tice if other countries adopted legislation similar to the Alien Tort Claims Act and its more recent offshoot, the Alien Torture Victims Protection Act.[26]

Another advantage of civil cross-border litigation is that it is frequently the only way to prosecute corporations, which are among the most serious violators of human rights through their activities in developing countries with less-than-democratic regimes. Criminal universal jurisdiction laws do not readily lend themselves to prosecutions against corporations, or, at least, have not done so until now. In the United States, the Center for Constitutional Rights[27], Earthrights International[28] and the International Labor Rights Fund[29] have pioneered this kind of litigation, bringing cases in US courts against multinational corporations engaging in or abetting such crimes as slave labor, torture and execution of labor organizers, and environmental crimes in various countries, including Burma, Nigeria, Colombia, Ecuador, and Turkey. As a result, business organizations have waged a campaign for the repeal of the Alien Tort Claims Act, but without success so far.

V. Conclusion

Even without 9/11, Bali, London, Madrid, and Amman, there was a need for effective mechanisms to enforce international human rights. The "war against terror" and its use to roll back long-standing human rights protections have merely reinforced this need. Universal jurisdiction, which may be viewed as the globalization of human rights, has a crucial role to play in this process. And civil society has a major role to play in protecting and nurturing the principle of universal jurisdiction and its application, or, in a worst case scenario, in saving it from extinction.

[26] 28 U.S.C. 1350.
[27] http://www.ccr-ny.org.
[28] http://www.earthrights.org.
[29] http://www.laborrights.org.

On the Aims and Actual Consequences of International Prosecution of Human Rights Crimes

Peer Stolle and Tobias Singelnstein

Three decades ago, scholars in the disciplines of criminology and critical jurisprudence began to look more intensively at how the preventive function of an expanding criminal law remains ineffective, how far it takes one-sided action against only certain forms of deviance and certain strata of the population, and thereby serves the interests of specific social groups. Crimes that failed to be targeted or prosecuted, they pointed out, included in particular so-called macrocriminality, for example, state and war crimes, crimes against humanity, and genocide, as well as forms of "organized crime," white-collar, and environmental crime ("criminality of the powerful").[1] What was seen at the time as proof of criminal law's latent functionality and capacity to serve power, and consequently as an argument for eliminating it, now serves the opposite purpose. On the basis of this critique, statutes and institutions were created on the national and international levels for the

[1] This critique was based on the assumption that penology does not predominantly serve to settle societal conflicts, but pursues other aims, in that it repressively enforces the interests of certain powerful societal groups and suppresses the interests of less powerful groups. It was thus regarded as an instrument in the conflict between various social groups and strata. For example, it was pointed out that the criminal code penalizes typical underclass and youth delinquency, whose social ill-effects falls far short of those of the so-called criminality of the powerful, which for a long time has in great part not been prosecutable. Moreover, the criminal code was also said to be discriminatory in its practical application, since it is predominantly youth and members of (ethnic) minorities who are targeted by monitoring agencies, while the prosecution of presumed perpetrators belonging to higher social strata is relatively rare. This critique was the basis of a demand for extensive decriminalization of petty crime, the abolition of the death penalty and prison sentences, and even the abolition of criminal law altogether. See U. Eisenberg, *Kriminologie*, 6th ed. (2005), pp. 71 et seq., 77 et seq., 618; D. Garland, *The Culture of Control* (2001), pp. 55 et seq.; F. Sack, in: F. Sack and R. König (eds.), *Kriminalsoziologie* (1968), pp. 431 et seq.; T. Singelnstein and P. Stolle, *Die Sicherheitsgesellschaft. Soziale Kontrolle im 21. Jahrhundert* (2006), pp. 100 et seq., 104 et seq.; G. B. Vold, T. J. Bernard and J. B. Snipes, *Theoretical Criminology*, 4th ed. (1998), pp. 219 et seq., 260 et seq.

prosecution of macrocriminality respective of international crimes in particular.[2] This expansion of the concept of criminal law was welcomed almost unanimously and possesses a systematic logic. If society in general resorts to criminal law to regulate behavior, there is no justification for limiting intervention to petty and middle-range criminality while exempting especially grave infringements. NGOs, human rights organizations and defense attorneys—precisely the groups that previously tended to doubt the efficacy of criminal law and stressed its negative consequences—now see this kind of criminal prosecution as an opportunity and point to its positive uses.

However, from the perspective of critical jurisprudence, skepticism is warranted, even if we take seriously the problem of so-called impunity in many countries. It is true, on the one hand, that the establishment of constitutional standards as a constraint on power and domination—standards fought for in social struggles—is an important step towards the idea of international enforcement of human rights and is fundamentally to be welcomed. On the other hand, it is obvious that such developments always take place in a context of politics and power.[3] Moreover, criminal law is a highly problematic instrument of state social control. This is true in regard both to its actual effectiveness (see I below) and to the danger of its selective deployment and political use (see II). Finally, one should consider the possible implications on the national level of such an increase in the importance and legitimacy of criminal law and its use in the context of repressive state control (III). This article represents an attempt to apply insights from critical jurisprudence and criminology—predominantly taken from the German debate—to the discussion of international criminal prosecution.

I. Aims and Effects of Punishment

On the theoretical or conceptual level, the questions posed for criminal law include what goals to pursue and whether they are achievable. Although these are fundamental to criminal law, neither the scholarly literature nor case law has conclusively resolved these questions for nascent international criminal law. This is also because there exist extensive differences between the varying national criminal justice systems. However, in some cases international criminal courts came to these questions during sentencing, where retribution, deterrence, reprobation, and rehabilitation were cited as the function of punishment.[4] Various authors have also addressed issues including reconciliation, restoration of peace, victim redress and satisfaction.[5] In the following sections we discuss these goals of punishment from

[2] On the various concepts and their ordering, see U. Eisenberg, *supra* note 1, pp. 194–201.

[3] On the relation between law and power, including in the context of international criminal law, see M. Maiwald, *Juristen-Zeitung* 2003, pp. 1073 et seq. See also the contribution of J. Arnold in this volume.

[4] See A. Cassese, *International Criminal Law* (2003), pp. 427 et seq.

[5] See M. C. Bassiouni, *Introduction to International Criminal Law* (2003), pp. 680 et seq.; K. Ambos, *Internationales Strafrecht* (2006), p. 254.

the German criminal justice system's point of view. While retribution is accorded a very low priority here, punishment is mainly and can only be justified by aims to prevent crimes in the future. In respect thereof the aforementioned aims of international criminal prosecution can in section 1 be divided into general prevention (the effect on the general public) and specific prevention (the effect on the perpetrator). Section 2 then considers the victim's point of view (redress and satisfaction) and criminal law's function in providing reconciliation and restoration of peace.[6]

1. General and Specific Prevention

If we consider first the legitimacy of criminal prosecution of human rights violations with respect to criminal law's aim of general prevention (deterrence, reprobation to boost public confidence in the legal system) and with respect to specific prevention (rehabilitation, incapacitation), we can look to criminological findings. In so doing, we should bear in mind that, as a rule, human rights violations are based on quite different circumstances than "normal" criminality; therefore one must examine the extent to which findings regarding national criminal law practice are applicable. The object of criminal prosecution under consideration here is so-called macrocriminality in the form of international crimes—that are, particularly severe violations of human rights, specifically genocide, war crimes, and crimes against humanity, which have emerged as elements of substantive international criminal law.[7] Thus we are talking about a particular group of offenses generally characterized by a particular context and committed by persons or groups of persons of a particular social status. Especially significant in this regard are national or supranational crises or wars, in which specific societal groups attempt to assert their interests. These groups are frequently located within state leaderships, the military, the police, and other state institutions.[8]

a) Specific Prevention

Against this background, specific prevention has been accorded a relatively subordinate role in international criminal law relative to its position in German criminal law.[9] The significance of incapacitation as *negative* specific prevention lays not so much in imprisoning the perpetrator, as in depriving him of the special social position that permitted the criminal behavior in the first place.

The rehabilitation or correction of the convicted perpetrator (*positive* specific prevention) is considered secondary, since the person concerned is in general held

[6] See F. Neubacher, *Kriminologische Grundlagen einer internationalen Strafgerichtsbarkeit* (2005), pp. 422 et seq.; G. Werle, *Völkerstrafrecht* (2003), pp. 35 et seq.

[7] See G. Werle, *supra* note 6, pp. 28 et seq.

[8] On state leaderships as communities of perpetrators, see, for example, U. Eisenberg, *supra* note 1, pp. 941 et seq.; C. Kress, *Neue Zeitschrift für Strafrecht* 2000, p. 617 at pp. 620 et seq.

[9] See C. Möller, *Völkerstrafrecht und Internationaler Strafgerichthof: kriminologische, straftheoretische und rechtspolitische Aspekte* (2003), pp. 485 et seq.

to be socially integrated, his deeds committed in extraordinary situations that cannot be repeated in this form.[10] These findings are accurate, first of all, in so far as the perpetrators are often (high-ranking) representatives of state institutions who essentially codetermine the norms and values of a society, and consequently the standard for social integration. Moreover, it is in fact a hallmark of various forms of macrocriminality that the perpetrators generally recognize and respect the national legal system, yet nevertheless commit serious breaches of human rights. Thus, if one takes human rights and related international legal agreements as the standard for social integration, we cannot consider protagonists of macrocriminality to be socially integrated. Nevertheless the question arises whether rehabilitation is actually necessary in such cases, since there is often no danger of repetition, as the deeds were part of a conflict that no longer exists. Furthermore, empirical studies have cast grave doubt on the possibility of preventative, effective reeducation through criminal law;[11] so it is doubtful whether criminal law is in any position at all to effect relevant changes in attitude and behavior.[12]

b) Public Confidence in the Legal System

In view of this finding, general prevention takes on a central role in the rationale for criminal law intervention in human rights violations. This is the case, both in relation to its negative variant in the form of deterrence and to its positive variant, defined as public confidence in the legal system.

Positive general prevention proves to be problematic even at the national level, since it is based on a disproportionate and instrumental concept of punishment.[13] It is hardly possible to empirically substantiate the belief that punishment symbolically restores the violated norm and consequently confirms its standing.[14] In addition, the penal objective of positive general prevention cannot simply be translated into terms of international criminal law, since its norms are not as established as other rules of law and are not generally recognized as binding.[15] In fact, it is only recently that the human rights protected by international criminal law have become tentatively established as part of the international legal system and the corresponding understanding of law. They are therefore of little use as a *basis* for criminal law intervention in the context of positive general prevention.

Positive general prevention could indeed also be understood in this context as education through global stigmatization of human rights violations. International

[10] See K. Ambos, *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 1996, p. 355 at p. 366; H. Jäger, *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft* 1993, p. 259 at p. 271; F. Neubacher, *supra* note 6, pp. 423 et seq.

[11] For a useful summary, see P.-A. Albrecht, *Kriminologie*, 3rd ed. (2005), pp. 48 et seq.; P. Stolle, *Studentische Zeitschrift für Rechtswissenschaft* 2006, pp. 27 et seq.

[12] Doubting, C. Möller, *supra* note 9, pp. 467 et seq.

[13] See the overview and criticism in H. Koriath, in H. Radtke et al. (eds.), *Muss Strafe sein?* (2004), pp. 49 et seq.

[14] Thus also F. Neubacher, *supra* note 6, p. 425, who, in accord with some others, nevertheless sees positive general prevention as playing a central role.

[15] Thus K. Ambos, *supra* note 10, p. 366.

criminal law would then have the task of demonstratively enhancing human rights through criminal law enforcement, in order to confer on the international legal order the same binding character that obtains in national legal systems.[16] But for this purpose, it would not inevitably be necessary to *punish* the perpetrator, and it is precisely here that the above-mentioned instrumental understanding of punishment emerges. Criminal law would not, then, be a means of guaranteeing an established legal order but would be used to enforce human rights as they are currently being established. But other measures are more significant for this process of establishment.[17] Human rights will not be considered a binding aspect of a legal system as long as states that invoke human rights as a motive for their actions do not themselves consistently observe them.[18] International criminal prosecution cannot substitute for lack of political will. In this light, it seems urgent that, in relation to criminal prosecution of *individuals*, human rights actually be realized on a *political* level. Criminalization of human rights violations could actually work against this, if states hesitate to recognize human rights agreements because they do not want their representatives exposed to the danger of criminal liability for disregarding these rights.[19]

c) General Deterrence

Deterrence as negative general prevention also encounters objections. Even in national criminal law, the concrete threat of punishment has little deterrent effect, and the probability of discovery and punishment hardly more so.[20] In the area of macrocriminality, the latter will increase through enforcement of appropriate criminal prosecution.[21] But it remains to be seen whether this enforcement will in practice lead to an increased risk of punishment and develop a deterrent effect for *all* perpetrators, or to what extent various states and groups of people will be affected to differing degrees, as a result of selective criminalization (see II below). Such doubt appears reasonable, considering that the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993 prevented neither the massacre at Srebrenica and further war crimes in the context of the war in Bosnia, nor the expulsion of the Krajina Serbs and the war in Kosovo.[22]

Furthermore, we should bear in mind that the probability of discovery and punishment as a factor for deterrence is especially significant for crimes that follow a rational cost-benefit analysis on the part of the perpetrator. This is problematic for several reasons regarding forms of macrocriminality, in contrast, e.g., to property

[16] Thus K. Ambos and C. Steiner, *Juristische Schulung* 2001, pp. 9, 13; C. Möller, *supra* note 9, pp. 522 et seq.

[17] On the meaning of this process, see K. Ambos and C. Steiner, *supra* note 16, p. 11.

[18] This is not only a question of breaches committed by representatives of such states, but is increasingly also seen as a political strategy in the "war on terror."

[19] Cf. P. Roberts and N. McMillan, *Journal of International Criminal Justice* 2003, p. 315 at p. 324.

[20] P. Stolle, *supra* note 11, pp. 33 et seq.

[21] F. Neubacher, *supra* note 6, p. 424.

[22] G. Werle, *supra* note 6, p. 36, is also skeptical.

crimes.[23] Macrocriminality is largely interpreted as the result of conflicts of values and interests, especially in the form of political conflict. Thus it seems doubtful that the anticipation of possible criminal prosecution weighs more heavily in a cost-benefit-calculation than the achievement of central political interests that are often constitutive of identity.[24] In this context one has also to keep in mind that in such crimes *states and other organizations* follow their interests. That is why most of the motivational elements arise within these organizations themselves but not in their agents. Merely focusing on deterrence of *individuals* has therefore limited effect in avoiding or stopping core crimes.[25]

Additionally, in anticipating a risk of punishment, the development of a corresponding awareness of wrongdoing is important since only someone who believes he is doing wrong expects criminal prosecution. This, however, is exactly what is normally missing in macrocriminality because those involved are convinced of the rightness of their goals and develop corresponding neutralization techniques like denying responsibility, blaming the victim, and rejecting the reality of victimization.[26] This is reinforced by the tendency of protagonist groups in such cases to proceed by means of a division of labor in which no person is alone in undertaking the different steps of a criminal behavior. What is more, these organizations are often pervaded by a rigid system of internal norms, which can take priority in guiding behavior compared to legal norms.[27]

Finally, representatives of state institutions tend toward imitation—a tendency that likewise affects their awareness of wrongdoing.[28] This can be further reinforced if these institutions receive support from other states. Recall, for example the School of the Americas in Fort Benning (USA), which trained numerous future dictators and torturers, especially from Latin America.[29] Another example is the claim of the German Minister of the Interior, Wolfgang Schäuble, that secret service information can be utilized even if it is unclear whether it was obtained through torture in other states.[30] In this context, possible criminal prosecution could become a factor that plays a role in the decision whether to participate in or initiate a human rights violation and could thus narrow the scope of action for potential perpetrators. Whether this factor will in fact be decisive, and thus function as a deterrent, depends essentially on how great the probability of prosecution is estimated to be. If the likelihood of criminal prosecution is based on political considerations rather than on neutral, legally established criteria, it will probably fail to function as a deterrent; observance of human rights will then be overshadowed by political factors.

[23] See P. Roberts and N. McMillan, *supra* note 19, pp. 331 et seq.

[24] See C. F. Stuckenberg, in J. Menzel, T. Pierlings and J. Hoffmann (eds.), *Völkerrechtsprechung* (2005), p. 772; K. Ambos, *supra* note 10, p. 355 at p. 366.

[25] See C. W. Mullins, D. Kauzlarich and D. Rothe, *Critical Criminology* 2004, p. 285 at pp. 286, 300 et seq.

[26] P. Roberts and N. McMillan, *supra* note 19, p. 327. On techniques of neutralization in organizational contexts, see H. Jäger, *Makrokriminalität* (1989), pp. 200 et seq.; R. Hefendehl, *Monatsschrift für Kriminologie und Strafrechtsreform* 2003, pp. 31 et seq.

[27] See also N. Roth-Arriaza, in N. Roth-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice* (1995), pp. 14 et seq.

[28] U. Eisenberg, *supra* note 1, pp. 944 et seq.

[29] On this, see the homepage of "School of the Americas Watch," at http://www.soaw.org.

[30] See *Frankfurter Rundschau*, December 17, 2005.

2. Further Aims of Punishment

For the legitimization of criminal prosecution of international crimes, two further aims are mentioned: the settlement of existing conflicts (reconciliation and restoration of peace) and the establishment of justice or of solidarity with the victims (redress and satisfaction). Both are clearly related to positive general prevention.[31] Criminal prosecution, so goes the argument, is necessary in order to restore the destroyed moral order and to deprive the perpetrators of any possibility of justification and neutralization. It is claimed that the question of power can only be definitively settled through criminal prosecution of the (formerly) powerful.

a) Settlement of Conflicts

To settle conflicts, investigation of the events and conditions underlying human rights violations is of central importance.[32] Here it seems questionable whether criminal law is capable of restoring peace and actually preventing subsequent conflicts. It is true that criminal prosecution of serious infractions of human rights can make possible societal acknowledgement of the pain suffered by victims and their families, stigmatize the acts as injustice, and limit the perpetrators' scope of action. Furthermore, naming individual guilt and wrongdoing is important in order to prevent responsibility from disappearing behind social structures and collective contexts.[33] However, this is only possible if a complex web of events is reduced to individually attributable consequences. This procedure is problematic even in general criminal law, since reducing complexity in this way is only an apparent solution to the social conflicts of interests and values that underlie criminal behavior. This is especially reflected in macrocriminality, where a great number of persons, institutions, and actions are normally involved within an extended time period and a complex history of conflict. Because of this, an effective investigation that can serve as the basis for societal debate aimed at long-term restoration of peace can rarely be achieved in the context of criminal prosecution.[34]

Additionally, one-sided criminal prosecution in situations of macrocriminality can worsen the conflicts or may only temporarily suppress them. In this respect, a peace-restoring function is more likely if criminal prosecution is the result of an intrasocietal process than an international or "foreign" act, which in some instances can be perceived as interference and disempowerment, at times even as a

[31] F. Neubacher, *supra* note 6, pp. 425 et seq.; G. Werle, *supra* note 6, pp. 28 et seq.

[32] See K. Ambos, *supra* note 10, p. 355 at p. 366.

[33] See C. Möller, *supra* note 9, pp. 521 et seq., 529 et seq.

[34] On this, see H. Jäger, *supra* note 10, pp. 262 et seq. See also M. Kaiafa-Gbandi, in K. Amelung et al. (eds.), *Strafrecht, Biorecht, Rechtsphilosophie* (2003), pp. 199, 215.

new form of colonization. It can thus bring about the opposite of what was intended: solidarity with the alleged perpetrators.[35] This negative effect could in part be seen in the case of the criminal prosecution of human rights violations and war crimes in former Yugoslavia by the ICTY.

b) Protection of the Rights of Victims and Justice

For victims of human rights violations, coping with the consequences, especially traumata, is of central importance. Ignoring their injuries and suffering can worsen these consequences. That is why a transparent, institutionalized, and guaranteed process is necessary whose framework gives victims the possibility of a hearing, and where the deeds are admitted, judged, and condemned as injustice, enabling the victims to work through injuries according to their dignity and personality. A criminal proceeding is one way of carrying out this function.[36] But this aims primarily at fixing individual responsibility and punishment through a strictly formalized procedure. It does not necessarily have to accord with the views of the victims, who are often more interested, at least within the context of general criminal law, in the reparation of damages than in the punishment of the perpetrator.[37] Even in normal criminal proceedings, conflicts among goals often appear, for example, if victims have little input into the judgment or if the strict conditions for conviction are not met and the defendant is acquitted, to the consternation of the victim. This occurs because criminal law reasonably focuses on the perpetrator and the public interest but only in a limited way on the satisfaction of the victim's needs.[38] Experience with the prosecution of East German state criminality, for example, shows that prosecution satisfies the interests of victims in only a limited way.

However, no generalizations can be made in this area. Thus, scholars, human rights organizations, and victim associations often stress that criminal convictions are also at issue—that is, guilty verdicts with tangible consequences and not just publicity or the attribution of responsibility. This position is understandable insofar as criminal law is the strongest legal means available to a state or society in dealing with conflicts, making it reasonable to deploy in massive breaches of the law. Thus, the work of the Truth and Reconciliation Commission of South Africa[39] was indeed very much praised internationally, and its victim orientation widely admired. But especially in South Africa, the resulting exemptions from punishment met with incomprehension.[40] The situation is different in Latin America.

[35] Cf. R. Keller, *Goltdammer's Archiv für Strafrecht* 2006, p. 25 at p. 32.

[36] Thus F. Neubacher, *supra* note 6, pp. 425 et seq.

[37] See the references in P. Stolle, *supra* note 11, pp. 27 and 41.

[38] D. Frehsee, in B. Schünemann and M. Dubber (eds.), *Die Stellung des Opfers im Strafrechtssystem* (2000), pp. 126 et seq., maintains that meeting the needs of victims is not a function of criminal law.

[39] The Truth and Reconciliation Commission of South Africa enabled the victims to tell their stories publicly for the first time and have them acknowledged by society. Even perpetrators were subpoenaed by the Truth Commission. Admission of guilt was rewarded with exemption from punishment.

[40] See C. Möller, *supra* note 9, pp. 164 et seq.

There the lack of criminal prosecution of human rights violations committed during the military dictatorships created a culture of *impunidad*,[41] which lives on in today's Latin American countries. In this case, criminal prosecution not only has the task of providing justice and restoring the rights of victims, but also of binding the contemporary state security institutions to justice and the law. In this sense, criminal prosecution would be a precondition for building constitutional structures.

With regard to concrete crimes, it is nevertheless doubtful victims would consider formal sanctioning of macrocriminality as just. Actual punishment proportionate to guilt is hardly imaginable in these cases, as long as international criminal law does not apply actual retributive justice. But this would nullify central tenets of at least Germany's criminal law and constitutional state. Thus, the motivation of protecting human rights would itself be extended ad absurdum. A purely repressive procedure for establishing justice carries with it the danger that, under the cloak of justice and in relation to positive general prevention, the absolute penal aims of retribution and atonement would again take pride of place.[42] Therefore, one may ask whether criminal prosecution is fundamentally an appropriate and necessary means of guaranteeing a solution or the settlement of conflicts and protecting the rights of victims. Given the comprehensive and complex character of macrocriminality, both goals presuppose a broad national debate in which the events and their social background are examined. Criminal proceedings can indeed provide impetus for this, and in a culture of *impunidad* it can also be of short- and long-term significance to achieve social stability through criminal convictions. But it remains questionable whether conviction and *punishment* is necessary, or if the public debate and education stimulated by criminal *trials*, along with the delegitimization and loss of power of the defendants, are more significant,[43] as the Pinochet case suggests. On the other hand, criminal prosecution can also hinder societal debate. This effect is possible because criminal law can block possibilities for conflict resolution by putting those involved on the defensive. Furthermore, criminal law is customarily employed by political actors to demonstrate activity and a willingness to act. The goal of its employment, however, is not the initiation and intensification of a social debate, but its termination.[44]

3. Summary

After pure retribution—at least from the German criminal justice system's point of view—can never be reason enough to justify punishment further aims with preventive goals are necessary. However, to recapitulate, it is also appropriate to doubt whether criminal prosecution of international crimes can actually achieve this desired aims and thus contribute to the international enforcement of human

[41] On this, it is sufficient to consult K. Ambos, *supra* note 10, pp. 355 et seq.

[42] On this, see T. Singelnstein and P. Stolle, *supra* note 1, pp. 29 et seq.

[43] See also K. Ambos and C. Steiner, *supra* note 16, p. 12.

[44] See P. Roberts and N. McMillan, *supra* note 19, p. 331.

rights. In regard to its deterrence and rehabilitation functions, there is a fundamental question of the efficacy of punishment. For the aims of negative specific prevention, maintaining public confidence in the legal system, the settlement of conflicts, and demonstrating solidarity with the victims, it is possible to imagine international criminal prosecution achieving partial effectiveness. The question therefore arises whether the expectations associated with international criminal law are too high, such that there is danger that they will necessarily be disappointed and thus discredit international criminal prosecution.[45] Concentrating on a criminal law response to serious human rights infractions can also distract from alternatives that possibly may more effectively achieve the intended goals.

II. Selectivity

Nevertheless, if one sees the aims of punishment discussed above as a sufficient conceptual legitimation of the international prosecution of human rights violations, the question arises whether these goals can be reached *in practice*, i.e., whether, going beyond individual cases, conflicts can be settled, justice and support for the victims done, and destroyed social orders restored. It is the character of criminal prosecution as a process of social construction, attribution and selection,[46] in particular, which could prove problematic here. This process of criminalization, which is especially pronounced in international criminal prosecution, could lead, for example, to such prosecution being seen as unjust or as the instrument of powerful (groups of) states.

1. Attribution and Selectivity in the Process of Criminalization

It is a fundamental element of criminological insight that the extent and composition of recorded criminality depends essentially on the effect of criminal prosecution institutions.[47] Empirical investigations have shown that their work is selective; in other words, they do not recognize and/or sanction every breach of norms. Although delinquent behavior is a widespread social reality, only a fraction of it is discovered and very few people are convicted for it. Deviance is accordingly not a specific characteristic of a person, on the basis of which a distinction between criminal and noncriminal can be made, but the result of a process of attribution and criminalization.[48] To be criminal is thus a characteristic attributed to a person externally by the institutions of social control. The choice of who is criminalized and who is not does not occur by accident, but on the basis of criteria that are influenced by power. In general criminal law, this choice is, for example, oriented

[45] Thus C. Möller, *supra* note 9, pp. 491 et seq., regarding the deterrence function.
[46] Thereto G. B. Vold, T. J. Bernard and J. B. Snipes, *supra* note 1, pp. 227 et seq.
[47] See, for example, K.-L. Kunz, *Kriminologie*, 3rd ed. (2001), pp. 178 et seq., 243 et seq.
[48] On this, F. Sack, *supra* note 1, pp. 431, 433 and 470; H. Peters, *Kriminologisches Journal* 2000, pp. 256 and 262.

around criteria such as class or family environment and depends on the ability of those involved to define facts and law.[49] Thus one is, for example, more likely to be sanctioned for an infraction of a norm if one is considered to be of a lower class, is young, or is viewed as deviating from the dominant culture. The result of this selective process is the unequal distribution of the label "criminal."

2. Selectivity and International Criminal Prosecution

These insights can also be applied in assessing international criminal prosecution.[50] Selective attribution in the process of criminalization on the nation-state level is dependent on the power of social groups to define, and their resultant hegemony over the processes of law making and prosecution. This power divergence is reflected, on the level of international criminal prosecution, in the relationship between states and their varying levels of influence on the process of criminal prosecution. Thus international criminal prosecution can be seen as an instrument for the exercise of power and the achievement of interests between (groups of) states or, within a state, among the groups contesting state power.[51] The problem becomes clear if one bears in mind that political conflicts generally underlie the relevant forms of macrocriminality. The tool of international criminal law can be deployed in this context to stigmatize one's opponent and achieve one's own interests. Thus, for example, criminal prosecution by the ICTY of Serbian politicians and members of the military also represented an attempt legally to justify the later NATO intervention. By contrast, the refusal of the German Federal Prosecutor to open investigations into the involvement of US Secretary of Defense Donald Rumsfeld and the US military in torture at Abu Ghraib aimed at avoiding such stigmatization. Both decisions are therefore (also) an expression of constellations of political interests. The same goes for attempts to include "terrorism" in the catalogue of crimes subject to international criminal prosecution.

The effect of this power to define situations and the meaning of rules of law is, on the one hand, reinforced by the relevant act's often extreme complexity and by the fluid character of the boundaries between criminal acts and activities that are (still) legal, for example, in wartime.[52] On the other hand, the legal, constitutional and institutional limits to criminal prosecution are far less pronounced on the international level than on the national level and thus more open for influence. Of course, institutions like the ICC are currently emerging that are committed not to the interests of individual states, but to the independence and neutrality of criminal prosecution; and that also represent a distinct improvement over the so-called ad hoc tribunals for Rwanda and former Yugoslavia. Nevertheless, even here it must be assumed that individual states are able, to varying degrees, to influence the

[49] F. Sack, *supra* note 1, pp. 469 et seq.
[50] On selectivity in the context of international criminal prosecution, see also H. Jäger, *supra* note 10, pp. 264 et seq.
[51] See P. Roberts and N. McMillan, *supra* note 19, pp. 322 et seq.
[52] U. Eisenberg, *supra* note 1, p. 655.

practice of criminal prosecution in regard to who is prosecuted and for what crimes. This is due, in the case of the ICC, to its dependence on the financing and—because it does not have its own executive—on the cooperation and therefore the good will of member states and other involved countries. Such dependence limits the court's room to maneuver.[53] So is doing, for example, the political and economic pressure the US administration puts on a lot of states and the UN.

In this sense, international criminal prosecution can also be seen as a tool of political power struggles among states.[54] While these states have up to now used political and military means to realize their interests, they now have at their disposal an instrument of international criminal justice. The latter's formal independence and impartiality make it an especially effective means for stigmatizing specific states and opposition groups, all the while giving the impression of neutrality. This effect could be observed in the ICTY, which in its initial phase was clearly constituted so as to attribute sole responsibility for the Yugoslav civil war to the Bosnian Serbs and the Serbian army and state leadership. Selective criminal prosecution oriented according to political criteria is also evident in the practical implementation of the German Code of Crimes against International Law (*Völkerstrafgesetzbuch*): all attempts to bring a case against Donald Rumsfeld et al., Uzbeki Ministers, and the former Chinese party and state leadership have so far foundered due to termination by the Federal Prosecutor.[55]

3. Summary

Just as in the case of national criminal prosecution, international criminal prosecution of human rights violations is selective and determined by considerations of power. Because of this, there is danger that international prosecution will be used principally against less powerful, or *no longer* powerful, states and state actors. The criminal prosecution of international crimes can thus be seen as a domain in which the selectivity and power-related aspect of penal intervention is especially evident. It is true that legal institutions are not subject to external influence to the same degree as political and other state structures. Thus the possibility of criminal prosecution even of representatives of influential states cannot be completely ruled out. However, in practice this will be distinctly more difficult, and the room to maneuver for criminal prosecution institutions is more limited here. Thus there is reason to fear that, due to selective attribution through criminal prosecution, the same types of political interests will prevail as in the past, with the danger that the international criminal justice system will help achieve these interests of the more powerful states.[56]

[53] Cf. C. W. Mullins, D. Kauzlarich and D. Rothe, *supra* note 25, pp. 303 et seq.

[54] See R. Keller, *supra* note 35, pp. 30 et seq.; M. Kaiafa-Gbandi, *supra* note 34, pp. 202 et seq.

[55] See Generalbundesanwalt, decision February 10, 2005, *Juristen-Zeitung* 2005, pp. 311 et seq.; OLG Stuttgart, decision September 13, 2005, *Zeitschrift für internationale Strafrechtsdogmatik* 2006, pp. 143 et seq. as well as the review of this in T. Singelnstein and P. Stolle, *Zeitschrift für internationale Strafrechtsdogmatik* 2006, pp. 118 et seq., available at http://www.zis-online.com.

III. Actual Consequences

Aside from the question whether criminal prosecution of macrocriminality is actually in a position to achieve the goals associated with it, it produces consequences of significance far beyond the realm of human rights crimes—consequences that are relevant to criminal justice as a whole.[57] Criminal law has gained overall legitimacy as an instrument of intervention. At the same time, criminal law is becoming more distant from its constitutional foundations, as it is continually strengthened and broadened. These two consequences play a role principally in Western European and in North American societies. In Latin America, which is dominated by a culture of *impunidad*, criminal law must first be granted a regulatory function.

The prosecution of serious infractions of human rights confers a legitimacy on criminal law that it could never achieve in prosecuting ordinary crime. It is therefore regaining significance as an instrument of social regulation, which has been justifiably contested by social movements and critical scholars. In the wake of this, the notion of victimhood—which no longer functions to protect victims and is now being used as a vehicle for the implementation of repressive criminal law—and the absolute penal aims of retribution and atonement have gained in significance.

At the same time, specific forms of criminality, especially macrocriminality, are used to intensify and broaden repressive social control. This effect, for example, could be observed in the discussion occurring principally in the 1990s, not only in Germany, on white-collar crime and sexual offenses. In the context of a broad social consensus, it was possible to tighten criminal law and criminal procedure, which had effect far beyond this realm and which would not have been possible in the case of other forms of crime that do not provoke such powerful outrage. On the supranational level, this was reinforced by the fact that, following international accords and agreements, criminal law regulations often go beyond national legal systems and not infrequently serve as Trojan horses that erode central legal and constitutional norms: money laundering, international corruption, the "war on drugs," and so-called organized crime are only some examples that illustrate the difficulty of undertaking internationally binding coordination of laws and how easily these accords can be, and are, used to justify a national discussion.[58] Thus "organized crime" and "international terrorism" served as vehicles to justify more intensive punishments and very problematic and highly invasive investiga-

[56] Cf. C. W. Mullins, D. Kauzlarich and D. Rothe, *supra* note 25, p. 304.

[57] See S. Quensel, in B. Menzel and K. Ratzke (eds.), *Grenzenlose Konstruktivität? Standortbestimmung und Zukunftsperspektiven konstruktivistischer Theorien abweichenden Verhaltens* (2003), pp. 32 et seq.

[58] On this, see T. Singelnstein and P. Stolle, *supra* note 1, pp. 73 et seq.

tive measures, as for example the European arrest warrant and the EU directive on retention of communications data independent of suspicion.

This development has special relevance in the realm of macrocriminality, since the latter provides the already overburdened concept of criminal law with a nearly insoluble task. On the basis of the specifics of such delinquency (complex successions of events, criminal relevance that is hardly apparent and susceptible to investigation, prudent action by alleged perpetrators, etc.) the instruments of criminal law come up against their limits. Examples are—alongside the above-mentioned investigative measures—questions of responsibility of associations, institutions, and organizations[59] (such as corporate hierarchy); the principle of legal certainty,[60] which prevents the creation of general clauses for socially harmful behavior in the realm of politics and the economy (the possibilities of action there are enormously varied); and the constant transfer of criminal intervention to the sphere of risk prevention.[61] Scientific debates about prosecution of human rights crimes already present such attempts, too.[62]

IV. Conclusion and Alternatives

Is international criminal law a further step toward the international implementation of human rights or is it a new way of implementing political power interests? Between these poles lies the discussion on aims and consequences of criminal prosecution of human rights crimes. Also between these two poles the answer must be sought to the question of the adequacy of criminal law intervention as a tool against breaches of human rights. Increasingly, the debate on alternatives breaks down.

1. Conclusion

There is serious doubt as to whether criminal prosecution of international crimes can actually achieve the aims it pursues. It appears, however, capable of aiding greater implementation of human rights on an international level. To what degree this succeeds will essentially depend on the *practice* of international criminal law. The creation and application of laws are the object and result of political and social conflicts. Thus they are, on the one hand, indeed formed by political interests that have prevailed in these conflicts. On the other hand, law can be understood as

[59] For criticism of the German Völkerstrafgesetzbuch, see T. Weigend, in O. Triffterer (ed.), *Gedächtnisschrift für Theo Vogler* (2004), p. 197 at pp. 214 et seq.

[60] On lack of certainty in the German Völkerstrafgesetzbuch, see H. Satzger, *Neue Zeitschrift für Strafrecht* 2002, p. 125 at p. 131.

[61] On the lack of consideration for limiting criminal law precepts in the ICC Statute, see M. Kaiafa-Gbandi, *supra* note 34, pp. 214 et seq.

[62] See, e.g., M. Pawlik, *Zeitschrift für internationale Strafrechtsdogmatik* 2006, p. 274 at p. 291, available at http://www.zis-online.com.

a containment of power and domination. This ambivalence in the law appears precisely and especially at the international level and in the realm of macrocriminality, because for the most part this involves circumstances of great economic and political explosiveness, and the groups of perpetrators in most cases consist of powerful and influential actors. The establishment of criminal prosecution of violations of human rights should therefore be interpreted as a political process for the legal regulation of political activity. Such criminal prosecution—as opposed to any *national* form of criminal prosecution—will encounter greater difficulties in eluding political influence and instead establishing its own rules.

Recognizing this means interpreting international criminal law not as the establishment of the rule of law, but as a constant political struggle, which although it can be influenced, cannot automatically be considered positive. The hope for consistent and independent international criminal prosecution of human rights crimes, which should effect a just and peaceable resolution of conflicts, will (at first) not be fulfilled. The extent, however, to which practice approximates this ideal goal and the extent to which prosecution is deployed as a mere instrument of hegemonic interests depends essentially on the degree to which states and other powerful actors prevail in this conflict or whether a democratization of international trial and decision structures is achieved. The proscription of abuse of power and breaches of human rights by juridical process is not automatic. It depends on who is granted access to the instrument of international criminal prosecution and the purpose for which this instrument is used: for confrontations between states and other powerful actors, or to criticize and limit illegitimate state power. Thus the contradictory relationship between power and law reappears here: law must fall back on power in order to make its implementation possible. At the same time, power uses the law to expand its influence; power thus limits and misuses law.[63] In order to use the law to delegitimize criminal state structures, one must be conscious of this contradictory relationship.

Independently of this, the instrument of criminal law can, through its use in the prosecution of human rights crimes, achieve social legitimacy, which is also reflected on the national level. As a result, the scope of criminal law can undergo further expansion and shift, and constitutional standards will in turn be questioned. Just as in the question of political influence, the issue is not one of startup problems, but of fundamental problems inherent in these instruments of intervention that accompany the positive goals of criminal prosecution. A position in support of the use of criminal law to combat macrocriminality must therefore include an awareness that criminal law is suitable only in limited fashion for the achievement of its recognized aims and that it can, in practice, produce unwanted effects or be misused as an instrument for the achievement of political goals. Moreover, this position must take into account that in the process it becomes increasingly difficult to critique the selective use of criminal law, its increasingly repressive and controlling character, and its expansion and intensification. This erosion of the rule of law and civil rights could otherwise unintentionally counteract the goal of implementation of human rights.

[63] See also M. Maiwald, *supra* note 3, p. 1073.

2. Alternatives

In light of these findings, the question arises of how to deal with international criminal prosecution of human rights violations. It would be wrong to assume that criminal law will fulfill the expectations placed on it. Instead, it should be used in the sense that the Enlightenment conceived of it: as a check on state power. In this spirit, international criminal law could serve, on the one hand, as a stage for the denunciation of human rights crimes principally committed by powerful states and influential international actors. On the other hand, a critique of criminal law can be linked to it, since in this area the deficiencies of repressive social control can be clearly understood.

In addition, efforts should be strengthened to move states themselves, and not primarily individuals, to recognize human rights standards, a path that was smoothed by the European Convention on Human Rights, among others, and which is reflected for example in the European Court of Human Rights. These instruments, which often are more effective and generate more concrete consequences for the victims and for society, should be strengthened and augmented.[64] They are meaningful both for the *working through* of human rights crimes, and for the social conflicts and structures that lie behind them,[65] in order to deal with victim powerlessness and traumatization. At the same time, such procedures could serve as institution to pursue a clarification of the events and thereby form a basis for social dialogue—a forum for discussing the crimes, the context in which they arose, the consequences for the victims and society, and possible counterstrategies, rather than remaining at the level of individual attributions of guilt.

[64] See also C. W. Mullins, D. Kauzlarich and D. Rothe, *supra* note 25, pp. 301 et seq.
[65] See P. Roberts and N. McMillan, *supra* note 19, pp. 335 et seq.

Part II

Developments in Law and Practice