

**MAX PLANCK INSTITUTE
FOR FOREIGN AND INTERNATIONAL
CRIMINAL LAW**

RETALIATION, MEDIATION AND PUNISHMENT

**SUMMARY OF PROCEEDINGS
IMPRS REMEP WINTER UNIVERSITY 2009**

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Contents:

Introduction.....	1
ANDREAS ARMBORST:	
Jihadism, terrorism, and the state.....	5
KIYOMI v. FRANKENBERG:	
Reciprocity in Retaliation and Mediation as a Means of Social Control	14
SHAKIRA BEDOYA SÁNCHEZ:	
On the Grammar of Punishment	21
JULIA GEBHARD:	
Crimes against Minorities and the Reflection thereof in International Criminal Law	28
MAYEUL HIERAMENTE:	
Criminal Prosecution as an obstacle to peace processes	35
MENG-CHI LIEN:	
Mediators in Criminal Matters	43
DAVID JENSEN:	
Naming your Enemies.....	50
JUAN B. CAÑIZARES NAVARRO:	
Mediatory functions of seconds in duels of honour?	56
Outro	65

Introduction

Founded in 2008, the International Max Planck Research School on Retaliation, Mediation and Punishment is a research and teaching network between the Max Planck Institute for Comparative Public Law and International Law (Heidelberg), the Max Planck Institute for European Legal History (Frankfurt), the Max Planck Institute for Foreign and International Criminal Law (Freiburg) and the Max Planck Institute for Social Anthropology (Halle) as well as the University of Freiburg and the Martin Luther University of Halle-Wittenberg.

The Research School's research agenda has its focus on fundamental questions common to the fields of sociology, social anthropology and jurisprudence as to how peace, social order and social control is negotiated, constructed, maintained and regained. The starting point is the significance of retaliation, mediation and punishment as a resource for social actors in establishing and maintaining order, which every student incorporates and develops differently in his or her research project. By approaching retaliation, mediation and punishment in diverse fields of study the Research School's contribution will enrich both the theoretical and the empirical understanding of these phenomena.

To reach this aims, the Research School provides unique multi- and interdisciplinary training and research opportunities. The student body has at its disposal not only excellent research facilities, but also the continuous guidance of professors in the fields of law, anthropology, sociology and history.

The Winter University is a component of the Research School. Its purpose is to bring together students and professors to discuss the research projects of the doctoral students, hear lectures on related topics and provide a soft skills workshop. The Winter University 2009 took place from 2nd to 7th February 2009 at the Max Planck Institute for Foreign and International Criminal Law in Freiburg. Members of the IMPRS REMEP teaching faculty and guest speakers gave lectures on specific aspects on retaliation, mediation and punishment.¹ These guest speakers were Mr. Eugene O'Sullivan, International Defence Attorney, who debated with Prof. Eser on the suitability of the Common and Civil Law to address the challenges posed by international criminal justice; Ms. Olivia Swaak-Goldman from the International Criminal Court, who lectured on the role and challenges of international criminal prosecutions in establishing social order, and Prof. Dr. Trutz v. Trotha, chair at the Department of Sociology of the University of Siegen, who lectured on cruelty. The Winter University ended with a soft

¹ For further information see the program of the Winter University 2009:
http://www.mpicc.de/apps/press/data/remep_program_winter_univ09.pdf

skills training by Ms. Andrea Kirchknopf of the Central European University, who gave a workshop on academic writing. At this time the doctoral students from the MPI for Social Anthropology in Halle were carrying out field research in various countries and therefore could not attend the Winter University.

During the Winter University the student body discussed their projects and demonstrated how they interrelate and contribute to the agenda of the Research School. The exercise proved that interdisciplinary work brings a varied perspective, but also made evident the different fundamentals underlying each point of view. This was palpable when defining the concepts of retaliation, mediation and punishment. Furthermore, the discussion broached three particular subjects: monopoly of power; actors engaging in social control, and purposes of retaliation, mediation and punishment. At the end these subjects were chosen to delineate the present work.

The purpose behind this issue of Research in Brief is to reflect and develop further upon some of the discussions that took place during the Winter University. Each student chose one of the above-mentioned subjects with the purpose of analyzing it through his doctoral project. The result should provide multiple approaches to the same subject, widening one's perspective and bringing about questions still to answer.

Furthermore, every article ends with a short description of the dissertation project of the student with the intention of presenting some of the research that is carried out in the Research School.

Of great concern for the REMEP research program are the results from the anthropological projects that are not discussed within this volume because their authors were carrying out fieldwork in various countries. The findings of our colleagues are eagerly awaited, since they will provide indispensable insights into the social reality of REMEP.

In order to avoid definitional incongruence, students agreed to use the same conceptual frame, which has no intention of being undisputable, but to serve as working definitions. Accordingly, in reading the following texts these definitions should be taken into account:

- Retaliation/Retribution: harm inflicted directly or indirectly to a person as a reaction to a real or perceived wrong.
- Mediation: the voluntary settlement of a conflict through non-violent means.
- Punishment: harm inflicted to an alleged wrongdoer by a recognized authority for his offense.

It should also be noted that *harm* and *pain* are used in the broader sense i.e. fines, admonitions, etc. are included. On the other hand, *non-violent* refers to the absence of an imposed physical harm or pain.

The first part of this publication is devoted to the monopoly of power and its relation to retaliation, mediation and punishment. The monopoly of power is sometimes considered a requisite for the use of punishment. Yet sometimes the bearer of the monopoly of power can find strong opposition from other social actors. The consequences can vary from problems when maintaining social order to the use of retaliation, or re-establishing it by mediation.

In *Jihadism, Terrorism, and the state*, *Andreas Armborst* addresses the issue of how terrorism and jihadism challenge the paradigms surrounding the criminal justice system of the State and pose criminological questions as to the possibility of countering these phenomena through repressive measures or ad hoc initiatives.

In the next chapter, *Kiyomi von Frankenberg* analyses under the title *Consensual Resolution of Conflicts: Reciprocity in Retaliation and Mediation as a Means of Social Control* the consequences of using means of conflict resolution other than punishment. By inflicting punishment, the State not only pursues the (re-)establishment of social order, but also confirms its supremacy and monopoly of power. However, all sorts of questions arise when social actors start solving conflicts through consensual agreements: Should the State relinquish its prerogatives for social order's sake? Are consensual agreements diminishing the power and supremacy of the State?

Shakira Bedoya Sánchez offers a different perspective of State and monopoly of power. Her article *On the Grammar of Punishment* studies the function of punishment in the establishment of meanings and significations, such as good and evil. The monopoly of power would accordingly be understood as the means of imposing one's viewpoint.

The second part is devoted to the purposes of retaliation, mediation and punishment.

In its first chapter, *Julia Gebhard* analyses if crimes committed against minorities are contemplated by International Criminal Law, thus eventually opening the possibility of punishing such acts. To this end she examines how the most relevant international instruments handle related concepts like genocide and ethnic cleansing.

After that, *Mayeul Hiéramente* discusses if the reconciliation of the parties involved in a conflict and the fight against impunity are in fact purposes that can be achieved in the forum of an international court. From his point of view, it appears that the political debate surrounding the need for international punishment may have also politicized the purposes of punishment.

The final part deals with the actors of retaliation, mediation and punishment.

It begins with *Meng-Chi Lien's* comparison of the mediation process in criminal matters in Germany, China, and Taiwan. She analyses the recruitment of mediators

and the functional role the mediator has in each country, thereby helping identify the nuances that differentiate the mediator from the arbitrator.

In *Naming Your Enemies*, David Jensen deliberates on the theoretical and legal tendency of identifying and fighting the *enemies* of the prevailing system. In his opinion, the anonymity of the penal law i.e. the formulation of general rules benefits both the State and its citizens.

Finally, as for the article written by *Juan B. Cañizares Navarro*, the author addresses from a legal history perspective, mediatory functions of seconds in duels of honour.

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Jihadism, terrorism, and the state

ANDREAS ARMBORST

This chapter will briefly discuss the relationship between jihadism, terrorism and state-power. Jihadism can be described as one contemporary form of (Sunni) Islamic fundamentalism that opposes secular influences through violent activism (namely *jihad*). The article at hand will not go into detail about the ideology of jihadism or the controversy surrounding the judicial concept of *jihad* as stipulated in Islamic international law (*as-siyar*). Rather, it will show in particular how jihadi violence – especially its terrorist dimension – relates to the state’s monopoly of force and to notions of crime and social control. For this purpose, two different, but analytically precise meanings of terrorism are presented in part 1 (What is terrorism?) Part 2 discusses three anomalies of terrorism that appear when framing terrorism as a crime.

Jihadi violence is not identical to terrorist violence but jihadism resorts to the “strategy of terrorism”² extensively. As with other subdivisions within the broad category of human violence (domestic violence, military violence, predatory violence, political violence etc.), it is assumed here that jihadi violence is systematically different from other occurrences of violent behavior with regard to motivation, justification, causes, and appearance.

For the purpose of this chapter, jihadi violence is defined as physical harm against persons committed by actors who thereby execute the doctrine of jihad (according to the heterodox interpretation of jihadism). In other words, jihadi violence is *violence motivated through and inspired by the ideology of jihadism*. This definition is subjective because it is characterized by motivation rather than clear-cut behavioral criteria (violence is considered jihadi when the actor claims it to be so). However, this subjectivity is intrinsic to jihadi violence: there is no univocal Muslim position on central religious-judicial questions concerning jihad.³

² See recently Neumann and previously Fromkin.

³ This juridical pluralism is not restricted to the legal concept of jihad but is omnipresent in Islamic jurisprudence. It is due to what Jackson calls “the problem of free speech” (p. 34). By this he means that every jurist can have his own position on any legal topic and as long as he uses the recognized sources and abides to recognized methods of interpretation (as stipulated by *usul-al fiqh* - the sources of knowledge and understanding of the law), his position is equally as valid as any other’s position. Accordingly, Jackson distinguishes between “an Islamic position” and “the Islamic position” (*ibid*). Only the latter is considered to be infallible. This infallibility (otherwise only granted to the prophet Muhammad) can be reached when the “interpretive community as a whole” has reached a “unanimous consensus” (*ibid*).

Similarly, there is no univocal political agreement on the question about what terrorism constitutes. The following paragraphs will summarize some of those academic contributions that have helped to restore the descriptive and analytic utility of the term *terrorism*.

What is terrorism?

Beyond its moral connotation, there are two different descriptive understandings of the term terrorism.⁴ The first is to understand terrorism consistently and explicitly as a polemic construct: terrorism is a label attached to militant action that shall designate the actor's damnability (and thereby justifies extraordinary measures to fight him). In this case, the empirical correlate of the term is a discursive construct which reflects power interests. Because power and the monopoly of force are contested and resisted by the "terrorist" activists, the political establishment uses its definitional power to label these goals and the method to achieve them as illegitimate and "evil."⁵ Lauderdale and Oliverio persuasively claim "there is no consistent unity in the way terrorism has been defined or constructed throughout the ages."⁶ Some forms of violence and their actors, especially in political conflicts, have been declared terrorist in a seemingly arbitrary manner. By understanding terrorism as a polemic construct, the researcher can discern and examine patterns in this seemingly arbitrary process.

According to the second understanding of terrorism, the empirical correlate of terrorism is *a certain modus operandi of political violence or social activism*. Terrorism is a method and a strategy and not an ideology or world view. Terrorism pursues no goal; jihadists, nationalists, separatists, millenary sects, political activists and insurgents pursue goals and they employ terrorism as a means to enforce their goals. "This same confusion between ends and means is what has given the rather silly adage that 'one man's freedom fighter is another man's terrorists' such a long life. The adage just reinforces the point that we don't like to label people whose goals we share as terrorists."⁷ This particular type of violence seems to be an ubiquitous resource for revolution and resistance to power. Terrorist violence is difficult to control even by the ultima ratio of state-power: military violence. Likewise, terrorism seems to be the ultima ratio of resistance to power as Heinrich Popitz has pointed out: "The assassin and the martyr publicly unmake the perfection of power. They demonstrate that specifically the power to kill restricts any power of humans over humans."⁸

⁴ Note that this paper does exclude state terror (*repressive terrorism*).

⁵ See Bedoya Sánchez in this volume

⁶ Lauderdale, Oliverio, p. 166.

⁷ Richardson, p. 26.

⁸ Popitz, p. 60. Translated by author.

Now, what are the criteria of the *modus operandi* that transforms violence to terrorism? Two notable studies have systematized the vast body of literature and definitions on terrorism, and thereby identified 22 “definitional elements”: Schmidt and Jongman have conducted a survey among experts in the terrorism studies community asking for their definition of terrorism. The authors identified 22 definitional elements across 109 definitions. In a second study, Weinberg and colleagues have compared these 22 definitional elements in a meta-analysis of 55 articles in academic journals containing definitions of terrorism to find a consensual definition. The authors conclude that the consensual definition (containing those elements most scholars use in their articles) is “highly general.”⁹ Because this consensual definition is of little analytic utility, I want to propose the following selection of definitional parameters that are crucial for a conceptual clarification:¹⁰

- Terrorism is the deliberate use of physical violence against civilians (including the latent or open threat to repeat such violence) with the motivation to bring about societal change.¹¹
- Terrorist violence necessarily involves the following four parties: First, the perpetrator who is an agent of an organization or movement or acts upon the maxim of an ideology. Second, the physically affected civil victim. The damage and the harm that is inflicted by terrorism is not an end in itself. Rather, the civil victim is just the medium through which the strategy unfolds its impact. Third, the possessors of power who are responsible for the perceived injustice against those who employ terrorist violence. These are usually members of the state power machinery who hold the monopoly of legitimate force (‘legitimate’ from a conventional point of view). Fourth, a general audience that shall be reached and influenced through the attacks. Basically, this audience can be divided into the population on whose behalf the state power acts and that shall be intimidated; and the population that shall be made aware of the ongoing perceived injustice and whose sympathy or even mobilization is sought by the terrorists.

Very tricky is the *definiens*¹² “civilians” or “civil victims”. Implicit to these terms are associations like “uninvolved”, “innocent” or “neutral”, all of which suggest civilians to be illegitimate targets. Accordingly, the term can be subject to controversy because *one man’s civilian is another man’s combatant* (or an otherwise guilty actor). If we

⁹ Weinberg, Pedahzur, Hirsch-Hoeffler, p. 787.

¹⁰ The consensus definition is: “Terrorism is a political motivated tactic, involving the threat or use of force or violence in which the pursuit of publicity plays a significant role” (*ibid*, p. 782).

¹¹ This is a slightly modified version of Louise Richardson’s short definition “deliberately and violently targeting civilians for political purposes” (p. 20).

¹² A *definiens* is a word that is used to define another word (namely the *definiendum*).

strictly consider “civilians” as anyone who is not wearing a military uniform, another problem arises: how can we distinguish terrorism from insurgency or guerrilla warfare? In nearly all asymmetric conflicts, non-military targets (such as members of the police force, judges, or diplomats) are attacked. Therefore, there must be an additional criterion to decide whether any given act of violence against civilians for political purposes is considered a guerrilla- or terrorist act. Accordingly, the criteria “civilian victim” should be combined with the criteria of the “indirect impact of terrorism”. Indeed, guerrilla warfare and terrorism are similar in many ways but they differ in the degree of the target’s military involvement and thereby in the degree of immediacy of the military impact of an attack. While guerrilla warfare usually pursues immediate military goals, which can be reached through the killing of (sometimes civil) adversaries, the strategy behind terrorist attacks is not restricted to a military environment.¹³

Louise Richardson distinguishes primary and secondary goals that shall be reached through terrorist violence:¹⁴ primary goals concern the intended long-term effect of terrorism on society and social order per se (e.g. abolishing secularism). Secondary motives are more immediate and concern objectives like revenge, publicity, the blackmail of concessions, provocation, reputation and a showing of strength.

After having described which discernable violent phenomena reasonably can be defined as terrorism, it shall be clarified in the next part whether terrorism constitutes “criminal behavior”.

Three anomalies of terrorism: is terrorism criminal behavior?

Terrorism obviously involves acts of law breaking and provokes legislative- and enforcement reactions by the authorities in an attempt to control its occurrence. It is thus surprising that terrorism has hardly found its way onto the criminologist’s research agenda for a long time, while other “unusual” crime phenomena have. Lafree and Dugan promote the criminological analysis of terrorism: “In general, many of the differences between terrorism and common crime are no more challenging than differences between common crime and more specialized crime, such as youth-gang activity, organized crime, hate crime, or domestic violence.”¹⁵

Other criminologists reject the idea of handling terrorism like other types of deviance in criminological research: “[T]o classify terrorism as crime is the surest way to ob-

¹³ This important distinction is mentioned by some authors. For instance Wördemann formalistically states “modern guerrilla occupies territory – terrorism occupies thinking” (p.145).

¹⁴ Richardson, p. 98.

¹⁵ Lafree, Dugan, p. 70.

secure its sociological identity and obstruct its scientific understanding.”¹⁶ This position is shared by Niggli: “[T]errorism differs from common crime especially by the conviction of the offenders to do right.”¹⁷ Consequently, Black proposes to look at *terrorism as social control*: “Terrorism is social control because it defines and responds to deviant behavior. It therefore belongs to the same family as law, gossip, ostracism, ridicule, and numerous other processes that define and respond to conduct as deviant, express grievances, or handle disputes.”¹⁸

Additionally, terrorism is distinct from ordinary crime since it takes the form of “quasi-warfare”¹⁹ and thereby “applies a standard of collective liability” instead of individual accountability²⁰: Not the individual wrongdoer is the addressee of moralistic violence (in fact it would be difficult to determine an individual wrongdoer in the case of offences like, “secularization” or “worldwide heresy”). Rather, the randomly chosen victims are just the *medium* of moralistic violence.²¹ The addressee who is reached through the medium of indiscriminate killing is the state power or more vaguely, the collective of “infidels”, “Zionists”, or “crusaders” in the case of jihadi terrorism. And just like terrorism is addressed against collectives, it is committed by collectives, whether the individual bomb carrier is the “agent of social control.”²²

Aside from its moralistic and vicarious quality, terrorism is an uncommon crime for a third reason: while criminal behavior is mainly addressed by criminal justice,²³ terrorism is addressed by additional efforts of the state, like the “war model”, the “expanded criminal justice model”²⁴ and the “public health model.”²⁵ These different concepts of control and containment are also referred to as counter-terrorism, anti-terrorism, and terrorism prevention. Different mechanisms of social control come into

¹⁶ Black, p. 12.

¹⁷ Niggli, p. 26. Translated by author.

¹⁸ Black, p. 10. In the case of jihadi terrorism, this argument seems reasonable. Jihadism is one form of Islamic activism that can be defined as “the active assertion and promotion of beliefs, prescriptions, laws, or policies that are held to be Islamic in character.” (ICG, p. 1).

¹⁹ The term 'quasi-warfare' is used by Black because Terrorism is not warfare (war between the military of two or more nation-states) and it is not guerrilla-warfare since the latter usually does not target civilians in a systematic way. Because terrorism as well as guerrilla warfare are a tactic (rather than a creed or ideology), both means can be, and are, employed by the same actors.

²⁰ Black, p. 10.

²¹ Similarly Rosenfeld states: “Terrorism uses the means of predatory violence to accomplish the goal of moralistic violence” (p. 22).

²² Black, p. 13.

²³ Certainly crime and deviant behavior is addressed by other forms of social control too. There are preventive measures beyond those stipulated in the criminal law (primary- as well as situational prevention). Also there are warlike measures taken against drug crimes in countries like Mexico or Colombia (including warlike reactions to those counter-measures). However, penal measures remain the central mode of social control of criminal behavior.

²⁴ Pedahazur, Ranstorp.

²⁵ Braithwaite.

play at this point: punishment, incapacitation (such as targeted killings), prevention (situational and individual), and even restorative justice and conciliation.²⁶ Contemporary terrorism has even provoked utilitarian reactions by some states that threaten democratic- and rule of law principles (“extraordinary renditions”, torture, and the “preventive turn” in some domestic criminal laws).²⁷

It appears as though the containment of terrorism does not follow the principles, paradigms and doctrines of conventional crime control. “[S]ocial control of terrorism is an instance of *the social control of social control* – justice in response to something that is itself a form of justice.”²⁸ This point of view is shared by Neumann in the case of warlike interventions against terrorism: “A war against ‘terror’ ultimately has no more meaning than ‘a war against war’.”²⁹

Despite these *three anomalies of terrorism* it should be possible for criminology to overcome conceptual challenges when dealing with terrorism. Rosenfeld urges criminologists to integrate terrorist violence within criminological research alongside other forms of interpersonal violence. Theoretical and conceptual difficulties only indicate the necessity for criminology to cope with reality. After all, it is the reality that shapes theory and not vice versa: “Yet if terrorism does not fit some theory, why blame terrorism, why not blame the theory.”³⁰ Likewise, Sebastian Scheerer argues that the discipline must and can adapt to the ever-changing “Sinnprovinz Kriminalität.”³¹ Criminology can do so because of its interdisciplinary nature.

Conclusions

The primary means of the nation state for controlling deviant behavior is its criminal justice system. This organization requires two things: first, the social contract between the state and its citizens that allows the state to apply force and punishment against its citizens for the defense of commonly shared values, and second, the actual ability to enforce procedures and penalties in the case of norm breaking. It has been shown that terrorism defies description through this paradigm. However, neither does it meet the war paradigm, even when considering unconventional military strategies, such as guerrilla warfare and low intensity warfare. Waddington labels this fact as “the blurring of

²⁶ Sederberg.

²⁷ David Garland, for instance, states: “Protecting the public has become the dominant theme of penal policy” (p. 12). For the German context this trend has been describes by, e.g. Hassemer and also Haffke. Albrecht (p. 9) reasons that terrorism is subject to the “enemy’s criminal law” (Jacobs 2000) precisely because it is directed against societal conventions *per se*.

²⁸ Black, p. 13.

²⁹ Neumann, p. 3.

³⁰ Rosenfeld, p. 3.

³¹ Scheerer, p. 37.

the crime/war dichotomy.”³² In this regard terrorism exhibits three anomalies: it is a) altruistic and righteous violence in response to perceived injustice; b) it is applied against vicarious victims who are held collectively liable for the injustice; and c) it is addressed through a mix of criminal justice and war like measures because it is neither genuine crime nor genuine military aggression.

In terrorist conflicts the adverse actors use sanctioned, punitive violence (employed by the state power) and deviant, retaliative violence (employed by the opposition) as a means to assert antagonizing views of the ideal social order. Both actors construe a corresponding narrative of how the application of violence is legitimate, functional, and necessary. Moreover punishment and retaliation itself has an “expressive capacity”³³ that shall designate the actor’s moral superiority.³⁴

* Dissertation project

In terrorist conflicts the adverse actors utilize violence as a means to assert their antagonizing views of the ideal social order. Both actors construe a corresponding narrative of how the application of violence is legitimate, functional, and necessary. This research project investigates the narrative of jihadism. Different modi operandi of jihadi violence (bombings, assassinations, assaults/raids, executions, etc.) shall be linked to sociological/anthropological concepts of violence and social control, such as retaliation, punishment, coercion, incapacitation and deterrence.

For this purpose an inductive and exploratory approach is applied: engaging in content analysis, textual data from the jihadi movement (open and semi-open statements, communiqués, claims of responsibility for attacks) is analyzed through open and focused coding techniques. Through this method, the classification of different occurrences of jihadi violence as retaliative, punitive, coercive etc., can be elaborated and empirically justified or dismissed, respectively.

For what purpose is this research carried out? The contemporary social phenomenon of jihadism is not adequately captured by (Western-secular) academic concepts and analytical frameworks such as crime, deviant behavior, and war. Terrorism is said to be the “blurring of the war/crime dichotomy” (Waddington, 2007:4). However, conceptual and descriptive clarity are a prerequisite for research in the social sciences. Through this project, therefore, a better conceptual and descriptive understanding of jihadism and the phenomenon of jihadi violence shall be achieved.

³² Waddington, p. 4.

³³ Sloane.

³⁴ About the expressive capacity of punishment in international criminal law see Bedoya Sánchez in this volume.

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Reciprocity in Retaliation and Mediation as a Means of Social Control

KIYOMI V. FRANKENBERG

Introduction

This paper considers the following idea: Mediation as a way of legal proceeding seeking for consent partly rests on rules defined by the participants themselves and not only by the state. In legal systems based on the monopoly of power, consent and mediation might appear as foreign to law.³⁵ Here, the participant's agreement is in principle not required, because the proceeding and its result are enforced by an authority. However, differentiated legal systems also entail extra-legal consensual elements like plea bargaining in the German criminal proceeding. This leads to the question of what impact mediation or consent -where they are not legally prescribed like in victim offender mediation- have for a legal system based on the monopoly of power. Are these elements to be considered as a divergence that points at a constitutional state's weakness? Or could consensual ways of proceeding provide a solution for situations where the legal ways of proceeding might not be considered as apt for modern problems of criminal law and therefore might lose acceptance among the participants?

This question concerning the monopoly of power is tied in with an aspect of the discussion about plea bargaining. This aspect, in turn, is concerned with the question about what the extra-legal practice of plea bargaining means to the development of the criminal justice system. *Schünemann* emphatically expresses his disagreement with the legislature who, until recently,³⁶ did not react to the extra-legal practice of plea bargaining.³⁷

REMEP Context

It is part of the Coreco project (see below) to analyze how a criminal legal system stands up to interferences from problems like case overload or the influence of powerful organizations. In this respect, Coreco touches on a main question of the REMEP project, the maintenance of social order. Against the background of the Coreco question and in order to shed light on the role of retaliation, mediation and punishment for social control according to the IMPRS-REMEP research scope, this paper examines an

³⁵ Grasnick, p. 8.

³⁶ A plea-bargaining bill was enacted by the federal cabinet on 4/08/2009.

³⁷ Schünemann (2005a) pp. 1193: „...die erschütternde Unfähigkeit des Gesetzgebers, auf die Aufkündigung des Gesetzesgehorsams durch die Justiz zu reagieren...“.

element retaliation and mediation might have in common: Both retaliation and mediation might be concerned with the principle of reciprocity.

Reciprocity and the Monopoly of Power - Reciprocity from an Ethnological Point of View

Retaliation directly points at reciprocity by its root *talion* reminding of the biblical *lex talionis* “an eye for an eye.”³⁸ Retaliation as the return of injuries can be seen as an expression of the negative norm of reciprocity.³⁹ The connection between reciprocity and mediation becomes clear as you think of consent, which is a condition of successful mediation as the voluntary settlement of a conflict through non-violent means and according partly to the participant’s own ideas about the proceeding. Thus, consent in mediation is achieved by *mutual, reciprocal* concessions of all parties involved.

The principle of reciprocity is the core of exchange theory. According to exchange theory, reciprocity and trust are of primary importance for establishing cooperation among foreigners and social order via social exchange.⁴⁰ In my work, I refer to this ethnological theory in order to research mechanisms of consensual negotiation. Here, I want to give a short overview about how reciprocity is connected with power and the impact this might have on plea bargaining.

Any gift is not only of promotive, but also of compulsive character. If person A gives something to person B without being paid for, B is obliged to return this service at some time with an unspecified gift. The norm of reciprocity defines the duty to repay for free gifts. This is due to the fact that A gives not only the gift, but also the trust that the receiving actor B will repay his obligations resulting from the gift. If B reciprocates A’s gifts, a social relationship between peers can evolve from their exchanges. But if B is dependent on A’s gift without being able to respond to it with an equivalent, this can lead to a relationship of subordination of A over B.⁴¹ Thus who gives, enforces reciprocation. Who takes, is entangled in dependency. So exchange can both connect peers and create inequality. This is best shown in two examples of highly sophisticated exchange systems well known among anthropologists: *Kula* and *Potlatch*.⁴² Whereas the *Kula*-ring of the Trobriand-islanders serves to establish and maintain lasting and peaceful relationships between exchange partners, *Potlatch* can be used in order to gain social reputation and power at the expense of the exchange part-

³⁸ Mathew 5, 38

³⁹ Gouldner, p. 172.

⁴⁰ Adloff & Mau, p. 43

⁴¹ Blau (1964) p. 8.

⁴² Blau (1968) p. 455; For depictions of these systems of exchange see B. Malinowski Argonauten des westlichen Pazifiks, Frankfurt a. M. 1979 (Kula); F. Boas The social organization and the secret societies of the Kwakiutl Indians, in: Report of the U.S. National Museum for 1895, Washington 1897, p. 311 and M. Mauss: Die Gabe, in: W. Lepenies et al. (eds): Soziologie und Anthropologie, München 1975, Vol. II p. 14 ff. (Potlatch).

ner. Both highly sophisticated ways of exchanging (not trading) goods could be seen as “a peacefully resolved war.”⁴³ I refer to these examples in my work more closely.

Reciprocity and the Monopoly of Power - Reciprocity in Plea Bargaining Proceedings

This ambiguous character of reciprocity leads to the second topic this paper deals with: the state’s monopoly of power. Responding to injustice seems to be a state’s affair *par excellence*. To that effect, punishment as a main characteristic of the monopoly of power is a one-sided response to injustice. It does not entail elements of exchange (except that the sentence must be adequate considering the offence). Punishment seems to be not dependent on reciprocity, on any “gifts” from the defendant like agreement or cooperation. It is based but on constraint.

But consensual negotiations like plea bargaining could be seen as a reciprocal exchange within criminal proceedings: confession for lenient punishment. If a state allows for this kind of consensual elements in criminal proceedings, the monopoly of power appears to be endangered. It seems to be a loss of power, when the state (enforced for example by capacity overload) accepts a stronger defendant’s influence on the course and the result of a criminal proceeding than is prescribed by law. In plea bargaining, the judge seems to give up his power by waiving a harsh sentence in order to shorten the proceeding. Making concessions towards the defendant does not suit the ethos of strong government that does not need to restrict its power of punishment.⁴⁴ This consideration is strengthened by a key result of an empirical analysis of the plea bargaining phenomenon: The more powerless the justice system feels, the more it accepts plea bargaining.⁴⁵

However, I doubt whether this is true. Due to their reciprocative character, consensual elements of exchange in criminal proceedings might not be a loss of power, but a solution for problems of acceptance and enforceability of criminal proceedings for the following reason: Consensual resolutions of conflicts demand *mutual* concessions of all parties involved. The reciprocal process of generating consent does not aim at unanimity, but at a compromise solution that all participants can agree with.⁴⁶ The exchange of mutual concessions could generate trust among the participants and therefore prevent the conflict from escalating.⁴⁷ Here, I only shortly mention the concept of trust in order to indicate that this will be a further key issue in my work. Reciprocity

⁴³ Lévi-Strauss, p. 25.

⁴⁴ Damaska, p. 1023; Eser, p. 384.

⁴⁵ Bussmann & Lüdemann, p. 60: „Je ohnmächtiger sich also die Justiz fühlt, desto eher läßt sie sich auf Absprachen ein.“

⁴⁶ Lehbruch, p. 15.

⁴⁷ Stegbauer, p. 55.

could serve as a regulating factor when conflicting interests clash. Concerning the example of plea bargaining, those interests could be on the one hand the wish for acting in accordance with today's business requirements and on the other hand the need to enforce the state's concept of justice. These interests might clash, because criminal procedure may not regard new aspects of business life in a sufficient manner. Allowing for compromises in order to achieve consensual resolutions of conflict does not necessarily indicate a loss of power. Instead, it could be seen as a risk assessment (for example a regular non-consensual proceeding could favor the defendant or make its course and result incalculable) in accordance with the state's monopoly of power.⁴⁸ Consensual proceedings could also be seen as a modernization for the preservation of the criminal proceeding geared towards the monopoly of power.⁴⁹ Consent could be applied to situations not governed by the current law of criminal procedure.

General Conclusion

Plea bargaining could be seen a sort of reciprocal exchange. Although the idea of punishment appears to stem from an authoritative concept of power and therefore should be enforced without any compromises towards the defendant, consensual proceedings like plea bargaining bear no loss of state power. The state still can exercise power over the defendant. Thus in plea bargaining, the judge can make a highly interesting offer to the defendant: freedom; no or fewer years in prison, whereas the defendant can offer nothing but information about the crime. This is mostly information which the authorities often could gather themselves if they spent more time on investigation. In this situation, the state can make his offer dependent on the defendant's behavior and therefore exercise power over him.⁵⁰ Elements of exchange and consent might change the criminal legal system, but not in its core domain: the exercise of power.

* Dissertation Project

Consensual Resolution of Conflicts in Traditional and Differentiated Legal Systems

“[V]irtually all contemporary justice systems [...] find it harder and harder to function in accordance with their own long-standing formal principles.”⁵¹

⁴⁸ Lehbruch, p. 18.

⁴⁹ Bussmann, p. 23.

⁵⁰ Blau (1977) p. 141.

⁵¹ Damaska, p. 1019.

Topic: The Impact of Consent for Penal Dispute Settlement

This project's aim is to compare main elements of consensual finding of justice in the modern German legal system and in systems where law is not separated from, but intertwined with religious or political authorities. This comparison is concerned with two main questions: First, how is the enforceability of legal norms related to the importance of collective affiliations? Second, what is the importance of consent for penal dispute settlement, when authoritative legal decisions are not available? According to these two questions, it is my aim to look for structural principles of the finding of justice in situations when legal codes of practice seem to be secondary.

Research Gap: Normative Groundwork of Consensual Negotiations

Negotiated justice clashes with basic tenets (for example the principle of legality or the presumption of innocence) of the German criminal procedure in several respects.⁵² Nevertheless, the practice of plea bargaining has flourished for some 30 years in German criminal proceedings.⁵³ However, there are only a few empirical studies about this phenomenon. These studies have left important questions open: If it is not only the code of criminal procedure, what else is it that provides the normative groundwork of plea bargaining and therefore determines the precise course of negotiations? Which set of norms shapes a so-called "second code"⁵⁴ for negotiated judgments?

Hypothesis: Consensual Resolution as Additive to Procedural Norms

The following is one of my basic hypotheses: Consensual resolution comes to the fore when there are serious difficulties in putting the regular criminal proceeding into practice. Obstacles to the regular proceeding can for example result from overpowering partial interests, highly intricate facts of the case or capacity overload of the legal system as is the case in many business criminal proceedings. In order to enforce criminal law despite these obstacles, legal practitioners might change the pure legal mode of decision making. They might change the normative frame of reference and open the criminal proceeding up to informal communication. This might allow for the taking into account of certain interests of the organizations involved in the proceeding that may otherwise be judged irrelevant in a regular criminal proceeding.

⁵² For example and with further references: Gössel p. 85; Schünemann p. 375; Weigend p. 1013.

⁵³ Schünemann (2005b) p. 9.

⁵⁴ Weigend (2008) p. 43.

Method: Grounded Theory

A main aspect of this project is an empirical analysis of plea bargaining in German business criminal proceedings. Therefore I have conducted case-related interviews with participants on the situational logic⁵⁵ of plea bargaining. A following ethnological secondary data analysis of conflict resolution without central power is geared to exchange theory⁵⁶ and refers mainly to the examples of early 1900 Melanesian societies. Finally a comparative analysis of consensual resolution of conflicts based on the interviews and on the ethnological analysis serves to find out structural principles in legal decision making that are decisive both in traditional and differentiated legal systems. Both analyses are based on grounded theory.⁵⁷

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⁵⁵ K. Popper: *Die offene Gesellschaft und ihre Feinde* (Vol. 2), 4th ed. München 1975.

⁵⁶ Blau, (1964).

⁵⁷ G. Glaser / A. Strauss *The Discovery of Grounded Theory*, 4th ed. London 2009.

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On the Grammar of Punishment

SHAKIRA BEDOYA SÁNCHEZ

The assumption that law is an expression of justice presupposes its performance in each and every instantiation and rule application of the law.⁵⁸ But, law is distinctly different from justice, justice is the experience of ‘the impossible’; the *aporia*; while lawfulness deals with the value of an action in relation with its legitimacy in respect to the law.

“Law (droit) is not justice. Law is the element of calculation, and there is just that there be law, but justice is incalculable, it requires us to calculate with the incalculable; and aporetic experiences, as improbable as they are necessary, of justice, that is to say of moments in which the decision between just and unjust is never ensured by a rule”⁵⁹

Seek justice ‘before the law’ coincides with the Kafkian metaphor of the man who over and over again is impeded by a door keeper for admittance to ‘the law’. As he waits for days and years ‘the law’ appears to be ‘untouchable’ and ‘unreachable’. As if it was its very nature to be a transcendent object and so “always to come, always promised, because it is immanent, finite and so already past.”⁶⁰

Justice demands that we address ourselves in the language of the other: “the act of justice must always concern singularity, individuals, irreplaceable groups and lives.” For something to be *just*, law must speak in general terms, and therefore it must simplify and falsify the situation at hand.⁶¹ In the sense argued by Bourdieu, the constitution of the juridical *formulates* reality itself as the entrance into the juridical field necessarily redefines ordinary experience and the whole situation at the core in any litigation. “The law [only] knows the world to the extent that it subjects it to its regulative operations.”⁶² Yet, complex factual situations cannot unequivocally *truly be* framed into legal norms; for something to be an absolute ‘truth’ it would need to exclude every imaginable antitheses to be valid in every counterfactual situation, to be necessary “truth as truth at all possible worlds.”⁶³

⁵⁸ Philipose, pp. 159-184

⁵⁹ See Derrida.

⁶⁰ See Derrida.

⁶¹ See specially Balkin’s discussion on justice.

⁶² Bourdieu, pp. 817-822.

⁶³ Wolcher, pp. 96-98; Kripke, pp. 690-716 and additionally Pollock.

Historical acts as law and ‘things’ have their unique horizon of possibilities within the world, in the sense that the world is lived as already significant but never completely explicit, because our access to reality is mediated by linguistics and conceptual frameworks so the world “is never captured or exhausted but continually opens up to (...) it is the open space.”⁶⁴ If the ‘world’ is understood as being composed of a dynamic set of relations and human possibilities then there is not one world, but many. The essence of the ‘worldhood’ is the significance that accrues to things by their relatedness to human interests.⁶⁵

Law functions in an all-encompassing way because it designates a particular order while uncovering particular meanings.⁶⁶ Likewise, the ubiquitousness of international norms rely on its incompleteness, it is at the bottom line a system of ‘culture’, whose legal norms are applied and interpreted within a mix of subjects and actors in a multicultural scenario a “cornucopia of historical narratives, perspectives and viewpoints, which exist in tension but which different peoples and international actors rely on, endorse in their day-to-day international enterprises, draw case studies from about the nature of law, and perhaps use to quell anxieties over the homogenization and governance of the world.”⁶⁷

The configurations of valid arguments produced in the realm of international criminal adjudication “follow patterns structured so as to obscure or repeat the dilemmas they were intended to resolve.”⁶⁸ They replicate the basic tensions immersed in the core nature of a political system of accountabilities, which struggles with opposing ambivalence and unruliness.

*The irreducible political character of law would not then cancel out law’s legal character. It would merely point to the inevitable moment of choice in legal practice in favor of one contested meaning against another.*⁶⁹

As in any trial, international punishment represents a paradigmatic staging of that symbolic struggle inherent in the social world, in which “what is at stake ... is monopoly of the power to impose a universally recognized principle of knowledge.”⁷⁰ So it is in the competition for the “control of the right to determine the law”⁷¹ where the *power of naming* unfolds its hegemonic capacity. [The symbolic power of naming ...

⁶⁴ See specially Kolb on Heidegger, p. 134-135

⁶⁵ See Sheehan.

⁶⁶ Minkinen, p.90.

⁶⁷ Korhonen, p. 279-311.

⁶⁸ See Kennedy, David.

⁶⁹ Koskenniemi, What should lawyers learn from Karl Marx.

⁷⁰ Bourdieu, pp.14-17

⁷¹ Bourdieu, *ibid.*

creates the things named... It confers upon the reality which arises from its classificatory operations the maximum permanence that any social entity has the power to confer upon another, the permanence that we attribute to objects.]⁷²

In order to accomplish the golden mandate of judgment, criminal adjudications desperately needs to be committed to the formalistic thesis that there is a single right answer in *every case*,⁷³ that criminal law can recognize justice when it sees it, it knows “the truth”. But the fundamental differentiation between lawful and unlawful is always made within a political *rhetoric of exceptions*; about who we point the finger to, who we prosecute and who we sentence – when ‘Guilt’ and ‘Innocent’ are transformed into a strategic vocabulary of legitimation. We forget that in increasing the responsibility of one person, we decrease the responsibility of another.⁷⁴

As pointed out by Allot, this acquires particular problematic distinctiveness for three major reasons, it corresponds to (1) an extreme *descontextualization*, so that “the offender and the offensive event are abstracted from the rest of the personal situation of the offender, and from the rest of the social situation of the event”; the criminal sanction imposes its own ideas of motivation and causation, ignoring the historical context and particularity of every state, nation and people. (2) It is created under the assumption of the feasibility of *corrective history*, for this reason it is not meant to tell the story of the past but to redeem it by remedying past injustice. (3) It *legitimizes* criminal discourses and validates the social evil that it seeks to condemn precisely because it can only deal with a minimum proportion of the crimes that fill the human world.⁷⁵

Regarding political order, punishment operates as a [sign of ultimate authority and it is the final materialization of that authority’s force]⁷⁶ communicative performances, punishment delivers the messages of authority whilst simultaneously *discourse formations*⁷⁷ of a particular construction of political history and ‘orderability’. As such, it belongs to the terrain of struggle opposing ambivalence, against chaos, to the abandonment of reality, the “displacement of present imperfection to future promise.”⁷⁸ The legal discourse on punishment “calculates, plans and molds” difference; it

⁷² Bourdieu, *ibid.*

⁷³ Moore, p. 151

⁷⁴ Balkin, p. 23.

⁷⁵ Allot, pp. 62-69. For Mark J. Osiel this constitute a failure of legal doctrines to track our moral intuitions “the criminal law fail to reach many people who bear significant moral responsibility for what transpired, while it reaches others whose measure of culpability seems far less.”

⁷⁶ See Garland.

⁷⁷ I borrow the terminology used by Foucault in which discursive formations can be seen as an “episteme” or understood as a “institutionalized doctrine”. The discourse can therefore reveal the subjacent knowledge or the “system of rules” that have created particular legal arguments and reveal its origin and ideology. Foucault, M. (1969/2002) pp.120-122.

⁷⁸ Koskenniemi, *Philosophy in a Time of T a Time of Terror.*

represents and constrains – the world ‘words’ as a picture⁷⁹ – so representation becomes a making presence, a corrective process in which the assignment is to configure an orderly image of the world.⁸⁰ The “law is not longer a reflection of natural order but fills its absence.”⁸¹

* Dissertation project

One of the most significant transformations in the international legal system following the end of the Cold War was the sudden extension of principles and procedures of criminal law into the international realm. This research seeks to provide a theorization of the current process of criminalization of international law itself. – In this frame, this study aims to explore the political legitimacy of international criminal trials, specifically how the discourses of punishment are used by different actors in international politics.

Every aspect of ‘punishment’ in international law is inextricably placed in a deeply ambivalent [political] process, in which selectivity is inevitable in the ‘operation of law’. Decisions whether or not to investigate and prosecute are delimited by concerns over how they affect institutional standing, funding and support among states. This is to say that the real life actions that have occurred in this field are encircled within a moment of tension between the “reality of power” and the universal “aspirations of law.” At the same time, the study of punishment, as a legal ‘object’, or more precisely, what punishment is within international law cannot be detached from how-it-is, precisely because there is an insoluble relationship between ‘punishment’ as ‘rules’ and ‘punishment’ as the way it is used by institutional discourses.

For the purpose of this thesis, punishment will be taken as a structured totality not only as a manifestation of power but more importantly as a matter of discourse, as ‘symbols and sensibilities’ used by the variety of actors in whose name punishment is enforced.⁸²

⁷⁹ Villa, *ibid.*

⁸⁰ In his characterization of modernity, Heidegger claims that there have been a series of total understandings of being in the West, which relate to cultural paradigms, to which Heidegger refers as works of art. In his essay “*The Age of the World Picture*” he mentions the conversion of the realm of art to that of aesthetic experience. With this assertion, Heidegger affirms that the very conception of reality has been transformed and that the ‘world picture’ describes the way in which modernity understands itself. See Schreiber.

⁸¹ Costas, and others, p. 19.

⁸² See specially Matravers, (1999) p. 152-163. Additionally Matravers, (ed). (2005) pp.160-189.

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Crimes against Minorities and the Reflection thereof in International Criminal Law

JULIA GEBHARD

Punishment of Crimes under International Law committed against Minorities

One of the focuses of the REMEP project is to intensify research on the purposes of punishment, by applying manifold research angles and methodologies. Examining the extent to which crimes against minorities are punishable under international criminal law is directly linked to several of the purposes of punishment in international criminal law. The protection of society as a whole from social order violations, the protection of victims and the goals of prevention and deterrence all depend on normative frameworks capable of sanctioning major violations of the social order and of legally protected interests (*‘Rechtsgüter’*).⁸³ Therefore, this paper will look at the main threats to the physical and cultural existence of minorities and examine if and to what extent they are covered by international criminal law.

Frequency and Common Characteristics of Crimes committed against Minorities

Crimes against minorities are a special case in international criminal law, both concerning quantity, as minorities are victims of international crimes in a disproportionate measure, and concerning quality, as crimes typically committed against minorities differ from other types of crimes under international law. Most obviously, they all feature a collective element, which means that the prime target of the attack or the violence, even though individuals suffer from them, is not the individual himself or herself but rather the group as a whole. In the following, some of the main crimes under international law are examined with respect to the minority aspect they entail and their capability to cover the broad range of social order violations committed against minorities.

⁸³ See eg Bassiouni 2008, p. 3.

Judicial Coverage of Crimes committed against Minorities

Genocide/‘Cultural Genocide’

Minorities have been called ‘natural victims’⁸⁴ of genocidal measures and ‘genocide’s most frequent targets.’⁸⁵ Therefore, they are to be considered the primary beneficiaries of Art. 6 Rome Statute of the International Criminal Court (‘Rome Statute’) and Art. 2 Convention on the Prevention and Punishment of the Crime of Genocide (‘Genocide Convention’). When the Genocide Convention was adopted in 1948, the deliberate intent of its drafters was to derive the scope of criteria from the ‘already well-recognized concept in international law then known as “national minorities”.’⁸⁶

As mentioned above, even though the individual is clearly a victim of genocidal measures, the perpetration of the act extends beyond its actual commission. The murder of a particular individual, for example, must therefore be committed for the realization of an ulterior motive, namely the specific intent to destroy, in whole or in part, a national ethnical, racial or religious group.⁸⁷

However, minorities are not only threatened with physical extinction and destruction, they are often also faced with attacks and (attempted) destruction of their cultural identity. The initial draft of the Genocide Convention addressed this problem and included, apart from prohibiting acts directed with the purpose of ‘destroying in whole or in part’ the ‘racial, national, linguistic, religious or political groups’, acts committed with the purpose of ‘preventing its [the group’s] preservation or development.’⁸⁸ The punishable acts included the prohibition of the use of language, the systematic destruction of books in the national language and the systematic destruction of historical or religious monuments. However, all references to ‘cultural genocide’, apart from the prohibition of forcible transfer of children, were removed in the final version of the Genocide Convention, at the time a huge setback in the field of minority protection.

This exclusion of cultural genocide from the scope of the Genocide Convention was at the time justified with the assumption that what was called ‘cultural genocide’ would be more appropriately dealt with under the regime of general human rights law and minority protection.⁸⁹

⁸⁴ Thornberry, p. 59.

⁸⁵ K. A. Annan, *Address to the Commission on Human Rights*, Geneva 7 April 2004, http://www.un.org/News/ossg/sg/stories/statments_search_full.asp?statID=13 [1 June 2009].

⁸⁶ Schabas 2008, p. 192.

⁸⁷ See eg *Prosecutor v. Jean Paul Akayesu* 2 September 1998, ICTR, Case No. ICTR-96-4-T, para. 522.

⁸⁸ UN Doc E/447, Article I (I) and (II).

⁸⁹ Summary Record of Meetings 175-225 UNESCOR 3rd Year, 7th Session, Supp. No. 6 at 7 UN Doc E/3/SR.175-224 [1948]; see also Schabas 2008, p. 200.

Yet the Universal Declaration of Human Rights, which was adopted in the same year as the Genocide Convention, did not entail any provision on the protection of minorities or any reference to cultural genocide either. Minority rights remained unregulated until 1966, when the International Covenant on Civil and Political Rights ('ICCPR') was adopted. Even though Article 27 of the ICCPR on the rights of minorities closed a gap in human rights protection that has been obvious since the collapse of the League of Nations, it did not lift systematic violations of minority protection to the level of crimes under international law and also did not provide for a basis for the punishment of crimes committed against minorities. International human rights lawyers therefore lacked a tool for the criminal prosecution of attacks on the cultural identity and survival of minorities even after the adoption of the Genocide Convention and the ICCPR.

Crimes against Humanity/Persecution

This gap in minority protection was, on a global level, partly remedied only with the adoption of the Rome Statute, which in Article 7 (1) (h) entails persecution 'against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious ... or other grounds that are universally recognized as impermissible under international law' as a crime against humanity. The provision again entails a group element, and includes the targeting of individuals because of their group membership as well as targeting the group as such.⁹⁰ Persecution as a crime against humanity encompasses acts from killing to limitations on the type of professions open to targeted groups⁹¹ and acts of physical, economic or judicial nature in violation of an individual's right to equal enjoyment of basic rights.⁹² As such, the prohibition of persecution in international criminal law supplements the general principles of equality and non-discrimination in international human rights law in a common effort to protect minorities in heterogeneous societies.

The acts must be carried out with the intent of depriving the victim of the political, social or economic rights enjoyed by members of the wider society for reason of his or her membership in a particular protected group.⁹³ One recent development of particular importance to minority protection is the categorizing of systematic hate speech against minorities as persecution by the ICTR.⁹⁴

The legal concept of crimes against humanity thus constitutes a useful tool capable of covering many of forms of attacks against minorities, including on their cultural heritage.

⁹⁰ See Boot/Hall in Triffterer 2008, p. 217.

⁹¹ *Prosecutor v. Duško Tadić*, 7 May 1997, ICTY, Case No. IT-94-1 para. 704.

⁹² *Ibid* para. 710.

⁹³ *Prosecutor v. Vlatko Kupreškić et al.*, 14 January 2000, ICTY, Case No. IT-95-16 para. 634.

⁹⁴ *Prosecutor v. Ferdinand Nahimana et. al*, 3 December 2003, ICTR, Case No. ICTR-99-52- T para. 1072.

'Ethnic Cleansing' in International Criminal Law

Targeting of minorities is often associated with the term 'ethnic cleansing'. However, ethnic cleansing is not a technical term used or defined in the Rome Statute or any of the statutes of international courts or tribunals. Nevertheless, it is an often-used term, in the media as well as in the international arena.⁹⁵ The UN General Assembly has expressly linked 'ethnic cleansing' to minority protection and racial discrimination in its resolution 48/91 on 'Ethnic Cleansing and Racial Discrimination.'⁹⁶

The International Court of Justice in the case of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* defined ethnic cleansing as 'rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area.'⁹⁷ Ethnic cleansing often comes hand in hand with other gross violations of human rights, as it may be conducted, *inter alia*, by means of forcible transfer, deportation murder or rape. Therefore, the legal categorization of the term is highly controversial and the additional value that the term brings compared to the use of already acknowledged legal terms is disputed. Nevertheless, the term has often been referred to by the ICTY, also in indictments, and has been linked to crimes against humanity in general⁹⁸ and also, more particular, to the crime of persecution.⁹⁹

Genocide has also been associated with the term 'ethnic cleansing'.¹⁰⁰ However, compared to the acts covered in the Genocide Convention, 'ethnic cleansing' seems to pursue a different goal, namely the expulsion of an ethnic minority and its culture from a given area as opposed to the extinction of that minority. One frequent component of 'ethnic cleansing', namely forcible population transfer, was, like the destruction of a minorities' cultural life, deliberately excluded from the Genocide Convention. This is true at least if it is not paired with a genocidal intent and done in circumstances 'calculated to bring about its [the group's] physical destruction in whole or in part.' Therefore, an equation of ethnic cleansing with genocide should be avoided and has in fact been scarcely used.

⁹⁵ For example, in the Outcome Document of the Summit of Heads of State and Government of 16 September 2005 in which the responsibility of a State to protect 'its populations from genocide, war crimes, ethnic cleansing and crimes against humanity' was set out, UN Doc A/60L.1; ('Responsibility to Protect').

⁹⁶ UN Doc A/RES/47/80.

⁹⁷ ICJ, 26 February 2007; <http://www.icj-cij.org/docket/files/91/13685.pdf> [1 June 2009] para. 190; see also Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 [1992] UN Doc. S/35374 para. 55 and Bassiouni/Manikas p. 608.

⁹⁸ *Prosecutor v. Vlatko Kupreškić et al.*, 14 January 2000, ICTY, Case No. IT-95-16 para. 606.

⁹⁹ *Prosecutor v. Duško Sikirica et al.*, 3 September 2001, ICTY Case No. IT-95-8-T, para. 90.

¹⁰⁰ See General Assembly in Resolution GA/Res./47/121 of 18 December 1992 and the Commission on Human Rights' Special Rapporteur on extrajudicial, summary and arbitrary executions in 'Extrajudicial, summary or arbitrary executions, Note by the Secretary-General' UN Doc A/51/457, para. 69.

In conclusion, ‘ethnic cleansing’ seems to be, at least partly, subsumed by the above-discussed crime of persecution (Article 7 (1) (h) Rome Statute) and the more specific means by which an area is rendered ‘ethnically homogenous’ are mostly punishable as crimes against humanity by themselves (see e.g. murder and extermination as enshrined in Article 7 (1) (a) and (b) Rome Statute or the prohibition of deportation or forcible transfer of population in Article 7 (1) (d) Rome Statute).

Concluding Remarks

Both ‘ethnic cleansing’ and ‘genocide’ are regularly invoked terms in the context of crimes committed against minorities. However, as pointed out above, the first is not a technical legal term whereas the latter is an exceptional crime, labelled the ‘crime of crimes’, which regularly does not provide for an adequate legal response to threats and persecution that minorities face. This does not, however, mean that international criminal law is not *per se* able to cover the variety of threats that minorities face. In most cases, courts and tribunals are able to give a legal response to atrocities minorities have suffered by using the concept of crimes against humanity. The *ad hoc* tribunals’ jurisprudence has insofar showed that the legal construct of crimes against humanity poses a flexible instrument in the hands of thoughtful and innovative legal practitioners, able to adequately cover and respond to systematic and widespread social order violations committed against minorities, thereby contributing to the protection of minorities within nation states.

* Dissertation Project

Research Question, Scope and Aim of the Project

International criminal law is for a large part concerned with the protection of minorities. This is evident from the very beginning of the establishment of a system for the international prosecution of systematic human rights violations. Raphaël Lemkin, the initiator of the Genocide Convention and a prominent supporter of a global system of international criminal law, already called for international as well as national ‘provisions protecting minority groups from oppression because of their nationhood, religion or race’ in 1944 (Lemkin 1944, 93), thereby linking the lack of minority protection to internal and international disturbances. This claim has been woven into international criminal practice like a red thread and has been invoked as a justification for the development of the still young discipline of international criminal law. From this starting point, the main question underlying this research project is what role minority rights law practically plays in international criminal law. The project intends to examine both the direct use of minority rights law in judgements of international criminal courts and tribunals and the influence international minority rights law and the idea of minority protection had in the development of the concept of crimes un-

der international law. The main aim, apart from creating an inventory of the use of minority rights law in international criminal law, is to point out areas in which useful synergies between international criminal law and international minority rights law can be generated.

Hypotheses

The initial hypothesis of the research project claims that even though minority rights law and international criminal law can be seen as allies in the pursuit of a common aim, namely the protection of minorities, sufficient use of minority rights law has not been made in the jurisprudence of international courts and tribunals. Compared with the use of other areas of international human rights law in international criminal law, the use of minority rights law could be particularly valuable for various reasons. First, because minorities are affected by crimes under international law in a disproportionate measure, and second, because international minority rights law has a long-term experience in dealing with the difficulties associated with the dichotomy of individual vs. group rights. These problems also arise in international criminal law, albeit under a different paradigm. The overlapping areas of international criminal law and international minority rights law therefore bear an enormous potential for synergies which could contribute to understanding, specifying and punishing crimes against minorities.

Furthermore, as the idea of minority protection is a fundamental reason underlying the development of international criminal law, the international criminal legal order should also reflect this by establishing a set of rules by which the 'broad range of threats to the rights of minorities' (Schabas 2008, 212) can be punished. Briefly and exemplarily summarizing the main findings regarding this problem will be the subject of this paper, which will lead to the conclusion that the main threats to minorities are covered by international criminal law de lege lata.

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Criminal Prosecution as an obstacle to peace processes

The problem of terminology

MAYEUL HIERAMENTE

On March 4th, 2009, the International Criminal Court (ICC) issued its first arrest warrant against an acting head of state, Omar Hassan Ahmad Al-Bashir, President of Sudan.¹⁰¹ President Al-Bashir is accused of crimes against humanity and war crimes allegedly committed in the Sudanese region of Darfur. The arrest warrant was largely welcomed as a first step to bringing justice to the victims of the civil war ravaging western Sudan. However significant it may be, it should be emphasized that this first step could easily turn out to be the last one. This is due to a variety of factors, including the fact that President Al-Bashir certainly has no intention of surrendering to the ICC, the fact that a significant change on the political plain in Sudan seems to be unrealistic and finally, the fact that the enforcement of the arrest warrant on the part of the United Nations Security Council either by military means or economic sanctions is doomed to fail due to resistance from two of its permanent members, Russia and China. To make matters worse, the Sudanese authorities are reconsidering their cooperation with international Non-governmental organizations (NGOs) and the United Nations Peacekeeping mission, both of which are vital for the protection of civilians in the region, thereby placing at risk the lives of more than one million people in Darfur.¹⁰² This reaction by the Sudanese authorities has already been harshly condemned:

*“President Al-Bashir’s response to being charged with war crimes in Darfur is nothing less than retaliation against the millions of people there.”*¹⁰³

This observation certainly goes right to the heart of the matter. Nobody can legitimately deny that horrible crimes have been committed in the Darfur region and that the perpetrators must be brought to justice. However, blaming President Al-Bashir and the Sudanese authorities could obfuscate an underlying dilemma between the punishment of international crimes and the prevention of crimes and conflict¹⁰⁴. One has to acknowledge the fact that the unconditional pursuit of criminal justice can, in certain sit-

¹⁰¹ Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, PTC I, No. ICC-02/05-01/09, <http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf> (4.6.2009).

¹⁰² Human Rights Watch.

¹⁰³ *Ibid.*

¹⁰⁴ See, e.g. M. Scharf, p.507.

uations, be a cause for future human rights abuses. Which actors to render responsible for these abuses should be a secondary question if one considers one of the International Community's primary goals to be the protection of human rights¹⁰⁵. On the national level, there has always been a discussion about when to refrain from criminal prosecution for immediate preventive purposes. Pertinent examples include the debate on the principal witness regulation or possibilities to resolve hostage crises.

Even when facing atrocities of the caliber committed in Darfur,¹⁰⁶ there should be room for balancing the need for criminal punishment against the immediate (legal¹⁰⁷) necessity for the prevention of future crimes and for ending the fighting. The dissertation project focuses on this dilemma from a primarily normative point of view in order to establish a clear basis for further empirical work. In order to assess whether a strict criminal law approach is to be favored, the article is focusing on the aims and purposes of international punishment.

Purposes of punishment in international criminal law

This article only addresses one small part of the dissertation project. However, similar difficulties as those discussed below arise when treating dogmatics of international criminal law in general.

When confronting atrocities committed under the Nazi regime, in Cambodia, in Rwanda or in countries of the former Yugoslavia, or nowadays in northern Uganda or in the Darfur region of Sudan, the question *why* to punish the offenders seems to be an absurd one. Yet, there exists a serious debate about this issue, and the list of possible arguments as to the importance of criminal justice is surprisingly long. Expectations towards international courts and tribunals are high and often exaggerated¹⁰⁸. One of the

¹⁰⁵ While it is true that human rights treaties address the question of investigation and prosecution, there is distinct obligation to prevent them (without determination of the method applicable).

¹⁰⁶ As a second example the situation in Northern Uganda should be mentioned. The ICC is accused of endangering the peace process by issuing an arrest warrant against the leader of the Lord's Resistance Army (LRA), Joseph Kony. (Warrant of Arrest for Joseph Kony issued on 8 July 2005 under seal, amended on 27 September 2005, PTC II, <http://www.icc-cpi.int/iccdocs/doc/doc97185.PDF>, 4.6.2009) The intervention of the ICC is criticized for two principal reasons. Firstly, there are questions surrounding the universality of the concept of retributive justice (cultural relativism) and it is often suggested that in the primarily affected Acholi region, reconciliation can only be achieved by forgiveness and compensation. Second, by targeting the LRA leader, peace negotiations are doomed to fail, an argument which seems to be realistic; see Manisuli Ssenyonjo, *The International Criminal Court and the Lord's Resistance Army Leaders: Prosecution or Amnesty?*, *International Criminal Law Review* 7 (2007), pp. 361-389. Concerning local approaches see E. Baines.

¹⁰⁷ See, e.g. ICJ, Judgment of 26 February 2007 in the Case "Application of the Convention on the Prevention and Punishment of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)", pp. 153 et seq.

¹⁰⁸ See also R. Sloane, pp. 43 et seq.

main problems in the scholarly debate is that there is often no clear distinction made between concrete purposes of punishment¹⁰⁹ and long-term objectives, or, to put it bluntly, aims or hopes. International criminal law lacks a clear differentiation and clear terminology. What can be acceptable (or is at least inevitable) in the highly politicized field of diplomacy should be rejected in an academic approach to the problems international criminal law and international courts and tribunals are facing today.

This article focuses on two frequently employed catchwords/phrases of the scholarly debate namely, “reconciliation” and “the fight against impunity”, and intends to shed light on the difficulty of employing these in order to resolve the above described dilemma between punishment of international crimes and the prevention of crimes and conflict. The article only focuses on terminology and abstains from an evaluation of the different approaches of “*Vergangenheitsbewältigung*”.

No court is able to reconcile!

When facing situations like those in Northern Uganda or Darfur, it is often argued that it is important to punish (at least¹¹⁰) the main perpetrators in order to enable a process of reconciliation.¹¹¹ Whether this argument holds true or not is of no relevance for the discussion that follows.

First of all, one must accept that the ICC is not a relevant *active* actor in the process of reconciliation. No court is able to reconcile; rather the criminal trial can only act as a catalyst. The victim(s) and offender(s)¹¹² must reconcile on their own¹¹³.

A court can establish a historical record (at least part of it)¹¹⁴, channel feelings of revenge of the victims¹¹⁵, give a voice to the victims and enable them to tell their stories. It can individualize the guilt in order to avoid revenge killings and retribute the harm done.¹¹⁶

¹⁰⁹ Including the purposes of a criminal trial, which are perhaps even more important on the international level., see e.g. Eser, pp. 209 et seq.

¹¹⁰ From a dogmatic point of view, this often accepted differentiation makes no real sense. The criminal responsibility of superiors and other perpetrators of international crimes may differ in quantity but not in quality. The differentiation can be considered a matter of jurisdiction of the ICC but not of criminal responsibility as such, for a precise analysis see A. Greenawalt, pp. 622 et seq.

¹¹¹ See e.g. Prosecutor v Dragan Nikolic, ICTY, 2003, Judgment of Trial Chamber [120], http://www.icty.org/x/cases/dragan_nikolic/tjug/en/nik-sj031218e.pdf.

¹¹² Not only the concrete victims and offenders of the crimes but also the communities affected by such crimes have to re-approach each other, see R. Sloane, p. 57.

¹¹³ This does not mean that no assistance is needed to get this process of reconciliation going.

¹¹⁴ For a critical analysis, see M. Koskenniemi.

¹¹⁵ For a critical analysis, see R. Sloane, p. 79.

¹¹⁶ For further information about purposes of punishment, see Nemitz, pp. 160 et seq and p. Stolle & T. Singelstein, pp. 38 et seq.

These possible effects/purposes of criminal prosecution may or may not be useful to future reconciliation. However, in order to achieve reconciliation, additional factors must be taken into account. That is, the process of reconciliation is influenced by a multitude of factors, such as economic stability, the possibility of political participation of citizens, the political will on behalf of the international community and the affected state(s) to end the conflict, and cultural settings that favor forgiveness or religious influence.

Trying to assess whether the ICC's actions have a concrete influence on the process of reconciliation seems to be difficult. More importantly, the amalgamation of different concrete purposes under the term "reconciliation" is always based on assumptions. In particular, it suggests a causal link of the concrete purposes described above and the pacification of the community affected by the crimes. But is it really true that establishing the truth is *in every case* useful to a reconciliation process?¹¹⁷ Does not the attribution of guilt stigmatize the authors of the crimes (and their whole community or ethnic group) so that they could in turn be isolated in the new society? These questions must not and cannot be answered in the abstract without examining a concrete case. However, arguably the overuse of the term "reconciliation" in connection with criminal prosecution hampers such a differentiated approach and leads to a use of oversimplified models when talking about criminal prosecution as means of enabling peaceful transitions. Reconciliation is the overall goal of international criminal prosecution, symbolizing the hope that criminal trials are conducive to a peaceful transition. Nevertheless, the term "reconciliation" is far too broad to provide concrete results for the purposes of this dissertation project; it should therefore not be used for legal argumentation.

Having said this, it should be demonstrated why the term "reconciliation" is not useful to finding a solution to the dilemma described in the first part. It has to be noted that the term "reconciliation" is not a term used for the sole purpose of describing the effects of criminal prosecution. Amnesty Laws are said to foster reconciliation, Truth Commissions are used as a forum for reconciliation, and traditional mechanisms, like *mato oput*, also seek to reconcile victims and offenders.

How to cope with the fact that criminal prosecution and alternative mechanisms are said to foster reconciliation? Do they really apply the same concept of reconciliation? If we want to compare the impact of criminal prosecution on the peace process on the one hand, and that of alternative mechanisms on the other, we have to establish verifiable indicators. For the reasons mentioned previously, reconciliation cannot be considered such an indicator. When assessing the effectiveness of different forms of "*Vergangenheitsbewältigung*", we should seek to avoid comparing apples with oranges.

¹¹⁷ Critical on this point e.g., M. Bagaric & J. Morss, pp. 245 et seq; on the role of victims, see M. Rauschenbach & D. Scalia, pp. 441- 459.

Reconciliation represents neither an apple nor an orange but rather the entire fruit basket. Every conflict needs a different and specific approach, such that the first step is to use specific and differentiated terminology.

The fight against impunity: a purpose of punishment?

The article now addresses a second term often employed when talking about purposes of international criminal prosecution: “The fight against impunity”. The preamble of the Rome Statute of the ICC puts it as follows:

“Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes, [...]”

“The fight against impunity” is extremely hard to classify. In order to show the problems of the classification, the article will examine different possible explanations. A starting point is to consider that the “fight against impunity” could be a purpose of punishment itself. On the national level, this seems to be totally absurd. The reason for punishing an offender cannot be motivated by the mere fact that his action might otherwise remain unpunished. Same holds true for international punishment. As Hannah Arendt¹¹⁸ pointed out persuasively, the “international community” should punish crimes because the nature of the crime can and must be considered as an attack against humanity itself. Having said this, it should be clear, that “the fight against impunity” cannot be considered as a purpose of punishment as such.

The Rome Statute’s preamble points in the right direction. Punishing the perpetrators can be seen as a way of preventing such horrible crimes, namely by deterring possible future perpetrators and by restoring confidence in the violated norm and the rule of law in general. These are classical purposes of punishment and there is no reason to add a vague new one.

In the author’s view, the only valid explanation of the meaning of the phrase “fight against impunity” seems to be a political statement for the creation of international criminal courts and tribunals¹¹⁹. As such, this concept is nothing new. Criminalizing certain behavior goes hand in hand with the establishment of adequate mechanisms to prosecute deviant behavior.

Coming back to the question of how to cope with the dilemma described in the first part, it is tempting to use the idea of “the fight against impunity” to proclaim that criminal prosecution must always prevail over alternative approaches, such as Truth Commissions, and that peace deals must always include criminal accountability mechan-

¹¹⁸ Arendt, pp. 373 et seq.

¹¹⁹ See also S. Sácouto & K. Cleary, p.837.

isms. As shown above, however, nothing supports this argumentation in the absolute. Deterrence and positive general prevention are utilitarian concepts and, as such, always amenable to a balancing act if the goals can be achieved by other means in a more effective manner. The risk of using the expression chosen in the Rome Statute is to accept a claim of exclusivity for a criminal law approach - an exclusivity which does not appear to exist.

Conclusion

It is a difficult task to solve the dilemma, which the international community in general and the ICC in particular, is facing today. An academic approach to this dilemma is even more difficult. The terminology of the Rome Statute is unclear and a pragmatic result of a long diplomatic struggle. It is of the utmost importance that the academic debate frees itself of ambivalent and broad concepts, such as exemplified by the terms/phrases “reconciliation” and “fight against impunity”. A narrower and seemingly not so ambitious approach has the advantage of generating verifiable results. These results are the basis for a differentiated and adapted strategy of conflict resolution in a concrete case, thus avoiding inappropriate generalization.

**The dissertation project*

The dissertation project follows a normative approach in order to establish criteria for balancing the need for criminal punishment of international crimes and the need for ending an ongoing conflict and thus, inter alia, preventing future crimes. In particular, the project focuses on the normative implications of international arrest warrants against leaders implicated in the conflict. It evaluates the possibilities of the Office of the Prosecutor (OTP) and the Pre-Trial Chamber (PTC) of the ICC to refrain from criminal prosecution de lege lata and de lege ferenda for the purpose of avoiding future crimes and human loss. Therefore, it elaborates on various provisions in the Rome Statute (mainly Arts. 16, 17, 20 and 53¹²⁰) and examines international legal obligations regarding the punishment and prevention of international crimes. Additionally, the project will assess the values at stake in the conflict by evaluating the purposes of international punishment on the one hand, and the purposes of peace negotiations on the other. This will be followed by an analysis of the legal implications for other actors, such as the UN Security Council (UNSC) or a national judge deciding to act on the basis of universal jurisdiction. Finally, the dissertation project will assess whether the various actors (OTP, PTC, and UNSC) that are implicated in Northern Uganda and Darfur (Sudan) can or should favor the upholding of the arrest warrants.

¹²⁰ The OTP explained his attitude towards Art. 53 containing the possibility to refrain from prosecution in “the interests of justice” in a “Policy Paper on the Interests of Justice” dated Sept. 2007 stating “that there is a difference between the concepts of the interests of justice and the interests of peace and that the latter falls within the mandate of institutions other than the the Office of the Prosecutor.”

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Mediators in Criminal Matters

MENG-CHI LIEN

Since the 1970s, the movement of “Restorative Justice” has increasingly gained support in Western countries. Contrary to conventional retributive justice, it adopts a more restorative approach in dealing with crime and puts more focus on the victim’s losses and needs. Instead of advocating the punishment of offenders, it emphasizes the repair of the harm caused by the crime. Accordingly, since victims and offenders are the real “owners” of the conflict, they should be given opportunities to discuss the offense and arrange for the reparation by themselves, rather than be excluded from the process by “professional thieves”, especially the lawyers, who take the conflict away from them.¹²¹ Put simply, mediation in criminal matters, which is used to carry out “Restorative Justice” in Germany, reflects the evolution of the perception of criminal justice and the flexibility about the means to maintain social order.

Unlike in the Western countries, where mediation is a relatively new concept, Chinese non-litigiousness and traditional preferences for mediation as a conflict resolution mechanism have been observed and investigated by many Chinese and foreign researchers¹²². However, most of the mediations are related to civil disputes. Mediation in criminal matters, on the contrary, was relatively restricted. This sharp contrast provides the motivation for this comparative research. This article aims to survey the function of mediation in criminal matters in Germany, Taiwan and China, and adopts a functional approach¹²³ to analyse the mediators in criminal matters from three perspectives: first, the organizational structure and legal basis of mediation agencies; second, the qualification and recruitment of mediators; third, the functional dimension of the mediators’ role.

¹²¹ See Christie. An argument has also been made that this kind of exclusion can be a “relief” to the victims, offenders and the social groups to which they belong. See Albrecht.

¹²² See, e.g., Cohen (1966). Chinese Mediation on the Eve of Modernization; Lubman (1967). Mao and Mediation: Politics and Dispute Resolution in Communist China; Fu (1992). Understanding People’s Mediation in Post-Mao China.

¹²³ In order to explore the function of different legal institutions, the functional approach has been proposed as a meaningful comparative method by many comparative legal experts. See, e.g., Zweigert & Kötz, who argue that: “The basic methodological principle of all comparative law is that of *functionality*.” (p. 34) See also Lubman, (1967), who notes that: “This functional approach requires identification of actors, their roles, and the values which they actually—as well as purportedly—maintain or suppress.” (p. 1288) In another article, Lubman illustrates how to use this research strategy to study contemporary Chinese law, which is very useful for foreign students. See Lubman, (1991), p. 328-336.

The Organizational Structure and Legal Basis of Mediation Agencies

The organizational structures of mediation agencies in Germany, Taiwan and China are relatively different. The main distinction lies in the use of private organizations as mediation agencies. Germany employs them frequently whereas China and Taiwan do not envisage this possibility at all. Different types of organizations might influence their working principles and the extent to which the mediator can commit him/herself to the mediation service.

In Germany, the organization of mediation agencies is not regulated by formal law. Although Victim-Offender Mediation (VOM) is legally widely accepted and regulated by the criminal procedure code (§§153a, 155a, 155b StPO) and criminal code (§46a StGB), these provisions contain no information on the position and organization of mediation agencies. In practice, VOM is carried out by various types of agencies, from existing public agencies, like Court Assistance for adults to private non-profit organizations¹²⁴.

In Taiwan, mediation has been institutionalized and regulated by formal law since 1955¹²⁵, which sets out the organization and implementation of mediation in detail. According to the law, the local governments of villages, towns and cities must set up a Mediation Committee to settle 1) civil cases and 2) criminal cases which may only be prosecuted upon complaint. The Mediation Committee is a section of the District Offices in the cities or Township Offices in the villages and towns. It belongs to municipal services and is usually located in the same building as the District or Township Office. Although it is a subordinate section, the empirical research indicates that it works quite independently; the District or Township Office has no direction power over mediation work¹²⁶. The only officer in the Mediation Committee is a Secretary, who is in charge of administrative affairs, like arranging the mediation meetings, making the meeting records and annual reports and so on¹²⁷. All mediators are volunteers and mediation services are free of charge for all citizens.

The situation in China is much more complicated and still in development¹²⁸. There is room here only for a brief sketch. Although in China mediation has also been institutionalized and ruled by regulation since 1954, the amended regulation of 1989¹²⁹ de-

¹²⁴ Hartmann & Kerner, p.2.

¹²⁵ "Act of Mediation in the Villages, Towns and Cities". Online:
<http://law.moj.gov.tw/Scripts/Query4A.asp?FullDoc=all&Fcode=I0020003>

¹²⁶ Kuo, p. 44.

¹²⁷ *Ibid*, p. 39-40.

¹²⁸ For example, the function of mediation and role of People's Mediation Committees have undergone a complete transformation from Mao to Post-Mao China. More details see, e.g. the articles, *supra* note 2.

¹²⁹ "Regulation on the organization of People's Mediation Committees". Online:
<http://big5.chinalawinfo.com/vip.chinalawinfo.com/newlaw2002/slc/slc.asp?db=chl&gid=4331>

prived the People's Mediation Committees of the authority to mediate minor criminal cases¹³⁰. Since then, the Committee can only mediate private disputes¹³¹. In recent years, several local prosecutors have tentatively used *Xingshi-Hejie* (mediation in criminal matters) to handle minor criminal cases and have referred cases to the People's Mediation Committees¹³². According to the above regulation, the People's Mediation Committees are set up in Villagers' Committees of the rural areas or the Residents' Committees in the cities, which are the most important self-governing organizations at the neighborhood level in China. Consisting of local villagers and residents, the Villagers' Committees and Residents' Committees administer local affairs, including managing public welfare, maintaining public order, conveying the government's policy to the villagers or residents, and so on. In practice, mediators are simultaneously the members of Villagers or Residents' Committees, which means, their work contains not only mediation but also all the other tasks of the Villagers' or Resident's Committees. The members of Villagers' or Residents' Committees are directly elected by the masses.

To sum up the foregoing, Mediation Committee systems have been created and operated in Taiwan and China for several decades. They are set up and supported by the local government. This has the advantage that the network of mediation service is nationwide and easily available to all citizens. However, their development is relatively confined since the organizational structure of the Mediation Committees is decided by formal law. The diversity of German mediation agencies might offer an interesting angle on the organizational structure of mediation agencies, notably providing insight into the possibility of integrating private organizations into mediation practice. Such diversity can contribute to the flexibility of mediation work.

¹³⁰ According to the explanations for amendment from the Vice Minister of Justice, the 1954 regulation allowed the People's Mediation Committee to mediate minor criminal cases, simply because there was no civil and criminal law and therefore the distinction between minor criminal cases and tort was not clear back then. After the Criminal Law (1979), the Criminal Procedure Law (1979) and the General Principles of Civil Law (1986) were promulgated, the People's Mediation Committees are only able to mediate minor offenses which do not violate the Criminal Law and therefore still belong to civil matters. On the contrary, if the offenses fall into the purview of public security cases or criminal cases, they can only be dealt with by the police or public prosecutors. Online: www.zsft.gov.cn/art/1989/6/17/art_188_10.html (last visited on August 5, 2009).

¹³¹ See section 5 of the "Regulation on the organization of People's Mediation Committees".

¹³² In practice there are three main forms of *Xingshi-Hejie*: 1. Public prosecutors refer cases to the People's Mediation Committees, e.g. the People's Procuratorate of Yangpu District in Shanghai City; 2. Public Prosecutors presides over a conference for *Xingshi-Hejie*, e.g. the People's Procuratorate of Chaoyang District in Beijing City; 3. Individual mediation between the victim and the offender, and then the result should be affirmed by the Public Prosecutor, e.g. the People's Procuratorate of Haidian District in Beijing City. See Huang, Zhang & Mo, p. 214-215.

The Qualification and Recruitment of Mediators

In Germany, there is no law regarding the qualification and recruitment of mediators. Aside from professional mediators, anyone who has experience in dealing with interpersonal problems and wants to carry out VOM can complete a training to become a mediator¹³³. For both professional mediators and trained volunteers, continuous training is essential and usually includes not only practical skills, like communication skills, but also academic knowledge in subjects, such as law, criminal policy, victimology and sociology¹³⁴. Since there are different types of mediation agencies, mediators are recruited by diverse agencies depending on their own needs and standards.

On the contrary, in Taiwan and China, the qualification and recruitment of mediators are regulated by laws or regulations and reflect uniformity. There are neither professional, full-time mediators nor training courses for becoming a mediator. Mediation skills are considered to be common, not professional abilities; talent and experience can make a good mediator. Corresponding to the traditional image of a mediator, a mediator is expected to be a fair-minded person with a good reputation and is usually enthusiastic about public service. These are also legal requirements¹³⁵. Moreover, to serve as a mediator, an individual must pass the recruitment process in Taiwan or go through the election process in China. The recruitment of Taiwanese mediators can be described as follows: twice the number of mediators needed are nominated by the head of the village, county or city and then the local court and local prosecutor's office together choose the necessary number of mediators (7 to 15, maximum 25 mediators). The term of office of mediators is for a period of four years and they are officially appointed by the head of the village, county or city. In China, as mentioned before, mediators are simultaneously the members of Villagers' or Residents' Committees. They are directly elected by the masses for a term of three years and can be re-elected repeatedly.

The point to observe is that aside from the common expectation of enthusiasm for public service of a mediator in the three countries, Taiwan and China place emphasis on the fairness of a mediator, and control the gateway of the post of a mediator. The

¹³³ See, e.g. the target group of the workshop "Mediation in Criminal Matters 2009/2010". This is a training program offered by the "Victim-Offender Mediation and Conflict Resolution Service Bureau" in Cologne, established as a supra-regional office to promote the VOM in 1992 by the DBH (German Association for Social Work, Criminal Law and Crime Policy) with the support of the Federal Ministry of Justice. Homepage: www.toa-servicebuero.de

¹³⁴ See the course contents of the above workshop, *ibid.*

¹³⁵ In Taiwan, the qualifications for mediators are "local people with legal or other professional knowledge and fair-minded people with good reputations". See section 3 of the "Act of Mediation in the Villages, Towns and Cities". In China, the requirements for people's mediators are: "being fair-minded, having close ties with the masses, being enthusiastic about the people's mediation work and having certain knowledge of law, policy and have received certain education". See section 4 of the "Regulation on the organization of People's Mediation Committees".

mediators in Taiwan and China are therefore embracing some degree of semi-official character. This has something to do with the expected function of a mediator and can be more easily comprehended after the explanation of the next section.

The functional dimension of the Mediator's Role

The role of the mediator is usually described as follows: s/he is a facilitator of the communication between the victim and the offender. Her/his main goal is to help both parties reach a conflict resolution on their own. Not only the German mediator, but also the Taiwanese and Chinese mediator, basically fit this description. However, we can still find a fine distinction through further investigation. Gulliver, nearly thirty years ago, pointed out that mediators alter the strategies quite widely. Based on the range of strengths of intervention, he describes mediators' strategies on a continuum and uses different terms to illustrate the function of a mediator. According to Gulliver's classification, a mediator can act anywhere from a "passive mediator, a "chairman", an "enunciator", a "prompter, a "leader" to a "virtual arbitrator"¹³⁶. It must be noted that both in China and Taiwan a mediator is considerably expected to act as enunciator of rules and norms. As Gulliver put it, the mediator represents the wider community to which both parties belong and the rules applied in it. People, such as the respected elder or lawyer are accepted to be a mediator because they possess special prestige and knowledge¹³⁷. As mentioned previously, this kind of expectation is also a legal requirement for a mediator both in Taiwan and China. On the contrary, the function of mediator as an enunciator is not emphasized in Germany.

Moreover, the mediators in Taiwan and China act more like arbitrators than in Germany. It is very common that the mediator makes a suggestion and tries hard to persuade or even pressure both parties to accept it. Since the suggestion of the mediator is often taken as a direction of the resolution and leads to the final agreement, the fairness and authority of the mediator is crucial in Taiwan and China. New empirical research in China reveals that 72.4% of questioned ordinary people believe that the mediation in criminal matters is better administered by investigating officials, while only 9.5% think that it is better conducted by other institutions (including People's Mediation Committees!)¹³⁸. The results reflect exactly the general expectation of authority of the mediator, mentioned previously, which is rarely mentioned in Germany.

¹³⁶ Gulliver, p. 28-34.

¹³⁷ Gulliver, p. 29.

¹³⁸ Song, P. 7.

Conclusion

After comparing the organizational structure and legal basis of mediation agencies, the qualification and recruitment of mediators as well as their function in Germany, Taiwan, and China, several noticeable differences and some interesting similarities between mediators in criminal matters in these three countries can be observed. This functional comparison can help us to find out the benefits and obstacles for mediation practices in criminal matters in a broader context. Furthermore, it also contributes to the mutual understanding of the perception of mediation and its function as a key instrument to maintaining social order in the West and East. This is indispensable for the conflict resolution in today's global society.

* Dissertation Project

Mediation in Criminal Matters and the Role of the Public Prosecutor

---A Comparison between Germany, Taiwan, and China

Mediation in criminal matters (MIC) is widely recognized as a viable alternative to more traditional and repressive responses to crime. As part of the restorative justice movement, MIC has achieved widespread attention in many countries. However, the development of MIC has been quite different in Germany, Taiwan, and China. In addition to extensive variations in legislation, e.g. a complete legal framework and widespread acceptance of MIC in Germany versus severe restriction in Taiwan and China, in practice German public prosecutors are overly prudent in referring cases to mediation agencies, whereas the Taiwanese and Chinese public prosecutors have demonstrated great enthusiasm in employing mediation frequently, despite different goals motivating the use of mediation in both contexts. This sharp contrast provides fertile basis for this comparative research.

In light of the fact that only a few MIC studies have aimed to address the problems and needs from the position of the public prosecutor, it is the intention of the present research to examine the required preconditions for an extensive MIC application from the viewpoint of the public prosecutor.

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Naming your Enemies

DAVID JENSEN

The *Criminal Law for the enemy* is a theory that favours the frontal confrontation of those who are considered enemies of the legal order. The antimaras measures implemented in Central America resemble this theoretical approach and go even further by identifying the enemies of the State. The purpose of this article is to discuss the consequences of naming the addressee of punishment in the hope of contributing to the understanding of the actors involved.

Criminal Law for the enemy

Criminal punishment is imposed when someone has committed an offence against a legal rule providing such consequence. The addressee, that *someone* who can be punished, is the undetermined element of the rule, which is to be established by a judge or a jury. This fact, in combination with the prohibition of retroactivity of the criminal law, assures all citizens that punishment will not be arbitrarily used by the authority, for all they have to do is respect those legal rules in order to avoid punishment. In other words, criminal laws protect the citizens from the power of the authority by preventing the arbitrary use of criminal sanctions. This proposition leads to a question: are criminal rules only a restraint for the authority or does the authority also benefit from establishing criminal laws with general applicability to its citizens? An argument against this proposition is, for instance, that authoritarian regimes grow stronger by arbitrarily *punishing* their enemies, thus eliminating all sort of resistance. Would it not be *more efficient* for a State to identify its enemies (the enemies of social order, persons or groups dedicated almost exclusively to crime, like terrorists, criminal organizations and so forth) and directly confront them, maybe even with more severe punishment than those that apply to the law-abiding citizens?

An approach in this direction was formulated by the German penologist and legal philosopher, Günther Jakobs. He believes in the existence of two different types of criminal law: *criminal law for citizens* and *criminal law for the enemy*. The former applies to normal law-abiding citizens who have assimilated and usually behave according to legal rules. In this case, criminal law has the function of deterring the citizens from committing offences and preventing the future perpetration of offences by putting deviant citizens back in the *right track*, thereby (re)assuring the other citizens that the legal and social order will be maintained by the State. *Criminal law for the enemy* on

the other hand, deals with individuals who do not just casually commit a crime, but make criminal activity their way of life. It can be expected that they will continue behaving contrary to the law, for they give no cognitive guarantee of behaving like citizens. In this case, the State should treat them as an enemy, not a citizen.

Unlike *criminal law for citizens*, the purpose of *criminal law for the enemy* is to eliminate a danger.¹³⁹ For this reason, the rules of criminal law have to be adapted to meet the challenge. Jakobs characterizes *criminal law for the enemy* with the following elements¹⁴⁰:

- The penalization of preparatory acts. Criminal law now focuses not on the perpetration of a wrongdoing, but on the acts taking place before and leading up to the actual perpetration;
- No proportional reduction of the punishment of preparatory acts. Although only preparatory, their sanction is as severe as the sanction of accomplished offences;
- The transition from a penal legislation to a “fight” legislation, which is directed towards dangerous crimes (terrorism, organized crime, etc.) without necessarily fighting the actual perpetration of a crime;
- The reduction of procedural protections. The requirements for precautionary measures and the production of proof are attenuated.

The theory of enemy’s criminal law has been widely discussed¹⁴¹ in Germany and other parts of the world, especially in Latin America. It was used in Colombia to ground the government’s war against the Revolutionary Armed Forces of Colombia (FARC) and to justify the fight against terrorism through *unconventional* means, like the creation of Guantanamo Bay detention camp. Furthermore, some Central American countries have implemented zero tolerance policies to fight the maras which, although not officially recognized as a development of the criminal law for the enemy, contain rules that clearly resemble Jakobs’ depiction of this system. These rules were called the Antimaras Laws.

Through their policies, the Central American governments (especially in Honduras and El Salvador) went even further in their implementation of the *criminal law for the enemy* than other governments, like the United States. The criminal policy of the United States is familiar (at least in practice) with this doctrine: *The War on Drugs* and *The*

¹³⁹ Jakobs, G. (2004) p. 88.

¹⁴⁰ Jakobs, G. (2000) p. 51-52.

¹⁴¹ See Aponte, A.; Zaffaroni, R.

War on Terrorism are good examples of its application. Although informally people might consider them legislation against an enemy (the former against Colombian and Mexican cartels and the latter against Al-Qaida and the Taliban), they are presented in a broader way to the general public, meaning that anyone involved in drug or in terrorist activities will be considered an enemy by the State. However, the Central American governments went a step further by *identifying* their enemy: *the maras*, street gangs allegedly responsible for numerous homicides, robberies, extortions and the countries' general level of insecurity. Is this a recommendable criminal policy?

The role of the State

It is generally accepted today that the State executes the task of solving the conflicts that arise in society.¹⁴² Its justice system provides the parties to a conflict unbiased ways to settle their problems, thereby preventing them from resorting to private ways (like retaliation) that might lead to the prolongation or the escalation of the conflict. The State is viewed as the impartial judge, providing justice equally for all its citizens.

When the State declares a group (e.g. the maras) its enemy, it suddenly loses its neutrality and becomes a party to the conflict. The Maras are considered enemies of the State, not enemies of its citizens. This, in itself, should raise questions about the convenience of the policy. If the neutrality of the State vanishes, the State itself *becomes* an enemy (in this case of the maras) to the detriment of the prevention of conflict and private retaliation.

In addition, this stance also implies that the enemy group is somehow banned from society; it can no longer belong to the *formal* or *legal* structure. This might not be such a problem if the enemy is a terrorist group from another country. The picture changes, however, when membership of these ostracized groups comprise a rather large segment of the society, ten or twenty thousand members of society, most of them minors, who live closely in the same neighborhood and city as other citizens, as is the case for the maras. The maras are, in fact, considered a threat by many, since they do commit homicides, extortions and robberies; many others, however, do not dislike the maras and may even feel 'protected' by them because maras members are highly territorial (they protect their *turf* from the activities of other gangs), they do not commit crimes against the residents of their own territory (it is forbidden by internal rules), and they contribute financially to their milieu. Based on the foregoing, to *eliminate* them through punishment does not appear to be a real possibility.

¹⁴² This is not without criticism. See Christie, N.

General positive prevention

The ability of the State to enforce the law and to prevail within its boundaries against other forces, gives its citizens the certainty that the law will be respected and offences punished. This reassures the citizens' confidence in the legal system and in the government. Of course, the system is not perfect. Sometimes crime rates rise, forcing the government to formulate new criminal policies. If a policy fails, the government has to reformulate it to regain peoples' trust.

In contrast, when the criminal policy consists of *eliminating* an enemy, then the ability of the State to prevail is at stake. Like in war, fighting an enemy will almost always end up with one of two results: either you win or you lose. However, the State cannot afford to lose, for it would compromise its authority and the confidence the citizens have placed in it. If this confidence was to be lost, citizens might try solving the problems by themselves because the State does not appear to be fulfilling its role. In the case of the mara conflict, the appearance of death squads and cases of lynching could become the expression of the citizens' disappointment with the State. Another example could be found in some paramilitary movements in Colombia. In other words, by declaring war against its enemy, the State authority becomes vulnerable and might lead to the undesired use of private justice.

Deterrence and Labeling

Further consequences of naming a group the State's enemy are the decreased deterrence and the labeling effect. The former refers to one of the purposes of punishment, which is to discourage the criminal from committing future criminal acts by establishing harsh consequences. When punishment is attributed to mere membership of the group, instead of the criminal acts committed by such groups, the enemy is not discouraged from criminal activity because punishment is inevitable.

An example can again be drawn from the mara case. According to the first Antimaras law in El Salvador, the criteria to identify maras are: having tattoos, scars, meeting regularly, marking territories and using signs and symbols to communicate (article 1). A person could be sentenced to 2 to 5 years in prison for being a member of a mara, which has intimidated, bothered or threatened a person in any way, or a neighborhood (article 6). In other words, the individual just has to be a member of an *intimidating* mara to be convicted by the law, regardless of his/her own actions.

Such a law also has the effect of labeling the enemy, making it more difficult for him to earn a living through legal means. A consequence of the Antimaras law can be, for instance, that members of a mara (as well as other tattooed persons) no longer find honest jobs and are forced to continue their criminal activities to make a living, in

short, a self-fulfilling prophecy. In other words, Antimaras laws can, in fact, have the undesired outcome of exacerbating the cycle of violence instead of mitigating it.

Conclusion

The point of departure of this article was to question if the general application of the law also benefits the State (not only its citizens) or, in particular, if the State could profit from determining the addressee of a criminal law by identifying an enemy. In a democratic state, the anonymity of the criminal law reinforces the State's role as an impartial actor, prevents it from putting its authority at stake, and favours general and special deterrence.

* Dissertation Project

The Maras: a study of their origin, international impact and the measures taken to fight them.

This research is devoted to the analysis of the maras, a street gang which has allegedly evolved into an international crime organization. The analysis will be performed on two levels. The first one relates to the origins, structure and activities of the maras. By focusing on the two major maras, Mara Salvatrucha (MS-13) and Barrio 18, this investigation studies how the street gangs gained international relevance through the combination of armed conflicts in Central America and the immigration policy enacted by the United States of America. Moreover, an evaluation of the structure and activities of the maras reveals the stage of their development from a street gang to an organized crime group.

Next, the measures taken against the maras at the national and international levels will be analyzed. The analysis will focus on the three Central American countries with the largest mara populations, El Salvador, Guatemala and Honduras, and will proceed in each case in the same manner. After describing the country's general indicators and the prevalence of the maras in each of them, the investigation will turn to the measures taken by governments when reacting to the presence of the maras, depicting not only the preventive, repressive and rehabilitating measures in themselves, but also the political discourse surrounding them. The consequences of these measures will then be analysed in four areas: crime rates, the judicial system, the penitentiary system, and the reaction of the maras. Successful measures should result in a decline in crime rates due to the number of crimes attributed to the maras. Likewise, the strain on the judicial system in processing those crimes could also reflect the impact of the measures. Furthermore, the ability of the penitentiary system to take in new convicted

maras and contribute to their rehabilitation will be tested. The reaction of the maras to those measures (number, structure, activities) will also contribute in evaluating their success. Finally, the analysis will turn to the efforts made by each of the above named country at the international level, such as coordinating actions and sharing information among themselves and with the United States.

In achieving its aims, the research will contribute to an understanding of the effects of globalization on crime phenomena, since the maras exemplify the transformation of a problem that previously only manifested itself locally but now has risen to an international level. Moreover, the mara case puts into question the use of zero tolerance policies and severe punishment to establish social order in the context of violent (post-war) society and suggests the use of alternative measures like prevention, rehabilitation and mediation.

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Mediatory functions of seconds in duels of honour?

Normative treatment: Spain, 19th century

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Introduction

The object of my dissertation project is about the research of the penal norms promulgated in Spain and France from the 19th century until the First World War with regard to the protection of honour and dignity of the convicted. Due to the interdisciplinary content of the REMEP program, I am focusing first on the research of a legal and anthropological use of the concept of honour by analyzing linguistic and normative sources as well as the juridical discourses. Second, I am researching and comparing both the juridical writings and the national regulations of penalties that were considered as dishonourable, harmful or shameful for the convicted people with regard to the changing meaning of the notion of honour. Finally, I am verifying the empirical infliction of these penalties through the existing jurisprudence.

Honour has a varying notion resulting from different social content and strongly influenced by collective attitudes and the common conceited and admitted convictions. In the juridical aspect of its notion, researches about honour from a legal historical approach prove its existence in both the normative sources and the juridical writings as an object of mechanisms of retaliation, mediation and punishment¹⁴³.

Regarding the protection of honour, one of the most extended and paradigmatic reactions against a real or perceived breach of honour of an individual was the duel of honour. This type of duel was an arranged meeting by the offender and the offended aiming at the restab-

¹⁴³ For a knowledge of the evolution and usage of the terms “honor, “honra” and “injuria” over the Middle Age in the different Kingdoms of the Iberian peninsula, see Serra Ruiz, R. (1969). *Honor, honra e injuria en el derecho medieval español*. Murcia.

As for the existing regulation in the normative and scholarly sources of the different Kingdoms of the Iberian peninsula from the Visigothic period until the codification period, see Pérez Martín, A. (1991). *La protección del honor y de la fama en el derecho histórico español*. Murcia.

Regarding the existence and the appliance of the retaliation since the 16th until the 18th century in Castilla, see Tomás y Valiente, F. (1969). *El Derecho penal de la Monarquía Absoluta (siglos XVI-XVII-XVIII)*. Madrid, pp 46-80.

Concerning the mechanisms of arbitration and mediation gathered in the normative peninsular bodies since the Ancient Age until the codification period, see Merchán Álvarez, A. (1981). *El arbitraje: estudio histórico jurídico*. Sevilla.

lishment of the social reputation and the preservation of the affected honour from a real or perceived affection of honour¹⁴⁴. Many normative attempts existed over the history of Spain by both the secular and the canonical Law aiming at the abolishment of the duels of honour¹⁴⁵. Due to the persistence of such arranged meetings in Spain during the 19th century¹⁴⁶, the Spanish penal norms did not make an exception in such attempts, containing regulations which criminalized such violent actions with the infliction of penalties to the duellists, the people who incited the offended and/or offender either to promote or accept a duel of honour, the third parties who were the carriers of the letters to summon the offender to the fight, the people who publicly discredited or denigrated the offender who rejected to fight in a duel of honour, all the people who voluntarily contributed to the performance of the fight, and the so-called “seconds”¹⁴⁷. “Seconds” were the attendants assisting a principal involved in a real or perceived offence against honour which could cause a duel of honour between them¹⁴⁸.

The 19th century is the epoch in which the Spanish State has already established its monopoly of power¹⁴⁹. We can observe as well that the principles of the Enlightenment influenced the Spanish penal system and the enacted Liberal penal Codes¹⁵⁰. In these new systematic and secular penal Codes, the General Part of the penal Law reduced the catalogue of the existing penalties, and the purposes and effects of penalties infringed a narrower variety of juridical protected goods of the convicted than the former existing penal regulations. Nonetheless, despite the existing conceptual typology of the penalties which are not considered as infamous or dishonourable, the honour was still an affected good by both the purposes and the effects of the penalties in the Spanish penal Codes¹⁵¹. Hence, the crucial importance of honour and the influence of first utilitarianism and later

¹⁴⁴ In order to know the regulated behavioural conducts which breached honour from the Gothic period until the codification period in the Spanish norms, see the publications of Pérez Martín and Serra Ruiz mentioned in the footnote number 1.

¹⁴⁵ For an overview of the enacted penal norms regulating the different forms of duel over the Absolute Monarchy, Tomás y Valiente pp 23-80

¹⁴⁶ For a knowledge of the existing duels of honour in Europe and most specifically in Spain over the history, see Cabriñana, M. de (1900). *Lances entre caballeros. Código del honor en España*. Madrid. I would not like to waste this opportunity to thank Professor Pérez Martín (*Universidad de Murcia*) for having sent to me the mentioned book, taking into consideration the difficulties I had to get it by myself.

¹⁴⁷ Focusing only on the Liberal Penal Codes that were enacted in Spain during the 19th century: articles 661-663 of the penal Code of 1822; articles 340-348 of the penal Code of 1848; articles 349-357 of the penal Code of 1850; articles 439-447 of the penal Code of 1870.

¹⁴⁸ Oxford English Dictionary, word “second”. (<http://dictionary.oed.com/>)

¹⁴⁹ See fundamentally Tomás y Valiente, pp 23-46, who stated that the Modern Era is the epoch when a process of establishing the monopoly of power by the State came to a final point in “Spain”.

¹⁵⁰ In order to know the evolution and consequences of the appliance of the Enlightened principles in the Spanish penal system, see Masferrer Domingo, A. (2003). *Tradición y reformismo en la Codificación penal española*. Jaén.

¹⁵¹ See article 23 of the penal Codes of 1848 and 1850 in order to check the most paradigmatic example of the conceptual typology used in these penal Codes for penalties breaching the honour as a juridical protected good.

on retribution as fundamental purposes of the penalties in the Spanish penal system of the 19th century¹⁵² implied the persistence of the affection of the convicted's honour¹⁵³.

The seconds in the Spanish penal Codes of the 19th century

Functions of seconds in duels of honour

The discussion about the specific functions as “mediators” of seconds in duels of honour according to the Spanish penal Codes of the 19th century will be developed in the following pages.

Peacekeeping competences of seconds

Before a duel of honour was performed, the Spanish penal Codes of the 19th century dealt with peacekeeping functions of seconds in order to avoid any violent action as a mechanism of solving any real or perceived breach of honour.

Regarding these penal Codes, the words used by the articles 346 paragraph 3 of the penal Code of 1848, 355 paragraph 3 of the penal Code of 1850 and 445 paragraph 3 of the penal Code of 1870 for expressing these sort of functions are “conciliate the spirits”¹⁵⁴; the Chapter III, First Title, Second Part of the penal Code of 1822 did not use any term referring to mediatory competences of a second in order not to go to a step further and fight both duelists for solving their dispute¹⁵⁵.

The aforementioned statements about the functions of seconds in the Spanish penal Codes were not the only ones regarding the competences of seconds before a duel of honour was performed. The articles 346 paragraph 1 of the penal Code of 1848, 355

¹⁵² About the existing doctrinal influences in the dealt Spanish penal Codes, see Lasso Gaité, J. F. (1970), *Crónica de la Codificación española, 5 Codificación penal. Volumen I*, Madrid, pp 51-53, 396-397 and 474-475.

¹⁵³ Masferrer Domingo, pp 162-177. For a clarifying overview about the empirical and historiographical treatment of penalties which purposes and effects affected the honour in Spain, see Masferrer Domingo, A. (2008), *La inhabilitación y suspensión del ejercicio de la función pública en la tradición penal europea y anglosajona*. Madrid, pp 39-41.

¹⁵⁴ “*Conciliar los ánimos*” is the used expression –“conciliate the spirits (of the duellists)”-; translation by the author of this article.

¹⁵⁵ Articles 661-663 Spanish penal Code of 1822.

paragraph 1 of the penal Code of 1850, and 445 paragraph 1 of the penal Code of 1870 threatened the same penalties to seconds that the penalties regulated for duellists when seconds were promoters of the duel, thus when they provoked its performance.

In spite of using the expression “conciliate the spirits”, the Spanish penal Codes of the 19th century did not specify neither the meaning of this expression nor a description and specification of the concrete functions of seconds. In the same way, these penal Codes did not concretize neither the meaning of the word “provoke” in this context nor the cases and mechanisms whereby seconds “provoked” duels of honour.

Regarding the penal Code of 1822, it did not state the consideration of seconds as promoters. Its article 663 regulated that, in the case when the duellists committed any crime during the duel, seconds should be punished as “collaborators and guilty parties of the committed crime”. Furthermore, in the case where no “(physical) injury” occurred, seconds would be arrested for the only reason of participating as such in these violent and criminalized actions. The commented penal responsibility of seconds and the regulated penalty were shared with individuals who acted as carriers of letters to summon the offender to the performance, as well as for “anyone that voluntarily collaborate or contribute to it (the fight)”.

Hence, a logical-deductive interpretation of the criminalized actions of the seconds by these Liberal Codes is the base to know and understand the competences of these third parties. What all these Spanish penal Codes punished was a passive behaviour and conduct of seconds to finish the dispute through non-violent means in order to avoid the fight, because seconds were considered as guarantors of impartiality in the dispute. Furthermore, seconds were always considered as principal participants in duels of honour in the Spanish penal Codes. The involvement of seconds in duels of honour was always punished only because of their participation both in an active way to cause its performance –as “promoters”- and in a passive way for avoiding the practice as a complicity in such illegal practices –as “collaborators” or “contributors”-. The participation of seconds for pacifying both parties in order to solve the dispute as well as to avoid the duel was never punished by the Spanish penal Codes of the 19th century, and this measure of trusting in these third parties was the measure followed by the legislators so that duels of honours would not be performed anymore.

Safety competences of seconds

Article 347 of the penal Code of 1848, article 356 of the penal Code of 1850 and article 446 of the penal Code of 1870 regulated that in a duel of honour where no death or physical injuries occurred, harsher penalties were applied to the duellists in some specific cases. Such harsher penalties were inflicted when each of the duellists did not

appoint at least two seconds and when these third parties did not agree on the allowed weapons in the fight and other applying rules¹⁵⁶.

Article 346 of the penal Code of 1848, article 355 of the penal Code of 1850 and article 445 of the penal Code of 1870 considered seconds as guilty parties or accomplices for their penal responsibility. Besides this penal treatment the mentioned norms regulated in some cases a “major arrest” penalty and a fine for these third parties depending on the behaviors led by seconds during the organization of the duel. The three cited articles of the penal Codes deemed seconds as authors when one of the fighters died or was injured and any treachery was committed by seconds in the execution of the fight or in the agreement on the applying conditions¹⁵⁷. For considering seconds as accomplices, seconds should have agreed at the end of the fight by the death of one of the combatants or with any “known advantage” for one of the duellists¹⁵⁸. Concerning the infliction of a “major arrest” and a fine for seconds, these two penalties applied when seconds did not even intend to agree on the less risky conditions of the duel for the life of combatants¹⁵⁹.

The dispositive part of the aforementioned articles shows the framework of the main functions and requirements of seconds for organizing duels of honour: at least two seconds were required for each duellist, all seconds participating in a duel had to be of age, and seconds were the persons in charge of agreeing on the weapons and the other conditions. In spite of not specifying further the concrete matters on which seconds had to agree upon these norms, they specifically mentioned the condition which was considered the most important by the legislators: agreement on the weapons used. Furthermore, legislators established an indeterminate and general statement in which they pointed out the necessity of agreeing on more conditions, and not just on the allowed weapons.

The analyzed articles provide interesting information about the importance that legislators conferred to the participation of seconds in duels of honour. Broadly mentioned

¹⁵⁶ Article 341 paragraph 3 of the penal Code of 1848, article 350 paragraph 3 of the penal Code of 1850, and article 440 paragraph 3 of the penal Code of 1870 established the infliction of the *arresto mayor* (major arrest) to the combatants who acted in a duel of honour with their respective seconds and caused no deaths or physical injuries. On the other hand, article 347 of the penal Code of 1848, article 356 of the penal Code of 1850, and article 446 of the penal Code of 1870 regulated the *prisión correccional* (correctional prison) when the same consequences of the performance took place and no seconds were appointed and agreed on the weapons and other conditions of the duel. The two mentioned penalties belonged to the category of penalties named „*penas correccionales*“ (correctional penalties), but the *prisión correccional* was classified as one of the harshest within the existing category of *penas correccionales*, while the *arresto mayor* was the mildest one. The translation of these Spanish terms is made by the author of this paper.

¹⁵⁷ Articles 346 paragraph 1 of the penal Code of 1848, 355 paragraph 1 of the penal Code of 1850, and 445 paragraph 1 of the penal Code of 1870.

¹⁵⁸ Articles 346 paragraph 2 of the penal Code of 1848, 355 paragraph 2 of the penal Code of 1850, and 445 paragraph 2 of the penal Code of 1870.

¹⁵⁹ Articles 346 paragraph 3 of the penal Code of 1848, 355 paragraph 3 of the penal Code of 1850, and 445 paragraph 3 of the penal Code of 1870.

in these articles, the main functions of seconds were to arrange impartial and safe conditions applying to the duel of honour in order to establish a fair fight. The best evidence of this statement is that the same consequences of a duel could cause the infliction of different penalties to the duellists depending only on the participation or non-participation of seconds by inflicting harsher penalties when the regulated circumstances for a duel of honour did not apply in the fight.

Seconds were the participants in charge of agreeing on the rules of the fight, although they were not allowed to arrange the end of a performance by the death of one of the duellists. In any case, seconds were forced by law to arrange the conditions of a duel of honour in the safest way for the life of fighters. Furthermore, seconds should be impartial in both arranging the applying conditions for the fight and during the fight without using any treachery or advantage in favour of any combatant. All those limits affected and were related to the risk of the life and physical integrity of the duellists, and the limits of their functions were based on immoral and partial ways of acting by seconds. Articles 346, 355 and 445 of the penal Codes of 1848, 1850 and 1870 stated in an indirect manner the limits of the functions exercised by seconds and concretized the general framework provided in the aforementioned articles 347, 356 and 446 of the penal Codes of 1848, 1850 and 1870. Once the compulsory peacekeeping attempts made by seconds did not work, these Spanish penal Codes considered seconds as important participants in a dispute of honour by acknowledging their capacity for arranging impartial and safe conditions for a fight in order to establish a fair fight and not to risk the life of the combatants.

Conclusion

The duels of honour are a paradigmatic example of establishment of the monopoly of the *ius puniendi* by the State. The Authorities were conscious that a subsistence of duels would derogate their monopoly of power, and the dispositive part of the norms of the Middle and Modern Ages gathering these fights stated such assertions. With the ancestral custom of the duels of honour, participants were carrying out competences as kind of “judges” and even “legislators” for establishing a parallel procedure to the one promulgated in penal norms in order to solve their conflicts without fulfilling any of the existing regulations about the judgement and punishment of offences against honour. This appropriation of punitive competences by participants in duels, and the persistence of this remote practice during the 19th century are the two main reasons why the Spanish penal Codes of the mentioned century still criminalized the duels of honour and regulated this violent mechanism with the same content in the penal Codes of 1848, 1850 and 1870. Hence, the mentioned Liberal Codes followed the same social-political motivations than the medieval and modern rulers so that Authorities could eradicate its practice.

The norms contained in these Spanish penal Codes did not describe the specific functions exercised by seconds in duels of honour. Apart from the emergence of the term “conciliate” with the enactment of the penal Code of 1848 until the promulgation of the one of 1870, the lack of development of the functions integrated within the term “conciliate” did not let us identify the procedure and mechanisms of action of the seconds. Furthermore, this disinformation of the Spanish penal Codes of the 19th century obliges us to follow a logical-deductive interpretation of the criminalized actions of the seconds in the penal Codes in order to know the concrete competences of seconds.

The figure of the seconds persisted in the duels of honour of the 19th century, and that’s the reason why the Spanish penal Codes are dealing with these third parties. Even more, on the one hand the participation of this kind of participants was considered fundamental in its performance by the *erga omnes* norms; the criminalization of these third parties both when they were participating as seconds because of their active involvement in the performance of duels of honour, and their negligence in exercising their functions why a duel was performed were the punished actions by the mentioned penal Codes. However, on the other hand both the presence of a minimum number of seconds for every duellist and their participation in trying to solve the dispute by non-violent mechanisms or establishing the applying conditions for the fight were supported and even protected by these Spanish penal Codes.

The Spanish penal Codes of that period promulgated an ambivalent regulation for seconds, establishing on the one hand “mediatory” functions in what we named “the peacekeeping competences” exercised by second before the duel was performed, and on the other hand “representative” functions of seconds for applying the “safety competences” when a duel would finally be performed. The permission by Authorities in the involvement of such third parties tended to mitigate the consequences of the fight between the conflict parties through an agreement with impartial and safe rules, and in a last step the trust that legislators gave to seconds as peacemakers tended to eradicate and abolish the existence of duels of honour in Spain.

* Dissertation Project

*The protection of the honour and dignity of the convicted in Europe
Specific comparative historical approach between the penal regulations in
France and Spain*

All European countries prohibit the infliction of inhuman or degrading penalties, and France, Germany and Spain provide examples of these protections to ensure the basic rights of people to honour and dignity. No Spanish constitution prior to today’s Constitution of 1978 regulated this issue, though this does not mean that up until 1978

Spanish constitutionalism did not protect this basic human right. Nevertheless, it is not the only case of non-regulation: Germany provides a further example as its current constitution does not have an express impediment of imposition of inhuman or degrading penalties, thus it precisely demonstrates this option without at all damaging the protection of the fundamental rights of the people to honour and dignity in the mentioned country. Thus, even when a country does not have an express prohibition, the impediment of infliction exists in all the European countries.

The aim of this project is focused on the “inhuman or degrading penalties”, and not on the crimes. As the commitment of every crime could breach the honour and dignity of the affected person, the vagueness, the extent and the concrete literature written about this content obliges us to limit the object of our research project to focus specifically on the penalties. We will therefore focus on the honour and dignity of the people that have been found guilty of perpetrating an offence, as they belong to a category of people whose honour and dignity can be easily violated due to their guilt, taking into account that everybody –even those people found guilty- is protected by the existence of fundamental and human rights, among which honour and dignity are included. Thus, once a person has been found guilty, the only legal mechanism through which his or her honour and dignity can be damaged is the applied penalty to this person.

The object of my Dissertation project is about the research of the penal norms promulgated in Spain and France from the 19th century until the First World War. The project is dealing with the protection of honour and dignity of the convicted. Due to the interdisciplinary content of the REMEP program, I am focusing first on the research of a legal and anthropological use of the concept of honour by analyzing linguistic, normative sources and the juridical discourses. Second, I am researching and comparing both the juridical writings and the national regulations of the penalties that were considered dishonourable, harmful or shameful for the convicted people according to the changing meaning of the notion of honour. Finally, I am verifying the empirical infliction of these penalties through the existing jurisprudence.

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Outro

The different projects presented in this volume illustrate that the concepts of retaliation, mediation & punishment can be found in such diverse contexts as white collar crime, terrorism, international criminal law and gang delinquency. All these three social mechanisms are fundamental when actors, may they be individuals or a collective entity, address deviancy and situations of conflicts. State-Agents of social control utilize punishment to stabilize existing, (codified) norms; but when private actors challenge the predominant normative fabric and the social establishment, they sometimes claim their actions to be punitive and retaliative, too, in order to indicate their moral superiority over the state power. After all, punishment and retaliation are so prominent and ubiquitous because they are a convenient justification for the application of violence and exercise of coercion; and violence is indeed multifunctional.

Therefore, punishment is employed with different intentions that can be such diverse as re-integration (criminal punishment) or incapacitation (when addressed against enemies to society). These two rationales can be observed for instance in the war against (and of) terrorism and gang delinquency as Armborst and Jensen show in their chapters “Jihadism, terrorism, and the state” and “Naming your enemies”, respectively. Bedoya Sánchez in her chapter “On the grammar on punishment” shows that the notion of punishment has a discursive as well as a *de facto* dimension. Through discourses of power the legitimacy for punishment (and the application of violence in general) is constructed. The right, even the imperative, to impose punishment on other human beings derives from the perception of doctrinaire indefeasibility and moral superiority over the ones who are to be punished (or retaliated upon). However, the application of these mechanisms in international punishment, Sanchez argues, usually does not follow doctrinal considerations but opportunistic ones. Hiéramente points to unintended effects when prosecuting core international crimes enumerated in Art. 6-8 of the Rome Statute. He critically reviews the usage of vague terminology (“reconciliation” and “ending impunity”) and argues that unclear concepts should not serve as “purposes of punishment”. The chapter on “Punishment of crimes committed against minorities by means of international criminal law” by Gebhard concretizes yet another purpose for the application of punishment. However, despite the fact that punishment might be capable of defending civil and minority rights, at the same time it threatens the honor and dignity of the punished person as discussed by Navarro in the chapter “Mediatory functions of seconds in duels of honour”. He discusses how the practice of seconds and duels is capable of conciliating a conflict while upholding the honour of the involved conflict parties. Von Frankenberg, in the chapter “Reciprocity in retaliation and mediation as a means of social control”, argues that negotiating and bargaining is a mechanism for consensual conflict resolution when means of punishment and

retaliation are exhausted or cannot be imposed upon the crime or conflict. Likewise, a non-retributive means of social control, namely “Mediation in criminal matters”, is discussed by Lien: In her article she compares organizational, personnel, and functional characteristics of restorative justice programs in Germany, China and Taiwan.

Of great concern for the REMEP research program are the results from a number of anthropological research projects that are not discussed in this volume because their authors were engaged in fieldwork during one year (from fall 2008 – 2009) in various countries and thus could not participate in the Winter University 2009. These and all other projects are described on the REMEP webpage.¹⁶⁰

The variety and the interdisciplinary approach of the projects discussed in this volume give consideration to the ubiquity and versatility of the three concepts retaliation, mediation & punishment. By studying the diverse contexts and settings in which they are applied by individuals, collectives, and state actors alike, the REMEP research program might provide insightful findings and initiate further research on the socio-legal nature of man made mechanisms to regulate conflict and deviancy.

¹⁶⁰ http://remep.mpg.de/remep/en/pub/people___projects/student_body.htm