

Анотація

Зелінська Н. А. «Помилка в забороні» або «опіміння совісті»? Уроки Нюрнберзького процесу. — Стаття.

У статті аналізується вплив Нюрнберзького процесу на формування інституту міжнародної кримінальної відповідальності та розвиток міжнародної кримінальної юстиції. Розглядаються етичні та правові підстави міжнародної кримінально-правової відповідальності. Аналізується застосування захистом нацистських злочинців у Нюрнберзькому процесі доктрини про «помилку в забороні».

Ключові слова: Нюрнберзький процес, права людини, міжнародний злочин, «помилка в забороні».

Summary

Zelinska N. A. “Forbidden error” or “numbness of conscience”? Lessons from the Nuremberg trial. — Article.

The impact of the Nuremberg trials on the formation of the institute of international criminal responsibility and the development of the international criminal justice are analyzed in the article. The ethical and legal basis of international criminal liability is examined. The use of the “forbidden error” doctrine by the Nazi war criminals’ defense in the Nuremberg trial is approached.

Keywords: the Nuremberg trial, human rights, international crime, “forbidden error”.

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A. Materia

FREEDOM, SECURITY AND JUSTICE: SYMBOLIC VALUES OR EUROPEAN REVOLUTION?

1. Introduction: The Entry into Force of the Treaty of Lisbon. The entry into force of the Treaty of Lisbon (*hereinafter* ToL) [1], redesigning the framework of the European Union (*hereinafter* EU) criminal jurisdiction, has profoundly affected the relationship between criminal law, EU law and municipal law. In fact, it has allowed a systematic reconstruction of both the EU supranational competence in criminal matters and of EU criminal law as such [2]. This process, and the current EU criminal policy *agenda*, have both been informed by the Stockholm Program [3] (*hereinafter* SP) and by the Action Plan for the implementation of the Stockholm Programme [4] (*hereinafter* AP).

Before the entry into force of ToL, the general structure of the EU criminal jurisdiction — broken down into supranational law (based on the community integration of norms within the so-called First Pillar) and international law (based on the intergovernmental cooperation within the so-called Third Pillar) — was extremely cumbersome. In addition, since 2005, the overall situation had been further complicated by two well-known decisions of the European Court of Justice [5] (*hereinafter* ECJ), both acknowledging the EU criminal jurisdiction within the «First Pillar».

The new legal framework established through the ToL, instead, is not only much clearer, but also blessed with greater internal consistency. In this respect,

the ToL provides for: the creation of a *unique* supranational Area of Freedom, Security and Justice (*hereinafter* AFSJ) as a new primary goal of the EU [6]; the abolition of the Pillars-based system now all treated as the supranational system of EU law; and the normative recognition of the Charter of Fundamental Rights of the Union.

In this connection, the EU has limited supranational criminal jurisdiction [7], in which the legacy of the Third Pillar-style of intergovernmental cooperation (the so-called «emergency brake» [8]) can still be detected. Moreover, two new Protocols address the role of national parliaments in the European Union [9], the principles of proportionality and subsidiarity [10], while the European Parliament has been recognised as co-legislator in matters related to the AFSJ [11].

On the contrary, the European Council has consolidated its role of dominus of the EU criminal policy [12]. Such consolidation, now clearly stated under the letter of the ToL, resulted from the practice of the five-year special summit of the European Council that took place in Tampere (in 1999) and The Hague (in 2004), and referred to the current SP (2009) and AP (2010). The latter two texts, in particular, have been drafted immediately after the entry into force of the ToL and identify the core policy guidelines underpinning lawmaking and implementation activities in the AFSJ until 2014. Accordingly, these two instruments are key to the achievement of the main purpose of the ToL, viz. to organise the EU as a single supranational entity integrated with the legal systems of its Member States.

2. The Stockholm Program. The SP, as anticipated, is the document in which the European Council has identified «in the abstract» the trajectories of the EU criminal policy for the years 2009–2014. It is the result of major achievements within the AFSJ and, at the same time, the proof that the EU still needs to tackle a number of challenging issues: first, «to ensure respect for fundamental rights and freedoms and integrity of the person while guaranteeing security in Europe»; moreover, it is stated that «It is of paramount importance that law enforcement measures, on the one hand, and measures to safeguard individual rights, the rule of law and international protection rules, on the other, go hand in hand in the same direction and are mutually reinforced». In this respect, the SP recognises that «the development of legislation in the area of freedom, security and justice is impressive, but it has shortcomings in terms of overlapping and a certain lack of coherence. At the same time, the quality of legislation including the language used in some of the legal acts could be improved». In the light of these premises, the SP considers necessary to pay more attention «to the full and effective implementation, enforcement and evaluation of existing instruments. Legal transposition should be ensured using, to their fullest extent, wherever necessary, existing institutional tools»; «In general, new legislative initiatives, by the Commission or by Member States where the Treaty so provides, should be tabled only after verification of the respect for the principles of proportionality and subsidiarity, a thorough preparation, including prior impact assessments, also involving identifying needs and financial consequences and using Member States' expertise. It is crucial to evaluate the implications of new legislative initiatives on

the four freedoms under the Treaty and to ensure that such initiatives are fully compatible with internal market principles». In Summary, therefore, it is possible to say that the SP represents an effort to rearrange the EU as a single supranational AFSJ. An effort that is nonetheless conscious of the need for preliminary consolidating and improving both consistency and clarity within the existing set of norms.

3. The Action Plan for Implementing the Program in Stockholm. The objectives and priorities outlined by the SP have been translated into concrete actions [13] via the AP, taking into account a precise timetable for adoption and implementation. The latter includes a draft schedule for the transformation of instruments with a new legal basis; a process that must be guided, in methodological terms, by the consideration that: «The Union must resist tendencies to treat security, justice and fundamental rights in isolation from one another». Under this fundamental assumption, the AP, with reference to the field of Freedom [14], states that «The protection of the rights enshrined in the Charter of Fundamental Rights, which should become the compass for all EU law and policies». The AP, indeed, sets forth an articulated series of actions aimed at: creating «A Europe based on fundamental rights» [15]; «Protecting the rights of citizens in society» [16]; combating «Racism and xenophobia» [17]; ensuring «Rights of the child»; protecting «Victims of crime, including terrorism» [18]; and recognising and protecting the «Rights of the person in criminal proceedings» [19] and «Detention» [20].

Making a specific reference to the field of Justice in criminal matters [21], the AP recognises that it «is a relatively novel area of EU action for which the Treaty of Lisbon sets a clear legal framework. A criminal justice strategy, fully respecting subsidiarity and coherence, should guide the EU's policy for the approximation of substantive and procedural criminal law. It should be pursued in close cooperation with European Parliament, national parliaments and the Council and acknowledge that focus will remain primarily on mutual recognition and the harmonisation of offences and sanctions will be pursued for selected cases». On this point, the AP provides a compelling number of actions aimed at: «Furthering the implementation of mutual recognition in criminal matters» [22]; «Strengthening mutual trust» [23]; the «Implementation» of different texts [24]; and «Developing a core of common minimum standards» [25].

Finally, with specific reference to Security [26], the AP explicitly recognises that the ToL «provides the Union with better tools to fight terrorism and organised crime» and that «The time has come to assess our past approach, when the Union had to react to unexpected and tragic events, often on a case by case basis, and to capitalise on the new institutional set-up offered by the Lisbon treaty with a coherent and multidisciplinary approach». To achieve these goals, the AP identifies several classes of actions, including, for example, those heading towards a «More effective European law enforcement cooperation» [27], «More effective crime prevention» [28], the «Protection against serious and organized crime» (e.g. «Trafficking in human beings» [29], «Sexual exploitation of children and child

pornography» [30], «Cyber-crime and Network and Information Security» [31], «Economic crime and corruption» [32], «Drugs» [33] and «Terrorism» [34]).

4. Concluding Remarks. In the light of the above, it is clear that the ToL, by creating a single common Area of Freedom, Security and Justice, offers a new framework of EU criminal competencies. The SP and the AP, on the other hand, specifically identify the trajectories of the current criminal policy of the EU.

The ToL certainly closes the debate on the existence of the EU supranational jurisdiction in criminal matters. The EU, in fact, is now endowed with a *mediated* criminal law system [35], controlled by a series of checks and balances serving as guarantees, that can be based on either direct European sources (i.e. the *supranational obligation to criminalize* as per article 83 n. 1 and n. 2 TFEU), or indirect European sources (i.e. the *supranational obligation to protect the EU law*, that finds its roots in the «Greek Corn» judgement and in the principle of Community loyalty [36]). As a consequence, and abstracting from possible, still unlikely, policy changes, the ToL firmly inscribes criminal law into the process of supranational European integration. The actual proof of such integration process is provided by the SP and the AP, whose concrete purpose is to consolidate — to the advantage of the European citizens — the AFSJ. This effort is centred on the implementation and improvement of the existing set of norms as well as on the overall design of the European criminal policy.

Criminal law, within the boundaries specified above, falls now within the EU competence as systematically mainstreamed into three directions (i.e. Freedom, Security and Justice), all converging to create a *single corpus iuris* of supranational law, integrated with the legal systems of Member States. In this context, therefore, the term Freedom must be read to mean not only the four traditional economic freedoms, but also the Rights to Freedom (art. 6 TUE [37]); the term Security should be read with the twofold meaning of EU-internal and EU-external security (see e.g. the relationship between the EU and the UN Security Council, or between the EU and the United States [38]); the term Justice, finally, should mean both judicial cooperation in criminal matters (Eurojust; European Public Prosecutor's Office; European Judicial Network) and cooperation in police (Europol) and customs matters (Frontex). From the EU Member States perspective, instead, this means that municipal criminal law is now articulated in three different levels: national, supranational and international.

The terms Freedom, Security and Justice, far from being merely symbolic or cosmetic in their intrinsic meaning, seem to enclose — along the lines of «Life Liberty and Pursuit of Happiness» of the American Revolution and of «Liberty, Equality and Fraternity» of the French Revolution — the gist of a «European revolution», if understood with the twofold meaning of «Europeanisation» of fundamental rights and of «supranationalisation» of criminal law. Considering *inter alia* that, after the entry into force of the ToL, the EU is now competent to carry out assessments on the appropriateness of criminal sanctions the way it happens in national jurisdictions, there seems to be grounds to start talking about a European integrated criminal science.

Literature

1. The ToL became effective on December 1, 2009.
2. Mitsilegas V. *EU Criminal Law* / V. Mitsilegas. — Oxford and Portland, Oregon, 2009; Klip A. *European Criminal Law: An Integrative Approach* / A. Klip. — Antwerpen-Oxford, 2009; Fletcher M. *EU Criminal Law and Justice* / M. Fletcher, R. Loof, B. Gilmore. — Cheltenham, 2008; Peers S. *EU Criminal Law and the Treaty of Lisbon* // *European Law Review*. — 2008. — P. 507; Peers S. *EU Justice and Home Affairs Law* / S. Peers. — Oxford, 2006; Vervaele J. A. E. *The Europeanisation of Criminal Law and the Criminal Law Dimension of European Integration* // *30 Years of European Legal Studies at the College of Europe* / P. Demaret, I. Govaere (eds.). — Bruxelles, 2005. — P. 286; Corstens G. *European criminal law* / G. Corstens, J. Pradel. — The Hague, 2002; Haekkerup N. *Controls and Sanctions in the EU law* / N. Haekkerup. — Copenhagen, 2001.
3. Document of the European Council adopted on 10 and 11 December 2009, OJ C 115, 4 May 2010. — P. 1–38.
4. Communication from the Commission to the European Parliament, the Council, the European Economic and social Committee and the Committee of the Regions — Delivering an area of freedom, security and justice for Europe's citizens Action Plan Implementing the Stockholm Programme; COM (2010) 171 final, 20 April 2010.
5. Cases C-176/03; C-440/05.
6. Art. 3 n. 2 TEU.
7. Art. 83 n. 2 TFEU.
8. Art. 83 n. 3 TFEU.
9. See Protocol No. 1.
10. See Protocol No. 2 on «The application of the principles of subsidiarity and proportionality».
11. See particularly art. 82 n. 1 and n. 2 TFEU in the field of harmonization of procedural criminal law; art. 83 n. 1 and n. 2 TFEU in the field of harmonization of substantive criminal law; art. 75 n. 1 TFEU in the field of prevention and fight against terrorism and related activities; art. 84 TFEU in the field of crime prevention; art. 88 TFEU in the field of Europol; art. 88 in the field of European Public Prosecutor's Office; art. 85 TFEU in the field of Eurojust.
12. Art. 68 TFEU.
13. In this paper, in order to pinpoint the multitude of actions outlined by the AP, I preferred to make reference to the most important of them in the following footnotes.
14. See the sections relating to «Ensuring the protection of fundamental rights» and «Empowering European citizens».
15. Recommendation to authorise negotiation of EU accession to the European Convention on Human Rights; Communication on the Fundamental Rights policy; Fundamental Rights Agency Multiannual Framework to cover the domain of judicial and police cooperation in criminal matters; Report on the memory of crimes committed by totalitarian regimes Annual Report on the EU's Charter of Fundamental Rights; Evaluation report on the implementation of the Council Decision 2003/335/JHA on the 'investigation and prosecution of genocide, crimes against humanity and war crimes'; European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes.
16. Communication on a new legal framework for the protection of personal data after the entry into force of the Lisbon Treaty; New comprehensive legal framework for data protection.
17. Implementation of the Framework Decision 2008/913/JHA on racism and xenophobia; Communication on the fight against racism, xenophobia and discrimination; Report on the implementation of the Race Discrimination Directive 2000/43/EC; Report on the implementation of the Framework Decision 2008/913/JHA on racism and xenophobia.
18. Legislative proposal on a comprehensive instrument on the protection of victims and action plan on practical measures including developing a European Protection Order
19. Legislative proposal on Translation and Interpretation; Legislative proposal on Information on Rights and Information about the Charges; Legislative proposal on Legal Advice and Legal Aid; Legislative proposal on Special Safeguards for Suspected or Accused Persons who are Vulnerable; Green paper on whether elements of minimum procedural rights for accused and suspect persons, other than those covered by the previous legislative proposals, need to be addressed.
20. Green paper on detention issues and necessary follow up; Report on the implementation of the Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to

- judgements in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purposes of their enforcement in the European Union.
21. See the section relating to «Strengthening confidence in the European judicial area».
 22. Implementation reports on the Framework Decision 2006/783/JHA on mutual recognition of confiscation orders; Report on the implementation of the Framework Decision 2002/584/JHA on the European Arrest Warrant, and appropriate follow-up; Legislative proposal on a comprehensive regime on obtaining evidence in criminal matters based on the principle of mutual recognition and covering all types of evidence; Legislative proposal to introduce common standards for gathering evidence in criminal matters in order to ensure its admissibility; Proposal for a Regulation providing Eurojust with powers to initiate investigations, making Eurojust's internal structure more efficient and involving the European Parliament and national Parliaments in the evaluation of Eurojust's activities; Legislative proposal on mutual recognition of disqualifications; Communication on the establishment of a European Public Prosecutor's Office (EPPO) from Eurojust; Legislative proposal on mutual recognition of financial penalties, including those related to road traffic offences.
 23. With reference to the European Judicial Network in Criminal Matters: implementing Council Decision 2008/976/JHA on the EJN; improving dissemination of up-to-date information on the implementation of EU instruments on judicial co-operation.
 24. Handbook on the implementation of the EU-US mutual legal assistance and extradition agreements; Handbook on the Framework Decision 2003/577/JHA concerning freezing of property; Handbook on the Framework Decision 2005/214/JHA concerning financial penalties.
 25. Legislative proposal on the approximation of customs infringements and penalties; Legislative proposals supplementing Directive 2008/99/EC on the protection of environment through criminal law and Directive 2009/123/EC on ship-source pollution.
 26. See the section relating to «Ensuring the security of Europe».
 27. Proposal for a Regulation implementing Article 10 of the United Nations Protocol against the illicit manufacturing of and trafficking in firearms, their parts and components, and ammunition, on «General requirements for export, import and transit licensing or authorization systems»; Communication on the status of cooperation between the ESDP police mission and Europol Proposal for a Regulation on Europol; Proposal on the conclusion of the United Nations Protocol against the illicit manufacturing of and trafficking in firearms, their parts and components, and ammunition on behalf of the Union; Proposal on information exchange between Europol, Eurojust and Frontex; Evaluation of the Framework Decision 2009/905/JHA on accreditation of forensic laboratory activities and reflections on possibilities to develop common quality standards within the forensic field; Communication on the improvement of customs and police cooperation in the EU, including reflections on under-cover officers, on Police Cooperation and Customs Centres, on an EU approach to Intelligence led policing, and on common actions to improve operational police cooperation: assessment of state of play and possible recommendations; In order to be able to analyse the threats at European level, a methodology based on common parameters should be established. Full use should be made of Europol, the Joint Situation Centre (SitCen) and Eurojust in the fight against terrorism;
 28. Evaluation of the functioning of the European Crime Prevention Network (EUCPN) and legislative proposal on the establishment of a Observatory for the Prevention of Crime (OPC); Promote the concept of preventing and fighting organised crime through an administrative approach; Development of a customs risk management framework in order to prevent organised crime activities linked to goods.
 29. Set up of EU Anti-Trafficking Coordinator (ATC) within the Commission; Proposal for a Directive on combating trafficking of human beings; Report on the application of Directive 2004/81/EC on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration who cooperate with the competent authorities, and possible follow-up; Report on the implementation of the Action Plan on trafficking in human beings 2005-2009; Report on the implementation the Action Oriented Paper on trafficking in human beings of November 2009; Communication on a new integrated strategy on fighting trafficking in human beings, and on measures to protect and assist victims (including the development of compensation schemes, safe return and assistance with reintegration into society in their country of origin if they return voluntarily) using ad hoc cooperation agreements with specific third countries.
 30. Proposal for a Directive on combating sexual abuse, sexual exploitation of children and child

- pornography; Promote partnerships with the private sector, namely the financial sector in order to disrupt the money transfers related to websites with child abuse content.
31. Measures aiming at a reinforced and high level Network and Information Security Policy, including legislative initiatives such as the one on modernised Network and Information Security Agency (ENISA) as well as other measures allowing faster reactions in the event of cyber attacks; Legislative proposal on attacks against information systems; Creation of a cybercrime alert platform at European level; Measures, including legislative proposals to establish rules on jurisdiction on cyberspace at European and International levels; Ratification of the 2001 Council of Europe Cyber-crime Convention.
 32. Report on implementation of the Decision 2007/845/JHA on asset recovery offices; Communication on a comprehensive policy against corruption in Member States, including the establishment of an evaluation mechanism as well as presenting modalities of cooperation with the Council of Europe's Group of States against Corruption (GRECO) for that purpose; Proposal of a new legal framework for asset recovery; Legislative proposal on criminal measures aimed at ensuring the enforcement of intellectual property rights (replacing proposal COM(2006) 168 final); Proposal to amend Regulation (EC) No 1383/2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights; Reconduction and implementation of the Action Plan concerning EU-China Customs cooperation on intellectual property rights; Legislative proposal updating the European criminal law framework on money laundering; Adoption and follow-up of a Commission report on the implementation of Regulation (EC) No 1889/2005 on controls of cash entering or leaving the Community; Assessment of the need for further measures to enhance transparency of legal persons and legal arrangements/trusts, aiming at the identification of the beneficiary owner, to be followed up by legislative proposals; Report on the convergence of sanctions in the financial services area; Communication on law enforcement aspects of the fight against counterfeiting.
 33. Legislative proposals amending Decision 2005/387/JHA on new psychoactive substances, following its assessment; Conclude the negotiations of an EU-Russia Agreement on the control of trade in drug precursors; Evaluation of the current EU Strategy on Drugs and EU Drugs Action Plan, including on the coherence between internal and external EU drug policy, and renewal of the Strategy and Action Plan; Legislative proposals to amend the EU legislation on drug precursors in order to reinforce controls in certain areas
 34. Communication on stocktaking of Counter-Terrorism measures; Recommendation to authorise the negotiation of a long term agreement between the European Union Commission and the United States of America on the processing and transfer of financial messaging data for the purpose of the fight against terrorism; Implementation of the EU Action Plan on violent Radicalisation (non-legislative measures to prevent Commission 2010 the distribution of violent radical content on the Internet; website on violent radicalisation development of benchmarking tools to measure the effectiveness of counter-radicalisation initiatives); Further development of the external aspects of radicalisation phenomenon; Legislative proposal on precursors to explosives; Report on the implementation of the Framework Decision 2008/919/JHA on Terrorism; Report on non-legislative measures to combat the use of the Internet for terrorist purposes; Legislative proposal on security vetting of persons having access to CBRN (Chemical, Biological Radiological and Nuclear) or explosives.
 35. It means that «a directive which has not been transposed into the internal legal order of a member State may not give rise to obligations on individuals either in regard to other individuals or, a fortiori, in regard to the State itself. Consequently, any directive cannot, of itself and independently of a national law adopted by a member State for its implementation, have the effect of determining or aggravating the liability in criminal law of persons who act in contravention of the provisions of that directive» (Case C-14/86); in other words, the EU criminal law it is a mediated system because «the obligation on a national court to interpret and apply the relevant rules of its national law as far as possible in the light of the wording and the purpose of the directive which they implement, so as to achieve the result it seeks to achieve and thereby comply with the third paragraph of Article 189 of the Treaty, is not unlimited, particularly where such interpretation would have the effect, on the basis of the directive and independently of legislation adopted for its implementation, of determining or aggravating the liability in criminal law of persons who act in contravention of its provisions. Where it is necessary to determine the extent of liability in criminal law arising under legislation adopted for the specific purpose of implementing a directive, the principle that a provision of the criminal law may not be applied extensively to the detriment

of the defendant, which is the corollary of the principle of legality in relation to crime and punishment and more generally of the principle of legal certainty, precludes bringing criminal proceedings in respect of conduct not clearly defined as culpable by law. That principle, which is one of the general legal principles underlying the constitutional traditions common to the Member States, has also been enshrined in various international treaties, in particular in Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The national court must therefore ensure that that principle is observed when interpreting, in the light of the wording and the purpose of the directive, the national legislation adopted in order to implement it (Joined Cases C-74/95 and C-129/95).

36. ECJ Case C-68/88.

37. This provision incorporates the Charter of Fundamental Rights into Union law and provides a legal basis for the accession of the Union to the European Convention of Human Rights.

38. See Recommendation to authorise the negotiation of a long term agreement between the European Union Commission and the United States of America on the processing and transfer of financial messaging data for the purpose of the fight against terrorism, supra n. 34.

Summary

Materia A. Freedom, Security and Justice: Symbolic Values or European Revolution? — Article.

The article is dedicated to the Treaty of Lisbon: its entry into force and impact at current legal system of United Europe. The author analyzes other acts e.g. the Stockholm program, and the Action plan for implementing the Stockholm program in a light of establishing and consolidation of civil values in Europe.

Keywords: Treaty of Lisbon, Stockholm program, Action plan for implementing the Stockholm program, civil rights, supranational law, trends in consolidated law of European Union

Анотація

Матеріа А. Свобода, безпека і справедливість: символічні цінності європейської революції? — Стаття.

Стаття присвячена Лісабонській угоді: її вступу в силу і впливу на сучасну правову систему об'єднаної Європи. Автор аналізує й інші нормативні акти, наприклад Стокгольмську програму і План дій щодо імплементації Стокгольмської програми у світлі утвердження і зміцнення цінностей громадянського суспільства в Європі.

Ключові слова: Лісабонська угода, Стокгольмська програма, План дій щодо імплементації Стокгольмської програми, наднаціональне право, тенденції в об'єднаному праві Європейського Союзу.

Аннотация

Материа А. Свобода, безопасность и справедливость: символические ценности европейской революции? — Статья.

Статья посвящена Лиссабонскому соглашению: его вступлению в силу и влиянию на современную правовую систему объединенной Европы. Автор анализирует и иные нормативные акты, например Стокгольмскую программу и План действий по имплементации Стокгольмской программы в свете утверждения и укрепления ценностей гражданского общества в Европе.

Ключевые слова: Лиссабонское соглашение, Стокгольмская программа, План действий по имплементации Стокгольмской программы, наднациональное право, тенденции в объединенном праве Европейского Союза