

Can Criminal Prosecution be the Answer to massive Human Rights Violations?

By *Christoph J.M. Safferling**

A. Introduction**

Almost 60 years after the surviving Nazi-leaders were tried in the first ever international criminal tribunal for mass atrocities during World War II in Nuremberg, criminal responsibility for genocide, crimes against humanity, and war crimes is perceived of as somewhat normal. Even if it is not yet an everyday event that human rights abusers are tried on an international level, the reality of the possibility of such a trial is present in the minds of the attentive public. This change was achieved over the last ten years. The establishing of the Yugoslavia-tribunal in 1993 was the turning point.¹ Since then a number of both national and international trials held against human rights criminals has given the topic high priority.² Finally the International Criminal Court (ICC) was founded³ and after a comparatively short time actually established⁴ and put in a position to operate.⁵ Sierra Leone relies

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¹ The ICTY was founded by the UN Security Resolution 827, 25 May 1993.

² Cases before the ICTY, the ICTR on the international level and cases like Pinochet or Djajic and Jorgic at the national level.

³ Rome Statute UN Doc.A/CONF.183/9, 17 July 1998, available online at: http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf

⁴ The Rome Statute according to Art. 126 entered into force on 1 July 2002.

⁵ Cf. Andreas Zimmermann/Matthias Kloth, *Der Internationale Strafgerichtshof sechs Jahre nach der Konferenz in Rom*, in: *JAHRBUCH MENSCHENRECHTE* 247 (2005).

on criminal prosecution in order to rebuild its society after a distracted and bloody civil war⁶ and a trial against Saddam Hussein seems a necessity.⁷ Many expectations are connected to criminal law and the working of the ICC. The dream of a world-wide justice, i.e. to attribute “just desert” to the offenders and to do justice to the victims, seems to have become reality. At the same time the establishing of an international criminal court is understood as a signal that will deter future offenders from committing human rights atrocities. The paper of Alexandra Kemmerer gives proof of how optimistically the EU promotes the idea of international criminal justice.⁸

These positive expectations are not shared everywhere. The US government has constantly ruled out the option to ratify the Rome Statute.⁹ The South-African society has opted for a truth commission in order to overcome the former Apartheid regime instead of resorting to criminal prosecution. A similar approach was taken in East Timor.¹⁰ This paper takes issue with the role of international criminal law in the context of massive human rights violations. It argues that whereas criminal prosecution can contribute considerably to overcoming the wounds of atrocities, it can only meet a limited number of expectations. The prosecution of international criminal law has an important part to play amongst other means to react to human rights violations, although it is far from being the panacea. In the following we will look first at the role of human rights law in the

⁶ William A Schabas, *Internationalized Courts and their Relationship with Alternative Accountability Mechanisms: The Case of Sierra Leone*, in: INTERNATIONALIZED CRIMINAL COURTS 157-201 (CESARE ROMANO/ANDRÉ NOLLKAEMPER/JANN KLEFFNER EDS 2004).

⁷ See e.g. Michael P. Scharf, *Is It International Enough? - A Critique Of The Iraqi Special Tribunal In Light Of The Goals Of International Justice*, in: 2 J. INT. CRIMINAL JUSTICE 330 (2004); Yuval Shany, *Does One Size Fit All? - Reading The Jurisdictional Provisions Of The New Iraqi Special Tribunal Statute In The Light Of The Statutes Of International Criminal Tribunals*, in: 2 J. INT. CRIMINAL JUSTICE 338 (2004).

⁸ See Alexandra Kemmerer, *Like Ancient Beacons: The European Union and the ICC - Reflections on a Chapter of European Foreign Policy*, 5 GLJ (2004) in this issue.

⁹ See e.g. William A. Schabas, *United States Hostility To The International Criminal Court: It's All About The Security Council*, in: 15 EJIL 701 (2004); Lee A. Casey, *Assessments of the United States Position: The case against the International Criminal Court*, in: 25 FORDHAM INT'L L.J. (2002), 840; Claus Kreß, *Der Internationale Strafgerichtshof und die USA*, in: [2002] BLÄTTER FÜR DEUTSCHE UND INTERNATIONALE POLITIK 1087.

¹⁰ See John Dugard, *Reconciliation and Justice: The South African Experience*, 8 TRANSNAT'L L. AND CONTEMP. PROBS 277 (1998); Ivan Simonovic, *Dealing With The Legacy Of Past War Crimes And Human Rights Abuses - Experiences And Trends*, 2 J. INT. CRIMINAL JUSTICE 701 (2004); Beth S. Lyons, *Getting Untrapped, Struggling for Truths: The Commission for Reception, Truth and Reconciliation (CAVR) in East Timor*, in: INTERNATIONALIZED CRIMINAL COURTS 99-124 (CESARE ROMANO/ANDRÉ NOLLKAEMPER/JANN KLEFFNER EDS 2004); other similar attempts are being analysed by Priscilla Hayner, *Fifteen Truth Commissions - 1974 to 1994: A Comparative Study*, 16 HUM. RTS. Q 597 (1994).

international society (B.); we will further look at the process of criminalising certain human rights offences (C.), then turn to discuss criminal law amongst other forms of reacting to international atrocities (D.) and finally summarize the role of criminal prosecution on the international level (E.).

B. Human Rights Law

The history of human rights is very much connected to World War II and the foundation of the United Nations. In the decades following the termination of the most horrid and degrading treatment of human beings by the Nazi regime, human rights law has soared both in conventional law and in theory at an impressive speed. At the same time it has undergone some radical, even revolutionary changes.¹¹ Without looking at the development in detail we will just draw a brief sketch by describing a classical (I) and a modern methodology of human rights (II).

I. Classical approach

The original conception of the functioning of human rights law saw in them a set of rules that would address the state. The state was called upon to implement human rights into its constitutional law providing subjective rights for the individual citizen. These were meant as legal claims the individual would have against the state in order to defend his autonomy against illegitimate infringement through state agents. An immediate legal position for the individual would not stem from the international human rights norm as such but only emerge through the mediation of national law. States would agree to human rights law on the international level and bind themselves to respecting human rights as international obligations. However, the adherence to those would remain unsupervised unless the national state subdued itself under a specific regime of control such as the European Court of Human Rights, the *Human Rights Committee*, or similar institutions. Otherwise the individual would depend entirely on the national state without the possibility to coerce recognition of his/her rights outside the domestic courts.¹²

¹¹ Cf. Florian Jeßberger, *Pinochet in Nürnberg: Das Völkerstrafgesetzbuch und die Universalisierung der deutschen Strafrechtspflege*, in: *JAHRBUCH MENSCHENRECHTE* 124 at 125 (2005).

¹² How the European Court of Human Rights can operate to support the individual in his/her fight for recognition in the domestic system is described by Andrew Clapham, *Revisiting Human Rights in the Private Sphere: Using the European Convention on Human Rights to Protect the Right of Access to the Civil Courts*, in: *TORTURE AS TORT* 513 (CRAIG SCOTT ED 2001).

Within this system, national criminal law would help to ensure the protection of the right to life and the property rights of the members of one national community on the one hand, while needing to be effectuated by a fair trial on the other. As a criminal sanction is a harsh reaction for the individual, criminal law would be limited to the protection of the most important human rights, it would be the *ultima ratio*, the ultimate resort for the protection of legal goods. Human rights would in this context operate for and against an offender at the same time: against the offender because he denied a core right to another member of the society, and for him because he would be guaranteed a fair trial in order to prevent harsh and inhumane treatment during prosecution.

II. The individual as Human Rights addressee

The shift indicated in the section heading was announced in the Nuremberg Trial of Major Nazi War Criminals. Only by punishing individuals who commit such crimes can the provisions of international law be enforced, reads the judgment.¹³ This reflected nothing short of a new way of thinking: international law addressing individuals directly without the mediation of the state.¹⁴ This in fact necessary shift away from a pure mediation system occurred mainly for the following reason: in a repressive political system the protection of human rights by the national state fails. Mediation is useless if an individual or a minority is in the hands of an oppressive, hostile state. State sovereignty as a traditional maxim in international relations ceases to lose its legitimacy if this very sovereignty is operating against human beings, not for them.¹⁵ The history of the development of human rights as individual subjective legal claims is thus a *history of failure* of national states. Immanuel Kant's original philosophical idea of a *ius cosmopolitanum* relied on a republican state as a genuinely positive institution. The only real international

¹³ Trial of German Major War Criminals (*Goering et al.*), International Military Tribunal in Nürnberg, Judgment and Sentence, 30 Sept and 1 Oct 1946; reprinted in: 41 AJIL 172, 173 (1947).

¹⁴ See Andrew Clapham, *Issues of complexity, complicity and complementarity*, in: FROM NUREMBERG TO THE HAGUE, 30 at 33 (PHILIPPE SANDS ED 2004).

¹⁵ The veil of state sovereignty therefore needs to be pierced, even if it is not totally abandoned; see BRUCE BROOMHALL, INTERNATIONAL JUSTICE & THE INTERNATIONAL CRIMINAL COURT, 20-21 (2003). To loosen the strict ties between human rights law and states is also the meaning behind the redefinition of human rights as general principles of law by Philipp Alston/Bruno Simma, *Sources of Human Rights: custom, jus cogens and general principles*, in: 12 AUSTRALIAN YB INT'L LAW 82 (1992). In constitutional theory conformity with human rights is suggested by a growing number of authors as one of the pillars to legitimise statehood, i.e. sovereignty; see JÜRGEN HABERMAS, DIE EINBEZIEHUNG DES ANDEREN 165, 175 et subs. (1996); Jörg-Paul Müller, *Föderalismus, Subsidiarität, Demokratie*, in: FÖDERALISMUS-PRINZIP UND WIRKLICHKEIT 41 et subs. (MAX VOLLKOMMER ED 1997).

(cosmopolitical) subjective right was the right to hospitality.¹⁶ Experience has shown that there are other areas where the individual warrants protection against the domestic state. Human dignity requires respect everywhere regardless of the environment and political system. Human beings owe one another mutual respect.¹⁷ Therefore there is a legal order that reaches through to individuals and creates a “direct membership in an association of free and equal world citizens”¹⁸. The legitimacy of this legal order – substantially limited as it is – rests on a global social contract.¹⁹ The international community of this social contract consists of individuals as well as states and other organisations. It is very much an international civil society, which is united in the common goal to empower each individual and each people to live freely and securely.²⁰

C. Criminalisation of Human Rights Violations on the International Level

I. Protecting rights through criminal law

The development of subjectivity for the individual in international law is – as was shown above – linked to the attribution of criminal responsibility. This might come as a surprise. It might do so because criminal responsibility is not just one kind of attributing responsibility; it is the ultimate infliction of moral blame which is followed by the harshest consequences any society has to offer: deprivation of liberty or assets or both. At the same time, the concept of protecting core rights and fundamental principles through penalising certain behaviour and prosecuting the offenders is a perfectly normal concept in a national society. Traditionally this

¹⁶ IMMANUEL KANT, VOM EWIGEN FRIEDEN (1795).

¹⁷ OTTFRIED HÖFFE, VERNUNFT UND RECHT. BAUSTEINE ZU EINEM INTERKULTURELLEN RECHTSDISKURS 77 (1996) calls this a „transcendental exchange“.

¹⁸ Jürgen Habermas, *Kants Idee vom ewigen Frieden – aus dem historischen Abstand von zweihundert Jahren*, in: FRIEDEN DURCH RECHT 7 at 20 (MATTHIAS LUTZ-BACHMANN/JAMES BOHMANN EDS 1996). A different approach is taken by ANDREAS PAULUS, DIE INTERNATIONALE GEMEINSCHAFT (2001), who relies on a changing attitude amongst governments towards a more human being centred public international law, but does not attribute subjectivity to individuals. It is a mixed concept of an institutionalised international community, see Bruno Simma/Andreas Paulus, *The “International Community”: Facing the Challenge of Globalization*, in: 9 EJIL 266-277 (1998).

¹⁹ I have elaborated on this in greater debts in: *The Justification of Punishment in International Criminal Law*, in: 4 AUSTRIAN REVIEW OF INT’L AND EUROP. L. (1999), 126, at 153-156.

²⁰ Compare Michael Bothe, *Durchsetzung der Menschenrechte und des humanitären Völkerrechts*, in: DIE RECHTSSTELLUNG DES MENSCHEN IM VÖLKERRECHT 115 at 126 et subs. (THILO MARAUHN ED 2003) describes the shifting of international law from a legal concept for diplomats and other epistemic communities to the law of the civil society (*Zivilgesellschaft*).

concept is applied to protect the right to life,²¹ to protect the economic basis of a society (individual property), and protect other fundamental values which are conceived of as being essential for community life. In modern societies the high standard of protection that is attributed to criminal law is more and more expanded to other areas, like the protection of the environment or safeguarding reliability in economic trade.²² Whether or not this development is laudable is not the topic of this paper; it seems to suggest, however that there is a general agreement that criminal law “works”.²³

At first sight it seems almost natural that, inspired by the impression of a functioning system of criminal law on the national level, the international community would decide to entrench its most valuable goods in a similar kind of protection, thereby creating criminal law on an international level. This development is buttressed by a parallel phenomenon: criminal law has experienced a major shift over the last decades. Whereas it originated as a tool for the powerful and wealthy to protect the *status quo*, it now turns against power and wealth and becomes a tool of controlling the top of the social hierarchy.²⁴ There is some benefit to this observation. Although criminal law and procedure in particular remain to be repressive instruments of governmental authority, criminal prosecution has nevertheless become a realistic threat e.g. to corporate executives and high profile

²¹ According to the European Court of Human Rights (ECHR) criminal prosecution is a human right corollary: „This obligation [the protection of the right to life, CS] extends beyond a primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions“, ECHR *Pretty v. United Kingdom*, 29 April 2002, Nr. 2346/02 § 38; see ECHR *L.C.B. v. United Kingdom*, 9 June 1998, REPORTS OF JUDGMENTS AND DECISIONS 1998-III p. 1403 § 36; *McCann et al. v. United Kingdom*, 27 Sept. 1995, SERIES A NO. 324, § 161; *Grams v. Germany* REPORTS OF JUDGMENTS AND DECISIONS 1999-VII, p. 401; *Ogur v. Turkey* REPORTS 1999-III; *Orphan v. Turkey* Nr. 25656/94, 18 June 2002, §§ 333-348.

²² See e.g. FELIX HERZOG, *GESELLSCHAFTLICHE UNSICHERHEITEN UND STRAFRECHTLICHE DASEINSVORSORGE. STUDIEN ZUR VORVERLEGUNG DES STRAFRECHTSSCHUTZES IN DEN GEFÄHRDUNGSBEREICH* 54 (1990).

²³ The danger of a more and more repressive system is elaborated on by several authors; most explicit in particular as regards the European criminal law endeavours the recent work of PETER-ALEXIS ALBRECHT, *DIE VERGESSENE FREIHEIT* (2003), English translation: *THE FORGOTTEN FREEDOM, SEPTEMBER 11 AS A CHALLENGE FOR EUROPEAN LEGAL PRINCIPLES* (2003); a decline in democratic legitimacy of penal law is also observed by Franz Streng, *Probleme der Strafrechtsgeltung und -anwendung in einem Europa ohne Grenzen*, in: *STRAFRECHT UND KRIMINALITÄT IN EUROPA* 142-164 (F. ZIESCHANG/E. HILGENDORF/K. LAUBENTHAL EDS 2003).

²⁴ Cf. JESÚS-MARÍA SILVA SÁNCHEZ, *DIE EXPANSION DES STRAFRECHTS. KRIMINALPOLITIK IN POSTINDUSTRIELLEN GESELLSCHAFTEN* 20-25 (2003).

politicians.²⁵ If there ever was an area bereft of a proper administration of justice and a policy which would play hard with the small and get soft with the powerful, the air in this space has certainly become thinner. International criminal prosecution canvasses the rule of law and is directed at controlling the powerful despite their power and control over national institutions. The process of establishing the ICC is an enormous, and by no means the only²⁶, endeavour of what has previously already been called the “global civil society”.²⁷ Sometimes it is supported by states, sometimes it has to fight against the most powerful states. The strive, however, is obvious: to establish the rule of law against political power and arbitrariness.

II. International criminal norms

Norms of international criminal law are somewhat vague and sometimes difficult to extract from custom or treaties; a specific set of norms, namely, genocide, crimes against humanity and war crimes has at least now been laid down in the Rome Statute. These are not the only crimes that exist in international criminal law. One further crime is adhered to in the Rome Statute itself. In Art. 5 § 1 (d) of the Rome Statute the crime of aggression is named though it lacks a definition.²⁸ One could

²⁵ Germany has seen a soaring rise in the prosecution of top CEOs or politicians; one of the biggest was the criminal case brought against former executives of the telecommunications giant, Mannesmann, before the *Landgericht* (Regional Court) Düsseldorf, (published in 57 NEUE JURISTISCHE WOCHENSCHRIFT 3275 (2004): see for a concise history of the case and its international relevance Peter Kolla, *The Mannesmann Trial and the Role of the Courts*, in: 5 GERMAN LAW JOURNAL No. 7 (1 July 2004), 829-847; see also Max Philipp Rolshoven, *The Last Word? - The July 22, 2004 Acquittals in the Mannesmann Trial*, 5 GERMAN LAW JOURNAL No. 8 (1 August 2004), 935-940 see furthermore, Joachim Jahn, ‘*Lehren aus dem “Mannesmann-Fall”*’, in 37 ZEITSCHRIFT FÜR RECHTSPOLITIK 179 (2004), FINANCIAL TIMES, 15 January 2004, p. 11; see also Rönna/Hohn, *Die Festsetzung (zu) hoher Vorstandsvergütung durch den Aufsichtsrat – ein Fall für die Staatsanwaltschaft?*, in 24 NEUE ZEITSCHRIFT FÜR STRAFRECHT 113 (2004); the US government found itself forced to react to growing misbehaviour of corporate executives by implementing the Sarbanes-Oxley Act; hereto, see Jennifer S. Recine, *Examination of the white collar crime penalty enhancements in the Sarbanes-Oxley Act*, in: 39 AM. CRIM. LAW REV. 1535-1570 (2002); Roland Hefendehl, *Enron, Worldcom und die Folgen: Das Wirtschaftsstrafrecht zwischen kriminalpolitischen Erwartungen und dogmatischen Erfordernissen*, in: 59 JURISTENZEITUNG 18 (2004).

²⁶ The process at the ICJ initiated by the UN General Assembly as to the legality of nuclear weapons is another example of the attempt of the civil society to bring about their idea of peace and security; ICJ Advisory Opinion of 8 July 1996, *Legality of the Treat or Use of Nuclear Weapons* REPORTS 1996, see Christoph Safferling, *Die Atomwaffe unter der Antarktis*, in: 40 NEUE ZEITSCHRIFT FÜR WEHRRECHT 177 (1998), with further references.

²⁷ See, e.g. KALDOR, *GLOBAL CIVIL SOCIETY: AN ANSWER TO WAR* (2003).

²⁸ The crime of aggression awaits a compromise in definition; according to Art. 5 § 2 of the Rome Statute jurisdiction over the crime of aggression by the ICC rests until such definition is found. As to the definition of the crime of aggression, see Richard L. Griffiths, *International Law, the Crime of Aggression*

also imagine terrorism²⁹, international drug trafficking, trafficking in women³⁰ on an international level (and similar activities on a global level) to qualify for international criminal law.³¹ However, apart from those crimes incorporated in Art. 5 of the Rome Statute, no other crime has as yet reached unambiguous codification³² and thus we should concentrate on the existing core crimes. At the same time the difficulties arising out of the compliance of international criminal law with the rule of law, namely with the principle of non-retroactive criminality, should now be considered resolved.³³ The same holds true regarding the worries over the disputed clarity of the law. While it is granted that some provisions in the Rome Statute are ambiguous in the wording,³⁴ nonetheless, it would seem more promising to concentrate on developing a methodologically sound interpretation of the norms as they stand. The danger of convicting someone who was not fully aware of the content of a vaguely drafted prohibition can, at least in some circumstances, be diminished by the recognition of a “mistake of law” (*Verbotsirrtum*).³⁵

and the *Ius Ad Bellum*, in: 2 INTERNATIONAL CRIMINAL LAW REVIEW 301–373 (2002) and Irina Kaye Müller-Schieke, *Defining the Crime of Aggression Under the Statute of the International Criminal Court*, 14 LEIDEN JOURNAL OF INTERNATIONAL LAW 409–430 (2001); however, a definition of the crime of aggression should not be expected soon, see Andreas Zimmermann/Matthias Kloth, *Der Internationale Strafgerichtshof sechs Jahre nach der Konferenz in Rom*, in: JAHRBUCH MENSCHENRECHTE 247 (2005).

²⁹ See ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 120–131 (2003), who writes in favour of a common definition of terrorism as a criminal law and BRUCE BROOMHALL, INTERNATIONAL JUSTICE & THE INTERNATIONAL CRIMINAL COURT 39–40 (2003), who is more critical in this regard.

³⁰ See Vincenzo Musacchio, *Migration, Prostitution and Trafficking in Women: An Overview*, in: 5 GERMAN LAW JOURNAL 1015 (2004).

³¹ Yoram Dinstein, *International Criminal Law*, in: 20 ISRAEL LAW REVIEW (1985), 206 counts as many as 22 crimes of international character.

³² Art. 123 of the Rome Statute is explicit about the fact, that the Member states may well extend the jurisdiction of the ICC to crimes beyond those mentioned in the Statute to this point.

³³ see Andrew Clapham, *Issues of complexity, complicity and complementarity*, in: FROM NUREMBERG TO THE HAGUE 30 at 47 (PHILIPPE SANDS ED 2004).

³⁴ Cf. Helmuth Satzger, *Die Internationalisierung des Strafrechts als Herausforderung für den strafrechtlichen Bestimmtheitsgrundsatz*, in: 24 JURISTISCHE SCHULUNG 943 (2004) addresses this problem and finds that war crimes in particular is criminal law addressing military experts (so called *Expertenstrafrecht*). These professionals can be expected to know the prohibitions.

³⁵ Cf. Article 32 § 2 Rome Statute; although the general rule is in accordance with the Anglo-American tradition *ignorantia iuris not excusat*, a mistake of law is notwithstanding accepted as an excuse, if it negates the mental element required by the prohibition. The English practice in this regard shows that a wide interpretation is possible; see e.g. House of Lords *Brutus v. Cozens* [1972] 2 ALL ER 1297, and *R. v. Smith DR* [1974] 1 ALL ER 632; Privy Council in the case *Beckford v. R.* [1987] 3 ALL ER 411; therefore I consider KAI AMBOS, *DER ALLGEMEINE TEIL DES VÖLKERSTRAFRECHT* 817–819 (2002) to hold a too pessimistic view of the concept of mistake of law.

III. Universality – Complementarity

The international criminal law system is based on the pillar of the principle of universality. This means that violations of international criminal law can be prosecuted by any national court no matter where and against whom the offence took place. It is essentially through this principle that international criminal law is executed. This is very much an indirect way of applying the law, i.e. an international norm is put into force by a national institution.³⁶ The only thing the Rome Statute has added to this concept is clarity concerning the content of the law to which universality is attributed. As far as genocide is concerned, universality was perfectly accepted even before the Rome Statute.³⁷ The principle that international norms are executed by national institutions complies with the classical concept of international law and human rights law. The individual is mediated by national states. In order to be compatible to the Rome set of law, many states have transformed the crimes in Art. 6-8 Rome Statute into national law.³⁸

The ultimate achievement of the Rome process lies in the fact that it left the existing system untouched by establishing a safety net in the form of the ICC. This court has two effects on international criminal justice: (1) it complements the national prosecution of international criminal law (principle of complementarity).³⁹ This means that the ICC can exercise jurisdiction in situations where the national jurisdiction fails to prosecute, be it for factual reasons, i.e. the national authorities don't function properly, or for political reasons, i.e. the national authorities refuse to exercise jurisdiction.⁴⁰ The ordinary way of prosecuting human rights violations

³⁶ Cf. Cherif M. Bassiouni, in: INTERNATIONAL CRIMINAL LAW VOL. I 3, 271 (CHERIF M. BASSIOUNI ED 1986); HANS VEST, GENOZID DURCH ORGANISATORISCHE MACHTAPPARATE 60-64 (2002); GERHARD WERLE, VÖLKERSTRAFRECHT MN 195 (2003); see also as to national trials concerning crimes conducted on the territory of former Yugoslavia in Germany: Cristina Hoß/Russell Miller, *German Federal Constitutional Court and Bosnian War Crimes*, in: 44 GYIL 576 (2001).

³⁷ see HANS VEST, GENOZID DURCH ORGANISATORISCHE MACHTAPPARATE 58-60 (2002). Some critics – US American writers in particular – deny universality, cf. Lee A. Casey, *Assessments of the United States Position: The case against the International Criminal Court*, in 25 FORDHAM INT'L L.J., 840 at 854-58 (2002);

³⁸ See Andreas Zimmermann/Matthias Kloth, *Der Internationale Strafgerichtshof sechs Jahre nach der Konferenz in Rom*, in: JAHRBUCH MENSCHENRECHTE 247, 251 (2005); e.g. Germany has adopted a Code of International Crimes, so called *Völkerstrafgesetzbuch*, 26 June 2002, BGBl 2002 I, 2254; see Andreas Zimmermann, *Implementing the Statute of the ICC: The German Example*, in: MAN'S INHUMANITY TO MAN 977-994 (L.C. VOHRAH ET AL EDS 2003); Christoph Safferling, *Germany's Adoption of an International Criminal Code*, in: 1 THE ANNUAL OF GERMAN&EUROPEAN LAW [AGEL] 549 (2003); an English language version of this Code is reprinted in 1 AGEL 1061 (2003).

³⁹ See Preamble and Art. 17 of the Rome Statute.

⁴⁰ The conditions of the complementarity principle are discussed in great detail by JÖRG MEIßNER, *DIE ZUSAMMENARBEIT MIT DEM INTERNATIONALEN STRAFGERICHTSHOF NACH DEM RÖMISCHEN STATUTE* 75-89

would be through the national channels; only if the national bodies are unable or unwilling to prosecute can and will the ICC prosecutor take over.⁴¹ (2) The existence of the ICC and its power to intervene in what looks like a purely national affair and carry out an investigation against individuals (even heads of state) will encourage national governments and agencies to prosecute themselves in order to avoid exactly this intervention by an outsider.

Looking at these two effects one could draw the conclusion that if the system operates in perfect shape the ICC would be utterly superfluous. It would be superfluous in most regards but for some cases where immunities were involved. On the other hand, the missing cooperation of a number of states, although a major political flaw, does in general not hinder the overall system of international prosecution from functioning. The national courts outside the Rome signatories are still under the obligation to try international criminals.

D. Criminal Prosecution amongst other means of Defending Human Rights

“Whereas it is essential,... that human rights should be protected by the rule of law, ... whereas Member States have pledged themselves to achieve ...the promotion of universal respect for and observance of human rights and fundamental freedoms”, states the Preamble of the Universal Declaration of Human Rights.

I. Necessary Reactions to Atrocities

Human rights violations provoke reaction. Any legal order is in need to defend itself if an infringement takes place. There are several possibilities for responding to human rights violations. I will introduce three types of reaction: (1) Finding the one

(2003), as well as by John T. Holmes, *Complementarity: National Courts versus the ICC*, in: THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, VOL. I 667 at 674-678 (ANTONIO CASSESE/PAOLA GAETA/JOHN R.W.D. JONES EDS 2002).

⁴¹ It would also be possible that national authorities ask the international prosecutor to investigate and prosecute. This would fall within the category of a national government unwilling to prosecute. It can also mean that international relations demand, that no national prosecution takes place. The ICJ has vested government officials with immunity before national courts as long as they act in their official capacity; see ICJ *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, 14 February 2002, compare Claus Kieß, *Der Internationale Gerichtshof im Spannungsfeld von Völkerstrafrecht und Immunitätschutz*, 150 GOLD. ARCHIV, 25 (2003); Micaela Frulli, *The ICJ Judgement on the Belgium v. Congo Case (14 February 2002): a Cautious Stand on Immunity from Prosecution for International Crimes*, in 3 GLJ No. 3 (2003); Steffen Wirth, *Immunity for Core Crimes? The ICJ's Judgment in the Congo v. Belgium case*, 13 EUR. J. INT'L L 877 (2002).

responsible for the violation of the law; (2) implement measures to prevent future violations, and (3) to take issue with the victims.

1. Finding the Responsible

If the law has been broken, finding the responsible seems to be a corollary. Modern societies have separated from private searches which would result in revenge and bear the danger of a new massive human rights violation. Executive power must be monopolized with the state authorities. Therefore modern societies have a certain type of procedure and a number of institutions which are specialised in finding the one responsible for a breach of the law. But why is this so important to find the responsible? The great German 19th century criminal law scholar *Franz von Liszt* has found one reason in human nature.⁴² If one takes a more sociological approach one can see that the presentation and the stigmatisation of a person who is responsible for a violation of the law have several consequences: First the belief in the reliability of the legal system is enhanced. The social system is strengthened by the experience that the legal system is able to defend itself. Second, the sense of justice is upheld or rectified. The general sense of justice is profoundly disturbed if a core rule is broken. This irritation is equalised if responsibility is attributed and a punishment inflicted. A criminal trial has a cathartic effect on society.⁴³ Third, the attribution of moral guilt for failure to conform to a common standard is a human urge.⁴⁴ Fourth, naming someone who is responsible for atrocities makes it easier for society and the individual victim to bear the suffering. The willingness to accept grave catastrophes as the will of God or the will of nature, if there ever was such a belief, has disappeared.⁴⁵ Lastly, it goes hand in hand with the finding of the responsible that the true history of events can be unravelled. Knowing the persons involved and getting insights into the structure of the crime will help to document the breach of the law. The victim then stands a chance to get noticed by society for what has happened.

⁴² Franz v. Liszt, *Der Zweckgedanke im Strafrecht*, in 3 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 1 at 45 (1883), who states, that state punishment is an abstraction and objectification of revenge as a primitive form of sentence; the original intention, however, remains the same.

⁴³ See JESÚS-MARÍA SILVA SÁNCHEZ, *DIE EXPANSION DES STRAFRECHTS* 36 with fn. 117 (2003)

⁴⁴ Cf. ANDREW. V. HIRSCH, *CENSURE AND SANCTIONS* (1993).

⁴⁵ CORNELIUS PRITTWITZ, *STRAFRECHT UND RISIKO* 107 et subs., 378 et subs. (1993). describes the growing tendency in society to view a catastrophe as a crime for which a responsible person can and must be found.

Taking these reasons together there does not seem to be a real alternative to finding the responsible.

2. Preventing future crimes

The prevention of future atrocities is paramount for a serious reaction to a human rights violation. Indeed, the codification of human rights has this one aim: to prevent further intolerance and violence. Thus, the Genocide Convention states in the preamble that it is aimed at liberating mankind from genocide as such an odious scourge.⁴⁶ The same is true for the codification of the laws of war, whereas the Hague Convention IV of 1907 clearly expresses an understanding that law will help to control military activities and reduce the suffering of both combatants and civilians.⁴⁷ Regulation is always connected to prevention to rule out conduct which is harmful to others and is likely to disintegrate society.

3. Redress

Finding the person responsible and making efforts to prevent future harm is not enough. The victim has to be put at the centre of interest for mainly two reasons: first, an appropriate compensation for suffering is in general a desire for justice. Even if the *status quo ante* cannot be re-established,⁴⁸ neither factually nor emotionally, at least a monetary compensation may serve to repair for the deed.⁴⁹ Secondly, a democratic society cares for the battered and wounded. Therefore it is not only direct and individual compensation that is an issue here; redress means that support is given to the victims also in pedagogical and psychological matters.

⁴⁶ Convention on the Prevention and Punishment of the Crime of Genocide, 11 December 1948, 78 UNTS (1951), pp. 277-323.

⁴⁷ See Preamble of Convention IV Respecting the Laws and Customs of War on Land of 18 October 1907, reprinted in 2 AJIL (1908) Supplement pp. 90-117. The four Geneva Conventions of 1949 and the Protocols of 1977 built on these ideas.

⁴⁸ This was made clear e.g. in the talks between the then Federal Chancellor of Germany Konrad Adenauer and the then President of the Conference on Jewish Material Claims against Germany, Nahum Goldmann, see Peter Heuss, *Ein Blick auf die Arbeit der Jewish Claims Conference*, in NS-FORCED LABOR: REMEMBRANCE AND RESPONSIBILITY 293 (PEER ZUMBANSEN ED 2002).

⁴⁹ This may sound more obvious than it actually is. Sometimes, victims would rather want a decent excuse or would collectively reject money as a means to compensate; during the fight for compensation for forced labor against the German industry, the Jewish claimants were not always like-minded on this issue; see e.g. ULRICH ADAMHEIT, "JETZT WIRD DIE DEUTSCHE WIRTSCHAFT VON IHRER GESCHICHTE EINGEHOLT" 373 (2004).

It is important for a start to listen to the victims and give them an environment and a venue where they can “tell their story”. Traumatized victims of mass atrocities need to be guided back to trust and reliability in a community.⁵⁰ Experiences like an incarceration in a concentration camp with a constant threat of death or degrading treatment and torture are likely to have not only an impact on the victim himself; these humiliations will be handed on to the next generations.⁵¹

II. Possible means

We have made out three types of necessary reaction to human rights violation: finding the responsible, preventing future crimes, and giving redress. What are the means of a democratic society by which these goals can be achieved? There is criminal prosecution (1) and a civil trial (2) that can be implemented as legal responses in the case of a human rights abuse alongside other mostly extra-legal means (3). In the following we want to scrutinise how much these possible processes can contribute to the reactions that are necessary if a violation occurs.

1. Criminal Prosecution

a) positive effects

A criminal investigation and trial has as the ultimate goal the finding of the person that is truly responsible for the offence in order to punish him. Indeed, the infliction of punishment could not be justified in a democratic society were it not the procedural certainty that the real offender is being (at least timely) incapacitated. Punishing the wrong person does not bring about the positive effects envisaged.⁵²

⁵⁰ Not much research has been done in this field. What effect does mass victimisation have on the persecuted group? What are the long term effects on children suffering from persecution and war? Are the feelings of resentment also transferred to the next generation? See Uwe Ewald/Constanze v. Oppeln, *War – Victimization – Security: The Case of the Former Yugoslavia*, in: 10 EUROPEAN JOURNAL OF CRIME, CRIMINAL LAW AND CRIMINAL JUSTICE 39 (2002); CHRISTINA MÖLLER, *VÖLKERSTRAFRECHT UND INTERNATIONALER STRAFGERICHTSHOF – KRIMINOLOGISCHE, STRAFTHEORETISCHE UND RECHTSPOLITISCHE ASPEKTE* (2003); Christoph Safferling, *Das Opfer völkerrechtlicher Verbrechen*, in: 115 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 352 (2003).

⁵¹ It is maybe unusual to point to the offenders as well, but also the torturer and the torturer’s sons will have to live with history.

⁵² See e.g. Franz Streng, *Schuld ohne Freiheit? Der funktionale Schuldbegriff auf dem Prüfstand*, in: 101 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 273 (1989). The US American society is deeply troubled by recent cases, where it could be proven by a new evaluation of evidence by modern technical methods that convicts were actually not guilty of the crime they had been convicted for; see recently

By enforcing criminal law on a public stage one could produce an educative effect with the bystanders.⁵³

A public prosecution will contribute to the finding of the truth, although a trial is not a convention of historical experts and the aim of the trial is not to establish the entire picture of the historical events. A trial's meaning is but limited to prove beyond reasonable doubt that the defendant bears whatever degree of responsibility for the offences. A criminal trial nevertheless adds to the search for the historical truth as it presents a platform where witnesses can actually be forced to testify or people and institutions can be coerced to produce material which could otherwise remain secret. In addition it gives victims an opportunity to "tell their story". Having said this, the flip-side of the coin is that the prosecution rests on the victims' cooperation and testimony. The victim on trial will be confronted with the offender which can cause what is called secondary victimisation, i.e. the psychological stress the victim suffers from reliving the harm again when being questioned. A conflict between the interests of justice, the right to a fair trial for the accused, and the respect for privacy of the witness arises.⁵⁴

A criminal conviction contains a strong stigmatisation of the defendant. He is presented as the one person who is to blame for the crime and who is being punished as a sign of moral failure. It is by this that positive effects are achieved within the society. The community sees itself satisfied that its rules are being safeguarded. Through enforcement the sense of reliability of the system is enhanced and the feeling of security under the law is improved. Last but not least, the sense of justice is reassured. Inflicting evil onto the evildoer seems to be just the right thing to do; the culprit deserves punishment.

Tresa Baldas, *Innocence Projects Are Multiplying and Changing the Law*, in: THE NATIONAL LAW JOURNAL, 4 Oct. 2004.

⁵³ Thus is the hope expressed by Kofi Annan, *Verhütung von Völkermord*, in: JAHRBUCH MENSCHENRECHTE 259, 262 (2005).

⁵⁴ International criminal prosecution had to solve this conflict from the very beginning on. At the ICTY the question of anonymity of witnesses for the prosecution caused trouble and necessitated a whole set of decisions; see e.g. CHRISTOPH SAFFERLING, TOWARDS AN INTERNATIONAL CRIMINAL PROCEDURE 226-239, 283-288 (2003); and in greater detail as concerns the Rules and the position of the victim at the ICC, see Christoph Safferling, *Das Opfer völkerrechtlicher Verbrechen*, in: 115 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 352 (2003) with further references.

The effects of a criminal trial described here are summarized in German criminal law literature in the theory of a positive general prevention (*positive Generalprävention*).⁵⁵

b) deterrence

Deterrence has certainly failed thus far.⁵⁶ As long as a law is not enforced it can hardly bring about deterring effects. International criminal law has been enforced only in a sporadic way, so that no human rights offender would seriously worry about being indicted. However, this might change. If the élan of the like-minded states prevails and the ICC develops into a reliable institution, international human rights abusers might have to take criminal prosecution into account. But even if the prosecution of international crimes would reach a level similar to that of national criminal law, it is still more than doubtful whether criminal law can usher deterrence. Empirical proof of a deterring effect does not exist.⁵⁷ Criminologists do attribute deterrence to criminal law, but for reasons of plausibility not because they can point to any convincing data. In no way can the data buttress the common hypothesis that criminal prosecution deters.⁵⁸ Research in national law can demonstrate two aspects of prevention through enforcing criminal law: first, respect for property seems to lurch as soon as enforcement agencies fail to be present,⁵⁹ and second, homicide and serious physical injuries will seldom be

⁵⁵ The literature in this context fills libraries. A summary together with detailed references can be found to name but two with FRANZ STRENG, STRAFRECHTLICHE SANKTIONEN MN 21-25 (2nd ed., 2002); CLAUD ROXIN, STRAFRECHT. ALLGEMEINER TEIL VOL. 1 § 3 MN 21-32 (3rd ed., 1997). A German-English critical dialog on the issue is documented by POSITIVE GENERALPRÄVENTION (BERND SCHÜNEMANN/ANDREW V. HIRSCH/NILS JAREBORG EDS 1996).

⁵⁶ Hilter is reported to have pointed to the Turkish massacre against the Armenians in 1917 in order to buttress the international apathy towards criminal prosecution of offences like these; see Antonio Cassese, *Reflections on International Criminal Justice*, in: 16 MODERN LAW REV 1, 2 (1998); critical also as to the sporadic prosecution: David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, in: 23 FORDHAM INT'L L.J. (1999) 473.

⁵⁷ See e.g. FRANZ STRENG, STRAFRECHTLICHE SANKTIONEN MN 53-60 (2nd ed., 2002).

⁵⁸ Nevertheless also Art. 1 of the Genocide Convention puts prevention and punishment side by side.

⁵⁹ A strong argument in favour of a statistical significance of the probability to be caught and convicted is made by Henning Curti, *Zur Abschreckungswirkung strafrechtlicher Sanktionen in der Bundesrepublik Deutschland: Eine empirische Untersuchung*, in: DIE PRÄVENTIVWIRKUNG ZIVIL- UND STRAFRECHTLICHER SANKTIONEN 71-94 (CLAUS OTT/HANS-BERND SCHÄFER EDS 1999); more sceptical FRANZ STRENG, STRAFRECHTLICHE SANKTIONEN MN 59 (2nd ed., 2002).

prevented by a threat of a criminal sanction.⁶⁰ This is so because most violent crimes are conducted in a state of high emotions when the actor is not approachable by the rational advice, “don’t do this or you will be punished.” How can we transfer these experiences in national society to the operation of international criminal law for the prevention of human rights abuses in the international community? If there is no enforcement of a criminal law it cannot produce any deterrent effects. Even if there would be a trustworthy enforcement system, a deterrent effect cannot stretch to offenders who are loaded with emotions. International “hate crimes” will often fall into this category.⁶¹ The same is probably true for criminals who are overcast with ideology, fanaticism or religious fundamentalism, and who conceive themselves to be over and above the law anyhow.⁶² Who remains is the cold-blooded “*Schreibtischtäter*” (armchair culprit), planning for genocide. He cannot be approached by deterrence either as he will believe himself too clever to be caught. In addition macro-criminality is mostly fostered by a state or a state-like authority. In such a system criminal behaviour is encouraged and rewarded.⁶³

2. “Civil Prosecution”

The civil action aims to award compensation for the tort, i.e. the human rights violation. A civil law suit also attributes responsibility but without the moral implication of blame and guilt.⁶⁴ A conviction does not entail moral censure; it

⁶⁰ The ongoing debate whether capital punishment has a substantial deterrent effect is of no general interest here, because in international criminal law, the death penalty is no option. It is however important to note that even for the most severe and ultimate penalty no conclusive empirical proof exist that it actually deters people from offending, cf. recently Lisa Stolzenberg & Stewart J D’Alessio, *Capital punishment, execution publicity and murder in Houston, Texas*, in: 94 J. CRIM. LAW & CRIMINOLOGY 351-379 (2004).

⁶¹ „Hate crimes“ are crimes which are conducted with a higher degree of contempt towards the victim than in ordinary crimes, cf. CHRISTINA MÖLLER, *VÖLKERSTRAFRECHT UND INTERNATIONALER STRAFGERICHTSHOF – KRIMINOLOGISCHE, STRAFTHEORETISCHE UND RECHTSPOLITISCHE ASPEKTE* 286-288 (2003); Paul Roberts, Nesam McMillan, *For Criminology In International Criminal Justice*, in: 1 J INT CRIMINAL JUSTICE 315 (2003); in national law hate crimes are mostly race or gender related, see HANS-JOACHIM SCHNEIDER, *KRIMINOLOGIE DER GEWALT* 43 (1994).

⁶² As concerns the genocide in Rwanda, see José E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE JOURNAL OF INTERNATIONAL LAW 365 (1999).

⁶³ Michael Bothe, *Durchsetzung der Menschenrechte und des humanitären Völkerrechts*, in: DIE RECHTSSTELLUNG DES MENSCHEN IM VÖLKERRECHT 115 at 128 (THILO MARAUHN ED 2003).

⁶⁴ This was e.g. already noted by LUDWIG V. BAR, *GESCHICHTE DES DEUTSCHEN STRAFRECHTS UND DER STRAFRECHTSLEHRE* 343 (1882); see also Peer Zumbansen, *Globalization and the Law: Deciphering the Message of Transnational Human Rights Litigation*, in this issue.

merely establishes liability for the payment of reparations. It is not an official inquiry led by official investigators and prosecutors. Litigation is a purely private enterprise, started by an individual plaintiff, sometimes founded by human rights NGOs or law firms, which is often called "private attorney general".⁶⁵ Nevertheless, a civil court can impose punitive damages, i.e. lay down reparation which actually exceeds the real material or immaterial damage.⁶⁶ Civil litigation does not depend on finding truth and therefore the outcome is debateable.⁶⁷ As such civil litigation, or human rights litigation as it is often called, can make valuable contributions to the needed reactions to human rights abuses.⁶⁸ It provides for a procedure which is perfectly suitable to set up liability for reparation and find an exact sum. It can thus operate alongside a criminal trial against an individual culprit as the criminal. Though, quite often a conviction in a civil court remains a symbolic feature as the enforcement of large reparation sums fail because the judgement cannot be enforced.⁶⁹ Tort liability is the only feasible way to adjudicate regarding corporate crime. Although some, indeed most, national criminal justice systems know of

⁶⁵ According to Pamela Karlan, the term was coined by Judge Jerome Frank in 1943 in the case *Associated Industries v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943) "to prevent [a government] official from acting in violation of his statutory powers"; see Pamela S. Karlan, *Disarming the private attorney general*, in: [2002] UNIV. ILL. LAW REV., 183 at 186. A fairly early example for a "private attorney general" taking action against another private actor can be seen in the discrimination case in the US Supreme Court Case *Newman v. Piggie Park Enterprises* 390 U.S. 400 (1968)

⁶⁶ This is every day practice in US courts, while it is fairly unknown and even considered unfair in other jurisdictions; e.g. the German *Bundesgerichtshof* (BGH) has always decided against accepting punitive damages for execution in Germany, see BGH, 45 NEUE JURISTISCHE WOCHENSCHRIFT 3096 (1992); Heribert Hirte, 'Spielt das amerikanische Rechtssystem verrückt?', in: 55 NEUE JURISTISCHE WOCHENSCHRIFT (2002), 345.

⁶⁷ The notion of the growing market in insurance does not seem to have any consequences on human rights litigation. Even if it is true that the possibility to insure any risk alters the status of civil law, as e.g. claimed by J. Simon, *The Emergence of a Risk Society: Insurance, Law, and the State*, 95 SOCIALIST REVIEW 61, 73 et subs. (1987), the insurance concept fails when it comes to intentional or gross negligent behaviour on the side of the defendant.

⁶⁸ An introduction to human rights litigation is given by, Michael Swan, *International Human Rights Tort Claims and the Experience of United States Courts: An Introduction to the US Case Law, Key Statutes and Doctrines*, in: TORTURE AS TORT 65-107 (CRAIG SCOTT ED 2001) and John Terry, *Taking Filártiga on the Road: Why Courts Outside the United States Should Accept Jurisdiction Over Actions Involving Torture Committed Abroad*, *IBID.* 109-133. A positive view concerning civil prosecution from a German perspective is given by Susanne Walther, *Menschlichkeitsverbrechen vor amerikanischen Gerichten. Ein Übersetzungsversuch*, in: 151 GOLD ARCHIV 390-401 (2004); a short introduction is provided by STEVEN RATNER & JASON ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW 240-248 (2nd ed., 2001).

⁶⁹ See e.g. *Kadiz v. Karadzic* 70 F.3d 232, U.S. Court of Appeals, 2d Cir. 13 October 1995; see also Theodore Posner, in: 90 AJIL (1996), 658, and Zumbansen, *supra*, note 64

criminal responsibility for enterprises,⁷⁰ it seems difficult to attribute moral guilt to an entity which lacks natural personality. Individuals can be held criminally liable for decisions they have taken as agents of a corporation or organisation.⁷¹ The organisation as such is liable for reparation.

Unfortunately, the holocaust litigation did not lead to a declaration as to the standpoint of international law on the matter. Civil courts on both sides of the Atlantic proved unwilling to decide on the cases, leading some to believe the statement of Alexander Hamilton to be true that the judiciary is the least dangerous branch.⁷² Nevertheless, the litigation forced a settlement and the establishment of a foundation which intends to serve the reparation claims for forced labour. Thus, the distribution of compensation is on a reliable and financially sound legal basis at least.⁷³ In that it may well be a model for similar situations of massive human rights abuses.⁷⁴

3. Other

There are plenty of extralegal activities that need to accompany criminal and civil legal action. In order to overcome sentiments of revenge on the side of the victims the international community needs to set up programmes which would help to overcome the deep gap that exists in a society during and after a crime of international character occurred. Building and strengthening trust and reliability

⁷⁰ As to English law, see SMITH/HOGAN, CRIMINAL LAW 201-208 (10th ed., 2002); from a German and comparative perspective see Roland Hefendehl, *Kriminalitätstheorien und empirisch nachweisbare Funktionen der Strafe: Argumente für oder wider die Etablierung einer Unternehmensstrafbarkeit?*, in: 86 MONATSSCHRIFT KRIMINOLOGIE 27-43 (2003).

⁷¹ Former high ranking politicians of the GDR have been held responsible for the killings at the Berlin Wall because they failed to take active steps to lift the order to prevent border trespassing with all means in the national security council and the party council; 48 BGHST 77 upheld by the Federal Constitutional Court, Bundesverfassungsgericht, in 95 BVERFGE 96 and ECHR. *Streletz, Kessler and Krenz v. Germany*, Judgment of 22 March 2001, REPORTS OF JUDGMENTS AND DECISIONS 2001-II.

⁷² See THE FEDERALIST No. 78, at 465 (Alexander Hamilton) (CLINTON ROSSITER ED 1961).

⁷³ See for a critical analysis, Libby Adler & Peer Zumbansen, 'The Forgetfulness of Noblesse: A Critique of the German Foundation Law Compensating Slave and Forced Laborers of the Third Reich', in: 39 HARVARD JOURNAL ON LEGISLATION 1-61 (2002), reprinted in NS-FORCED LABOR: REMEMBRANCE AND RESPONSIBILITY 333-392 (PEER ZUMBANSEN ED 2002); see also Christoph Safferling, *Zwangsarbeiterentschädigung und Grundgesetz*, in: 34 KRITISCHE JUSTIZ 208-221 (2001).

⁷⁴ See Roland Bank, *Die Leistungen an NS-Zwangsarbeiter durch die Stiftung „Erinnerung, Verantwortung und Zukunft“*, in: DIE RECHTSSTELLUNG DES MENSCHEN IM VÖLKERRECHT 83 at p. 114 (THILO MARAUHN ED 2003).

amongst former enemies is a protracted endeavour. The legal activity that has been proposed to take place after a human rights violation occurred needs to be accompanied by measures that explain these proceedings. Therefore the victim and witness units of the ICTY and the ICTR as well as the envisaged programmes of the ICC are of foremost importance.⁷⁵

As well, it will be necessary to support the region that was swept over with an armed conflict or crimes against humanity financially to rebuilt the economy. Economic wealth is after all one of the most promising tools against conflicts.

E. Final Remark

The promotion and protection of human rights stands as one of the main goals before the international community. I have argued that at least the core set of human rights is vested in international criminal norms by means of Art. 5 § 1 of the Rome Statute. Criminalization of the most heinous human rights infringements and prosecution of these norms relies on the international social contract of the global civil society. Every individual has a legal claim to be protected in these core rights. The protection is one of criminal law. The resort to the rule of law is probably the most powerful tool for the civil society to fight against suppression, genocide, and aggression.⁷⁶ Nevertheless civil society heavily depends on national states as the powerful international players. The more national states cooperate in repressing international crimes, the more positive effects of international criminal law will emerge.

And there are many positive effects. International criminal law can help to establish reliability in the principles of humanity and foster the feeling of security and welfare as well as finding a common sense of justice. Finding, censuring, and punishing the responsible persons has a pacifying effect on both the victims and society as a whole. It may well be noted, that the party of the convicted will have feelings of resentment and promise revenge at the next possible time. The historical development of the status of international criminal law in Germany, from total refusal to one of the forerunners in founding the ICC, should serve as encouraging

⁷⁵ The ICTY entertains offices in Sarajevo and Zagreb as well as in Pristina (Kosovo) and Belgrade. The so called „outreach programme“ which is financed by donations aims at making the work of the Tribunal known in the states which are affected by the trials the most. ICTY 10th Annual Report, UN Doc. A/58/297-S/2003/829, §§ 278-287

⁷⁶ Cf. Michael Bothe, *Durchsetzung der Menschenrechte und des humanitären Völkerrechts*, in: DIE RECHTSSTELLUNG DES MENSCHEN IM VÖLKERRECHT 115 at 128 (THILO MARAUHN ED 2003).

evidence to the opposite.⁷⁷ Even if it took some fifty years for the change in attitude to come about, in the end it did.

In a pluralistic society in which values seem to be arbitrary, criminal law can develop as the back bone of a human consensus regarding basic needs. In a world of uncertainty, the catalogue of core crime can give normative orientation.⁷⁸ International criminal law could well be a modern Decalogue of humanity.

The strive to provide a consistent reaction to human rights abuses, however, cannot be shouldered by criminal law alone. Criminal prosecution is one tool and an important one. Alongside implementing criminal law mechanisms, there must be provisions to care for redress and healing. Human rights litigation has its place in this regard next to many other measures. Criminal prosecution is one answer to human rights abuses, but it cannot be the only one.

The world is at the beginning of creating suitable measures to bring about justice in the case of massive human rights violations. The establishing of the ICC is no doubt a major step in the right direction. With regards to the numerous conflicts that still evolve every day in every corner of the world, the implementation of international criminal justice by a group of like-minded states seems almost miserable. "[But] even these modest and early glimmerings of international criminal justice may be dramatic and transformative".⁷⁹

⁷⁷ Cf. Andreas Zimmermann, *Role and Function of International Criminal Law in the International System After the Entry into Force of the Rome Statute of the ICC*, in: 45 GYIL 35 at 49-54 (2002).

⁷⁸ JESUS-MARIA SILVA SANCHEZ, *DIE EXPANSION DES STRAFRECHTS* 14 et subs. (2003) for the development of national criminal law.

⁷⁹ Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?* in: 95 AJIL 7 at 30 (2001).