoter* goes back to Bronislaw Malinowski, *Crimen y costumbre en la sociedad salvaje*, Barcelona, 1956; a new phenomenon is the creation of the *victim/hero*: see C. Eliacheff, D. Soulez Larivière, *Le temps des victimes*, Albin Michel, Paris, 2007.

for the benefit of the authoritarian state)<sup>31</sup>. The political efficiency of vindictive speech does not explain itself through contextual circumstances, because it remains unchanged throughout the history of state and even *pre-state* punitive power.

13. (Punitive power always tends to mass homicide). Since the moment that in the 11th and 12th centuries, punitive power reappeared in Europe, its tendency to become uncontrolled has been a constant under the pretext of fighting against enemies that generate emergencies that are an imminent threat to humanity<sup>32</sup>, and in almost all of them, their agents have committed mass crimes against humanity<sup>33</sup>.

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<sup>31</sup> This success is once again verified with the present revengeful advertising trend and the consent of the populations that demand greater controls and more punitive power, satisfied by irresponsible and frightened politicians that advance in an accelerated road of destruction of the state of law, through a revival of authoritarian and totalitarian criminal laws. This experience is almost planetary, that is to say, it is not exclusive of any country or region, and is simultaneous to last century's market fundamentalism, that brought about social exclusion and the stop of development. The leaders of such fundamentalism are today the main promoters of revengeful publicity.

<sup>32</sup> Since reappearance of punitive power, the main emergency invented when it was necessary to strengthen the central power of the Church was the heresy of the Cathars and Albigenses (Cf. Jesús Mestre, *Cathari, Problema religioso, pretexto político*, Barcelona, 1995), and, immediately, witchcraft, that is to say, the identification of the demon as the enemy which, as it was unreachable, fell upon women who came to an agreement with it. Since about eight centuries ago, emergencies –and enemies- were successively changing each time faster: the degeneration of races, syphilis, alcohol, drugs, international communism, and others, up to reaching terrorism in present times. Each of these enemies existed in reality and sometimes were a danger (witches were persecuted since Roman times, at least) but emergency erects it in the sole evil that justifies any degree of repression. In the individual level, delusions almost always have a minimum real basis.

<sup>33</sup> Although here we only deal with mass homicides, these have not been the only crimes against humanity committed in the emergencies generated through the creation of enemies. The handicapped, the ill, the

14. (Enemies are created by agencies and are destroyed by disputes between them). The enemy is created by a moral promoter agency that hegemonizes punitive speech and mass criminal power until another agency disputes this, starting by denying the enemy's danger, to create another one, as the true or new threat that generates another emergency<sup>34</sup>.

Between one agency's declining hegemony and the ascent of the next one (at the moment of the discursive criticism), a gap opens through which the critical speech of punitive power secularly advances –criminal law of containment or reduction<sup>35</sup>- as well as the resulting state of law in

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mentally ill, the blind, the dumb, homosexuals, indians, have been the scapegoats, the victims –among other things- of many thousands of forced or illegal sterilizations. We can mention the aberrations committed against degeneration as enemy of the race; on this, Edwin Black, *War against the weak. Eugenics and America's campaign to create a master race*, New York, 2003.

<sup>34</sup> This dynamic operates since the origins of current punitive power. The Roman Inquisition against witchcraft was organized by the Dominicans and then deteriorated. Almost all legitimating and inquisitory speeches were Dominicans (see the recompilation of S. Abbiati, A. Agnoletto, M.R. Lazzati, *La Stregoneria*, Mondadori, Milano, 1991). The manual that encloses and summarizes the experience against witches is the *Malleus Maleficarum*, of 1487 (H. Krämer, J. Sprenger, *Il martello delle streghe*, Marsilio, Venezia, 1995). When in the 16<sup>th</sup> century it was reorganized – based on the Spanish model- against the reformed, it was placed under control of the Jesuits, who discredited the speech of emergency against witches. In this sense: G. Romeo, *Inquisitori, esorcisti e streghe, nell'Italia della Controriforma*, Sansoni, Firenze, 1990; R. Canosa, *Storia dell'Inquisizione Spagnola in Italia*, Sapere, Roma, 2000; from the same, *Storia dell'Inquisizione in Italia dalla metà del cinquecento alla fine del settecento*, Sapere, Roma, 2000; A. Del Col, *L'Inquisizione in Italia dal XII al XXI secolo*, Mondadori, Milano, 2006.

<sup>35</sup> The first critical speech published in a work especially devoted to this job (because he had been preceded by other Jesuits in general theological works) appeared in 1631 and belonged to the Jesuit Friedrich Spee (*Cautio criminalis*, Salerno, Roma, 2004). Spee was also one of the best German poets of his times; see compiled works in *Friedrich von Spee. Dichter,*

the political field. The first one is usually called *authoritarian criminal law* and the second one, *liberal criminal law*, although these denominations belong to centuries much later to the beginning of this pendular movement.

In spite of the fact that uncontrolled punitive power always renews the same discursive structure<sup>36</sup>, its content wholly varies according to the chosen enemy, although it invariably reduces all criminal law to direct coercion (administrative law), because one is supposedly fighting against an on-going harmful process<sup>37</sup>.

On the other hand, criminal law of containment, has also had since its origins the same discursive structure<sup>38</sup>, only that – unlike the inquisitorial- its

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*Theologe und Bekämpfer der Hexenprozesse, herausgegeben von Italo Michele Battaferano*, Luigi Reverdito Editore, 1988.

<sup>36</sup> The structural elements of inquisitorial speech recognizable in manuals of the 15th century, and even before, remain unaltered: severe punishment against those who doubt of the dangerous condition of the enemy and emergency, enemy's human inferiority, agency's immunity to evil, prejudiced signs of evil, euphemistic language at the time of declaring punishment, agency's exclusivity in the recognition of evil, etc. These elements clearly appear in the *Malleus*, which is a late work, published almost by the end of the persecution of witches, but which summarizes the inquisitorial experience of two centuries.

<sup>37</sup> The difference between punitive power and direct administrative coercion is broken; every violence to ruin the enemy becomes legitimate by means of necessity or of legitimate defence. This was the legitimating speech of torture proper of the ideology of national security in the south of America thirty years ago, and today's speech in the north: once the difference between punitive power and direct coercion has been annulled, it is the same to twist an individual's arm or to slap his face to grasp the key to disarm a bomb tied to a bay's cradle, than to organize and plan the subjugation to pain of a gang's member so as to destroy it.

<sup>38</sup> In Spee's mentioned work, one can see the critical elements to punitive power that have been in force up to now: indifference of the political authority in front of the agencies' abuses, their corruption and extortions; disinformation of the population; aboulia and repetition of prejudice by the theorists; concealing euphemisms to apply tortures; condemnation of innocent people; selectivity due to vulnerability; perverse interpretation

contents do not change, but increase and improve themselves with the successive experiences of criticism to absolutist impulses, while it borrows elements from civil law (punishment in payment for a guilt<sup>39</sup>, crime as a breach of contract<sup>40</sup>).

When punitive power loses control, the phenomenon it generates does not exhaust itself in criminal theory – and far from this- it *directly passes on to political theory*, because there arises the police, authoritarian or totalitarian state, with a tendency to absolutism<sup>41</sup>.

15. (The creation of the enemy has the form of a paranoid delusion). Although it is risky to go from individual pathology to collective phenomena, an entity's hypertrophy until erecting it into an enemy and the illusion of emergency, are signs equivalent to paranoid delusion<sup>42</sup>. Modern state

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of victimization signs; allocation of special powers of resistance to the victim; reproduction of the system, etc.

<sup>39</sup> The German word *Schuld* means *guilt* but also *debt*: *Schuldrecht* is the civil law of obligations. In Spanish, the word *debt* also has the meaning of *guilt*, meaning it had in the old version of the 'Our Father': it said *forgive us our "deudas"*.

<sup>40</sup> On this concept and freedom as an exchange value, M. Pavarini, *La Criminologia*, Le Monnier, Firenze, 1980, pages 19 and following; also D. Melossi, M. Pavarini, *Carcere e fabbrica. Alle origini del sistema penitenziario*, il Mulino, Bologna, 1979, page 109.

<sup>41</sup> More than a relationship between criminal and constitutional law, in the state of law there exists a reciprocal dependency, because when constitutional law does not provide criminal law with its containment principles, criminal law loses its main function, and when it does not comply with its containment function, constitutional law loses its effect.

<sup>42</sup> The statement that the delirious idea consists in an "incurable mistaken judgement" is common to almost all psychiatry, being the morbid origin what makes it distinct from other mistaken judgements (cf. M. Reichardt, *Psiquiatria General y Especial*, Madrid, 1958, page 37). It is not simple to establish what the "morbid origin" consists in. On the other hand, it is stressed that in the paranoid personality, there is a tendency to project upon others whatever its "self" does not accept (cf. Antonio Seva Díaz, *Psiquiatria Clínica*, Barcelona, 1979, page 376).

always presents a *paranoid tendency*<sup>43</sup> that reaches *paranoid psychosis* when it proclaims emergency, being it then a mad state that suffers a very serious error of meaning<sup>44</sup>. The basic idea invades the whole; it is a victim and an instrument of fear, because it believes that all evils come from the enemy, source of the emergency. When delusion is reduced, the state recovers reason and accumulates experience to contain delusion, the result of which is the set of guarantees of constitutional and international law, which starts generating a culture that gradually becomes regional and planetary<sup>45</sup>.

16. (Paranoia has been positively theorized as essence of politics). Historical verification of the collar of delusions that from the 12th century up to these times has claimed millions of lives committing the worst crimes, has yielded the aberrant result that an *amoral political thesis* presents the perennial need to create –or identify- enemies, making the essence of politics itself lie in that, and discrediting constitutional culture as a mere *criticism of politics*<sup>46</sup>. To summarize, for this thesis, politics would be the art of building the absolute state, and criticism of the absolute state and the constitutional culture derived from it, would be mere words that weaken state power, which would make the state vulnerable and weak: democracies would be weak structures; the true strong and consolidated state would be the

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<sup>43</sup> Cf. J. Hillman, *La vana fuga degli dei*, Adelphi, Milano, 1991, page 78.

<sup>44</sup> Idem, page 83.

<sup>45</sup> Cf. Peter Häberle, *Europäische Rechtskultur*, Suhrkamp, 1997.

<sup>46</sup> We refer to Carl Schmitt's thesis, *Der Begriff des Politischen*, 1932.

absolute one, the only one capable of annihilating its enemies<sup>47</sup>.

The amorality of this thesis is such that it does not need to *naturalistically* qualify the enemy; the latter is not marked by anything. It is simply the one whom the politician chooses as such<sup>48</sup>. The only strong state would be the delirious, and hence, the absolute one<sup>49</sup>, because – as every delusion – it does not admit any *correction*<sup>50</sup>.

17. (It is an amoral thesis that exploits psychosis). As amoral<sup>51</sup> this theorization may be, the truth is that it is founded on a secular historical verification: relapse into state delusion. But its amorality lies in the fact that it pretends the political exploitation of delusion that, as it accepts it as normal, does not question its causes or nature. No psychopath asks himself about the causes of his madness when –due to his psychosis- he does not admit it, or, what is even worse, no psychopath does so although he admits it, when he decides to politically exploit it.

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<sup>47</sup> Thus, Schmitt, op. cit., Spanish translation, Madrid, 2005, page 82.

<sup>48</sup> Schmitt sees in this the essence itself of sovereign power: “Sovereign is he who decides over the state of exception”, that is to say, whoever has the power of choosing the enemy (*Teología política*, Buenos Aires, 2005, page 23).

<sup>49</sup> This is more clearly stated by Schmitt in *Der Leviathan in der Staatslehre des Thomas Hobbes*, 1938 (*El Leviatán en la teoría de Thomas Hobbes*, Mexico, 1997).

<sup>50</sup> A characteristic of delusions is that they may not be influenced by experience and by irrefutable conclusions (cf. Karl Jaspers, *Psicopatología General*, Buenos Aires, 1963, p. 119).

<sup>51</sup> Minimization of responsibility as the intellectual participant of the author of this thesis, may have been sincere, because it is not possible to demonstrate that it has “caused” anything, because it limited itself to legitimizing what was being committed, although in the facts this has been true. See his defensive arguments in the early post-war in Carl Schmitt, *Risposte a Norimberga*, a cura di H. Quaritsch, Laterza, Bari-Roma, 2006.

18. (It is an amoral political resource, but why is it used and how can one explain its millennial efficiency?). What leads punitive power to lose control and what leads the state to become absolute, paranoid, to eliminate limitations to its powers, and to annihilate a human mass that the state itself identifies as its enemy? Certainly, individualization of an enemy by the state directs discomfort and revenge; it is evident that blaming a group for all evils and recommending its destruction so as to make it stop, is a very strong political resource, tremendously amoral, but very efficient.

Given its efficiency, there are people who perceive it as a simple *means to accumulate power*, which is still an obviousness that does not explain (a) why a human group obtains such an accumulation of power until it reaches absolute power, nor does it explain (b) the reason for this resource’s great political efficiency, which repeats itself without being worn out throughout thousands of years, in spite of the verification that it always ends in a mass crime.

These two questions are the key to any serious attempt of prevention: the reason for *motivation* and the *efficiency*. We start walking on slippery ground but one we must inevitably walk through, and we shall see that both issues are intimately related.

19. (What leads to the indefinite search for power? Capitalism? The impulse of death?). Dominant civilization has been criticized from psychology, as being the impeller of an indefinite amount of wealth, in such amounts that thousands of very long-lived lives would not be able to consume, assigning this to a *civilizing pathology*, detected through corrections made to the Freudian

theory of its creator's last years<sup>52</sup>. The idea of human history as a *history of neurosis*<sup>53</sup> was original at that time, and this would be due to the incapacity to incorporate death, because by radically separating it from life, it causes an indomitable ambivalence. It is not only the indefinite search for goods, but for power, which is also true for the accumulation of knowledge as power, because the search for indefinite power through science also definitely results in the accumulation of goods. With this, modern society presents morbid characteristics not in what concerns knowledge itself, but as regards the schemes that rule the search for knowledge, the purpose of which is to dominate objects.<sup>54</sup> Although this psychologist criticism is half a century old<sup>55</sup> the conclusion that the goal of a non-morbid science would not be the domination of nature but the union with it, is very up-to date<sup>56</sup>. Capitalism, the stimulator of indefinite accumulation, would be the expression of this civilizing neurosis, which by setting the accumulation of wealth as its goal leads to the denial of the Eros, to the sublimation of the body: wealth is not the means but the end in itself<sup>57</sup>, with which the triumph of the death instinct advances.

<sup>52</sup> We refer to Freud's thesis on "Eros" and "Thanatos".

<sup>53</sup> Norman O. Brown, *La vita contro la morte. Il significato psicoanalitico della storia*, Bompiani, Milano, 1964, page 262.

<sup>54</sup> Brown (page 267) remembers that this had been stated by Freud; years after, Foucault goes deep into this.

<sup>55</sup> The original edition of *Life against Death* is of 1959.

<sup>56</sup> Brown, op. cit., page 268.

<sup>57</sup> In page 339 it reproduces the following paragraph from Keynes: *When the accumulation of wealth stops having great social importance, there will be great changes in the moral code. We will be able to free ourselves from many pseudo-moral principles that have obsessed us for two hundred years, with which we have raised some of the most unpleasant human qualities to the place of the highest virtues. We will be able to allow ourselves the audacity of giving the*

20. (Indefinite accumulation supports itself in linear time, which also supports revenge). The mentioned conclusions do not differ much from those pointed out from other theoretical frames. Every indefinite accumulation of power assumes a temporal environment which is also indefinite, and which corresponds to the idea of linear time – in the form of an arrow- that exceeds individual existence and does not return. No wonder it has been observed that the idea of revenge is also based on that same idea of time: revenge is always revenge against time<sup>58</sup>, because one cannot make what happened not to have happened. Therefore, the linear idea of time is an assumption both of indefinite accumulation of power and of revenge. However, a necessary assumption is not sufficient explanation.

21. (Science that accumulates power is a feudal knowledge that does not think). It has been observed that *science does not think* when it looks for power<sup>59</sup>. In the knowledge to *dominate*, the interrogated entity is an *object*, and the interrogator a *subject* that *questions him* to more and better dominate him<sup>60</sup>. The relationship

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*motivation of money its fair value. Love for money in terms of possession, different from the love for money as a means for enjoyment and for the reality of life, shall be recognized as it is, a morbidity which, in a certain sense, is unpleasant, one of those semi-criminal tendencies, semi-pathological, that with a shudder are derived to specialists in mental illnesses* (taken from *Essays in Persuasion*, New York, 1932, page 369).

<sup>58</sup> F. Nietzsche, *Also sprach Zarathustra, II. Von der Erlösung*, in "Werke in vier Bänden", Kart Müller Verlag, Erlangen, I, page 409.

<sup>59</sup> See M. Heidegger, *Umanesimo e scienza nell'era atomica*, La Scuola, Brescia, 1984; *Ormai solo un Dio ci può salvare, Intervista con lo "Spiegel"*, Ugo Guanda, Parma, 1987.

<sup>60</sup> According to Foucault, the interrogatory (the *inquisitio*) as a form of access to procedural truth, that replaced the fight (*disputatio*) of the ordeal of combat or duel, extended itself as a model to all wisdom and generated what we here call the *dominus* (Cf. Michel

between the interrogator and the interrogated in this knowledge of *dominus* is asymmetrical, because the interrogated is always in a lower level<sup>61</sup>. This has a double effect: (a) On one hand, the interrogator does not expect the answer with all the importance of the interrogated entity (which is the only one the entity can give: the human being with its *humanity*, and the rock with its *quality of stone*), but only in the part that is useful for it *to dominate*. As it cannot assimilate them, the remains of the entities' answers accumulate; the entity *objects to it* (goes against it) and *subjects it* (pushes it downwards)<sup>62</sup>. This accumulation of inassimilable answers ends up *subjecting it* and makes this technique lose human control. (b) Besides, when the interrogated entity is another human being, the asymmetry of feudal knowledge places the interrogator in a superior level, and, therefore, the knowledge of *dominus* essentially hierarchizes human beings, which allows the rationalization of colonial mass crimes and of every other arbitrary identification of enemies, which are always considered humanly inferior or sub-human (*Untermenschen* or *Unmenschen*)<sup>63</sup>.

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Foucault, *La verdad y las formas jurídicas*, Barcelona, 1980).

<sup>61</sup> It is the position that corresponds in this scheme to the entity to be dominated. Foucault's thesis on the extension of the *inquisitio* as a scientific model may not be shared, but the truth is that the change of scientific paradigm is temporarily near and the cruelty which knowledge submits the "object" to is highly significant.

<sup>62</sup> It may be stated that etymology here is significant: *ob* and *sub* give a clear idea of the relationship.

<sup>63</sup> Generally this is identified with racism, but hierarchization of human beings is not reduced to racism nor does it always have a pseudo-biological origin or fundament. Discrimination of women, the elderly, homosexuals, the mentally ill, is not always related to racism. Division into castes, for instance, usually has –as is the case of India- a supposedly

22. (But mass homicides are prior to this and to the state itself). But the observation of the civilizing neurosis as well as of revenge and the feudal accumulation of knowledge, all supported by revenge, although they convincingly explain a lot, seem to rest in events of the last millennium. However, mass homicides are much previous to this, and do not limit themselves to our dominating, modern, and pre-modern civilization. Mass crimes appear covered by religious visions, are as old as religion, and as religion, are *pre-state* or committed by societies with organizations completely different from modern ones and very different from each other.

23. (Neither do we know how to make the weight of revenge stop). When we nowadays read the abolitionists<sup>64</sup> we smile with the superiority of him who lacks an answer, because we have not reached the bottom of the question. We know that what they propose is impossible or almost impossible, but we do not know why. We stammer because we do not dare to look for the answer. We direct revengeful violence in the criminal justice system, but remain silent when punitive power breaks the barriers of juridical containment of criminal law and bursts into mass homicides, the authors of which are none other than those whom the speech assigns the function of preventing them. We know that revengeful violence is previous to the state, that its origin is related to religion, that no matter how modernity has encouraged it –and it has undoubtedly done so – it has not generated it, but we cannot eliminate it

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spiritual rationalization: the good ones reincarnate themselves into the superior caste.

<sup>64</sup> We refer –for example- to L. Hulsman, J. Bernat de Celis, *Peines perdues. Le système pénal en question*, Le Centurion, Paris, 1982; T. Mathiesen, N. Christie –

and we do not know why. We know that the hard search for an unlimited power generates mass homicide violence, that the knowledge of *dominus* strengthens it and threatens planet life, that the exploitation of revenge destroys our juridical culture and leads to the absolute state and mass homicide, but we cannot neutralize its instigation nor move to a non-morbid or *frater* or *non-dominus* science; we cannot move from asymmetrical *inquisitio* to symmetrical *dialogus*<sup>65</sup>. 24. (Is it a biological determinism?). It could be said that the persistency and antiquity of the phenomenon could be due to biological reasons, that is to say, to something non-mutable in human biology, to a genetic flaw that leads it to violence and self-destruction.

Although this thesis is unverifiable, it cannot be denied that it underlies in Hobbes<sup>66</sup> and in many who follow his line<sup>67</sup>, who were able to observe mass death with a somewhat amoral indifference<sup>68</sup>, because it was limited to a

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u.a., *Abolicionismo penal* (translated by M. Cifardini and M.L. Bondanza), Buenos Aires, 1989.

<sup>65</sup> It would be the form of knowledge that would learn how to listen to the entity in a horizontal and symmetrical way. This knowledge is the only one that would guarantee the preservation of planetary life. It is true that the difficulty for this *dialogus* was intensified by two marked Medieval tendencies with respect to the animal: one radically separated the animal from the human being, while the other one humanized it to the point of submitting it to process and punishment, that is to say that none recognized its condition (on this, M. Pastoreau, *Una historia simbólica de la Edad Media occidental*, Buenos Aires, 2006, pages 27 and following).

<sup>66</sup> From a certain point of view –and with certain reason– it was considered as an antecedent of positivism (cf. F. Copleston, *Historia de la Filosofía*, Barcelona, 1983, book V).

<sup>67</sup> Thus, C. Schmitt, *El Leviatán en la teoría de Thomas Hobbes*, Mexico, 1997.

<sup>68</sup> In the same line of biological determinism, we could place Herbert Spencer's catastrophic cosmo-vision, which was the one that nourished neo-colonialist racism and positivist criminology and criminal law, until culminating in the legitimation of racist

considerable number of persons. But for some time now it has been seen that technological advance –*science does not think*– today considers the possibility of a catastrophe that may affect the whole species<sup>69</sup>, and not through a war, but due to the production system itself that seeks to accumulate goods and does not stop even in the face of catastrophes with huge consequences<sup>70</sup> with the risk of total annihilation. The current perspective of mass homicide includes the possibility of extinction of life in the planet; a biologist even thought that the *cephalopods* or molluscs in the bottom of the sea could replace human beings –after many millions of years of evolution–<sup>71</sup>.

The festive, lethal, amoral and irresponsible glorification of paranoia, and the thesis of its inevitability mean today –just to clearly say it– the proximity of mass homicides much greater than the past ones and the not distant extinction of the species. It may be stated that over the past years it has been the theologians<sup>72</sup> who have moved away from every religious and ecclesiastical exclusivism to draw attention over the risk in the

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totalitarianism of Nazism (thus, F. Grispigni, E. Mezger, *La riforma penale nazionalsocialista*, Milano, Dott. A. Giuffrè, 1942).

<sup>69</sup> Although danger is currently perceived from another source, a deep change in culture is taking place since nuclear energy announced the possibility of human self-destruction; for example, K. Jaspers, *La bomba atómica y el futuro de la humanidad*, Buenos Aires, 1961; on these warnings: E. J. Hobsbawm, *Il secolo breve. 1914-1991: l'era dei grandi cataclismi*, Rizzoli, Milano, 1997, page 618.

<sup>70</sup> Cf. L. Boff, *Do iceberg à Arca de Noé, O nascimento de uma ética planetária*, Rio de Janeiro, 2002.

<sup>71</sup> Monod, cit. by Leonardo Boff, op. cit., page 80.

<sup>72</sup> L. Boff, op. cit.; same author, *Civilização Planetária, Desafios à sociedade e ao Cristianismo*, Rio de Janeiro, 2003; H. Küng, *Religões do mundo, Em busca dos pontos comuns*, Campinas, 2004.

search for a basic ecumenical coincidence of brotherhood of (and with) living beings<sup>73</sup>.

25. (There is no evidence that violence and revenge are a biological fatalism). The truth is that there is no evidence of this biological fate of the species. Many are the behaviours that were historically considered conditioned or *natural*, when they were a product of culture, and very frequently it was pretended that they were *natural* institutions or cultural standards as a resource of power. If there were times when slavery or the superiority or inferiority of human races were considered *natural* – and not by authors lacking intelligence<sup>74</sup> – one cannot avoid been suspicious that the fate of the creation of enemies and the subsequent mass crimes are also a *politically naturalized* cultural product.

26. (If the process goes back to pre-history it is necessary to appeal to ethnology). The only verified fact is that since immemorial times enemies are invented and sacrificed; that afterwards a new enemy is invented and a new sacrifice occurs; that this is clearer and dramatically notorious as modern civilization becomes planetary and technology advances, and each new sacrifice implies new mass homicides, in the form of genocide or war crimes with *collateral effects* or under other euphemisms<sup>75</sup>.

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<sup>73</sup> From any creationist perspective, it is contradictory for a being to have created an intelligent species biologically condemning it to its self-destruction.

<sup>74</sup> Lack of intelligence may not be attributed to Aristotle or Thomas Aquino. However, see the efforts thought needed to make to demonstrate the aberration of slavery; on this, D. Brion Davis, *O problema da escravidão na cultura ocidental*, Rio de Janeiro, 2001.

<sup>75</sup> Euphemism is always a form of concealing language, proper of every punitive power of inquisitorial model; Speer made it clear when inquisitors called *voluntary confession* the one rendered by a woman after having been hung and

Not being there any evidence that this is a biological predestination, one may ask oneself about its deep origin in culture. The greatest and most brilliant intuition of the past century in this sense seems to have been Freud's when in *Totem und Tabu* he theorized on society's origin<sup>76</sup>, with which he focused the true location of the problem in ethnology. *Freudism* watched this intuition with certain mistrust and the ethnological verification defects weakened it<sup>77</sup>. On the other hand, taking the issue back to ethnology always makes one think that we are going too far behind. We can now ask ourselves the same question: Aren't we going too far behind if we pretend to explore in ethnology when we try to prevent modern times mass homicides? The narrowness of the criminal or criminological speech we are used to, causes us vertigo when we take a look at that depth, but it seems there is no other resource when we clear up the contextual anecdotic data and we observe the unceasing succession of enemies, emergencies and mass homicide violence as far as we can look back into history, and we verify that it goes back to pre-history and tragedy, always related there to religion.

27. (We cannot become excited believing that a phenomenon that only shows circumstantial new

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dislocated, and *involuntary*, when other tortures were applied.

<sup>76</sup> S. Freud, *Totem und Tabu, Einige Übereinstimmungen im Seelenleben der Wilden und der Neurotiker (1912-1913)*, in "Kulturtheoretische Schriften", Fischer Verlag, 1974, pages 287 and following.

<sup>77</sup> In anthropology, it was the Boasian culturalists who in principle rejected Freud's conceptions, but even the investigators who followed his steps, such as the Hungarian Géza Róheim abandoned the idea of the phylogenetic memory of essential parricide, the same as the further synthesis of Kardiner (on this: M. Harris, *El desarrollo de la teoría antropológica. Una historia de las teorías de la cultura*, Madrid, 1983, page 370 and following).

characteristics is new). Only the illusion that we are living something entirely new encourages the criticism that states we are unnecessarily going back too far, which is thoughtlessly stimulated by the difficulty of venturing up to the ethnological root of the phenomenon, but we cannot deny that although what is new is important in many senses, it does not alter the essence of the phenomenon. The novelty is the discursive garment, the greater technical-homicidal potential, the perpetration by those who for some centuries now have invented themselves as those formally in charge of avoiding or penalizing them, the acceleration in the production of enemies<sup>78</sup>, and –what is most important- that its indefinite continuity makes it possible to foresee planetary destruction. But we know that with or without this information *the structure of the enemy creation process, of directing evil and revenge so as to end up in sacrifice*, has been exactly the same since before history, where it always appears related to religion, and there is nothing to prove that this is unchangeable due to biological predestination. To prevent the phenomenon there is no other way than to grasp its essence and, for this purpose, we must follow Freud up to ethnology, that is to say, beyond history.

28. (From criminal law and criminology we are very limited, but we must do it). We cannot but observe the extreme limitation of criminal speech in the face of this urgent need<sup>79</sup>, nor the

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<sup>78</sup> We may observe that the devil, as an enemy, lasted over four centuries, while current enemies go by faster each time, in a cinematographic succession, the dynamics of which can be so obvious that – hopefully- it will conspire against public credulity.

<sup>79</sup> We only count on juridical constructions based on intuitionism on the function of punishment and, therefore, of political-criminal judgements, generally axiomatic.

narrowness of criminology that practically omits treatment of mass crimes<sup>80</sup> and, therefore, how little trained we are to go up to where we should. However, it is impossible to avoid this responsibility if we wish to contribute something to the prevention of facts so serious that they imply an irreversible limit situation for all human beings<sup>81</sup>.

29. (Freud's explanation is insufficient, because it is not a fact of the past, but a fact that repeats itself). Although it is possible to follow Freud up to ethnology, today it does not seem adequate to move there following his steps. Little does his hypothesis explain to us about the *Urvater* homicide as foundational<sup>82</sup>, because its explanation is static, sacrifice occurs once and for all and leaves society founded<sup>83</sup>. For this reason, we believe that in the field of ethnology, it is René Girard's investigations<sup>84</sup> the ones that provide us with a dynamic explanation, the ones that can guide us in the road towards that we are looking for, as far as they suggest the improvement of the Freudian hypothesis, getting rid of the *terrible father*, of the identity of the victim of the sacrifice, stressing that the important fact is not that identity but its suitability to direct the

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<sup>80</sup> Only during the last years interdisciplinary works have been published, such as M. Raffin, *La experiencia del horror*, Buenos Aires, 2006.

<sup>81</sup> Besides, we have extensively nourished the speech supporting the disposition of our criminal and criminologist knowledge towards the opening to other disciplines, using expressions such as *interdisciplinarity*, *transdisciplinarity*, etc.; the time has come to demonstrate this.

<sup>82</sup> V. Freud, op. cit., pages 426 and following ones.

<sup>83</sup> Cf., R. Girard, *La violenza e il sacro*, Adelphi, Milano, 2005, page 280.

<sup>84</sup> Besides the mentioned work., *Des choses cachées depuis la fondation du monde*, Paris, 1978 (*Delle cose nascoste sin dalla fondazione del mondo*, Adelphi, Milano, 2005).

function of revenge assigned to it and which it really performs<sup>85</sup>.

30. (Sacrificial victims are very varied, although not everyone can be one). Girard emphasizes that this function is assigned to very different sacrificial victims, who are such due to their suitability to act as channels in different societies, without this role being determined by a previous *ontological identification*. It must be stated that by the end of the 19th century, criminology pretended the *ontological identification* of the sacrificial victim<sup>86</sup> –of the enemy-, but in the 20th century, political theory, with a greater penetration, admitted that identification was purely political<sup>87</sup>, although it did not establish the political power's identification limits, because *although there is no ontological identification, there is an ontological limit for that power, that is determined by each society's specific conditions*.

An expiatory victim cannot be anyone, but only that who is strange but not completely different<sup>88</sup>, and which for that reason can personify all the evils of society, all its members' violence, without analysing if it is guilty or innocent<sup>89</sup>. Definitely, the guilt or innocence of the expiatory victim does not decide its capacity of directing revenge: the primitive is not concerned about guilt, because he fears that by appealing to it he may encourage violence, for that reason he is only concerned with

the victim's channelling suitability<sup>90</sup>. Although for us this is a sign of cultural inferiority and the under-estimation of the subjective element of the infringement belongs to a savage criminal law, something similar is recommended by the political theory that encourages the state's absolutist paranoia, but because it wants to have its hands free to better direct and encourage revenge. Anyhow, everyone will believe the victim's guilt has been verified when after killing him, peace and order return<sup>91</sup>.

31. (The victim becomes miraculous). The struggle for the same objects gives rise to tensions that lead to collective violence that destroys coexistence: blood is shed demanding more blood – revenge – in an escalate (*essential violence*) that only ceases when it is directed through the expiatory victim, whose sacrifice results miraculous, because it immediately stops destructive violence. This causes an inversion in the assessment of the victim who from being the personification of evil turns to be an agent of goodness. Hence, worship of the victim is ritually perpetuated and becomes sacred. The intimate relationship between the circle of revenge – identification of enemies- and religion<sup>92</sup>, answers to this.

32. (The criminal justice system plays the role of directing revenge). Modern society's judicial criminal justice system tries to rationally direct revenge, which moves from private revenge to

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<sup>85</sup> Cf. Girard, *La violenza, op. cit.*, page 294.

<sup>86</sup> Thus, C. Lombroso, *L'uomo delinquente*, Bocca, Torino, 1884; more roughly and expressly referring to the "enemy", R. Garofalo, *Criminologia*, Bocca, Torino, 1891, page 59.

<sup>87</sup> Thus, C. Schmitt in *Politische Theologie*, cit.

<sup>88</sup> This requirement is fulfilled even in case the movement is over animals, that must first be domesticated and share society's life (cf. R. Girard, *Delle cose, op. cit.*, page 93).

<sup>89</sup> Cf. R. Girard, *La violenza, op. cit.*, page 17.

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<sup>90</sup> Thus, R. Girard, *La violenza, op. cit.*, page 40.

<sup>91</sup> Cf. R. Girard, *Delle cose, op. cit.*, page 72.

<sup>92</sup> It is possible to think that the circle is not always completed when the originary experience is repeated, because not always does the victim have the conditions to become sacred; however, experience indicates that there are many cases when this happens, as is evidenced by the multiple sanctification of delinquents

public revenge<sup>93</sup>. Whereas religion tries to avoid revenge or to deviate it over a secondary object, the criminal justice system pretends to make it rational<sup>94</sup>. *Behind the practical and at the same time mythical difference, it is necessary to affirm the “no” difference, the positive identity of revenge, of sacrifice and of judicial penalty, precisely because these three phenomena are at all times the same that always, in the case of a crisis, tend to relapse in the same undifferentiated violence*<sup>95</sup>.

33. (Capitalism accelerates violence, but does not create it). Improvement of the Freudian ethnological thesis by Girard is very rich for criminal law and, although it is not possible to exhaust it now<sup>96</sup>, the very brief mentioned notes make it possible to formulate certain

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– generally decorated with Robin Hood conditions-who make “miracles” happen in Latin America.

<sup>93</sup> Cf. R. Girard, *La violenza, op. cit.*, page 32; Girard notes that the expression “public revenge” is not common, although it is used by those who pretend to see in the criminal justice system a “civilizing evolution”, especially positivists of social Darwinism and even earlier ones, as the followers of Comte. Besides the hollowness of the fundament of the “retribution”, there are few doubts as to the reality of criminal execution, even in developed countries; in this sense, J. Pratt, *Castigo y civilización. Una lectura crítica sobre las prisiones y los regímenes carcelarios*, Barcelona, 2006.

<sup>94</sup> *If our system seems more rational to us, truly this is because it is more closely made up with the principle of revenge. The insistence as to the punishment of the guilty has no other meanings. Instead of endeavouring to avoid revenge, to moderate, to evade or deviate it towards a secondary object, as all procedures that are really religious do, the judicial system rationalizes revenge, is capable of sub-dividing it and limiting as it best fits it; it makes with it a limitedly efficient curing technique, and, secondarily, of violence prevention* (R. Girard, *La violenza, op. cit.*, pages 40-41).

<sup>95</sup> Cf. R. Girard, *La violenza, op. cit.*, pages 43-44.

<sup>96</sup> His thesis present an attraction that greatly exceeds our subject’s interest. One can see the implications found by G. Vattimo, *Credere di credere*, Garzanti, Milano, 1999; also R. Girard, G. Vattimo, *Verità o fede debole? Dialogo su cristianesimo e relativismo*, Transeuropa, Massa, 2006.

considerations to approach the answer to the question posed.

In theory, if *essential violence* results from the desire for the same objects, when society encourages competence and their infinite accumulation supported in a temporal arrow that is also infinite, social crisis in which collective violence and revenge explode are also accelerated. This reaffirms that the circle of revenge (the production of successive enemies and emergencies that sacrifice numerous human groups) is not a phenomenon generated by capitalism, in spite of encouraging and accelerating it, with the consumption society and the concentration and polarization of wealth. This acceleration explains the already mentioned speed with which enemies currently change, whose position lasts very little and some are also even outlined as manipulation attempts of the violence directing mechanism, without fully turning it into operation.

34. (The surpassed criminal justice system pretends to recover its legitimacy by executing revenge). If religion tries to deviate revenge and the criminal justice system tries to manipulate it, what is true is that when one reaches critical times – when demystification neutralizes the deviation from revenge or the capacity of criminal direction is surpassed-, modern society repeats the process, with the special feature that agencies of the criminal justice system itself execute revenge over the expiatory victim without any rationality, and, besides, assign that channelling role to a human group or mass.

Truly, the modern invention of the criminal justice system is almost diabolic, because although Girard does not observe this, it is not only a

manipulating means of revenge but also –and according to circumstances- a very powerful means for its execution. When social tensions and collective violence (with its *blood that claims for blood*) exceed the manipulating capacity of the criminal justice system and this is surpassed, it is discredited, because it loses the confidence of being capable of directing violence. Punitive power agencies launch themselves to retaining or recovering their channelling legitimacy (which is equivalent to their power), for which purpose they assume the leadership of executing sacrificial revenge, under the pretension of capitalizing the merit of the restoration of peace. It is true that the inversion of the victim's assessment –which ends up capturing the merit of the cessation of violence- reverses the effect of the homicidal impulse and the same agents of the punitive power become future sacrificial victims. Anyhow, this explains why the rule is that the criminal justice system itself commits homicides and not another state system. This process is independent from violence being ascribed to power or that the latter encourages it to more rapidly sacrifice the expiatory victim and restore the pretended peace; this is contextual information of every process repetition, that is not essential.

35. (Colonial genocides are resources to avoid the outburst of violence in colonizing societies). This analysis would explain mass crimes during the past century –such as the Holocaust or the Armenian genocide-, but at first sight, the repetition of the expiatory sacrifice would not be sufficient to explain colonialist mass crimes<sup>97</sup>,

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<sup>97</sup> V. M. Ferro (dir.), *El libro negro del colonialismo, Siglos XVI a XXI: Del exterminio al arrepentimiento*, Madrid, 2005; same author, *La colonización, Una historia global*, México, 2000.

such as the Iberian colonialism<sup>98</sup>, slave trade<sup>99</sup> or the most recent one of Leopold II in the Belgian Congo<sup>100</sup>. However, it is not correct to rule out the application of the same theoretical frame, although with a different mechanism.

There are two ways of preventing the outburst of collective violence in the dispute for the same object: to reduce demand by discouraging it, or to increase the offer, by increasing the objects. In both cases, there will be less conflict. Today it would be impossible to pretend to increase offer by means of the indefinite increase of production and consumption levels, because we would destroy the planet, but in times of colonialism and of neo-colonialism, the most efficient way to increase objects was the subjugation of other complete societies to force their inhabitants to provide goods, precious metals (means of payment or currency) or elements with which to elaborate the objects of dispute<sup>101</sup>. This was colonialism, at the expense of which colonialist societies pretended to reduce their internal conflicts, although due to their internal conditions (excessive centralization of wealth, difficulty to

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<sup>98</sup> V. R. Jaulin, *El etnocidio a través de las Américas*, Mexico, 1976; A. Gerbi, *La naturaleza de las Indias Nuevas, De Cristóbal Colón a Gonzalo Fernández de Oviedo*, Mexico, 1978.

<sup>99</sup> V. T. Hugh, *La trata de esclavos. Historia del tráfico de seres humanos de 1440 a 1870*, Barcelona, 1998; Walter Rodney, *De cómo Europa subdesarrolló a África*, Mexico, 1982; D. L. Molinari, *La trata de negros. Datos para su estudio en el Rio de la Plata*, Buenos Aires, 1944; H. T. Lechamps, *Storia della tratta dei negri*, Mondadori, Milano, 1971; J. E. Inikori, *La trata negra del siglo XV al XIX*, Barcelona, 1981.

<sup>100</sup> On this, the detailed analysis of Wayne Morrison, op.cit.; and the novel by J. Conrad, *Heart of Darkness*, Firenze, 2005.

<sup>101</sup> On the role of colonialism in the Industrial Revolution, G. D. H. Cole, *Introducción a la historia económica*, Mexico, 1963.

become dynamic, excessive verticalization, etc.) not all of them achieved this.

36. (Colonies are gigantic jails or concentration camps for inferior beings). Although it may seem that this has nothing to do with punitive power, in truth this subjugation was achieved through the extension of punitive power to another complete society, which had to be submitted to this power by reason of its inferiority and of the danger that because of this, it supposedly represented for the *civilized*, for they were enemies because they were foreigners – strangers- who for not being similar were dangerous inferior beings. Colonialist power was punitive, because *a colony is a prison for containment and forced labour, that is to say, a gigantic concentration camp* where prisoners were deprived (colonized<sup>102</sup>) from their culture, language, religion and traditions. European prisons confined their inferior natives (similar to their colonized), while colonies confined foreign natives because all of them were dangerous inferior beings (savages) that threatened them with their mere existence<sup>103</sup>.

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<sup>102</sup> Similarity between colonized and true born criminals was sustained by Cesare Lombroso, who described the latter as bearer of Mongoloid and Africanoid characteristics (*L'uomo delinquente*, 3° ed., Bocca, Torino, 1884, pages 248 and 295).

<sup>103</sup> Kant writes- *it is commonly admitted that no one can harass another person, unless the latter has attacked the former. This is very precise when both live in the civil and legal status. Because for the mere fact of having entered in the civil status, every one gives all the others the necessary guarantees; and it is the sovereign authority the one that, having power over all of them, serves as an efficient instrument for all those guarantees. But man – or the people – who is in the state of nature, does not provide me with those guarantees, and even hurts me due to the mere fact of being in that state of nature; in effect, he is besides me, and although he does not actively harass me, the anarchy of his status is a perpetual threat for me. I can force him to enter with me into a common ordinary status or to part from my side* (*Zum ewigen Frieden* en

37. (The sacrificer must invent a new enemy to avoid becoming the next sacrificial victim). The thesis of the sacrifice of the expiatory victim also explains why an international criminal justice system will have little preventive strength in the face of mass homicides. When revenge is directed towards the expiatory victim, and the latter is sacrificed, peace and order are restored, but the victim starts gaining a sacred capacity, its ambivalence arises: from the personification of evil it changes to the personification of goodness, the mythical component is introduced, the sacrificer himself starts being a candidate to become an expiatory victim, which is somehow the fate of the hero<sup>104</sup> and, on occasions, of the autocrat –of the king<sup>105</sup>-, and the new contradictions that reintroduce violence will be directed towards him, for which reason the political theory of the absolute state advises him to create a new enemy, something that is not always achieved<sup>106</sup>. The only thing that international criminal law can then do is to limit or contain the new wave of revenge, as we stated when pointing out its source of legitimacy.

38. (Primary prevention of mass homicides is strange to the field of criminal sciences). But the problem of prevention remains unsolved. Deviation of revenge through myths and the restraints of the criminal justice system are not sufficient when society's violent conflicts are beyond the limits of the channel through which

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*Werkausgabe, herausgegeben von W. Weischedel, Frankfurt, 1977, Book XI page 203).*

<sup>104</sup> R. Girard, *La violenza, op. cit.*, page 126.

<sup>105</sup> Idem, pages 150 and following.

<sup>106</sup> In repetitions, a victim is not always consecrated. Frequently, the power chooses one that lacks the necessary conditions. It is clear that the mechanism is known by those who hold power and many times

revenge circulates, with which it is clear that both only provide palliatives or postponements, but do not solve the problem, they do not interrupt the chain that dates back to basic violence.

In spite of acknowledging that every preventive resource is good, in spite of being a palliative, or if it only provides a shift in time, the truth is that if basic violence is not attacked, it will not be possible to avoid its explosion sooner or later, and with it, revenge and its well known process of sacrifice of the expiatory victim.

In order to attack basic violence, it is essential to decelerate the appetite for the same objects and reduce the social level of competitiveness. This would be what is usually called *primary prevention* applied to mass homicides. Criminal theorists are not the ones in charge of projecting a future, more supportive and less competitive society<sup>107</sup>, at least in what concerns our specific function and knowledge, although we can warn politicians and managers of the trans-national economic power, who seem absorbed in fighting over the best cabin in the *Titanic* while they speed up towards the iceberg, about its need.

39. (Secondary prevention demands the inversion of current criminal policies prevailing in the world). But we are concerned with the so-called *secondary prevention*. Everything we may do to reduce conflict or its effects, will be healthy. Criminal policy applied throughout the world, inspired by United States republican administrations over the last decades<sup>108</sup>, who

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manipulate it, but not always find the ideal candidate for the sacrificial victim.

<sup>107</sup> For example, the claims of Leonardo Boff in the mentioned works.

<sup>108</sup> Since the eighties, the United States' criminal justice system has been hugely expanded, being the country that has achieved the highest imprisonment level, what it always uses as exchange token to adjust

repudiating their own tradition<sup>109</sup> constantly extend criminalizing programming and each time authorize more punitive power to direct revenge, does not realize that if the limits of the criminal justice system are exceeded, its reversal occurs, because when it is surpassed, from being a channelling element it becomes an executioner of revenge itself so as to maintain or recover its power and, therefore, the sacrifice of the expiatory victim.

Functionalist thought here faces a strong dilemma, because if it remains in its usual ascertainment and its corresponding assessment jump, it would reach the conclusion that the overflow of the channelling capacity of the criminal justice system that leads to sacrifice is *functional* to stop violence, for which reason it would agree with the amoral thesis of the absolute state; only that under present circumstances the suicidal thesis of the supposed functionality of a catastrophe that compromises the whole species, would be undefendable. It seems that deeper functionalism has no other way than incorporating new values and accepting the malfunctioning of the repetition of sacrifice ad infinitum.

Therefore, an adequate secondary prevention of conflict would consist in exhausting the possibility of the models of effective solutions of conflicts (as the repairing, restoring, therapeutical and conciliating models, among others), limiting the application of the punitive model to those few cases when these are absolutely inadmissible.

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its rate of employment (it removes prisoners from the market and demands services to maintain the criminal justice system).

<sup>109</sup> The present US criminal justice system has nothing to do with its tradition prior to the eighties of the past century, where it presented stable imprisonment indexes since half a century before.

40. (Current direction leads to new mass homicides). On the other hand, a realistic policy, truly concerned about the solution of social problems, cannot continue pretending that punitive power is the one in charge of solving them, when primary prevention must be social, and secondary prevention should be oriented towards a reasonable –and demandable- reduction of damages<sup>110</sup>. Direction of these conflicts towards punitive power is a hypocritical way of leaving them unsolved<sup>111</sup>, fostering social tensions.

This means that criminal policy that prevails in the world needs an urgent turn on the opposite direction to become a factor that may break the high level of conflict. Disintegration caused by conflict can be neutralized in two ways: encouraging efficient models of conflict solution, which would strengthen social cohesion, or else sacrificing the expiatory victim, that is to say,

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<sup>110</sup> Such are the cases of toxic substances and abortion. Faced to both problems, punitive solutions have failed, events increase their frequency and their terrible social and individual effects do not diminish, while everybody feels satisfied with absurd criminal laws that are indifferent to the deathful reality. Prohibition in what concerns toxic substances has generated an unbelievable profit derived from the distribution service, through which a national and international criminality has been organized which has caused the death of a high number of persons, being it time to ask oneself what causes more death, if the prohibition or the toxic substance. In the case of abortion, the rule is impunity, through which millions are performed with the indifference of the criminal justice systems, that do nothing – nor do the states- to try to reduce that number.

<sup>111</sup> Those dead through violence generated by the traffic of toxic substances and their distribution, and the number of deaths of foetus seem not to matter the criminal justice systems nor the politicians who show their concern supporting criminal laws with paradoxal effects.

with mass homicide<sup>112</sup>. To avoid the latter, it is obvious that the alternative must be encouraged.

It will not be simple to bring about this turn, because present world seems to follow the amoral indications of the absolutist political theory, that stimulated state paranoia: the discursive pretence of fighting against terrorism these days, supposing there is a *war*, only legitimates the alleged *war* of the Islam, with which not only they do not fight against terrorism but they also fall within a shared paranoia or delirium à deux<sup>113</sup>.

41. (The old amoral formula did not work). But the old amoral political formula does not yield the expected results, because to create the new foreign enemy far from its own frontiers, a real war was created outside and an economic recession within, which announces an increase of tensions, that means that it resulted in a perverse manipulation of the revenge process, the consequences of which are still unimaginable. The old amoral political formula did not establish economy's limits and its strict application instead of reducing tensions seems to generate other new ones, running the risk that some of its promoters may become the new sacrificial victims.

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<sup>112</sup> This would be “functional” in a sense analogous to the one in which Émile Durkheim considered criminality.

<sup>113</sup> When the “enemy” assumes a paranoid attitude, as is the case of the “Holy War” of some authors of indiscriminate mass destruction crimes, power is offered the ideal pretext to nourish its own paranoia, that is to say, to re-invent another “war”, which definitely ends strengthening the “enemy’s” paranoia and even legitimating his speech. How did the Inquisition explain its extermination in the name of Christ, who died in an instrument of torture of the criminal justice system of his times? Christ is not a warrior, but just the opposite. Simply, a bellicose enemy (Satan) was invented in front of a powerful army (of devils and she devils) that declared war, and where he made use of all sort of dirty tricks. Satan was the rebel head who did not respect the rules of the

This phenomenon is not new –in essence- because old colonialism many times frustrated its objective of reducing internal tensions as a consequence of metropolitan economy’s failure to adapt itself to the abundance of desirable objects, as it occurred with Spanish colonialism that did not know how to capitalize results through industrialization and ended losing its colonial hegemony, which moved to the hands of European central and northern powers. Although now –following an old formula<sup>114</sup> and the experience of the previous century<sup>115</sup>- it was believed that a war would strengthen economy, apparently it depressed it (or was insufficient to avoid the announced depression). It is a failure of an attempt to avoid violence by creating external violence, which would show the need of correcting the amoral formula: *when one appeals to the creation of an external enemy (because it is inferior) violence directs itself provided the internal conditions make it possible to take advantage of its benefits; if not, external mass homicide results useless and even negative.*

42. (There are few alternatives provided by criminalism) In the face of the current criminal

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gentlemen’s war; he was Schmitt’s “partisan” in the Middle Ages and in a fight against Christ.

<sup>114</sup> Bodin seems to advice making extreme war so as to avoid the civil war. This is how he interpreted Rome’s history: “*But after the Romans partly subjected the people of Italy, and partly confederating with them, and seeing that they could not live in the city without civil dissension, they found out that for their Republic’s security it was good to look for, and even invent, new enemies, ordering triumphs, degrees and prizes for the brave captains*” (J. Bodino, *Los Seis Libros de la República, translated from French and chaotically amended by Gaspar de Añastro Isunza*, Madrid, 1992, Book V, Chapter. V, t. II, page 904); on this: M. E. Lermnier, *Introducción General a la Historia del Derecho*, Barcelona, 1840, page 97.

<sup>115</sup> Cf. G. Mammarella, *L’America da Roosevelt a Reagan. Storia degli Stati Uniti dal 1939 a oggi*, Laterza, Roma, 1986.

political tendency that, if it is not interrupted, leads to the commission of new mass homicides, criminalism faces three logical variables: (a) to discredit the dominant policy; (b) to legitimate and stimulate it; and (c) to try to reach a compromise with it. The second variable is the option for the absolute state typical of amoral politics, that today does not deserve greater attention, because it seems a forbidden road<sup>116</sup>.

The third one is the most frequent one, although with a curious duality: it is formally rejected when it is made express, but it is accepted and daily put into practice. Its express formulation gave place to a discussion which was at times scandalous and confirmed the expression *criminal law of the enemy*<sup>117</sup>. But truly, what is called *criminal law of the enemy* is a current practice, in a greater or lesser extent, in almost the whole world and especially in Latin America, where its preferred instrument is *temporary detention pending trial* used as the main form of punishment and almost the only one<sup>118</sup>. Considering that the only express

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<sup>116</sup> In the academic field, there are no serious theorists that support this. We are not very sure if there aren’t others who share it, but today it would not be possible to express this with Carl Schmitt’s amoral sincerity, because the dominant juridical culture does not tolerate this, and whoever does so would immediately be marginated. It is possible to notice that sometimes, in political publicity, some significant incoherent clippings may be found.

<sup>117</sup> The expression and express formulation corresponds to G. Jakobs (op. cit) and the controversy covers a huge bibliography in Germany, Italy, Spain and Latin America.

<sup>118</sup> Criminal law of the enemy argues “depersonalizing” the enemies and, therefore, not to submit them to punishments measured according to guilt, but to “contain” them so as to neutralize their danger. It is no other than the repetition of the “security measures” for the multi-reoffenders, usual ones, etc., known since Karl Stooss, that is to say, punishment without guilt according to Kohlrausch’s known thesis (“the lie of labels”). Well then, since almost 70% of Latin American prisoners are in temporary detention pending trial and usually serve their term during this period, it is

theoretical formulation –besides general contempt- is unfeasible because it is based upon a static vision that ignores the dynamics inherent to punitive power<sup>119</sup>, the truth is that compromise with the dominant criminal policy is degraded to a practice without theoretical support. It seems something more of a compromise of agencies that a theoretical position: juridical agencies – conscious or not- assign power due to the fear of being devastated by executive agencies and by the publicity of the apparatus of power, similarly to politicians besieged by the *völkisch*<sup>120</sup> and revengeful sole speech of mass media.

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very evident that this operates as a punishment without guilt, in advance to formal judgement.

<sup>119</sup> The review of this thesis was made in *El enemigo en el derecho penal*, Buenos Aires, 2006 (Madrid, 2007; Rio de Janeiro, 2007; Mexico, 2007). Also see the bibliography mentioned up to edition, which has been enriched a lot in spite of the time elapsed; among others, the works gathered in two thick volumes coordinated by C.O. Meliá, G. Jara Díez, *Derecho penal del enemigo, El discurso penal de la exclusión*, Buenos Aires/Montevideo, 2006; G. Aller, *Corresponsabilidad social, sociedad de riesgo y derecho penal del enemigo*, Montevideo, 2006; M. Polaino-Orts, *Derecho penal del enemigo. Desmitificación de un concepto*, Lima, 2006; F. Resta, “Nemici e criminali, Le logiche del controllo”, in *L’Indice Penale*, 2006; Fernando Villamar Lucía, *Una aproximación al derecho penal del enemigo*, La Paz, 2007; works published in monographic work 4 of 2006 of “Questione Giustizia”; J. L. González Cussac, *El renacimiento del pensamiento totalitario en el seno del estado de derecho: la doctrina del derecho penal del enemigo*, in “Revista Penal”, La Ley, Madrid, 2007, 19, pages 52 and following; K. H. Gössel, *Réplica del derecho penal del enemigo*, in the same, n° 20, pages 89 and following.

<sup>120</sup> The expression “*völkisch*” is often translated as *populism*. Its most accurate translation would be “*populacherismo*”, because it implies a serious underestimation of the people through the exploitation and deepening of society’s most serious prejudices. *Populism* is a political current that offers highs and lows, but that in Latin America has enabled the possibility of incorporating important and wide sectors of population to society. There existed populisms that employed *völkisch* techniques, and they were also used by other political currents with the aspect of a greater ideological coherence.

43. (Ethical and cultural compromise). From a compromised attitude, it is objected that criminal knowledge can do nothing in front of the decisions of power, for which it is better to take shelter in the supposedly pragmatic compromise. This objection under-estimates the power of the speech, that is precisely the one that jurists must not give in. With speech one exercises power – dictators always knew so-, although it is not the same power owned by the executive agencies of the criminal justice system, but without speech, these become discredited, and in the end, power without speech, although it may cause serious damage before falling apart, does not last very long<sup>121</sup>. If criminal law massively deprives it from speech, public inducement to revenge would be reduced to what it is: pure mediatic publicity, with the limitations proper to any product’s publicity.

44. (True criminal prevention consists in denouncing the neutralization techniques of mass homicides). Individualization of enemies, that is to say, the state’s paranoid outbreak, nourishes itself from speeches that rationalize expiatory sacrifice, expanding the causes of justification and exoneration of criminal law in a different way, but always based on what criminology of the past mid-century called *neutralization techniques*<sup>122</sup>. When criminologists of those times exposed these techniques, they did so based on simplistic discursive resources that were at the time used by *rebels without a cause* to minimize, justify or

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<sup>121</sup> ¿Qué necesitan hoy los que suben al poder aparte de una Buena tropa, aguardiente y salchichón? Necesitan el texto (A. Glucksman, *Los maestros pensadores*, Barcelona, 1978, page 43).

<sup>122</sup> G. M. Sykes and D. Matza, “Techniques of neutralization: a theory of delinquency”, in *American Sociological Review*, 1957, 22, pp. 664-670; reproduced in *Criminological Perspectives. Essential*

excuse their vandalism; but neutralization techniques in mass crimes are theorized at high political level –even by academic or reproduction agencies- and are glorified through the social communication media. This has not been observed by criminology because it has not been concerned with these crimes<sup>123</sup>, because in order to do so, it should abandon its pretended and impossible ideological neutrality.

In fact: criminal sciences have no other option than getting rid of their incredible aseptic pretension if they seriously pretend to approach the issue of the most serious crimes, because they can only do so by criticizing ideologies<sup>124</sup>, so as to be able to discover those which true nature is that of neutralization of mass homicides or their preparation by means of revengeful speeches, even penal and criminological. If the *criminal law of the enemy* legitimates the typification of preparatory acts, penal and criminological knowledge must correct this by advancing their criticism to preparatory acts of mass homicides, such as is the preparation of their *neutralization techniques*<sup>125</sup>.

It is amazing that we still do not clearly see that *we are in a revival of the ideology of national security now at world level*<sup>126</sup>, when we have

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*Readings*, edited by MacLaughlin, Muncie, Hughes, London, 2005, pages 231-238.

<sup>123</sup> Maybe one of the factors of this omission has been, precisely, the need to resign to its pretended “assessing” or “ideological” neutrality.

<sup>124</sup> It may be stated that by “ideology” we understand a certain system of ideas, without associating the expression to negative assessments nor concealments. In each case, it will be the ideological critic the one who will express if the ideology is rational, paranoid or concealing.

<sup>125</sup> Ideologies of racial superiority, of hierarchization of human beings, of national security, of destruction of the limits of the state of law, that legitimate torture, etc.

<sup>126</sup> National security ideology’s characteristic is to invent “wars”, under the pretext of being “anomalous

been living its regional experience for over half a century, and that we tolerate that with identical simple plans they may undermine the states of law. That is the true preventive function that criminal juridical knowledge must and can perform in what concerns mass homicides.

International criminal law may offer palliatives or possible pragmatic benefits, may avoid the restoration of the *Friedlosigkeit*, but the true prevention of mass homicides that criminal juridical knowledge can provide, shall be through the exercise of criticism and the frontal rejection of the *values neutralization techniques*, finely prepared by theorists, and roughly by public or mediatic inducement to revenge. If we do not do so, our knowledge will fall within another thinking drainage<sup>127</sup> and for some time it will be *another science that does not think*.

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wars”, that is to say, “dirty wars”, and, therefore, not subject to the laws of war among “gentlemen” (which would be the only ones obliged to respect the Geneva Convention) nor to criminal law due to their being wars. That is to say that, due to their being “wars” and “dirty” wars they remain within a hollow space outside law, free from limiting rules. The thesis of the “dirty war” was prepared by French commanders in Indochina and Algeria, and then spread to the United States and Argentina (Cf. M.-M. Robin, *Escuadrones de la muerte. La escuela francesa*, Buenos Aires, 2005; the hardest critic to this policy was written by Jean Paul Sastre, in the famous prologue to Franz Fanon, *Los condenados de la tierra*, Mexico, 1965; the finest theorization of this genocidal policy belongs to Carl Schmitt in a veiled defence of the chief Raoul Salam, head of the terrorist organization OAS, in a conference in 1962 in Spain: *Teoria del partigiano. Integrazione al concetto del politico*, Adelphi, Milano, 2005).

<sup>127</sup> We believe that the thinking contents of juridical-criminal knowledge have suffered alternatives: from the high level achieved in the 19th century, it started falling by the end of that century until reaching its almost complete drainage, which ended in some shameful legitimation of the worst crimes of the 20th century, to reappear in post-war times.

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