DEVELOPMENTS

Book Review – Kaleck/Ratner/Singelnstein/Weiss (eds.), *International Prosecution of Human Rights Crimes*

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[Wolfgang Kaleck, Michael Ratner, Tobias Singelnstein, Peter Weiss (eds.), *International Prosecution of Human Rights Crimes*, Berlin: Springer Verlag 2006, pp. 224, € 72,56]

A. Introduction

The book under review originated in a conference held in Berlin in June 2005. The conference's title was "Globalverfassung versus Realpolitik" (Global Constitution versus Realpolitik) and was organised by two notorious NGOs: the German Republikanischer Anwältinnen- und Anwälteverein (Republican Lawyers' Association) and the New York based Center for Constitutional Rights. The German Republican Lawyers Association became known to a wider public, especially in Germany, when they filed a criminal complaint against the former US Secretary of Defense, Donald Rumsfeld, and others with the General Public Prosecutor. The Association claimed that Rumsfeld and others were responsible for violations of international criminal law at Abu Ghraib and similar sites in Iraq under § 1 of the German International Criminal Law Code.[1] Although the public prosecutor and the German courts have until now declined to issue an indictment,[2] the Republican Lawyers' Association have initiated a highly controversial debate in

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[1] For an English translation, *see,* 1 THE ANNUAL FOR GERMAN AND EUROPEAN LAW [AGEL] (2004) and the attending summary, Safferling, *Report - German Public Law Legislation - 2001/2002: Das Völkerstrafgesetzbuch*, 1 AGEL 574 (2004). *See also* Werle & Jessberger, *International Criminal Law is Coming Home: The New German Code of Crimes Against International Law*, 13 CRIMINAL LAW FORUM 191 (2002).

[2] *See*, decision of the General Public Prosecutor at 60 JURISTENZEITUNG [JZ] 311 (2005), and the final decision in this regard by the Oberlandesgericht Stuttgart (OLG-Higher Regional Court), 26 NEUE ZEITSCHRIFT FÜR STRAFRECHT [NStZ] 117 (2006); see also Ambos, *Völkerrechtliche Kernverbrechen, Weltrechtsprinzip und § 153f StPO - Zugleich Anmerkung zu GBA*, JZ 2005, 311 und OLG Stuttgart, NStZ 2006, 117, in: 26 NStZ 434 (2006).

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Germany as to the relevance of the principle of universality in the context of enforcing international criminal law by German authorities.[3] The publication at hand lies within this political context. The book's aim is to promote and develop ways to prosecute human rights violations in an effective manner.

It might surprise some that a conference held in the German capital produced a collection of essays in English that were printed and distributed by a German publishing house (Springer). On the one hand, it is not very surprising considering that this is due to the trans-Atlantic cooperation of an American NGO and a German NGO. Also, one might see this as a sign that German academia is slowly moving into a more internationalised perspective. Questions of international criminal law particularly need to be discussed in a global context. Notwithstanding the fact that criminal prosecution is mainly understood as a nation state's right stemming from the principle of sovereignty, international criminal law, which is now, or with the further rise of the ICC in the near future, governed by the complementarity principle, needs to develop as a truly international matter even if it is executed by national courts.

The book addresses four major issues, reflected in its three parts. First, some fundamental questions are addressed by four individual essays (Part I). Second, a variety of developments in law and practice are focused on. (Part II). Finally, the "war on terror" is dealt with as a specific and rather recent development with international criminal law implications (Part III).

B. Part I: Fundamental Questions

The fundamental questions part consists of four papers. The first two have a more political perspective, while papers three and four pertain, judging by the title, to basic legal questions. Jörg Arnold focuses in the first essay, on the relationship between criminal law and politics (p. 3-12). He operates on the hypothesis that human rights protection is dependent upon a variety of factors, which are not only political but also cultural and economic. By calling into mind several states which have had to deal with a repressive system, he argues that in each case criminal law played a different role in the overall aim of coming to terms with the past. It is interesting to note, however, that Arnold does not mention the German situation after World War II, but relies solely on the post 1989 process of dealing with the communist regime.[4] This might surprise as both processes differ immensely; while

[3] Keller, 153 GOLTDAMMER'S ARCHIV 34 (2006); AMBOS, INTERNATIONALES STRAFRECHT, § 5 Rn 95 (2006).

[4] A short analysis of the Post-Nuremberg Process in Germany can be found at a later stage in this book. Wolfgang Kaleck in his article on the German situation regarding international criminal law spends a few paragraphs on this problem (pp. 95-98).

criminal prosecution in Germany was rather low concerning former Nazi-collaborators, it turned out to be rather harsh towards border guards and other GDR-cases.[5] These inconsistencies have been criticised as biased and detrimental to the reconciliatory aspect of criminal law.[6] Arnold, however, does not seem to be interested in scrutinising the inside/outside aspect of national "Vergangenheitsbewältigung" ("dealing with the past). Comparison of the German situation after 1945 and the post Communism after 1989 shows that the readiness to prosecute macro-criminality depends also on whether or not the prosecutor was part of the former regime (an insider) or not part of it (an outsider). In his final plea, Arnold, warns not to overstretch the impact criminal law can have on the protection of human rights. A criminal law which is heavily dependent on the political will runs the risk of being marginalised, as it is perceived of as being unreliable and unfair.

The second essay by Andreas Fischer-Lescano (p. 13-27) discusses the aim of constitutionalizing international relations. The rule of law at the centre of international politics does not only pertain to criminal law issues but also to private law restitution disputes.[7] A conclusive system of redress on a global level would help to deviate from the "further domination of conflicts by fundamentalism" and to avoid "much more drastic means of conflict repression." (p. 27)

A third paper in the first part takes issue with the "Future of Universal Jurisdiction." Peter Weiss presents a rather short statement (p. 29-36) that goes back to ancient Greek and Roman political philosophy. The quotes pertaining to "natural law" as global law might be helpful in the political discourse on the universality of human rights law. Regarding the complicated issues of universal prosecution of international criminal law under positivistic circumstances and with a view to the non-retroactivity principle, these remarks are somewhat superficial. Unfortunately, the author falsely claims that the Rome Statute of the ICC contains universal jurisdiction (p. 34), which it does not.[8] Some of the inaccuracies are, however,

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[5] See, e.g., Rüping, *Between Law and Politics: The Prosecution of NS-Criminals in the Two German States after 1945*, *in* THE NUREMBERG TRIALS: INTERNATIONAL CRIMINAL LAW SINCE 1945, 186 (Reginbogin and Safferling, eds., 2006); Wittmann, *The Normalization of Nazi Crime in Postwar West Germany*, *in* THE NUREMBERG TRIALS: INTERNATIONAL CRIMINAL LAW SINCE 1945, 196 (Reginbogin and Safferling, eds., 2006).

[6] *See*, SCHLINK, VERGANGENHEITSBEWÄLTIGUNG DURCH RECHT (2002)

[7] *See, e.g.*, Safferling, *Can Criminal Prosecution be the Answer to Massive Human Rights Violations*, 5 GERMAN LAW JOURnal 1469 (2004).

[8] *See, e.g.*, AMBOS, INTERNATIONALES STRAFRECHT, § 8 MN. 7; SCHABAS, THE INTERNATIONAL CRIMINAL COURT, 54 et subs. (2001).

healed by later contributions in this book, in particular by the articles of Kai Ambos (at p. 65-67) and Florian Jessberger (p. 213-222).

Finally, Peer Stolle and Tobias Singelnstein take up the question of Aims and Consequences of International Prosecution of Human Rights Crimes. This compared to the prior essay, a more extensive piece of research (p. 37-52), brings a laudable and inspiring argument in favour of a well-balanced and limited approach to international criminal law. The authors describe the swing from criminal law as a tool of the powerful to control the underprivileged, to a means for controlling the powerful. According to their reading, international criminal law is "a political process for the legal regulation of political activity." (p. 51) Thus, it meets greater difficulties compared to the well-established national criminal law systems. In all, the author's view on international prosecution of human rights violations is, in my eyes, too pessimistic. Although, I agree that selectivity is a major hindrance to the establishing of reliability under the law and that selectivity is most evident in international criminal law, I would also point at the flip-side of selectivity for the powerful: human rights abusers can, even now, never be sure whether or not they might face prosecution and punishment. This makes life more difficult for macro-criminals, whether they are actually being tried or not.

C. Part II: Developments

In Part II, Developments in Law and Practice, one finds several treatises of more theoretical questions and a set of five reports from individual countries. The starting point is a treatise of the well-known German Professor for international criminal law, Kai Ambos,[9] titled, Prosecuting International Crimes at the National and International Level: Between Justice and Realpolitik (p. 55-68). Despite the generality of the heading, the paper addresses mainly questions of proprio motu-investigations by the ICC prosecutor according to Article 15(3) ICC Statute), state cooperation during investigations and the German situation concerning universality. The proprio motu power of the ICC was heavily debated during the Rome Conference; yet, at least for a continental lawyer, it seems as a corollary to any prosecutorial activity.[10] Ambos states that none of the proceedings which are currently under way at the ICC have been initiated by the prosecutor ex officio, although the number of communications received by the ICC is more than

[9] Kai Ambos has written a great volume on eneral Principles of International Criminal Law and has, at the beginning of 2007, issued a general compilation, called "Internationales Strafrecht", comprising both international criminal law and European criminal law.

[10] *See, e.g.*, Sec. 152 (2) of the German Criminal Procedural Code (StPO); *see also*, SAFFERLING, TOWARDS AN INTERNATIONAL CRIMINAL PROCEDURE 76 (2003).

impressive.[11] This lack of ex officio activity on the side of the OTP certainly gives rise to questions of selectivity, which has already been an issue in the paper of Peer Stolle and Tobias Singelnstein. Member states' cooperation is also relevant in this context. Ambos explains why the ICC is equipped with a mixed cooperation strategy, which is partly horizontal, relying on mutual assistance amongst Member States, and partly vertical, establishing a duty to cooperate, which is however not as enforceable as the Chapter VII-based ad hoc tribunals, ICTY and ICTR. Despite this (theoretical) legal framework, these rules seem to fail the practicability test, as it were, at least for the time being. The Sudanese situation shows, says Ambos, that the system does not work well. I might also add that the situation in Congo, which has provoked the first accused before the ICC, proves that the cooperation scheme is biased. It seems that surrendering Thomas Lubanga to The Hague was more of a deception strategy on the side of the Congolese government, where the accused is turned into a scapegoat deflecting from the true amount of injustice which has occurred.[12] Little can be done against these practical difficulties in enforcing international criminal law. Sanctions as a means to put pressure onto the culprit state will probably turn out to be counter-productive, as Ambos rightly observes. This is why the ICC depends on a reliable system of complementarity, in which each Member state utilises its prosecutorial mechanisms by virtue of the universality principle and thereby makes it hard for the international criminal to escape. However, a strictly executed universal jurisdiction by national states might provoke bilateral difficulties between the home state of the alleged criminal and the prosecuting state. As a solution to this problem, Ambos points to German law, that is equipped with a mixed approach. On one hand, Sec. 1 of the International Criminal Law Code establishes an unequivocal universal jurisdiction, and on the other, Sec. 153f of the Criminal Procedure Code gives to the prosecutor a rather wide margin of appreciation in the decision whether or not to initiate an investigation (see also the contribution of Jessberger at p. 213). Even if German law is an example for a well-balanced approach to universality, the Rumsfeld case, as a first real test-case, has shown that realpolitik prevails over the mandatory rule of law. According to Ambos, and I am willing to agree, the system of international criminal law is still in its infancy, which is why certain factual limitations have to be accepted.

The next paper by Lorna McGregor addresses the question of state immunity and the interrelation it has with jurisdiction: Addressing the Relationship between State

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[11] To date, there are four investigations under way, all of them are either state referrals or rely on the UN Security Council.

[12] *See e.g.*, Dominic Johnson, *Anklage mangelhaft*, DIE TAGESZEITUNG, 29 January 2007, available at: http://www.taz.de/index.php?id=archivseite&dig=2007/01/29/a0173 (20 August 2007).

Immunity and Jus Cogens Norms: A Comparative Assessment (pp. 69-84). The title describes the research of the author perfectly. State immunity conflicts with jus cogens and different jurisdictions give different solutions to this friction. The author differentiates between monist and dualist constitutional systems and argues that dualist systems must be brought to compliance with international law. As examples Canada, the UK and the US-System are looked at in greater detail. Whereas in civil litigation, it has been held that state immunity produces a great amount of inequality which is not justifiable in criminal matters, immunity remains as a protection scheme against the prosecution of an individual, even if the individual has a different legal personality from the state.

To a certain extent the following contribution of Christopher Keith Hall: Universal Jurisdiction: Developing and Implementing an Effective Global Strategy (p. 85-92), transfers the foregoing articles to the straight forward question of whether utilising the universality principle is advisable and doable. He explains difficulties and strategies of human rights NGOs in this regard.

The following individual reports will not be discussed here in detail. At first Wolfgang Kaleck addresses the German situation (p. 93-112). A little clarification is necessary at this point. Kaleck states (p. 96) that Germany holds a reservation against the exception to the nullum crimen principle laid down in Article 7 (2) of the European Convention on Human Rights. Whereas, this was indeed the case, and while this reservation was indeed directed against the legality of the Nuremberg trials, the Federal government revoked this reservation in 2001.[13] To Wolfgang Kaleck's exoneration, I might add that the German government operated rather silently in this regard. Nevertheless, the reservation against the Nuremberg trials has been abolished. After that Naomi Roht-Arriaza scrutinizes the Spanish approach (p. 113-124), Jeanne Sulzer reports on France (p. 125-138), Michael Verhaeghe on Belgium (p. 139-148), Carla Ferstman on the UK (p. 149-158) and finally Dieter Magsam brings a short but interesting insight into the situation in Rwanda between national courts and the ICTR (p. 159-165).

[13] *See*, Zimmermann, *in* THE NUREMBERG TRIALS: INTERNATIONAL CRIMINAL LAW SINCE 1945 196 (Reginbogin and Safferling, eds., 2006); Kress, *Versailles-Nürnberg-Den Haag: Deutschland und das Völkerstrafrecht*, 61 JZ 981 (2006); Werle, FESTSCHRIFT KÜPER 675 (2007).

D. Part III: "War on Terror"

The last part of the reviewed book is directed towards one of the most pressing questions in criminal law, both nationally and internationally: the threat of terrorisms, here as often crafted in the misleading and gruesome term "war on terror." While the applicability of international criminal law is questionable, national laws are under constant scrutiny of whether they are apt to meet global terrorism. These discussions have shown some remarkable if not shocking results. Rights which have been widely understood as being absolute and global in character, like the prohibition of torture, are under serious attacks from the anti-terrorism war heroes.[14] The killing of innocent victims as a collateral damage in this "war" has readily been taken into consideration.[15] Today in Germany, it has even been suggested to establish a right to shoot alleged terrorists without trial or any other judicial safeguard.[16] Against this massive attack on fundamental rights, one almost forgets constant intrusions into the data protection rights, the right to privacy, or fair trial provisions.

The reviewed book is obviously concerned with the most fundamental questions related to the international context. There are four articles in this final part of the book which take up the topic of terrorism from different angles. The first contribution by Scott Horton, Military Necessity, Torture, and the Criminality of Lawyers (p. 169-183), is concerned mainly with US-American anti-terrorism mechanisms. He relates US military laws back to the Kantian idea of a moral imperative and to von Clausewitz's doctrine of warfare as they have been received and balanced by Francis Lieber in the first US field manual. This in its foundation humane doctrine was destructed on 7 February 2002, when President George W. Bush issued an Order, giving, in substance, prevalence to military necessity over human rights. Thus, annihilating the protection of the Geneva Conventions. In the

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[14] The case which has led to this discussion is now pending before the European Court on Human Rights *Gäfgen/Deutschland*, Appl. No. 22978/05, declared partly admissible by the Court on 10 April 2007; the decision of the Federal Constitutional Court can be found at: 58 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 656 (2005); see also: *Brugger*, 55 JZ 165 (2000); *Saliger*, 116 ZStW 35 (2004); *Erb*, Jura 24 (2005); *Ellbogen*, Jura 339 (2005); *Herzberg*, 60 JZ 321 (2005); *Jerouschek*, 45 JuS 296 (2005); *Kudlich*, 45 JuS 376 (2005); *Roxin*, FS Eser, 461 (2005).

[15] See the original version of Sec. 14 of the Luftsicherheitsgesetz (Air Security Act), BGBl. 2005 I 48 and the decision of the Federal Constitutional Court of 15 February 2006, (available at http://www.bverfg.de/entscheidungen /rs20060215_1bvr035705.html) declaring this law unconstitutional, ; *see also*, Safferling, Terror and Law: German Responses to 9/11, 4 JICJ (Please write out in small caps) 1152 at 1153-1156 (2006).

[16] *See*, http://www.focus.de/intern/archiv/todesschuss_aid_67213.html (23 July 2007).

end, this means that torture is no longer prohibited. Scott Horton sees in these developments an abrupt break with the legacy of Nuremberg.

The following article by the former UN Special Rapporteur on Torture, Nigel S. Rodley, titled, The Prohibition of Torture: Absolute means Absolute (p. 185-200) gives again sometimes discouraging insight information on US policy, describing the step-by-step abolition of the torture-prohibition. The following contribution by Michael Ratner, Litigating Guantánamo (p. 201-211), addresses the special situation of the Guantánamo internees and reports on the attempts of the Center for Constitutional Rights in New York to challenge this special form of detention.[17]

The last contribution brings us back to the German situation. The Berlin professor for criminal law, Florian Jessberger, writes about Universality, Complementarity, and the Duty to Prosecute Crimes Under International Law in Germany (p. 213-222). At the heart of his treatise lies the question of how to interpret Sec. 1 of the International Criminal Law Code and Sec. 153f of the Criminal Procedure Code in Germany with a particular view to the Rumsfeld case in German courts. In this regard, Jessberger acts as a complementary to the prior contributions of Ambos and Kaleck. Discretionary powers on the side of the public prosecutor arise if there is no "domestic connection." If there is a "domestic connection" – personally, I would prefer the term "genuine link" – between Germany and the crime or the alleged criminal respectively, the public prosecutor would have a duty to prosecute according to Sec. 152 (2) of the Criminal Procedure Code. Writing about the decisions in the Rumsfeld case, Jessberger observes that the German public prosecutor takes recourse to the Rome Statute of the ICC in order to interpret the provisions in German law. The question of whether a genuine link exists is answered by a reference to Article 14 of the ICC Statute. If jurisdiction exists over such "situation" according to Article 14, which has priority over the universal jurisdiction according to German law, Germany's jurisdiction is subsidiary and would be blocked. This indeed has "far-reaching consequences." (p. 218) In the end national universal jurisdiction over a situation without a "genuine link" would serve as a mere fallback mechanism if the national jurisdiction which has priority is unable or unwilling to prosecute. Whereas, Jessberger is in principle ready to accept this reading of concurring jurisdictions in international criminal law, he also points to the fact that with state sponsored crime the state which is involved in the crime will generally be unwilling to prosecute. Under the Rome Statute, however, the determination of unwillingness is due to a formal legal procedure according to Article 18 of the ICC Statute. A similar proceeding is missing when it comes to the

[17] For an interesting legal analysis of the status of the detainees, *see*, Stuckenberg, *Das zähe Ringen um die Rechtsstellung der Gefangenen von Guantánamo Bay*, 61 JZ 1142 (2006).

national setting. In this, Jessberger has identified yet another issue, which needs to be resolved in international criminal law.

E. Summary

There are two key issues that appear again and again in the course of this selection of essays. The first is "selectivity" in international criminal law, and the second could be described as the "relativity" of international criminal law. As mentioned before, the selectivity issue in my eyes is seen too pessimistically. The authors of this book have convincing arguments in separating international criminal law from national criminal law systems when looking at its aims and purposes. However, they seem to apply similar expectancies to the international system as one would in the national context. What is missing is the broader picture of an already existing cooperation between international and national entities in fighting impunity. As regards the second issue, the relativity of international criminal law, I concur with the authors of this book that international criminal law cannot be the panacea of a world scattered in violence. It is but one means amongst many others, to fight crime and promote human rights. In addition, it is a specifically helpless tool, as it comes into play only when a massive violation has occurred.

The editors of "International Prosecution of Human Rights Crimes" have certainly managed to bring together a variety of experts from different environments. This laudable circumstance, however, does not work for the benefit of the publication. We have observed a huge ambiguity in quality and style. While some contributions are shorter and obviously driven by a clear political aim, others give a first hand legal analysis.

Even if this ambiguity is – from a lawyer's perspective – sometimes annoying as one never knows what to expect when starting the read, the mixed approach offered in this book is a necessary one. When writing about international criminal law it has to be taken into account that there is no reliable overall (national or international) judiciary. Cooperation of national courts and international courts is politically difficult and legally unclear. Macro-criminality, after all, is at the same time state sponsored, i.e. perpetrators are shielded by certain states, which put the execution of international criminal law at risk. Therefore, an integrative approach, which does not focus only on legal questions, is necessary in order to proceed on the path of establishing a reliable international criminal law system. In this sense "International Prosecution of Human Rights Crimes" paints a realistic picture of the difficulties in the execution of international criminal law and sheds light on some of them from different angles. At the same time – and this might be a good reason for a non-German reader to look at the book – it gives an immense amount of information on the first round of the criminal complaint against Donald

Rumsfeld and others in the German judicial system.[18] This proceeding shows the intricacy of national law and politics in the prosecution of international criminal law which dins itself trapped between a "global constitution" and "Realpolitik".

[18] For further information on the second complaint of 2006 *see*: http://www.rav.de/ag_voelkerrecht.htm