UNDERSTANDING RETALIATION, MEDIATION AND PUNISHMENT

COLLECTED RESULTS

[Eds. Timm Sureau and Yelva Auge]

International Max Planck Research School
on Retalitation, Mediation and Punishment

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MAX PLANCK INSTITUTE FOR SOCIAL ANTHROPOLOGY
DEPARTMENT 'INTEGRATION AND CONFLICT'
FIELD NOTES AND RESEARCH PROJECTS XXV

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Cover Photo: South Sudanese pupil on a government organised demonstration in favor of a retaliatory attack on contested Sudanese territory. © Timm Sureau 2012

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Understanding Retaliation, Mediation and Punishment: Collected Results

of the

International Max Planck Research School on Retaliation, Mediation and Punishment (IMPRS REMEP)

edited by Timm P. Sureau and Yelva Auge

Halle (Saale)

SERIES EDITOR'S PREFACE

GÜNTHER SCHLEE

ABOUT THE SERIES

This series of *Field Notes and Research Projects* does not aim to compete with high-impact, peer-reviewed books and journal articles, which are the main am-bition of scholars seeking to publish their research. Rather, contributions to this series complement such publications. They serve a number of different purposes.

In recent decades, anthropological publications have often been purely discursive – that is, they have consisted only of words. Often, pictures, tables, and maps have not found their way into them. In this series, we want to devote more space to visual aspects of our data.

Data are often referred to in publications without being presented systematically. Here, we want to make the paths we take in proceeding from data to conclusions more transparent by devoting sufficient space to the documentation of data.

In addition to facilitating critical evaluation of our work by members of the scholarly community, stimulating comparative research within the institute and beyond, and providing citable references for books and articles in which only a limited amount of data can be presented, these volumes serve an important function in retaining connections to field sites and in maintaining the involvement of the people living there in the research process. Those who have helped us to collect data and provided us with information can be given these books and booklets as small tokens of our gratitude and as tangible evidence of their cooperation with us. When the results of our research are sown in the field, new discussions and fresh perspectives might sprout.

Especially in their electronic form, these volumes can also be used in the production of power points for teaching; and, as they are open-access and free of charge, they can serve an important public outreach function by arousing interest in our research among members of a wider audience

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STRUCTURE AND ORGANISATION OF THE INTERNATIONAL MAX PLANCK RESEARCH SCHOOL ON RETALIATION, MEDIATION AND PUNISHMENT (IMPRS REMEP)

FOLLOWING INSTITUTES AND UNIVERSITIES WERE INVOLVED IN REMEP[1]

- Max Planck Institute for Social Anthropology, Halle (Saale)
- Martin Luther University Halle-Wittenberg
- Max Planck Institute for Foreign and International Criminal Law, Freiburg
- Albert Ludwigs University of Freiburg
- Max Planck Institute for European Legal History, Frankfurt
- (2008-2012) Max Planck Institute for Comparative Public Law and International Law, Heidelberg

SPOKESPERSONS

- Prof. em. Dr. Günther Schlee, director emeritus at the MPI for Social Anthropology in Halle (Saale), is Spokesperson and Dean of the IMPRS REMEP (2014-2019; Deputy Spokesperson 2008-2013)
- Prof. Dr. Dr. h.c. mult. em. Hans-Jörg Albrecht is Deputy Spokesperson; (2014-2019; Spokesperson 2008-2013)

STEERING COMMITTEE AND COORDINATORS and their (former) affiliations

- Prof. Dr. Dr. h.c. mult. Hans-Jörg Albrecht, director emeritus at the Max Planck Institute for Foreign and International Criminal Law, Freiburg
- (2008-†2013) Prof. em. Dr. Franz von Benda-Beckmann, Max Planck Institute for Social Anthropology, Halle (Saale)
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- Prof. Dr. Roland Hefendehl, director of the Institute for Criminology and Business Criminal Law, Albert Ludwigs University, Freiburg
- Dr. Carolin Hillemanns, scientific coordinator and researcher at the Max Planck Institute for Foreign and International Criminal Law, Freiburg

[1] **This report is and should be understood as a result of all participating institutions, senior researchers, professors, departments and of course the doctoral students and alumni themselves.** It is printed in a series of the Max Planck Institute for Social Anthropology, at the department 'Integration and Conflict'.

- (2014-2016) Dr. Dominik Kohlhagen, coordinator at the Max Planck Institute for Social Anthropology, Halle (Saale)
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TWO INTERNATIONAL COLLABORATIONS were established with the

1. BGS Doktoratsprogramm in Strafrechtswissenschaft, Universität Bern (BGS)
   REMEP and the BGS of the University of Bern, Switzerland, jointly organize scientific workshops and soft skills training for their PhD students and support the scientific exchange between both students and senior researchers across the fields of international and comparative criminal law, theory and philosophy of criminal law, criminology and psychology of law. REMEP and BGS students may choose to conduct parts of their research at the partner institute for up to one academic year;
2. Università Cattolica del Sacro Cuore
   In mid 2011, REMEP and the Centro Studi 'Federico Stella' sulla Giustizia penale e la Politica criminale (CSGP) in Milan, Italy, entered into a collaboration to promote joint research, symposia and conferences in the area of criminal law and criminal justice reform with a focus on restorative justice. The CSGP is a research centre for criminal law and criminal policy at the Università Cattolica del Sacro Cuore, which is one of the leading academic institutions in Italy.

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TIMM SUREAU

It is a daring deed to write comprehensive acknowledgements for a twelve-year project with innumerable doctoral students (sixty-one) at multiple different Max Planck Institutes (four) and at several universities (two), frequent summer and winter schools (about 20) and conferences, and countless involved professors and senior scholars (for supervision within REMEP, please see list above; however, non-REMEP professors, senior researchers and post-docs also participated in the exchange). It is particularly bold, because in those twelve years, doctoral students did research

+ on almost all continents (Europe and Asia, or Eurasia; North and South America, or America; Africa, and except for Oceania and Antarctica) and in all climatic zones (tundra, boreal, warm temperate, subtropical, and tropical);
+ with the financially poorest and the richest one per cent and many in between;
+ with people that someone could categorise in all imaginable types of classes, cultures, identities, gender, age, age-sets, and similar;
+ with people with a high formal education, and others with tremendous non-formalised knowledge;
+ with producers, both living and deceased, of texts, archives, and legal cases;
+ and with helpful research partners, interviewees, host families, archivists, IT-support staff, and with friends,

whose actions and words, in the end – knowingly or not – were referred to, cited, analysed, explained and sometimes misunderstood in the production of the doctoral theses and during the multiple summer schools. All those people thus participated in this endeavour of understanding social order in legal contexts. It is preposterous to assume that I would be able express adequate thanks for my human interactions, let alone the one of others, and anthropologists have extensively written about the complexity of thanking and the complexity of social exchange relations in general, in which many of the doctoral students got themselves into. Instead, what I wish to do here is acknowledge the participation of these innumerable individuals.

I further would like to acknowledge contributions of the doctoral students, who were part and parcel of REMEP. I would like to stress that this means that REMEP brought the students together, and at the same time, they were constitutive agents of it. They were the social agents of REMEP, social agents that made REMEP into what it is. The doctoral students – you can find their names just above the acknowledgements – made this research school a research school.

Here, it is probably also not inappropriate to acknowledge the professors and senior researchers who designed this program and who invested a lot of time and effort with those remarkable groups of students, listening and contributing to, and benefiting from their research from all over the world. The same holds true for the coordinators

before me. The students and professors themselves know well those to whom they are indebted for their time and effort and commitment to this research group.

Together, REMEP participants engaged in complex discussions about different understandings of normativities and diverging definitions of concepts and categories; they altered their fundamental beliefs about other disciplines and produced texts, held conferences, and, at current count, completed about forty dissertations. The two introductions offer a look at the discussions, the productive frictions, and also the results of REMEP. The volume then collects summaries of thirty of the dissertations, thus offering even more complex entry points into the ways this research school has contributed and contributes to the understanding of retaliation, mediation, and punishment.

I also would like to convey my deepest gratitude to all the administrative stuff, library stuff, student assistants, and secretaries who supported the research at the above-mentioned institutes and universities, and without whom – let's face it – we wouldn't have been able to get here.

Further, for this book, I would like to thank all the authors for their texts, comments, and input; and the language editors Brenda Black and Siri Lamoureaux for their work; for editing and formatting suggestions and further miscellaneous help, I would like to thank Kristin Magnucki, Viktoria Giehler-Zeng, and Carolin Hillemanns; the steering committee for the necessary decisions and ideas; and, once again, the administration for making this manageable.

Timm Sureau
Coordinator of REMEP
Halle (Saale), 27 November 2019

SECTION ONE: INTRODUCTORY TEXTS

INTRODUCTION

GÜNTHER SCHLEE & KEEBET VON BENDA-BECKMANN

AUTHORS' BIOS

Günther Schlee retired in 2019 from his position as Director at the Max Planck Institute for Social Anthropology, which he co-founded. Until 1999 he was Professor of Social Anthropology at the University of Bielefeld, having studied anthropology, Romance languages, and general linguistics in Hamburg. He received his doctorate for research on the belief and social systems of the Rendille, an ethnic group in northern Kenya, and his *Habilitation* from Bayreuth University for a thesis later published as 'Identities on the Move: Clanship and Pastoralism in Northern Kenya and Southern Ethiopia'. Alongside extensive fieldwork in Kenya, Ethiopia, and Sudan, he also was a guest lecturer in Padang (Sumatra) and at the École des Hautes Etudes en Science Sociales in Paris. Typical of Günther Schlee's research is the 'inter-ethnic' procedure and the combining of historical, sociological, and philological methods. He is one of the spokespersons of the IMPRS REMEP and co-chairs the Centre for the Anthropological Studies on Central Asia (CASCA) with Peter Finke (University of Zurich). He was a long-time editor of *Zeitschrift für Ethnologie* and still is editor of the book series 'Integration and Conflict Studies' with Berghahn.

Keebet von Benda-Beckmann is professor emeritus at Martin Luther University Halle-Wittenberg, former head of the Project Group Legal Pluralism and currently an associate of the Department 'Law & Anthropology' at the Max Planck Institute for Social Anthropology in Halle (Saale), Germany. She is also an Associated Principal Investigator at the Bayreuth International Graduate School of African Studies (BIGSAS), Bayreuth University. She has conducted field research in West Sumatra and the Moluccas as well as in the Netherlands. Her publications address legal pluralism, including its temporal and spatial dimensions; dispute management; property; social (in)security; law and religion; natural resources; and decentralisation, on which she published, together with Franz von Benda-Beckmann, the book *Political and Legal Transformations of an Indonesian Polity*. Her current work focuses on the anthropological backgrounds of global legal pluralism.

INTRODUCTION

The International Max Planck Research School on Retaliation, Mediation and Punishment (REMEP) was established to study the interrelations of these modes of dispute management. Most research schools of this institutional format comprise doctoral students and faculty of a single Max Planck Institute and the neighbouring university. This one has been different. Students and faculty have come from multiple institutions: the

Max Planck Institute for Foreign and International Criminal Law and the Law Faculty of the University of Freiburg; the Max Planck Institute for Social Anthropology in Halle (Saale) and the Institute of Anthropology at the neighbouring Martin Luther University; the Max Planck Institute for European Legal History, and, initially, the Max Planck Institute for Comparative Public Law and International Law in Heidelberg. The idea from the start was to stimulate interdisciplinary dialogue between and among students and faculty. The following overview was written to show how some ideas which originate in anthropology have made their way into the work of lawyers and vice versa. Over the years, we have struggled with the different meanings and related assumptions that core concepts, such as crime, punishment, the state, carry in the various disciplines. We had to deal with the fact that legal scholars often use concepts in the technical legal meaning, while anthropologists and legal historians tend to use more general analytical concepts for cross-cultural comparison. Within each discipline these procedures are entirely legitimate, but they make interdisciplinary work at times challenging. Each new cohort of participants had to go through the same learning process. One of the achievements of REMEP has been that participants developed a sensitivity for the potentially different understandings of concepts that only seem unambiguous as long as one remains within a particular discipline. This volume presents summaries of theses of doctoral students that participated in REMEP. They are accompanied by short biographical sketches, so that the reader can check the disciplinary affiliation of each author. For more information about REMEP, see Kohlhagen et al. (2015) and Sureau (2017).

A Max Planck Research School has a dual aim: One aim is human development, or 'capacity building', and the success we have achieved along this parameter is illustrated by the number of doctoral degrees conferred for the theses summarized in this volume. The other aim is acquiring knowledge. This introduction discusses some of the major insights with which we think REMEP researchers over the past twelve years have contributed to a better understanding of processes of retaliation, mediation, and punishment (for the history of REMEP, see Schlee and Turner eds. 2008).

Equality and hierarchy

What was the original idea behind our selection of retaliation, mediation and punishment? One of the purposes of REMEP was to study not only the diverse forms of and interactions within each of these three modes of dispute management, but also to look at their mutual interdependence. Punishment and retaliation both relate to social relations but are positioned at nearly opposite ends of the scale 'equality–inequality'. Punishment requires a power differential; for example, parents may punish their children. Beyond the family we find punishment associated with a power differential on the societal scale, typically in the form of statehood or some other form of polity. Punishment carried out in the name of an authority – the people, the state, the Crown, or God – usually with the purpose of re-establishing the social or cosmic order, security, or public welfare. From a historical perspective, theocratic forms preceded secular notions of authority and legitimation of authority.

Retaliation typically take place among those who are – formally – equals and in contexts where norms are not effectively imposed by a superior power ('from above', as the spatial metaphor would have it). Among equals one has to fight things out or reach an agreement by negotiating and sharing. The term retaliation has created much confu-

sion and misunderstanding, because it is often used interchangeably with its many near-synonyms, such as revenge and vendetta. This obscures the fact that retaliation, in contrast to revenge or vendetta, denotes a process that puts specific constraints and notions of proportionality on conflicting parties to prevent uncontrolled escalation of a conflict and enables participants to enter into negotiations or mediation (Turner 2017). Retaliation is one way that makes it possible to enter into negotiation in a violent escalating conflict. Parties may initiate negotiations with the aim of agreeing on a compensation payment. To avoid direct communication, which might turn out to be a confrontation, mediation might be sought. Mediation is understood as a dialogue between two or more conflicting parties who seek to resolve their dispute with the help of a neutral third person or persons (Benda-Beckmann 2003). While the entitlements of the parties and compensation claims for harm done may be important aspects of mediation, they are not necessarily the most important aim. In many cases the focus of mediation is on the future relationship of the conflicting parties and the restoration of peace and conviviality. All this takes place in the sphere of formal equality, since the parties are not in a position to force a judgement on each other or to give each other orders, nor is the mediator in a position to force a solution on the parties without the consent of both or all of them.

Interaction, entanglement, and hybridity

These different contexts suggest that of the ability of retaliation, mediation, and punishment to mutually replace one another is an important way that our three forms of conflict management interact. Where there is a power differential, crime is dealt with by punishment, as generally happens in modern states. In the absence of statehood, the role of punishment may be taken over by retaliation, though this is not necessarily the case; other forms of dispute management are possible as well. So, according to context, one may take priority over the other. Here it became particularly clear that different disciplinary perspectives generated different analyses leading to different conclusions. Lawyers – and other proponents of a statist perspective – tend to assume that the state's punitive law has replaced, or ought to replace, other forms of punishment. From that perspective, retaliation is superfluous and even harmful, and therefore illegal. However, from an anthropological perspective, this is not self-evident. Many of the REMEP studies were set in plural legal contexts, where punishment under criminal law of the state may be followed by or alternated with retaliation or other modes of dispute management in accordance with the local legal order of the community in which the conflict is situated (Benda-Beckmann and Turner 2018). Thus, a murderer may face retaliation after release from prison. In such cases punishment has *not* replaced retaliation; rather, people are caught between formally retributive and informally restorative justice, resulting in a situation of selective justice, as **Nathan Muwereza** argued for Northern Uganda. What became clear from many studies is that replacement of one mode by another is not the only way that retaliation, mediation, and punishment interact. More importantly, one mode of dispute management often cannot be understood without understanding its connection with other forms of dealing with conflicts.

We were aware that the analytic distinctions between the three types of conflict management or between hierarchical and egalitarian or state-like and non-state arenas would not necessarily always be reflected in actual practices, and that we would likely not find examples of these ideal types. Rather, these distinctions help to understand the

particular forms of hybridity and interrelations between all these components and the often-contradictory logics that we find in the ways conflicts are dealt with. We expected to find elements of retaliation in the motivations behind punishment, of mediation in the shadow of the state (to paraphrase Mnookin and Kornhauser 1979), and other forms of interaction between retaliation, mediation, and punishment and the state and the non-state spheres. Even if we only consider criminal law of the state, it is possible to identify negotiation and mediation and often retaliation – however poorly understood – in nearly all sectors at nearly all levels of criminal law and in all stages of criminal procedures. The threat 'if we are not satisfied with the results of mediation and negotiation, we will go to the police', clearly anticipates decisions that state authorities might take at a later stage part of the negotiations between non-state actors. The state is there like a silent participant, whether or not it is explicitly mentioned and whether it is actually involved at a later stage or not, and irrespective of whether the anticipations about its decisions are correct or erroneous.

There is a substantive body of literature on the connections between different modes of dispute management (v. Benda-Beckmann 2003, Härter, Hillemanns, Schlee forthcoming). For example, in her study of the Minangkabau in West Sumatra in the mid-1970s, Keebet von Benda-Beckmann argued:

> 'The state courts are an alternative to dispute processing within villages. Through their mere availability, they form a threat to the authority of village institutions and provide a check on excessive dispute-manipulation at the village level. The villagers are perfectly aware of the fact that courts give judgements which can be executed and that they can overrule previous settlements arrived at in the village. And the courts are by no means only a theoretical alternative. Villagers regularly employ courts in their forum shopping, thus demonstrating the relativity of village dispute settlements.' (v. Benda-Beckmann 1984: 55).

However, older studies rarely addressed crime and punishment. It is in connection with research in fragile states and post-war situations and on migration, as well as in connection with a rising interest in corporate crime, that crime and punishment by non-state institutions have moved into focus in studies of dispute management. Studies of REMEP show a rich variety of types of mediation and its interlinkages with other forms of dispute management. They show that one mode of dealing with 'crime' cannot be understood without other forms of dispute management, and that what is considered a crime within one context may be legitimate action in another. **Severin Lenárt** in his thesis 'Chiefs and Witches in a Gendered World: Legitimacy and the Disputing Process in the South African Lowveld' and the accompanying visual and descriptive materials (Lenárt 2013 a, b) applies a legal pluralism approach, showing the high levels of forum shopping in cases involving actions defined as crime by the state but not in other contexts. In contrast with Keebet von Benda-Beckmann's findings in Sumatra, jurisdictions and political authority seem less well defined and more contested in this South African context. Traditional chiefs regain power because of the legitimacy they gain by competently dealing with cases of witchcraft. Thereby their power expands at the expense of modern authorities. This competence involves reconciling different interests and different perspectives and is therefore akin to that of a mediator (cf. also Lenárt 2017).

The many variations on the theme 'mediation in the shadow of the state' are also a central concern in the work of **Clara Rigoni** on honour crimes and forced marriages in

immigrant communities in Western Europe, with a focus on the UK and Norway. She shows that acts of violence are evaluated differently depending on the context in which they are being dealt with. **Julia Kasselt** also studies honour crimes, but her focus is on honour killings. She demonstrates that German courts, which previously were willing to take the normative conceptions of the perpetrators into account, today treat such killings the same as any other killing with premeditation.

Mediation is entangled with processes of adjudication in many forms and for many reasons all over the world. In many countries the court system may be overloaded for reasons having to do with what one might call the economics of law. Proof of prior serious attempts at mediation may be required before a case is admitted at court. In such cases there is a tension between the confidentiality expected by the parties to the negotiation or mediation and the duty to report to a higher authority. Mediation conducted 'in the shadow' of the courts, as Alfini and McCabe formulate it (2001), is another demonstration of the inadequacy of attempting to dichotomize social relations into egalitarian/horizontal and hierarchical/vertical ones.

Plea bargaining in criminal procedures is another example of the ways punishment and mediation/negotiation may overlap. Criminal justice establishes truth and adjudicates from above. The culprit does not need to agree with the sentence. But when establishing facts becomes difficult, negotiation between the attorney general and the representative of a presumed culprit may lead to a lesser charge. **Kiyomi von Frankenberg,** with her study of plea bargaining in business law, shows that this informal process generates obligations and liabilities, but this comes at the expense of truth. **Csaba Győry**, whom we will discuss further in a different context below, comes to similar conclusions. Criteria like true/false, guilty/not guilty here become intermingled with the interests of the parties and their calculations of risk. If the culprit rejects the bargain, what are the alternatives? How high are his or her chances of being acquitted? How high is the risk of being convicted of the more serious crime even where there are deficiencies in the evidence? (Schlee forthcoming). **Kaleb Kassa Tadele** reports how mediators in conflicts between tribal groups in in the Kenyan/Ethiopian borderlands are handpicked by Ethiopian government authorities. Different as these studies are in other ways, they share a concern with the ways that negotiation and mediation, although typically associated with the non-state sphere, can be appropriated by the state.

The fractured character of states and corporations

In the course of twelve years of REMEP many more such entanglements and hybrid forms came to light, and the differentiation between state and non-state became more and more complicated. Many of the studies showed that considering the fractured character of the state and of corporations is of vital importance for understanding problems of assigning responsibility, identification, and differentiated citizenship, whether in fragile states or the world order as a whole. Instead of just the dichotomy of states and stateless societies that are organized as ordered anarchies along lines of balanced opposition of clans and lineages, in the modern world we also find corporations that are worth as much as several national budgets and that wield more power than many small or mid-sized states. There is a large body of literature that demonstrates that the term 'state' is used in many different connotations: as a fragmented institution, as the state personnel, or as a polity consisting of citizens (Thelen, Vetters, and v. Benda-Beckmann

2018). States are sources of social differentiation and inequality (as the instrument of the ruling class, as the Marxian interpretation has it, or through direct appropriation in the form of conquest and collection of tribute by the state personnel). Yet today, statehood, with the support of international human rights law, is often also the last line of defence of a measure of equality. Against a rising 'neoliberalism' (an unfortunate term for unbridled capitalism that is neither new nor liberal[1]), some politicians and representatives of the state are now attempting to bridle capitalism and defend a shrinking 'welfare state'. So, contrary to earlier views, the state in fact sometimes comes down on the side of equality.

Today we find many more entities between and around the state and its citizens that exist at the same level of aggregation or inclusivity as states (in their various historical manifestations such as empires, feudal states, nation states). States are no longer just subdivided into different components and levels of administration. They in turn are part of wider entities like international institutions, and they interact with non-state entities that exist on the same scale as states, such as transnational organizations, global corporations, identity groups (including those with shared lifestyles, such as global youth cultures), and networks of various sorts. States no longer just rule over or punish their subjects or citizens, or fail to do so. They now have to deal not just with unruly tribes and insurgent cities, but also with new kinds of supra-individual entities. Attempts to rule over or punish corporations are often unsuccessful. This is not an entirely new phenomenon. After all, the East and West India Companies also ruled over states and deposed and punished rulers or even entire populations. However, the scale and diversity of the transnational actors have increased, and the kind of legal issues arising from this complex international and transnational landscape have also changed. One of the pressing issues that have emerged with the current constellations concerns corporate punishment, that is, the attempt of states to control corporations. This issue has been extensively studied in the framework of REMEP. Several studies discuss shaming as an alternative mode of enforcing social norms in light of the lack of options for punishing corporations.

In her thesis 'Compliance and Money Laundering Control by Finance Institutions in China: Self Control, Administrative Control, and Penal Control', **Jing Lin** elaborates extensively on shame and face culture as means of control. Soft measures and appeals to a code of conduct come in where harder tools like investigation by state institutions and punishment do not work. In this context, there is a much less clear delineation of a hierarchical relationship like the one implied in establishing facts about a crime and punishing the culprit(s) in the state judicial system. Other aspects of shaming as a mode of dispute management are addressed by **Aleksandre Glonti** in his thesis 'Internet as Social Control Mechanism', which looks at the ways the internet and the new social media offer new and anonymous possibilities to enforce social norms. The new media also are the subject matter of **Andreas Armborst**'s study of the theological and strategic underpinnings of jihadi violence on al-Qaeda media. This work contributes to the understand-

[1] The classic study by Polanyi (1944) already showed the degree to which politics and ideology were involved in creating the so called 'free market', and how far it is from something that emerges naturally, spontaneously, or freely.

ing of the ideological origins of religiously inspired violence and the role of media in shaping the foundations of such violence.

Yuning Ruiheng discusses the difficulty of dealing with corporations from a classical criminal law perspective. According to German criminal law, corporations do not have free will. Therefore, guilt cannot be attributed to corporations, which means that punishment is also not possible. If only natural persons can be guilty of something, and therefore cannot be considered responsible for crimes, it follows that there is an urgent need to identify the people behind a corporation. The question arises who are the responsible people: the owners of a corporation or its managers? Yuning Ruiheng explains that corporate punishment still targets owners, but he diagnoses a trend that responds to the dissolution of ownership into multiple stockowners by holding the managers responsible for corporate crime and proposes following this way of dealing with corporate crime in the future.

At this point of our overview it has become clear that the entities with which we are dealing are far from clear-cut. We can, of course, define what a state and what a corporation is very precisely, but then we would find that these clearly defined entities do not correspond to the forces whose interplay we observe in the empirical reality. Even if we restrict ourselves to law, as **Julia Gebhard** does, we find a plurality of sources of law, borrowing and blurred boundaries between different kinds of law, misconceptions translated into actions, and judges who have different personal preferences.

In addition, the 'Ocampo effect', a phenomenon in which prosecution by an International Court of Justice strengthens solidarity among culprits and victims of crimes (described in more detail below), highlights the importance of considering not only institutions, but also the effect of the personalities of individual actors. Even decisions by the chief prosecutor may be influenced by the desire of a single person to project a certain self-image. Thus, there may be personal ambitions behind institutional decisions.

This leads us to the question: what is the level we need to look at? Is it the level of individuals and their cost/benefit calculations? Do we need to look at norms, values, and emotions which are more difficult to capture in terms of costs and benefits than material incentives and disincentives? Do we need to look at them at the level of the decision makers whose decisions we want to model and whose behaviour we want to explain? Or at the level at which these norms, values, and emotions are generated? That level may be the one of smaller or larger collectivities. The identities which define these collectivities may be the classical (but not less problematic ones) like class, gender, ethnicity, nationality, religious affiliation, and others, or we can look at sociotypes, like 'the expert', 'the intellectual', 'the artist', 'the angry young man', 'the single parent'.

Inequality and 'differentiated citizenship' – Identification and Responsibility

The difficulty of defining a corporation as an entity endowed with agency or composed of heterogeneous agencies shows a parallel with the problems of defining the state and raises the same questions concerning identification and responsibility. In the volume *Difference and Sameness as Modes of Integration* (Schlee and Horstmann 2018), Schlee divided the question of what the state is into the subthemes of identification with the state (Who are the state personnel? Who feels represented by the state?), and identification by the state (Who are the 'proper' citizens? Who are the targets of development? Are there, from the perspective of the state or of those acting in its name, different kinds

of citizenship (or categories like full citizens, model citizens, 'backwards' people) and different kinds of entitlements or practical access associated with each? Are parts of the population exposed to conditions of marginality or even treated as aliens?).

In a more general sense, identification means that I treat others as myself, as if their costs and benefits were my costs and benefits. I adopt their rationality or what I think should be their rationality in my perception of their interest. (If I impose my ideas about what is good for them on them, we speak of paternalism.) In some cases, I value the interests of others more than my own. That is what we call love. Under normal conditions, however, others count for less than myself (the decision maker) and my degree of identification decreases in concentric circles moving away from me. Family and close friends are taken almost fully into account. (But drama and tragedy in world literature to a large extent thematise cases in which their interests cannot be combined with mine). Shared church membership or regional affiliation may also count, but typically less, and 'the nation' and other 'imagined communities' (Anderson 1983) are given greater weight and relevance in situations of political crisis or military mobilization. The category of humankind, even though it is the framework in which discuss important ecological and economic issues are discussed, is generally the broadest form of identification, but also the weakest and vaguest. Even wider identifications, like identification as mammals, although they might help to understand how we tick, typically do not matter in our political or legal discourses.

The issue of identification ascribed by the state is a theme that arises in a number of REMEP studies. In his own work, Schlee problematized the notion of citizenship in this context, with a focus on Sudan and Ethiopia. There is no uniform citizenship which entails the same rights and duties for all. And there is a lot of tension between the (historically fairly recent) normative notion of equality of all citizens and the political and social reality of inequality and status differences (in Schlee and Horstmann 2018).

This is illustrated for Ethiopia in **Ameyu Godesso Roro**'s thesis about struggles over land between two ethnic groups, the Gumuz and the Oromo, and investors from elsewhere in the border region between the states Beni Shangul-Gumuz and Oromia. The Gumuz are a minority in Oromia (and elsewhere, such as in the Sudan). In Beni-Shangul-Gumuz they are numerous and have their main settlement areas, but they are second in political importance to another ethnic group, the Berta. Ameyu Godesso Roro demonstrates the important sources of status differentiation that generates complex systems of conviviality. Besides ethnicity, but closely interwoven with it, is the characteristic constellation of Ethiopian statehood with strong regional states competing or collaborating with agencies of the federal state in land deals with capitalist investors. He shows that it is in this context that local elders are treated as second class citizens, as 'backward', and are overruled.

Theoretically, land deals and conflicts between local groups should be preceded by consultation of the local people affected, but in practice these consultations are turned into a farce. Here, state agencies make whatever the state policy is, to prevail by hand-picking the elders. Ameyu Godesso Roro (2017) writes:

> 'As to the makeup of the joint peace committees, a division can be made in terms of how members are selected: that is, ownership versus client interest. If peace committees are established by asking the community to assign "prominent elders" and take a proactive role in peacebuilding, members of the committees or [all of

them] as a unit tend to be viewed more or less as *jaarsa-biyyaa* [which is Afaan Oromo and means elders of the people] and are expected to abide by *dhugaa lafaa*, literally "the truth of the land." However, if peace committees are assembled by members recruited by governmental bodies and whose role in peacebuilding is thereby compromised, the committees are perceived as agents with an affiliation to the ruling E[P]RDF party politics and are branded as mere party mouthpieces…'

There is also the suspicion that their main motivation to take part in meetings to collect their per diems.

For the present constellation of Eastern Sudan, differentiated citizenship and the role of the state in it are illustrated by **Zahir Musa Abdal-Kareem**'s thesis**.** He identifies 'tribe, ethnicity, language, occupation and nationality' as 'the key dimensions of group identification in Gedaref State at both the town and village levels' and goes on to explain how these different identifications interrelate. People belonging to certain ethnic groups are believed not to be Sudanese by origin, and people with certain occupations (pastoralists) in this area are classified as Arabs, which makes them somehow more Sudanese than others, because the Sudanese state proclaims an 'Arab-Islamic civilization' as its core identity and the goal of assimilation of those who do not fit this ideal yet.

Modern ideas of citizenship, which imply equality, are of fairly recent origin. In certain parts of Germany, the Prussian three-class franchise system, which, like other suffrage models once common throughout Europe, gave different weight to the votes of different categories of people according to property and status, was not abolished until the early twentieth century. And in many parts of the world, women's suffrage was not granted until the mid-twentieth century, or even later. Racial equality and the non-discrimination of sexual minorities are still hotly debated political issues even in the so-called developed world, as is reflected in the changing legislation on these matters. The principle that all citizens of a country have the same citizenship rights is the universalist notion of citizenship. This concept is not to be confused with global citizenship or cosmopolitanism, which refers to forms of political agency and notions of responsibility in a wider framework.[2]

Holston (2008: 7) proposed the term 'differentiated citizenship' to critically analyse cases in which there is 'a gradation of rights among [citizens] in which most rights are available only to particular kinds of citizens and exercised as the privilege of particular social categories'. In Brazil, which is the focus of Holston's study, this has a long history, and in her thesis **Raquel Sirotti** describes how 'two levels of citizenship' developed during the First Brazilian Republic. In case of an insurgency, some kinds of insurgents are taken to court while others are to be dealt with, or to be done away with, by the police or the military.

As Karla Escobar's current ongoing project demonstrates that even explicit defenders of 'differentiated citizenship', like champions of ethnic federalism or indigenous rights, in principle subscribe to the ideal of equality. But that implies that they

[2] On the level between the nation state and the world we have intermediate identifications which may be associated with notions resembling citizenship, like for example continental ones ('African unity', 'European values').

have to define a core of rights and duties which apply to all citizens and explain the reasons for the demand of special rights, and why the special rights they demand for some are not affecting the core rights of others, or find reasons for the extent they should be allowed to do so.

In his comparative study in several North and Central American countries about how states deal with transnational criminal gang, the maras, **David Jensen Ghesquiere** touches upon citizenship in more than one way. Among the historical factors that he identifies as relevant for the emergence of this phenomenon are the conquest of half of what was then Mexico by the United States in the US-Mexican War, which made Mexicans citizens of a state with which they were not originally identified, and subsequent labour migration, which gave more Mexicans a precarious status at the lower end of social hierarchies. But differentiated citizenship of mara members is not exclusive to the US. David Jensen Ghesquiere also cites one president of Honduras in quite recent years who claimed that the mara 'had to be eradicated and [their] rights would be respected only second to the rights of the citizens.'

David Jensen's study also connects to a number of REMEP-related studies on urban youths and gang violence (see also Wright, Topalli, and Jacques 2017 in another REMEP publication). **Cléssio Moura de Souza** studies the formation of normative order in interpersonal violence, gang violence, and other forms of collective violence in Brazil. He shows the importance of status, role models, peers, and the role of money and drug-selling groups.

The distinction between state-like and non-state social configurations remains difficult. In her study about vigilantism, **Kerrin-Sina Arfsten** shows how state control merges and combines with non-state forms of control. Even where we succeed in making this distinction, it only covers a small part of the differences with which we have to deal. Each of these configurations has multiple realities. We have to distinguish multiple forms of identification and belonging, among them categorical inclusion or exclusion of self and other, and symmetrical or asymmetrical relationships.

Differential citizens' rights are also found in western democracies. **Anina Schwarzenbach**'s comparative study of attitudes of youths towards the police in Germany and France can also be read from this perspective. Young Frenchmen of Maghrebian origin are treated differently by the police than those of European heritage and respond with antagonism and vigilantism. Such internal differentiations between different kinds of citizens emerge more often through everyday practice than through legal status.

What these studies suggest is that the issues of membership in and representation of a state in practice render the state a complex and internally differentiated category. As was the case for corporations, this complexity results in problems identifying culprits and assigning responsibility. REMEP's interdisciplinary gaze at issues of identification and responsibility leads to the dissolution and re-thinking of familiar categories. However, as others have pointed out, despite the fragmented and diffuse character of state institutions and interactions, images of a state may be prominently present in people's consciousness and play an important role in social interaction (see Thelen, Vetters, v. Benda-Beckmann 2018). REMEP studies show that this may be the case even in fragile states such as, for example, Somalia, where the state is contested and is not really a functioning institution on the ground. State control does not extend through the whole capital city, Mogadishu, much less the rest of the country.

However, as **Faduma Abukar Mursal** shows, the state has a strong presence as a mental construct. Statehood is remarkably present in popular discourse; it carries significant normative weight and plays an important role in shaping social relationships and patterns of behaviour.

Similar questions arise for corporations. As legal entities they are also mental constructs. This raises questions that require further investigation, such as: What are the precise relationships between identification with a corporation, its corporate culture, its legal form, its actual practices, its meanings for different kinds of owners and its relationship to different interests?

World jurisdiction without executive power

Some of the early propositions with which REMEP started have been supported by our continuing research. We have compared international jurisdiction on the global scale with segmentary societies, with 'tribes without rulers' (Middleton and Tait 1958). There is no world government and therefore the world can be considered an acephalous order that formally, if not in practice, consists of equal polities. The UN Security council can take decisions, but has to rely on national governments or on 'coalitions' of national states like the coalition which fought the war in Iraq in order to implement these decisions. This inevitably leads to selectivity and inequality. The International Criminal Court depends on the consent of sponsors[3] and people who voluntarily submit to it. The world government (the UN and its daughter institutions) does not have an executive branch that can enforce its decisions. Where force is required, it must be borrowed from others, and this has problematic consequences. Several REMEP studies have discussed ways in which the lack of a fully developed world government affects the judicial system.

Julia Gebhard discusses the problems of the fact that in a world of 'nation states' it is these states which have codified bodies of law. Gebhard observes that practitioners in this relatively recent discipline of international criminal law have to resort to outside areas in order to fill gaps and interpret the definitions of crimes established by the respective statutes; they also do so by looking into international human rights law on 'customary' international criminal law.

Legal diversity or legal fragmentation is also discussed by **Jennifer Schuetze-Reymann** in the context of referral of cases from the ICTY or the ICTR, the tribunal dealing with Rwanda, to national courts.

Shakira Bedoya Sánchez, in her thesis 'The Politics of Order: A Critical Theorization of Selectivity in Relation to the ICTY's Indictment Policy Practice', analyses some of the consequences of the fact that international courts depend on political consent. The International Criminal Tribunal for the former Yugoslavia had to deal with a political environment which expected an equal number of Serbs, Croats, and Bosnians to be tried and which was fond of numerical indicators of performance. This required prosecution of mid-level culprits because there were more of these available than of the top-level perpetrators (economization of jurisdiction). Numbers and mathematical symmetries were produced to satisfy political sponsors and supporters.

[3] About the funding situation of the ICC see Arcudi (2016).

Another problematic aspect of the status of international criminal courts is related to the lack of security and protection of witnesses (and likewise of victims – as potential witnesses – and of perpetrators, as Shakira Bedoya Sánchez notes)The lack of effective protection of witnesses is certainly one reason why the ICC trial of the Kenyan politicians Uhuru Kenyatta and William Ruto for their alleged role in the post-election violence of 2007/2008 was called off due to the withering away of the evidence against them. One could observe witnesses talking for their life and recanting on TV, claiming 'We had been bribed by The Hague'. The later election of Uhuru Kenyatta as president, with Ruto as vice-president, can be called the Ocampo Effect, after the then-chief prosecutor of the ICC. By the Ocampo Effect we mean the way that an accusation may lead to solidarity with the accused and in the end strengthen the position of the accused. Another example of this effect is the international arrest warrant issued by Ocampo several years earlier against the then-president of Sudan, Omar al-Bashir. His popularity had been on the decline for quite some time but got an immediate boost following the arrest warrant. Immediately after the issue of that warrant, al-Bashir went on a state visit to some Gulf countries where he received red-carpet treatment. Nobody arrested him. The result was that Ocampo had provided al-Bashir with an opportunity to show the impotence of the ICC and to rally larger segments of Sudanese society and the African Union behind himself (Schlee, forthcoming).

In this collection we have five contributions dealing with the ICC or its elder sibling, the ICTY (the International Criminal Tribunal for the former Yugoslavia). **Chenguang Zhao** discusses the principle, laid out in the agreement which led to the foundation of the ICC, that preference should be given to national jurisdiction, and that the ICC would take over only where national jurisdictions are unwilling or unable of trying crimes against humanity committed by their citizens or on their territory. She describes the relationship of complementarity between the national jurisdictions and the ICC resulting from this, and especially what all this means for the largest non-signatory state, China.

Filip Vojta points at another deficiency of the UN system, namely the lack of a prison system, and discusses the consequences this had for the ICTY. As former Yugoslavia was thought to be unsuitable as a place of enforcement for perpetrators from former Yugoslavia, for the enforcement of its sentences the ICTY had to rely on the offers of 14 different states that had volunteered to host prisoners in their prisons. These 14 states offered very different conditions: from relatively open conditions with access to Skype and frequent family visits, to conditions in which non-Muslim perpetrators felt threatened by Muslim fellow prisoners and spent much time in solitary confinement for their own safety. The aims of justice, equal treatment and resocialization associated with the prison sentences thus were compromised, because prisoners had to be sent to wherever prison capacity was available. Fairness and legitimacy were replaced by luck, which favoured some prisoners and not others.

The REMEP studies dealing with international tribunals demonstrate important problems resulting from the fact that the UN system is a far cry from a world government. It lacks an army, police, and prisons, as well as taxation power. It therefore depends on others for enforcement by means of force and for financing its institutional survival. Thus, the allegorical figure Iustitia, usually depicted as a woman clad in a flowing tunic, blindfolded, with a sword in one hand and a scale in the other, perhaps

needs to push her blindfold up a little bit to keep a lookout for sponsors who will pay her next meal and whose wishes might tilt her scale in one direction or another (cf. Schlee and Turner 2008: 59).

Mayeul Hiéramente investigates the effects of arrest warrants issued by the ICC against leaders of parties involved in on-going violent conflict. One of these was Omar al-Bashir, the then-president of Sudan, the other one Joseph Kony, leader of the Lord's Resistance Army in Uganda. This study highlights the age-old dilemma of justice versus peace. Legal action against politico-military leaders may interfere with peacemaking, change the balance of power, and create new victims. Mayeul Hiéramente also argues against the dichotomizing approach of claiming there is a neat division between law and politics, with law standing for what is good and for moral values, while politics stands for compromise and all that is morally suspect. But politics, he claims, is also concerned with rights, such as future victims' rights to life and physical integrity if legal prosecution leads to an intensification of a violent conflict.

Peacemaking

Also working on peacemaking, in her thesis 'Designing Peace', **Nadine Adam** examines how different forms of art (the focus is on paintings and theatre) are used for peacemaking in Sudan. For that she uses two categories which cross-cut all distinctions we have made so far (state/non-state; local/national/inter-, transnational), namely 'artworld' and 'peaceworld'. The artworld comprises the artists and their audiences/customers as well as the schools where arts are learned and galleries and other outlets. It has local, regional, and global spheres. The peaceworld is largely made up of international experts who are not specialists on Sudan but specialists on peacemaking and their counterparts in Sudanese ministries and in local NGOs. The international experts believe in sets of procedures which are universally applicable and which only need to be 'translated' or 'contextualised' to fit the local situation. An example for this is to convert a UN resolution into a National Action Plan (NAP). International experts have a culture of report writing for which they need pictures, and for this they need local acceptance. Working with local artists and involving them in propagating a culture of peace serves these needs and is part of the interaction of artworld and peaceworld which Adam examines in her thesis.

Linking Legal and Social Domains – Competing Logics

A set of fascinating findings that emerged from REMEP concerns the clash of logics belonging to different legal and social domains. Many researchers were in one way or another confronted with the problems of competing logics. Some studies of comparative criminal law showed logics that varied across different legal systems. But the clashes became particularly clear in studies that linked various fields of law, such as criminal law and human rights, and in studies looking at criminal law in conjunction with other social fields, such as politics or economics. A particularly productive line of investigation resulted from studies that combined various disciplines, including: law, criminology, anthropology, history, economics, political science, quantified knowledge, Islamic studies, and social movement theory. These studies demonstrate the varied ways that law is embedded in other social domains and the remarkable degree to they are linked. This goes for the three pillars of REMEP itself, as well as for other forms of linkages

found in the field, such as the connections between terrorism, rule of law, and freedom of expression; between retaliation and political violence, political protest and crime; between disputing and healing and punishment; and between international finance, law and justice, to mention only a few.

Erdem-Undrakh Khurelbaatar's thesis about the development of criminal law in Mongolia compares developments in Mongolian law with German criminal law. She demonstrates the problems that arose when foreign law was transplanted without reflection or consideration about how this might interfere with existing socialist criminal law and older notions of crime and punishment. Legislation in Mongolia is often not created by competent lawmakers who are guided by knowledge and research, but is often made somewhat arbitrarily, especially with regard to the severity of punishment. She also discusses the lack of cooperation between various state departments, with each making its own regulations. The pride in 'their' law that is felt by those who have initiated a law seems to be an important factor in the poor quality, lack of coherence, and lack of instruments for implementation. The result of this is that Mongolian criminal law consists of an incoherent set of regulations with very different logics.

Inga Švarca draws attention to the problems that arise when international courts such as the European Court of Human Rights have to assess standards of democracy, human rights, and rule of law in countries that have a totally different legal history. The study assesses the implementation and results of intensive probation on juvenile and adolescent offenders who require additional support and supervision. She shows the inconsistencies that emerge when the different legal logics applied by the European Court and the Latvian legal system are not properly understood and taken into account.

Alexandra Schenk's ongoing work on preventive detention in Germany demonstrates that the punitive turn in penal law has a lot to do with electoral politics in which the electorate serves as an audience of policy-making. The numbers of people actually affected by the new, stricter rules are often small and, as she notes, the effects of extended police custody are difficult to measure. But that does not seem to affect important symbolic functions of these measures for the wider audience of penal law: the electorate that responds on the basis of a logic of perceived threats and danger rather than effectiveness. From a different perspective **Maria Walsh** compares the effects of two approaches to managing crime – a model project that tries to turn young multiple offenders away from their criminal path, and the criminal legal system that focuses on imposing sanctions – and demonstrates the importance of the different logics underlying these procedures.

Carolijn Terwindt discusses the different logics of politics and crime in her dissertation 'When Politics Becomes Crime'. Comparing the ways in which political movements were turned into crimes in Chile, Spain, and the US, she points at the different logics underlying political protest and criminal offences. She demonstrates that in each of these countries specific connotations of harm, public interest, and legitimacy were embedded in criminal procedures, which led to different ways in which the criminal justice system contributed to shaping these Western democracies.

Raquel Sirotti analyses the historical roots of the interrelation of political and legal reasoning in Brazil, tracing the subsequent logics in the development of criminal law and political movements since the first serious attempts towards modernization were made in the First Brazilian Republic in the late nineteenth century. She argues,

counter to mainstream interpretations, that ordinary criminal law and states of exception do not follow separate logics, but have been intimately related throughout history.

From a different perspective **Johanna Mugler** studied how the newly emerging logics of measuring accountability using quantified knowledge affect the operations and decisions of public prosecutors in South Africa. This process is based on the use of performance statistics, indicators, targets, rates, and ranking. She questions some of the concerns that these numbers will diminish the law's authority and reduce its necessary scope for discretion by showing that there is a substantial degree of what she calls *numerical reflexivity* among prosecutors. In other words, when the logic of quantified knowledge is situated, context-dependent, and relational, it may well be compatible with the logic of law.[4]

Csaba Győry combines the logics of economics with that of law in his comparative study of insider trading in the US and Germany. He inquires why this has been treated as a crime in the US while it remained a normal feature of the capital market in Germany until 1995. He examines the law against the background of economy, not in the sense of mathematical economical models but of actual, historically evolved and socially embedded varieties of capitalism that are specific to individual national contexts, much in the spirit of Karl Polanyi.

Traveling models

Many REMEP projects are concerned with laws that were designed in and for one particular state and are exported to other localities, where they become part of quite different legal constellations. These processes of legal transplantation have long been studied by comparative lawyers, who point out the changes these transplanted laws undergo in the process, while legal anthropologists have discussed the implications of the imposition of foreign law. These are all examples of what Rottenburg and others called 'traveling models', of which law is an exceptionally successful example (Behrends, Park, and Rottenburg 2014). REMEP research repeatedly showed that such Western models contrast with locally existing models that are often ignored by or unknown to those who introduce Western models, as Chenguang Zhao demonstrated for China and Mahieul Hiéramente for Uganda. Several REMEP studies take this as a basis to contribute to legal reforms that do justice to a country's specific context and history, as is the motivation for Erdem-Undrakh Khurelbaatar's study of Mongolia.

There are also traveling models that are not in themselves legal, but that are inserted into an existing legal system, such the use of as accountability and quantitative models to measure efficacy and effectiveness discussed by Johanna Mugler. She has shown that the criticism towards this model is not entirely justified.

Of course, mediation as it is propagated by international and development organisations is in itself a successful traveling model. As early as the 1980s anthropological studies of mediation showed that mediation is most successful when the degree of power differences between the parties is low and has serious shortcoming in cases where there is significant power imbalance. REMEP studies have shown that mediation still

[4] We might discuss such interpenetrating logics in terms of hidden agenda/hidden transcripts (Scott 1990) or in terms of blurring of boundaries of subsystems of society, of functional systems (Luhmann 1977).

suffers from strong power imbalances that affect the effectiveness of mediation, for example in mediation regarding forced marriage in Germany, as Clara Rigoni has demonstrated.

The direction of travel of such models is not limited to movement from Europe and the US to other places in the world. The modes of dispute management that migrants develop in Europe are recent examples of models that have travelled to Europe from other parts of the world. Similarly, some of the ideas that underlie forms of neighbourhood mediation that developed in the US in the 1980s (and have since been exported as a successful traveling model themselves) since the 2000nds, were based on research done in African and East European contexts (v. Benda-Beckmann 2003). Models always travel with and through people. REMEP member **Severin Lenárt** now works in Vienna as a psychological counsellor, and in his work he draws on his doctoral research into emotion- and healing-oriented models of dispute management from southern Africa and the Philippines. This resonates with the recent interest in emotions within anthropology, but Severin Lenárt applies this perspective by moving from observation to true participation, and in the field of psychological counselling in which this has not yet become a core issue.

Scale

Finally, the REMEP studies suggest that it is important to pay attention to issues of scale. First of all, different disciplines tend to work on different scales. Within law, there is a tendency to operate at the level of nation states (national law) or the world (international and transnational law). The meaning of individual court decisions is measured at the national or international scale. Whatever happens at a subnational scale is immediately scaled-up in order to assess its implications for the legal system or subsystem at large. By contrast, anthropologists in particular tend to focus on the local level and generally pay relatively little attention to up-scaling.

Traveling models, and the translation processes involved, always imply changes in scale: either up-scaling, as in the case of indigenous rights, or gangs such as the maras (see David Jensen Ghesquiere), or down-scaling, as in the case of women's rights. The newly developed instruments of justice and reconciliation and the internationally transplanted modes of mediation are products of both up- and down-scaling – as are new forms of crime such as incitement to terrorism.

Conclusion

To conclude, it is clear that the original analytical model with which Günther Schlee and Rüdiger Wolfrum began REMEP has to be diversified and supplemented. The relationships between retaliation, mediation, and punishment are more complex than the ideal types suggest. The REMEP studies have shown that these complexities fall into generalizable patterns, some of which we have discussed in this overview, without being exhaustive. Studying retaliation, mediation, and punishment in conjunction with each other has shown some of the mechanisms by which law contributes to social inequality. The REMEP studies have also shown that further questions emerge when different areas of law are linked with each other and with other social, political, and economic fields. One such question is whether these processes might make criminal law less 'digital' and more fluid than it is often taken to be. A second question is to what

degree such links prevent coherence and in practice lead to considerable and unintended degrees of legal pluralism. Finally, looking at the linkages between legal and social domains also makes evident the serious and disturbing effects of criminal law's worldwide shift towards securitization. Several REMEP studies have shown that this changes the structure of criminal law, placing considerably more emphasis on its preventive role. Some might see this as a positive trend, but it entails an enormous expansion of police powers and security instruments at the expense of human rights, rule of law, and equality. We hope that the body of texts generated by REMEP will remain a source of theoretical inspiration for some time.

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FROM RETALIATION TO HUMAN SECURITY: EPISTEMOLOGY AND INSIGHTS GAINED IN THE HALLE CHAPTER OF REMEP 2008-2012 (AND BEYOND)

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AUTHOR'S BIO
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Turner was involved in the drafting of the first research proposal for the IMPRS REMEP between 2006 and 2008. From January 2008 on he was a factuly member and until the end of 2013 he was the coordinator of the Halle chapter of REMEP. In December 2012 he submitted the successful application for the second term of the research school.

INTRODUCTION

The International Max Planck Research School on Retaliation, Mediation and Punishment (IMPRS-REMEP) has almost come to an end. It is now time to reflect on what has been achieved with respect to the research agenda that was set up when the project has started. The ambitious agenda proclaimed a research interest of IMPRS REMEP that went beyond the scope of a doctoral program and aimed at establishing an interdisciplinary dialogue between social anthropological and jurisprudential research. In the REMEP chapter at the MPI Halle, I believe that we took this programme seriously and it guided our research for the entire time of the project. In my contribution to this summarizing REMEP publication, I wish to recapitulate the intellectual trajectory, the epistemology and insights, and the scholarly progress made over this period of twelve years, ending with an outlook on future research building on the REMEP work.

As one of the initiators, I was involved in the drafting of the first REMEP proposal between 2006 and 2008 and, along with Günther Schlee, co-edited a volume on retaliation in 2008 (Schlee and Turner 2008). This publication was meant as a first transdisciplinary attempt to delineate how research partners from the different disciplines united in the research school understand the three basic components of retaliation, mediation, and punishment and their connections with one another; it was also meant to provide a look at the future REMEP research agenda. From January 2008 until the end of 2013, I was the coordinator of the Halle chapter of REMEP and devoted a substantial part of my own research capacities to the overall research design.

Antecedents

The project did not, of course, emerge fully-grown from the void, and regarding its antecedents, there is a foundational myth or narrative that explains the divine providence

or the inevitability with which REMEP materialized on earth. It is said that the visual impression of henna tattoos on the skin of a secretary motivated MPS directors to engage in a comparison of the political organization of segmentary acephalous societies (the presumed intellectual origin of the tattoos under consideration) with the international community of sovereign states today. I will not go into the specifics of this myth, but what I do want to do is to show what we did with this in terms of developing an ambitious research profile. The myth of origin was not the only challenge we had to face; there were many, among them one in particular which we consciously confronted; this was the challenge of collectively drawing up a research design that could put into motion a cooperation between social sciences and legal disciplines. Despite our original myth, we wanted to upgrade the (actually quite daring) comparison of tribal acephalous models of social and normative ordering with the international world order (Barkun 1968). This comparison had already been heavily criticised when it was first proposed in 1968, and it appeared to us even more misleading today in a globalizing world in which international law is in the process of to transforming into something that has never existed before, an emerging world order that challenges the notion of the sovereign nation state.

This was the point of departure from which I trace the development of a common research agenda and show what has become apparent in this process. Our objective was the identification of common interests in specific research questions; but also identification of productive differences, mutual misunderstandings, different uses of more or less similar concepts, different concepts that are labelled with the same term, overlaps, and related challenges. Regarding my own scholarly profile, I had been struggling with such questions for years already and actually had decided to cast aside this research on 'blood, sweat and tears' and to do something more pleasant (see Turner 2005). However, I wasn't really successful. I will come back to this in the conclusion.

Apart from the foundational myth, there are some other – less frequently narrated – antecedents of REMEP that deserve to be remembered: There was already a fruitful cooperation between the MPIs in Halle and Freiburg on the one hand and also between those in Freiburg, Frankfurt, and Heidelberg on the other.

As regards these previous forms of cooperation, I would like to highlight three events: the MENA Conferences on Conflict and Conflict Resolution in Middle Eastern Societies in Istanbul in 2003 and at Banz Abbey in 2004 (Albrecht et al 2006) and the colloquium on retaliation and sanctioning held at the Sektionssitzung, i.e. the Social Sciences and Humanities Section, at the general assembly of the MPS in 2004.

These initiatives led to the idea of strengthening our cooperation and establishing a research school. Jan Simon, Karl Härter, and I set up a nuclear group of application writers, supported by Hans-Jörg Albrecht, who took the lead and moderated our discussions with the other directors.

Ensuing from the foundational myth that connected acephalous societies (using the example of Morocco; see, e.g. Geller 1969) and the international community, we planned a concise interdisciplinary research programme. And the first research agenda was prepared between 2006 and 2008 and engaged in an initial transdisciplinary translation process. I illustrate this in a separate section in which I deconstruct the acronym with reference to the concept of retaliation and the way the contributing disciplines understand the three components of the REMEP sequence and their relations to each other.

We were not concerned with debating the question of who is right or how one party may persuade the other. Our main effort was to develop awareness of the different concepts and approaches circulating within disciplines that are interested – from different perspectives – in the same phenomena or empirical questions.

The outlined research profile had its basic foundation in the research expertise pooled in Halle on the social significance of conflict management strategies. The research agenda focused on the fundamental question common to social sciences and humanities disciplines regarding how social order and human security are negotiated, constructed, maintained, and re-gained. Research within the Halle chapter of REMEP was to fall within the fields of legal anthropology and conflict studies in the broadest sense of these terms. The focus of analysis was to be conflict and conflict settlement procedures (retaliation, mediation, punishment) in plural legal contexts, including strategies for inclusion and exclusion in conflict situations. Of special interest were various juridical configurations, such as local or customary law, state law, religious law, or transnational norms of conflict management, including actors' abilities to manoeuvre within or among these options (e.g. forum shopping). Likewise important were issues pertaining to the social construction of conflict parties and their identity patterns.

Potential research topics thus ranged from conflict settlement in acephalous/egalitarian societies to conflict management procedures in (post-)conflict societies (retaliation, punishment, compensation, reconciliation) – for example, in the form of transitional or restorative justice or reconciliation processes. It thus encompassed dispute management within or between various groups or institutions at various levels of social organization: in semi-autonomous social fields such as local and kinship groups; within or between ethnic or religious communities, whether within or across national borders; between states; or in transnational settings. Epistemologically, our interest was concentrated on agency in the context of REMEP-related fields and how it is connected to processes of legitimation, to political and social conditions and plural legal frames of reference.

In particular, in the context of conflict and post-conflict societies, so-called mechanisms of transitional justice, which global governance institutions in particular were experimenting with, have been put centre stage. Those include ADR (Alternative Dispute Resolution) mechanisms in constellations of parallel legal registers, dispute management procedures under conditions of cultural diversity and migration, and forms of transitional or restorative justice or reconciliation processes. The interaction of global, local, and translocal processes thus acquired special analytical importance.

The Barkun thesis

Now, how did we try to revamp the Barkun thesis? Essential for the conceptualization of the research program was a reconsideration of the discourse on the rationale of comparisons drawn between the repertoire of procedures in dispute settlement that take effect in case of conflict between sovereign states on the one hand and those referred to in cases of conflict between actors within social formations that are characterized by the absence of political central authority on the other. To repeat, the Barkun thesis posits that epistemological insight can be gained through the identification of analogies and the comparative analysis of procedures of dispute settlement in different settings. Thus,

what we did was a sort of second-order observation operation, in order to avoid a comparative oxymoron and also deal with differences and distinctions.

Generally, second-order observation entails an analysis into the ways in which distinctions are produced and as a result how specific knowledge systems are socially constructed. As such, deploying this concept allowed us to understand '... what can appear in society and how' (Andersen 2003). It is termed 'second'-order observation because we observe the observers as observers ourselves; we observe the ways in which distinctions are constructed in a given society, a realm of knowledge. Consequently, second-order observation reveals the excluded knowledge (i.e., objects, subjects, symbols, and meaning in general), which have become inaccessible as a result of distinctions made by 'first-order observers. This unknown and excluded knowledge is referred to as society's 'blind spots' (Luhmann 1993). In other words, we proceeded on the assumption that comparative analysis of procedures of dispute settlement in various settings that are characterized by the absence of central authority are, with certain adaptations, relevant to helping understand processes of globalization and transnationalization.

Moreover, this assumption allowed us to come to the following basic consensus joining all contributing disciplines: Under conditions of increasing transnational integration, the management of conflict and the settlement of disputes in plural legal settings undergo a radical reconfiguration due to accelerated translation processes between normative repertoires and models of dispute regulation at all scales and trans-scalar, incorporating local dispute settlement and transnational post-war scenarios and constellations. The basic consensus, finally, brought us to the common research premise that in the context of such development, the agency of local actors may expand both towards state institutions involved in conflict regulation and towards institutions of global governance. We became aware, however, that such a view might be too optimistic in light of increasing politics of securitization that were no longer merely looming at the horizon, but already manifestly affecting the framework of our research design. All this guided us towards the second REMEP design I drafted, in which human security was addressed in the context of the techno-legal upgrading of securitization.

The research school offered an integrated curriculum which was designed to draw on the respective theoretical and methodological inventories and empirical approaches of all participating disciplines. The anthropological component of the integrated curriculum addressed the interconnectedness and combination of strategies of action in constellations of conflict. The agenda covered anthropological theories of conflict and disputing, explanatory models of conflict generation (naming – blaming – claiming [Felstiner et. al. 1980]), and models of the possible course of events in conflictive relationships. This included strategies of avoidance, negotiation of compensation and conciliation, and escalation leading to the use of violence (honour killings, hate crimes, blood revenge, and feuds). The analysis of such practices and procedures addressed concepts and social expectations such as peacefulness or propensity towards violence, strategic emphasis on social similarities, and collective identity or cultural difference.

A deconstruction of the REMEP acronym

While up to this point all participating disciplines agreed on the research focus, we were aware of the fact that we all translated the three concepts that composed the REMEP acronym in quite distinct ways, according to our own various disciplinary logics. It was

the explicit wish of Hans-Jörg Albrecht that the IMPRS be established under this acronym, based on the argument that the temporal order implied reflected basic configurations in the ways that crime and deviance formally and informally dealt with in society – at least from the view of criminology and criminal law. But what associative links surface when the REMEP sequence is dissolved? To start with, one has to emphasize that the internal logic of the REMEP acronym is not necessarily self-evident for anthropologists. For them, the most convenient starting place would be mediation. While the term mediation is sandwiched between retaliation and punishment in REMEP, anthropologists see it rather sequentially associated with arbitration and adjudication: all three constitute modes, practices, and procedures of dispute and conflict settlement. This quite distinctive sequencing of mediation with arbitration and adjudication leads to the question of how it is connected to the other two notions in the research school name. Most obvious would be to look for a contextualization of the notion of punishment, which, for anthropologists, appears quite disconnected from retaliation and mediation: It seems only possible to relate it to adjudication and to understand punishment as a result of adjudication – which presupposes, again, the introduction of another concept, namely crime, or of associated concepts, such as socially transgressive, illegal action and similar, so that the sequence would be crime – adjudication – punishment.

Adjudication implies a formal procedure, includes the identification of guilt: a decision over right and wrong followed by sanction and punishment. Whereby the reasons for punishment that come to the fore are notions of reparation, satisfaction, protection of the public, deterrence and so forth. Thus adjudication connects punishment with formal political institutions, enforcement mechanisms, and the notion of a monopoly on the use of force.

Mediation, by contrast, connotes no such externally initiated intervention into a dispute, no power to decide upon the case, no power to make the conflicting parties accept a verdict. On the contrary, mediation means that the parties involved are supported in finding a solution themselves. It is all about peaceful settlement, compromise, reconciliation, or mutual avoidance.

Arbitration, which falls between mediation and adjudication, refers to the grey area in which a disputed matter is addressed on the basis of a decision of an arbitrator. Arbitration indexes the restitution of the situation that existed prior to the conflict, which includes a restitution of the relationship between the parties involved in the conflict at hand. Thus arbitration may go beyond the outcome of a mediation process but excludes the option of punishment.

Where, then, in all this, is retaliation to be situated? In criminology and legal disciplines (here I radically simplify the line of reasoning) retaliation means the illegal recourse to (private) violence, thus a challenge to the state monopoly of violence. In this respect retaliation appears as a form of private punishment that, in the sequence of the REMEP acronym, is opposed to formal legal punishment. Following this logic, on the one hand punishment has replaced retaliation at the level of state justice. On the other hand, the same logic brings private exercise of retaliation before the court as a crime to be punished. The two terms bracket the notion of mediation, the latter being considered as a way to help lead from retaliation to an alternative to punishment. I will come back to this point later, as retaliation became a research focus of the first PhD cohort in Halle and led eventually to an international interdisciplinary conference and an edited volume

to which three of the PhD candidates and three members of the faculty have contributed. For me personally, it was the challenge to revisit and to come back to the study of concepts I hoped I had said goodbye to. One thing that we did in the course of time was to challenge our own concepts by taking into consideration additional disciplinary approaches to retaliation, such as psychology.

All the socio-legal institutions mentioned here form – together with others such as asylum and other forms of institutionalized protection, forgiveness and other forms of shaping the future after conflict – an institutional assemblage and matrix that, it seems, is universal to the human condition.

Benefits from transdisciplinary cooperation (2008-2010 and 2011-2013)

This first setup of the REMEP agenda proved to be useful for establishing a basis of transaction, so to speak. We committed ourselves to the establishment of an interdisciplinary dialogue between social anthropological and jurisprudential research. Not just faculty members were called upon to contribute to the overall research agenda; once the programme was drafted, the most intensive research and contributions came from the PhD candidates. This gave us the opportunity to continue elaborating on the project and more closely integrate the tasks of professional education with our transdisciplinary research agenda.

Research done on the basic REMEP concepts during the first of the four cycles gave new impetus to the research agenda, including an emphasis on cultural diversity, migration, the role of religion, and the increasing technicization of lifeworlds in the field of human security.

The synergy effects of REMEP cooperation by far transcended the framework of the respective local research clusters. Some of the common fields of interest that attracted PhD students across the contributing MPIs – and which have led to stimulating debates – turned out to be narratives and politics of memory, processes of law production, and competing concepts of justice. So from my perspective as an anthropologist, the cooperation with criminologists, historians of law, and experts in criminal and international law brought fresh impulses to anthropological research on global and transnational processes, e.g. on ongoing processes of increasing transnationalization of law and the consequences of this. This allowed us for a broader approach to translocal and transnational interactions. Since its establishment, the IMPRS REMEP showed promise of being able to successfully generate the epistemological benefits sought by all contributing disciplines. The first and foremost advantage proved to be the enriched transdisciplinary awareness that allowed students and faculty members to avoid mutual misunderstandings resulting from different terminologies, perspectives, and priorities while doing research on the same or comparable topics. This growing interest in each other's trajectories was not the only benefit; the research projects also showed certain convergences in the sense of identification of analytical overlaps or the possible adoption of new perspectives. In finding a common language, we were far beyond the mere identification of 'the gap' that separates us from one another, but were identifying necessary overlaps, complementarities and mutual references. In the course of time a number of overarching topics were been identified, such as the impact of global governance institutions, especially the International Criminal Courts (ICCs), the impact of transnational securitization politics, and the importance of global financial flows for the management of con-

flict. Interesting dynamics also evolved in regard to methodological issues: Jurisprudential projects increasingly adopted an empirical component and also took the social working of law into consideration, while anthropologists accepted the transformation of social realities into normative texts as an indispensable component of their research and found ways to apply anthropological theory to understanding these texts.

Retaliation

My main publication within the REMEP framework was surely the co-edited volume (with Günther Schlee) *On Retaliation* (2017). I started working on it when I was coordinator of the Halle chapter of the research school and organized an international conference on the topic in 2011. Logics of retaliation and compensation were the subject of much dispute regarding the role of the state and its institutions in the maintenance of order and in relation to differing social conditions. The best evidence of our progress was the agenda of the transdisciplinary conference on retaliation in October 2011. The impetus behind this initiative was the observation that the concept of retaliation has resurfaced in various discourses and scholarly debates and has gained momentum in a variety of situations that, at first glance, do not appear to be connected. The book presents an inventory of approaches to 'retaliation' in selected disciplines and an overview of the most recent theoretical innovations and research perspectives on the subject. It analyses recent developments without neglecting the historical context within which they unfold. In contrast to other prevailing models of retaliation, the contributions to this volume operate with the basic assumptions that concepts of retaliation inform individual as well as collective action and that they often express multiple truths and follow more than a single logic.

In the field of human security, my introductory and concluding chapters in the aforementioned volume on retaliation contribute to a theoretically nuanced, empirical understanding of the concept of retaliation. I derive the concept of retaliation from the overall notion of reciprocity, and ultimately define retaliation as a human disposition to strive for a reactive balancing of conflicts and other situations perceived as unjust. Retaliation thus refers broadly to the full range of reactions to circumstances that are perceived to be deviant or socially transgressive. Retaliatory logics may inform the whole gamut of conflict resolution procedures, from consensual settlement through various forms of compensation, to violent reprisal and escalation. As an empirical social fact beyond individual disposition, retaliation is associated with all possible types of social and political organization, is an inherent component of any given plural legal configuration, and is embedded in complex institutional arrangements. I aim at a synthesis of the violence-generating and violence-avoiding potentials of retaliation. Accordingly, its social relevance may rather be seen in its potential to prevent one party from acquiring advantages through committing acts of social transgression and engaging in deviant behaviour. Ultimately, my theoretical stance is directed towards an integrated approach to retaliation that helps to understand retaliation in its entanglement with mediation and institutionalized forms of protection. Due to the extremely positive reception of the book upon its publication in 2017, Berghahn issued a paperback version in 2019. We were very happy about this success. In addition, in 2018, I handed in another paper for publication, this time on relational aspects of retaliation.

Evaluation

The IMPRS REMEP underwent evaluation in year five of the initial six-year term. The evaluation, which took place on 1 February 2012 at the Max Planck Institute for Foreign and International Criminal Law in Freiburg, was conducted by a reviewer group composed of eminent experts from the various disciplines united in REMEP. The spokespersons and faculty members from the university partners introduced the REMEP agenda. Johanna Mugler and Severin Lenárt, who had completed their dissertations, presented the findings of their research projects as representatives of the Halle PhD group. The results of the evaluation were extraordinarily positive and particularly highlighted the research school's exceptional and unique cross-institutional interdisciplinary format, its professional organization, and its innovative research profile.

The second term: fine-tuning REMEP toward human security (2014-2019)

Following the extremely positive evaluation in 2011, REMEP applied to the Max Planck Society for a second research term of six years. The application for extension, submitted in December 2012, was used as an opportunity to modify the overall REMEP research profile by taking into account the research results produced during the first phase of the IMPRS and adapting the research agenda accordingly. In particular, this led us to add the issue of human security to the existing profile.

In order to take into account the theoretical advancements and preliminary results that our research achieved during the first four years of our cooperation, the overall research profile was fine-tuned and concretised to highlight a number of common strands and to identify epistemologically promising fields of research. During the first research phase, the idea of connecting the core question for further research to the issue of security emerged as the guiding concept, since our findings indicated that security is an object of theorizing in all contributing disciplines. In line with this change of perspective, the following overarching topics were identified and prioritized in the research agenda: (1) the impact of global governance institutions, for instance the International Criminal Courts (ICCs), but also of globally operating non-governmental organizations such as Human Rights Watch and Amnesty International; (2) the impact of transnational securitization politics; (3) the importance of global financial flows for the management of conflict; (4) the role of travelling technologies of ordering society, new arrangements of governance, and networks of cooperation; (5) the impact of rights-based approaches and human rights; and (6) the importance of religious law and tenets of faith in the transformation of technologies for creating order.

These issues promised to provide new insights into the overall question of normative power and the social workings of the basic concepts of REMEP. Moreover, many of us shared the conviction that the processes of profound social, economic, and legal transformation of the last several decades have demonstrated an urgent need to join efforts across disciplines with the aim of arriving at new analytical insights into global attempts to maintain or restore human security.

As in the first term, we still focused on the fundamental question of how peace, social order, and human security are negotiated, maintained, and regained. On that note we continued to examine retaliation, mediation, and punishment as three related ways of dealing with the violation of rules. The relation between the concepts of human security and of retaliation is that both address the temporalities of law, the interfaces between

precaution, avoidance, prohibition, and, when all efforts to deter rule violation have failed, subsequent reactive action.

Thus, there was a shift in emphasis to recognize the scalar and temporal component of these phenomena. On the one hand, a retrospective view allowed for more nuanced analysis and focused on subsequent attempts to restore order after it has been disturbed. On the other hand, we had learned to examine more closely the attempts to establish rules with the intention of preventing disorder and conflict in the first place. We realized that practices and technologies aiming at producing order and human security were thus unavoidably based on the presupposition that at least certain aspects of social development can and should be anticipated or regulated. Such practices and technologies also imply the conviction that the actors responsible for producing anticipatory knowledge and for using this knowledge to design and implement preventive measures and regulations can and should be held accountable for the effects of their interventions. Again, an important shift in perspective was the recognition that the challenge of dealing with human disasters, conflict, and post-conflict scenarios in the post-war world had paved the way for the concept of prevention. Moreover, the anticipation of crisis, disaster, and conflict has been increasingly inscribed in preventive legal registers.

In order to deal with the complex relations of local and translocal processes and to grasp the different ranges of ordering practices and technologies, REMEP was designed as a project that would link three interconnected scales.

The first scale and point of reference for all our considerations remained the nation state with its legislative, judiciary, and institutional apparatus. In a historical perspective, the emergence of the modern state and the monopolization of violence have established criminal punishment as the only legitimate form of violence and state-organized coercion as the only legitimate form of coercion when the maintenance of social order within the framework of a state and on its territory is at stake.

In conformity with the fundamental research frame outlined above, we referred here to a concept of violence in its broadest sense that goes beyond the scope of physical violence and includes all manifestations of violence and coercion. As part of the state monopoly of power, criminal sanctions can be regarded to have successfully channelled (retaliatory) violence by insisting that private forms of violent coercion are outlawed and will not be tolerated. This means that the power to punish is to be seen as embodied in the modern state and its institutions for delivering and enforcing punishment, such as the police, prosecution services, the courts, and correctional services.

Under conditions of globalization and neoliberalism, it appears that such basic components of the concept of the national state are being challenged and undergoing transformation. Private and retaliatory violence in case of noncompliance with rules or criminal acts that violate private interests has been outlawed, leaving only small niches of (legitimate) exemptions; justifications include, for example, reasons of self-defence and necessity. Such developments have side-lined not only private violence and the violent component of retaliation as a means of responding to crime, deviant behaviour, and other disturbances of social order. They have also side-lined the other complementary components of the concept of retaliation, namely mediation and reconciliation in the settlement of conflicts, and have established the state as the dominant power that enforces conflict regulation and conflict resolution.

However, in the attempt to establish and maintain social order and human security, the relationship between punishment (by the state), mediation, and retaliation is far more complex and less evident than has been suggested by conventional normative and social theory that focuses on the nation state as a given unit of analysis. Moreover, while colonialism has exported the European model of the nation state to all corners of this world, in many regions there is no enduring presence of a functional state with effective institutions and room is thus created for a variety of arrangements to deal with conflict. In some cases of dysfunctional states, societies and social orders are dominated by other units of solidarity and identification and include forms of violence such as retaliation and feuds. Transnational actors intervene in such areas and bypass the institutional apparatus of fragile or vulnerable states to generate new forms of normative and institutional hybridity. This, however, often leads to new breakdowns.

The second and smaller scale consists of segments of society that may for various reasons be widely exempted from the rule-of-law approach that characterizes the general response to deviance and crime, or that may enjoy a certain room for manoeuvring in dealing with internal conflicts. The point of departure was thus the observation that, within the nation state with its monopolized power and judiciary only an extremely small number of cases are able to involve the state apparatus. In a wide range of arenas, ranging from milieus of illegality, such as drug markets and well established traditional subcultures, to religious communities and basic social units such as the family, the recourse to law and administration of justice-based conflict regulation is, for evident reasons, either severely restricted or even prevented entirely. The research design was therefore connected to the fundamental question of who has the interpretative prerogative to define human action as deviant, as threatening security or disturbing the social order, while other actions, although also perceived as conflictive, are considered constructive and as promoting societal advancement.

The emergence of the metropolis over the last two centuries has resulted in the existence of urban environments such as ghettos, *quartiers en difficulté*, favelas, and townships, which tend to generate their own modes of social control that do not rely on formal justice systems and the institutions representing them but, on the contrary, avoid them. Instead, order is maintained to a large extent by agents who are not acknowledged by the state and who have particular repertoires and techniques. The workings and functions of organized crime and conventional underworlds were of particular interest here. Conventional underworlds also refer to the history of what is dealt with today as organized crime but overlaps with social systems that were once opposed to the imposition of governance (mafia, yakuza, triads). In other cases, actors opt for forum shopping, in which the state judiciary is one element of a wide range of interacting normative regimes and institutions.

Over the last several decades, moreover, policy makers have not only encouraged conflict regulation, victim-offender conciliation, and mediation outside the structure of the judiciary, but have also provided a statutory basis for the insertion of mediation into formal justice systems. These developments at least partially reflect the need to economize in the field of formal justice systems, while also substantiating the well-founded supposition that modern criminal punishment produces unwanted side effects that can be avoided by resorting to reconciliation and mediation.

The third scale focused on processes of globalization and transnationalization. The governance of human security on the transnational scale in particular has recently attracted increasing interest. Security requirements are implemented in the form of normative templates that address a variety of issues, ranging from threat protection to public safety to any of the many domains relevant to livelihood security. Such processes are commonly communicated as achievements in the language of neoliberalism.

The politics of securitization is mainly dominated by global governance institutions such as the United Nations and its numerous sub-organizations, the International Monetary Fund, the World Bank, and the World Trade Organization. Transnational actors such as powerful INGOs, civil society organizations, epistemic communities, strategic alliances of interest groups, social and faith-based movements, and multinational corporations also contribute to a new legal architecture of security, risk containment, and conflict prevention. They have been establishing legal frameworks of security in various areas of human life and thus redefining the conditions of people's legal agency. One of the major fields was identified as the governance of conflict and violence (crime prevention, gated communities, urban security, anti-terrorism legislation, and laws on torture, war, war crimes, and mass atrocities) and the normative scripts for all kinds of post-conflict scenarios. In this context, control over the flow of information and informational politics also plays a decisive role. In addition, health, food, and resource security and economy and finance are domains in which transnational normative securitization has become increasingly effective. We viewed these as the main fields in which conflict patterns, on various scales, may turn into threats to global security.

Proceeding from the assumption that there is a coherent logic behind this wide range of normative operations, the research agenda included investigation of the means and ends of such politics of securitization: How are such transnational templates of security law translated into local settings? Who are the actors behind the establishment of a transnational legal architecture of security and who are its beneficiaries? Whose security is secured and who profits from the politics of securitization? What kinds of normative processes have been launched and in what ways do they interact with complex plural legal configurations on various scales, affect the nomosphere, and impact the livelihood conditions of ordinary people? For instance, in what way do such processes appear as either strengthening or impeding factors in connection with rights-based approaches and human rights politics?

In this field, the monopoly of power and the nation state take a backseat to international and transnational forms of police, military, and intelligence cooperation, as expressed in the development of cross-border systems of collecting and exchanging information as well as in the emergence of supranational intervention and task forces.

Moreover, and following the same logic, the privatization of social control is increasing, not only in the most obvious expressions of economic and technical globalization, as in the case of the self-regulation (or hybrid co-regulation) of financial markets, multinational corporations, and the internet, but also in the use of violence within the context of counterterrorism and the new warfare.

Another strand that has been gaining momentum in the research on the impact of retaliation, mediation, and punishment in the context of large-scale conflict, crime, and the exchange of violence is their increasing technologization and the interactions among law, science, and technology in dealing with those scenarios. Law and legal institutions

increasingly refer to other knowledge regimes in the development of mechanisms of intervention, in the production of evidence, in the use of informational flows, and in the reference to the production of memory, the addressing of public grievances, and many other issues that are directly related to the research agenda.

Finally, we were particularly interested in transscalar processes. Some of them have gained importance due to increased human mobility, flows of migration, and the emergence of diasporas, all of which lead to multiple forms of belonging. They have contributed to the transformation of societies that previously cultivated an image of themselves as ethnically and religiously homogeneous or maintained a narrative of upholding formal civic equality. Migrants may bring with them their own plural legal repertoires and concepts of order, thus creating culturally diverse configurations and multicultural societies. Some of these migrant communities may tend to remain alienated and distanced from the formal justice system as well as its agents (and the police in particular). Dissociated from state-based conflict regulation, immigrant communities sometimes develop their own informal ways of coping with conflict and the regulation thereof. New stimuli such as these may affect the established models of order and security and contribute to the emergence of accommodative forms of dealing with conflict in society, such as referring to overarching institutions (for example, religious experts) or forum shopping.

Around the globe, the character of warfare has been changing: instead of being predominantly characterized by symmetric violent conflicts between states, there is a trend towards 'small' or 'private' wars, conflicts that are chiefly asymmetric by nature and which represent what have been called economies of violence. This is paralleled by a trend towards subjecting states to international law, conceived in analogue to the model of ordinary criminal law, that prohibits the use of (organized) violence as well as extreme and disproportional use of violence (crimes against humanity, torture, genocide, war crimes). This trend was expressed most significantly in the establishment of the International Criminal Court and the ad hoc international criminal courts that preceded it. It is in this field, in particular, that the relationships between retaliation, mediation, and punishment have been of particular interest, as the institutionalization of international criminal law appeared to be taken as testing ground or a laboratory for experimentation. Within this framework, the scope of punishment was limited, as were mediation and resorting to violence. The increase of truth commissions working parallel to the ICCs underlined the obvious necessity of creating a balance between punishment on the one hand and techniques of mediation and reconciliation on the other.

Taken together, the updated research agenda was designed to contribute to the analysis of emerging hybrid regimes of security control and the containment of violence on various scales and in various concrete settings.

In addition, I was interested in adding another item to the agenda that had not yet been considered, namely the emergence of human security as a transnational legal concept. I hoped that at a later state it would be possible to integrate the UN legal template of human security as an overarching point of reference for further REMEP research. This template would open up a wide field of research and allow for addressing a wide range of concrete research questions and empirical settings within a common epistemological framework

The background of my considerations was a remarkable shift in attention toward human security in the post-war era in the social sciences and in the public discourse, which led to a shift in perspective in economy and international law away from instrumental objectives (growth, progress, state rights…) and towards the human factor (human development, human rights…). Dealing with insecurity was a concern in the grand theory building during the era of industrialization as a consequence of the changing relationship between state and society at this time. The experience of two world wars subsequently made it clear that security was a crucial challenge. Moreover, risk has been identified as one of the challenges characteristic of modernity.

In order to explore this development a bit further in my REMEP lectures, I connected the current debate with some of its historical foundations, starting with the formal agreement on a new legal order of state organization as laid down in the Treaties of Westphalia. These agreements marked the first time it was stated that nation states should not interfere in each other's national affairs. Put briefly, this principle eventually led to the concept of crimes against humanity, a development that materialized in the establishment of an international and independent institutionalized organization, the International Criminal Court (ICC) in The Hague in 2002 as.

Although these security politics revolve around the prevention of human rights violations in general, the focus is nevertheless on the concept of crimes against humanity, whereas other domains of human rights appear to be enforced with less intensity. In combination with the focus on politics of securitization, I increasingly adopted a 'science and technology studies' perspective on the role that law plays in shaping the future.

A final word about the PhD candidates and their contribution to REMEP

The REMEP PhD students in Halle, Freiburg, Frankfurt, and Heidelberg, while being fully integrated in different research units of their respective MPIs outside of the IMPRS, have developed a strong internal cohesion and REMEP identity, as well as an academic culture of comparative and interconnected research. The PhD projects conducted between 2008 and 2012 all revolved around the basic REMEP agenda and the majority of projects were linked by their concern with several overarching topics: trans-scalar (local – state – transnational) dimensions of disputes, competing concepts of order, and the problem of securitization politics in connection with divergent concepts of justice. Thus, the basic sequence 'Retaliation – Mediation – Punishment' of the IMPRS was contextualized and further theorized from both anthropological and various legal perspectives. In addition, all the projects profited from the transdisciplinary lens of the research school.

In Halle, the projects collectively covered two geographical research areas: South and East Africa, and the Greater Middle East. A strong asset of REMEP was the diversity of the group in terms of disciplines and training, and also that the PhD students came from all over the place and all brought in their own ideas and perspectives on the core topics of the research network.

Conclusion

It is time indeed to conclude. Timm Sureau chose 'Understanding social order' as the topic of the last REMEP retreat in 2019 and I'd like to add: '…and how far have we come with that?' For me, the REMEP agenda intertwined with my own biography and personal experiences which had motivated me to study anthropology and to combine it with a closer look into normativities. In a sense, REMEP allowed me to revisit unprocessed parts of my own professional biography. And fortunately the wide range of topics that found shelter under the REMEP acronym provided me with distance and to look at my own data with new eyes and motivated me to deepen my investigation of the fields of legal studies united in the REMEP family.

So what did I take out of it? While continuing with my other strands of research in legal anthropology, especially in legal pluralism, I have continued to advance my reflections on the institutional assemblage with which I started my PhD work and tried to analytically grasp and theorize it more precisely by taking inspiration from the numerous discussions and also controversies we had over the years. And I am just about to finalize all this and to write papers on the missing links I had to revisit. For me, at the end, a specific way or procedure of dealing with conflict references a set of inextricably linked institutions of order.

With the handover of my responsibilities within the IMPRS-REMEP framework, my focus on human security research shifted towards the role of science and technology in human security politics and how human security relates to human rights. Of particular interest are technologies of truth-making and the production of evidence in plural legal configurations. My research interest in this field ranges from evidentiary practices in truth and reconciliation commissions (TRCs) to truth-making at the grassroots level. A publication on the translation of evidentiary practices in plural legal configurations and technologies of truth finding in Morocco (2017) is embedded in this research. REMEP will have an impact on the trajectories of my research that evolved out of this. I have noted that I originally had different plans when I was subjected to REMEP swarm intelligence and started integrating REMEP collective knowledge into my work. To conclude with one example, REMEP brought me back to the apology/forgiveness nexus as part of the institutional assemblage in which technologies of conflict processing such as mediation, arbitration and adjudication combine with institutionalized protection and post-conflict arrangements, theorized as a future-making technology, as a bet on a range of possible futures. REMEP knowledge helped me consider forgiveness conceptually as a component of the translation process of conflict settlement in order to explore how promises and other practices forge relationships (networks or assemblages) among humans and translate agreement between them as part of envisioning possible futures.

Finally, let me say that I learned a lot from the cooperation with PhD students and colleagues in legal studies and I am very grateful for having had the opportunity to cooperate with young and enthusiastic scholars who conducted field research under difficult circumstances and came back with extremely rich sets of data. My gratitude goes to all those who have accompanied me and us on the journey during the last twelve years.

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SECTION TWO: DISSERTATION SUMMARIES

GROUP IDENTIFICATION AND RESOURCE CONFLICTS IN GEDAREF STATE, EASTERN SUDAN: WHO ALLIES WITH WHOM? WHY? AND HOW?

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AUTHOR'S BIO

I received my PhD from the Martin Luther University Halle-Wittenberg, (Germany) in 2016. I am currently a research fellow at Max Planck Institute for Social Anthropology. My current postdoctoral project examines '*The Challenges of Migration and Integration of Muslim Arab and African Refugees in Germany and Western Europe*'. My recently published works include: 'Contested Land Rights and Ethnic Conflict in Mornei, West Darfur: Scarcity of Resources or Crises of Governance? In B. Casciarri, Munzoul A. M. Assal, and F. Ireton (eds) 2015. *Multidimensional Change in Sudan (1989-2011): Re-shaping Livelihoods, Conflicts, and Identities*. New York: Berghahn Books: 69–86, with Musa Adam Abdul-Jalil,'; and 'Small-scale Farming in Southern Gedaref State, Eastern Sudan. In S. Calkins, E. Ille, and R. Rottenburg (eds) 2015. *Emerging Orders in the Sudans*. Cameroon: Langaa RPCIG: 139–152.

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DISSERTATION SUMMARY

This study provides insight into the question of group identification and resource conflicts in Gedaref State, Eastern Sudan. The literature reviewed shows that the issue of group identification has become a central subject for most of the studies that deal with conflict phenomena globally, regionally (at the level of Africa in this case), and nationally (in the Sudanese context). From my perspective, the starting point to this issue is what is argued by Günther Schlee: although the secondary data on the subject of group identification is enormous, 'it is somewhat "loose" or "soft", in so far as it does not fully exploit the analytical technique of cognitive anthropology and related approaches in linguistic anthropology that have been available since the 1960s' (Schlee 2010: 9). For this reason, Schlee has begun to direct the attention to another question within the subject: 'Who fights whom?' (Schlee 2004: 135). Schlee goes further with his explanation and tells us that his main focus will be mostly on 'the criteria by which friend and foe are distinguished and in which participants offer different explanations about who they are, what unites them, and what distinguishes them from their enemies' (Schlee 2004: 135). Schlee rejects the dichotomy of 'resource-based conflicts' versus 'ethnic-based

conflicts'. In his view, every explanation of a conflict needs to clarify who is involved (identity) and what the conflict is about (resources). He also propagates a combination of economic and sociological approaches. He states that 'there seem to be only two possible approaches at hand for those who are concerned with the issue of group identification in conflict situations: either a form of cost-benefit analysis as favoured by economists, or an approach focusing on social structure and its cognitive representations. These two approaches involve very different kinds of thinkers. What I sought to show in this dissertation is that much clarity can be gained by combining these two perspectives systematically' (Schlee 2004: 135 – 136).

Based on the above-mentioned, concerns that include resource contestation, the essentialization and construction of group identities and the creation of plausible claims in the course of identity shift were at the core of this study. Following Abdul-Jalil (1984), Barth (1969), Haaland (1972), and Schlee (2004, 2008), I focused on the subjects of identification processes and on the maintenance of boundaries. Dynamics of group identification were studied in connection to cases of conflicts that have taken place in Gedaref State since the 1980s. The main actors in these processes of identification were different ethnic groups who live in (or are attached to) Gedaref State. Nevertheless, more focus was given to conflicts between farmers, herders and the owners of mechanised farming projects in southern Gedaref State. In addition, conflicts and competitions over governmental political positions (e.g. membership in the legislative council in Gedaref State) among the different groups who live in Gedaref town – along with concurrent processes of ethnic mobilization – were studied as well. Taking into consideration the importance of systems of dispute management, I addressed the question of how ethnicity, the nature of social relations and access to political power impact the performance of customary institutions of conflict resolution in Gedaref State.

The theoretical approach which I adopt in my thesis makes an association between a cost-benefit analysis and an approach which focuses on social structures and their cognitive representations. The importance of this broadened approach stems from the fact that it seeks to answer the two inseparable questions of why and how people take sides in conflict situations. In so doing, and following Schlee (2004, 2008, 2009), I deal with the question of conflict as a phenomenon that is inherently related to a simultaneous contestation over resources and identities.

The main argument taken in this study reads as follows: in cases of resource conflicts (whether economically, ecologically, politically or legally orientated) in Gedaref town and southern Gedaref State, groups shift between a multiplicity of potential collective identities and perform strategies of exclusion or inclusion. These processes have to do with three overlapping issues: rational calculations of costs and benefits by the engaged groups, the general logic of identification that exists among these groups in Gedaref State and the dominant logic of identification throughout Sudan.

I used the classical ethnographic research methods and carried out fieldwork in Gedaref State for one year from April 2011 to April 2012. This included data collection, which I employed including participant observation, the recording of field-notes, informal and semi-structured ethnographic interviews, a household census, and the collection of genealogies, photography and audio-visual recording.

The study is divided in four parts. In the first part, which is entitled 'Theory and Methodology,' I tackle the theoretical and methodological questions of the study. This

part comprises the first two chapters. In chapter one, I overview and discuss the debates on the issue of identification and conflict globally, regionally and locally. Then, I illustrate the main argument of the study as well as methodological issues. In chapter two, I lay out my theoretical approach and clarify the key concepts of the study. Here, I also problematize the terms 'Arabs', 'Africans', 'tribe' and 'ethnic group' as referring to collective identities that are subject to change and political mobilization.

The second part of the study, chapters three and four, is entitled 'The Land, the People, and the Main Challenges of Livelihood Systems in Gedaref State'. Here, I provide an ethnographic account of Gedaref State and the main challenges that are encountered in the area's livelihood systems. In chapter three, I describe the location and geography, climate, ecology, types of soil, vegetation, population, ethnic composition, natural resources, livelihood activities, and system of Native Administration in Gedaref State. As regards the population, I classify people into six broader ethnic groups that include the 'Arabs', the 'Western Sudanese' (Gharaaba), the 'West Africans', the 'Beja', the 'indigenous groups of the Blue Nile region' and 'the groups of foreign origins' (e.g. Ethiopians, Eritreans, Somalis, Copts, Kurds, Yemenis and Indians). I emphasize that I deal with these categories as 'collective identities' and problematize them. Here, following Barth (1969), I also reject classical definitions of ethnic groups that apply a preconceived notion of the genesis, structure and function of such groups. Such definitions assume that boundary maintenance is unproblematic and affected by isolation that results in 'racial difference, cultural difference, social separation and language barriers, spontaneous and organized enmity' (Barth 1969: 10). In contrast to this, I deal with ethnic groups as an organizational type. Here, the major feature becomes self-ascription and ascription by others. As is clearly emphasized by Barth (1969: 14) 'the features that are taken into account are not the sum of "objective" differences, but only those which the actors themselves regard as significant'.

In chapter four, I deal with the question of small-scale farming and animal herding in Gedaref State, with a specific focus on the southern part. I examine the main challenges encountered in these two major livelihood activities. The main argument adopted in this chapter is that the current situation of small-scale farming and animal herding in Gedaref State has been affected by challenges that are mostly socio-economic and political in nature. Nonetheless, other biophysical factors, climate change in particular, have started to affect the situation to a lesser degree. Among the key conclusions in this chapter is that poverty, economic, political and cultural marginalisation, underdevelopment and lack of agricultural wage labour are among the main problems encountered by small-scale farmers in Gedaref State. Despite these problems, large-scale farmers and the mercantile class, due to their belonging to the northern riverine ethnic groups, are economically and politically empowered.

The third part of the study concerns 'Processes and Practices of Group Identification in Gedaref State'. It comprises chapters five, six and seven. In chapter five, I deal with the issue of dimensions and markers of group identification in al-Fazara village of Basunda locality council in southern Gedaref State. My main concern is to uncover the dimensions and markers of group identification that exist at the grassroots level in Gedaref State and their relation to national socio-economic and political contexts. My analysis is built upon information that I collected through a microcensus, which I conducted in al-Fazara. The chapter concludes that tribe, ethnicity, language, occupation

and nationality are the key dimensions of group identification in Gedaref State at both the town and village levels. These dimensions are not separate from each other. For instance, I showed that both language and occupation are associated with ethnicity at the village level. Such associations are common in Sudan. Many popular views associate specific occupations to particular ethnic groups, particularly in the rural areas of Western and Eastern Sudan. One such association is that animal herding is undertaken by 'Arabs', while farming is the provenance of 'non-Arabs'. More specific economic activities have begun to be used as identity markers for particular ethnic groups. Some occupational symbolism can be linked to the British colonial mode of production that connected Northern Nigeria and Sudan in the first half of the twentieth century; other aspects can be linked to the emergence of a neo-colonial mode of production in the post-colonial period (Duffield 1983). Similarly, I clarified that affiliation to the Sufi orders is among the key identity markers in al-Fazara, with the inhabitants belonging predominantly to the Tijaniyya order.

In chapter six, I address the issue of changing identification and the importance of creating plausible claims for accomplishing identity shift. I view and analyse the case of Fulɓe in Gedaref State and their shifts between 'Arabic' and 'African' identities. I consider both the settled Fulɓe of Gedaref town and pastoral Fulɓe groups (particularly Mbororo). One of my conclusions is that political entrepreneurs play a strong role in identity shift. Political organizations that were engaged with processes of identity shift include the National Congress Party (NCP), the Popular Defence Forces (PDF), Sudan People's Liberation Army/Movement (SPLA/M), the 'West African Alliance (WAA)' and the Sudanese Revolutionary Front (SRF).

In chapter seven, I deal with the question of local mechanisms of dispute management and their connection to group identification. Here, I seek to demonstrate that much insight can be gained by combining a game theorists' approach, a bargaining perspective and the extended case method. In so doing, I am interested in examining the extent to which the local dcleslinmuweics of dispute management are affected and defined by and enacted within wider socio-economic and political contexts concerning social relations, ethnicity and access to political power.

The last part of the study is the conclusion, which appears in chapter eight. In this final chapter, I review and discuss the key results of the study. Throughout this discussion, I compare and contrast my results with what other researchers have concluded about the same subject nationally, regionally (mostly in the East African context) and globally. Because my main focus was on processes of group identification in Gedaref State, I briefly review the key dimensions and markers of group identification there. Then, I deal with the issue of how actors create plausible claims when shifting their identities. At that juncture, I analyse the emic views held by the broader ethnic groups in Gedaref State about themselves and others. The main reason behind that is to illustrate the role played by these emic views in shaping the question of who allies with whom in Gedaref State.

To conclude, the example of Gedaref State clearly illustrates that members of the same ethnic group hold diverse standards of evaluation and judgement at the same time. Among all the ethnic groups – 'the Arabs', 'the Western Sudanese', 'the West Africans' and 'the Beni Amer' – individuals and groups maintain emic views that are both essentialist (tribal/ethnic based) and constructivist (based on 'class' or 'political' affiliation).

Here, I should state that primordialist positions can hardly be found among anthropologists in recent decades. Geertz is often referred to as a primordialist, although the primordialism he describes is not his own but what he observes. Among his key results is the finding that group identification mostly relies on 'the assumed "givens" of social existence' (Geertz 1973: 259) that include 'blood, race, language, locality, religion, or tradition' (Geertz 1973: 258). Such emic primordialism is also found by Dereje Feyissa who argues that 'whether an ethnic group under investigation is primordialist or constructivist in the self-understanding of group members is sometimes, perhaps often, an empirical question' (Feyissa 2011: 14).

To end with, it has been made clear in this study that instead of 'playing the same game' (Barth 1969: 15), members of the same ethnic group 'play different games' as argued by Dereje Feyissa. However, Feyissa makes his argument in relation to identification in the context of different ethnic groups (Nuer and Anywaa) and not the same ethnic group. If one analyses the results of this study in relation to Rogers Brubaker and Fredric Cooper's stance on ethnicity, one would find that it supports their argument that identities are subject to reifications associated with questionable economic and political ends. Nonetheless, it refutes the part of their argument which openly appeals for discarding identities as categories of analysis. Brubaker and Cooper (2000) would have us speak only of 'identification'. But with what is identification, if not with an identity? This study illustrates that for understanding the question of identity and conflict in Sudan, one needs to examine the identities that are adopted by different groups in various settings. My use of identities as a 'category of analysis' in Gedaref State has proven to be very fruitful for understanding the dynamics of social relations and processes of group identification at both the local and national levels.

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WHEN THE STATE MATTERS: AN ANTHROPOLOGY OF VIOLENCE, POLITICAL IMAGINATION AND SOCIAL SUFFERING IN POST–2012 MOGADISHU

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DISSERTATION SUMMARY

PROBLEM, CONTEXT, AND THE RESEARCH QUESTION

The thesis explores the relationship between political imageries and violence by studying the state in Mogadishu. The objective of the thesis is to examine why people in Mogadishu aspire to the state despite the history of violence that accompanies it.

The failures of the state-buildings projects and the protracted armed confrontations has often been interpreted as a clash between differing world-views, whereby the Somalis fundamental assumptions about the best way to live seem to radically differ from the values established by the rule of the state. Despite the dominance of the idea of the 'exteriority' of the state in the analysis of political dynamics in Mogadishu, I take on the mediated popular aspirations (Marchal 2000; Schlee 2013) to the state in Mogadishu to reflect on the role of public perceptions of the state in the reproduction of the state in everyday life.

The main research question of the project has been: why do people in Mogadishu aspire to the state despite the recent history of violence associated with it?

The aim is to inquire about its local meaning associated to the state, and how that informs the actions in the practice of everyday life. In particular, I look at when the category of the state emerges in public space, especially the discourses of low-income urban communities in the practice of everyday life and how that informs the ways they engage in supporting, contesting and negotiating state formation in Mogadishu.

Findings, argument and structure of the thesis

The objective is to examine why people in Mogadishu aspire to the state despite the history of violence that accompanies it. The main result of the thesis indicates that actually, it is not 'despite' the recent history of violence, but instead it is sought in daily life *because* of the local perception that it is a remedy to it. The state is perceived as neces-

sary for the improvement of the socio-economic conditions, to ending social suffering, as well as the ideal of living together.

I develop a theoretical frame to help account for the relationship between the meanings of the state and what it means for political actions. I build on the effort that accounts for the ethical dimensions of everyday discourses (Ahmed 2004b; 2004a; Das 2010; Fassin 2012) to argue that the circulation of the concept of the state, as a recurring abstraction in everyday discourse, is bound to ethical claims whereby people recognize the obligations of the state, and that this collective understanding is integral to its maintenance and reproduction because it informs the daily actions. During fieldwork, I found that the state serves as a tool to evaluate the social environment. It is used as a frame to make ethical claims on political power, in particular what the state is, and what it should be, i.e. what it does and what it should be doing. I suggest that the state matters in both popular and academic discourses because the state is an abstraction that serves to qualify particular social relations and things. My analysis is to look at the subjective association and dissociation of the state with and from particular social relations and things, and the conditions in which they are produced.

Accounting for everyday encounters is central because it enlightens the circumstances and processes under which values and rules are evaluated and justified in the mundane practical matters that market traders are confronted with. For instance, in the mundane practice of everyday life around marketplaces of Mogadishu, the state was mobilized to refer to encounters with different types of civil servants, particular types of violence, but also buildings, the moral qualities and values of respectable leaders and authorities.

The organization of my thesis reflects the examining of the different ways in which the state comes to matter in everyday life. By looking at the presence and circulation of representations of the state in everyday life, I examine the cultural codes that are mobilised to formulate ethical claims. The different empirical cases illustrate different social imaginaries that people mobilise in relation to the state, and the reflexive processes in the efforts to re-inhabit a world, in response to the volatility of social order and the investment in a better the future.

Each of the chapters accounts for different meanings of the state whereby the state comes to matter in everyday life, namely in the quest for personal security, the management of violence, the qualities of good leaders who are merciful to the needs to securing livelihood and social suffering as an interplay of the daily manifestation of violence and socio-economic inequalities. For instance, the ethnographies in the chapters illustrate that how people recreate, support, and engage with formal municipal and district polities, social organisations, ruins, memories of violence and its daily manifestation. Confronted with contradictory and paradoxical situations in daily life, people maintain the state as a positive expression of authority, or at least, perceive it as the only political option able to respond to their aspirations to normality, and to ending social suffering. In doing so, they contribute consciously or not to the institutionalisation of sets of mechanism and processes of control around government that targets populations.

The enunciation of the state to justify particular sets of rules inform the actions of actors who engage with power, because the insertion of the state within networks of relationships allows to account for the obligations that emerge from them. I illustrate thus the cultural processes that have ‘state effects’ (Mitchell 2006; Trouillot 2001) that

is the actions of interdependent series of actors who in their daily interactions negotiate the obligations established by what they consider the state.

Contributions to thinking power, autonomy and culture

To talk about or study the state in Mogadishu is to account ultimately for political violence, as the interplay of different kinds of structural violence.

I have explored how daily events are illustrative of the different structures people have inherited, and how they re-inhabit a world that appears strange. The state is necessarily an abstraction, one that matters in popular discourse and for researchers. As I account for how it matters in everyday life in urban neighbourhoods, in particular around marketplaces, I show how people in Mogadishu think the state is real, identify it as real, feel it as real, and act as if it is and will be real. In looking at how the state serves to qualify particular social relations and things, the ethnographic chapters show the anchorage of the state in local moral economy, what does not extinguish kinship, nor religious practices but leads to their reinterpretation, the loss of some functions and the emergences of new ones. This transformation, I suggest, is not only a reproduction as an imitation, but the result of the activity of society itself – hence the particular attention to the conditions in which these meanings are produced, and the cultural struggles that bring people to frame the ideals of the good life and normalcy in reference to the state.

The findings contribute to thinking of the politics of the state-building projects, which can be understood as other neo-liberal projects that regularly fail because it is designed to do so (c.f. Ferguson 1994; Escobar 1995). In particular the discourse and practices that surround the 'weak state' allows for the increase and multiplication of different technics of securitization, in particular the military presence at the expense of the social needs for less violence and the improvement of the socio-economic conditions. The focus on the state as a technocratic endeavour to build a bureaucratic structure diverts us from thinking of the systematic social exclusion and social inequalities that is at the centre of the processes of the state, notably the rearrangement of global security apparatuses and practices, and as part of the measures to manage poverty on global scale.

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DESIGNING PEACE – IMAGINING EQUALITY

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AUTHOR'S BIO

Nadine Rea Intisar Adam studied Development Studies at the University of Vienna, where she graduated with distinction in 2013. After an internship on labour law and human rights in Costa Rica, she joined REMEP in 2014. Recently, she submitted her thesis 'Designing Peace – Imagining Equality'. While awaiting the date for her defence, she explores Europe's best surfing beaches by train.

DISSERTATION SUMMARY

This dissertation is a postcolonial feminist analysis of art for peace activities in Sudan. My aim in writing it is to contribute to debates in the anthropology of development, peacebuilding and feminist peace studies, as well as discussions on art and peace and how engagement with the arts can help transform conflicts and establish peaceful relations.

As Wibben and colleagues have suggested, the utopias that people imagine in one part of the world may be a reality in other parts. This suggests further that utopias are not dreams that can never be fulfilled and that they have implications instead for practice (Wibben et al. 2019). They contribute to the process of designing a world to which all of us can contribute.

Von Borries (2017) suggests that worlds can be constructed by different actors through different means, such as design or policies. Similarly, peace can be imagined and designed through policies by the actors of peaceworld or imagined in artworks by the actors of the Sudanese artworld, as in the examples I give throughout this thesis. Given the events that have evolved in Sudan since December 2018, I must emphasise that this dissertation refers to pre-revolutionary Sudan in 2015-2016.

Dictionaries like *Merriam Webster* or the *OED* give multiple meanings for the word 'world'. A world can be 'the earth with its inhabitants and all things upon it, the system of created things, a distinctive class of persons or their sphere of interest or activity' ('Definition of WORLD' 2018). As such, the world can be singular or plural, changing according to the context in which it appears and is flexible in its meanings. The different worlds nevertheless make up one big world, are interwoven, influence one another and are influenced by the wider world outside the small worlds. They overlap and are therefore not separate, like the stories and events in this thesis: mutually influencing and transforming each other, although on different levels and with different means and impacts.

Several international organizations are currently designing policies for peace in Sudan, while artists are designing their imaginations of the utopia of another Sudan in their artwork. Equality in different forms is imagined by the actors of both the Sudanese artworld and peaceworld. How they design a future peaceful Sudan as the utopia they are striving for and how they imagine equality as an element of peace are questions that are at the heart of this thesis.

In the following section, I will first introduce each chapter in the relation to the parts of the thesis briefly. During the course of this summary I will then provide a deep-

er insight into the different parts in later sections. This dissertation is structured into five main parts with fifteen chapters. In the first part, 'Introduction: Thinking, Constructing and Entering Worlds', I introduce the reader to this thesis and its topics. This part provides theoretical, politico-historical and personal contextualisations of the topic, as well as an introduction to the country of Sudan and the research methodology. In the first chapter, I discuss the theory underlying this research, ideas about the construction of worlds, and utopia and ideology as analytical concepts in exploring how worlds are imagined in utopian and ideological thought. I introduce different theories of peace as an imagined utopia. I then continue to describe Sudanese politics in Chapter two, especially the last thirty years in Sudan and the attempts to 'Arabize' the country, as well as showing how the government has managed to install a regime of surveillance and fear that impacts on Sudanese society and influences its imagining. In providing a personal contextualisation of the research in Chapter three, I describe my positionality during my fieldwork in Sudan and outline women's status in the capital, Khartoum. Part one ends with Chapter four, which contains a description of the methodology I have used in this thesis and the research questions that guide it.

In the second part of the thesis, 'Artworld', I present the artworld of Sudan. First, I discuss the concept of artworld generally in Chapter five, basing my definition on Becker's (2008) and defining the artworld as a network of actors involved in the creation and dissemination of artworks. In Chapter six, I then provide a historical background to the development and present status of the Sudanese artworld, before delving into the topic of how Sudanese artists imagine the future of the country and what their utopias are in Chapters seven and eight. In light of the ideas of Karl Mannheim, already set out in Part one, I thereby look at the relationship between the ideology of the state and the utopia of some of its citizens and artists, who are still imagining transformations into a different kind of society, away from the Sudanese state and its authoritarian Islamist rule.

International peacebuilding is stimulated from outside and uses utopian ideas, such as gender equality, to advocate the transformation of society. Tensions around this issue in Sudan, as well as within the UN itself, will be analysed in Part three, 'Peaceworld', where I discuss the efforts of international actors to build peace in Sudan, with a focus on gender, gender equality and peacebuilding. I first describe peaceworld generally in Chapter nine, referring to Autesserre (2014), who coined the term 'peaceland' to describe the network of international actors working on peace. The United Nations is a special case of the topic of utopias, since it is a utopia itself that simultaneously creates and shapes policies. In analysing peaceworld, I focus on activities linking gender and peace. In Chapter ten I examine the Sudanese National Action Plan for UN Security Council Resolution (UNSCR) 1325 and subsequent resolutions that formed the Women, Peace and Security (WPS) Agenda. Chapter eleven addresses UNAMID's reports and documentation of its gender-related and peacebuilding activities in Darfur.

In the fourth part, 'Bridging Worlds: Art and Peace', I analyse how the actors of the artworld and peaceworld work for peace in Sudan with and through the arts. In Chapter twelve, I outline how the relationships between art, politics and peace have been discussed theoretically by different scholars. In Chapters thirteen and fourteen, I show how the actors of the artworld and peaceworld work towards and imagine another, more 'peaceful' Sudan through the use of art and performances to stimulate thought and

raise awareness of the problems in the country. In their efforts, they are trying to transform the present into a more 'peaceful' future. In Chapter fifteen, I discuss why the actors of peaceworld are keen on working with those of the artworld and the methods used to stimulate the transformation of conflict and the re-establishing of relations between people, as well as the risks arising out of this collaboration.

In the fifth part, the conclusion, I summarise the findings of the thesis and provide considerations regarding possible future research on the topic arising from the questions that emerged during the research and writing process.

Artworld

An artworld is a network of people guided by conventions for their collaboration. Artworks are the products of people collaborating in the artworld. For Becker, an artist is a member of a subgroup of artworld participants, one who possesses special gifts and talents, defined by the common agreement of artworld participants, but also acknowledged by the society the artists live in (Becker 2008: 14, 16).

The other two sections of this part are dedicated to two main issues. The first is how to work as an artist or do art in the broadest sense in a country ruled by an authoritarian Islamist regime, and how to manoeuvre the thin line between expressing criticism through art without becoming a target of government repression. The second issue is a topic that came up as a point of criticism in the artwork, the question of Sudanese identity and how artists define, negotiate and appreciate the different identities of the Sudanese postcolonial state, as well as how they imagine peaceful coexistence.

To exemplify the political activities of the government and its repercussions for civil society in Sudan, in Chapter seven, entitled 'Artivism? Manoeuvring the Barbed Wire', I looked at the activities of young artists. Here I have addressed how a street theatre group composed of young students staged theatre to talk about issues of public interest in light of the 'Arab Spring' between the years 2011-2013. The chapter has focused on the challenges the group faced in relation to the wider public and political events in the country. It also exposed the government's strategy of opening up certain aspects in order to hide or divert attention from other issues, such as the price increases following cuts in subsidies or its mismanagement of resources. I have analysed this through the theory of 'Sagbarkeitsfelder' (Jäger 2000), which defines what is say-able and doable at any given moment.

One of the questions in the minds of the artists I spoke to during fieldwork in Sudan was that of identity, which I discussed in Chapter eight. What is the Sudanese identity, and who are the Sudanese? Is this identity an 'Arab' identity, with Islam as the religion, as propagated by the government? The artists I spoke to envisage a more inclusive Sudan, a Sudan where diversity is not understood as a threat to the country's identity, as it is by the former government, but rather as a rich and strong cultural heritage that has impacted on society to the present day. The former regime's Arabisation mission can be understood as a way of preserving the postcolonial status quo in the country, in which the 'Arab' population from northern riverine Sudan still enjoys and benefits from the privileges it had acquired under colonial rule. The emphasis of the state on Islamic values and their propagation may be interpreted as a way of defending these privileges, rather than sharing power and wealth among the whole population.

Artists in Sudan understand the purpose of art as depicting beauty. *Al-gamaal*, beauty, is not necessarily about the present. Representing beauty, or the desire to represent it, may also be a way of expressing a wish for the future, a desirable state to be achieved, imagining utopia and calling for transformation. Art can be a way of sensitizing the audience to certain issues that are addressed in the artwork.

Beauty and harmony may be words to describe peace – a peace that is more encompassing than the pure absence of direct violence. Harmony hints at the aspect of structural violence, also discussed in the artwork about identity. These political factors, the policies of the authoritarian Islamist regime, were criticized by *Shawariya*. Raising awareness through street theatre, depicting beauty and discussing the issue of Sudanese identity are all very political acts.

Peaceworld

Similar to the artworld, peaceworld has its own structures, and it functions in accordance with its own culture and conventions. The peaceworld has its own habits, its own standards, which are universal and thereby make transitioning from one mission to another easy for the expatriate staff. As Autesserre argues, and in contrast to the artworld that seems to function well in line with its own conventions, peaceworld is failing in achieving the goals it sets for its operations: stabilizing a country and 'bringing peace' (Autesserre 2014: 3).

The inhabitants and actors in peaceworld use a standard pattern of universal tools in their peace interventions, taking practices applied in one country and applying them in the next peacebuilding mission somewhere else, where the context, the conflict, the culture and the political situation may be completely different. Expatriate peacebuilders, as Autesserre argues, conceptualize their operations with very little input or knowledge about the country where the operation takes place. These missions are usually financed by external donors and implemented by an international agency, the local counterparts only being consulted at the very last stage, as assistants, contractors and recipients (Autesserre 2014).

Gender equality through gender mainstreaming is a utopia being striven for by the United Nations, and efforts are in place to improve women's representation and involvement in both peacebuilding and peacekeeping. At the same time, these ideas of mainstreaming gender into peacebuilding and peacekeeping are similar to ideas of development when it comes to how they are produced, discussed, disseminated and put into practice. The example of the Sudanese National Action Plan (NAP) for United Nations Security Council Resolution (UNSCR 1325) shows how these ideas of gender mainstreaming were discussed in Sudan, why Sudan at a certain moment in time decided on its own NAP and why the first draft was rejected. In Chapter ten, I focus on (UNSCR) 1325 as the product of a global discussion and a tool to relegate the idea of gender mainstreaming to the local contexts where it is meant to be implemented. The contradictions arising through this translation to local contexts and how these issues are discussed locally will be analysed.

Bridging Worlds: Art and Peace

In this part of the dissertation, I examine 'art for peace' initiatives in Sudan. In the first chapter of this part, I will look at how different scholars and artists have theorized about how art can help in fostering peace and conflict transformation. In Chapter thirteen, I discuss a UN publication entitled *A Culture of Peace* published by UNAMID, in which different Darfuri artists and their works for peace in the region are portrayed. This publication aims to highlight the potential of art to promote peace in Darfur and the different voices of these Darfuri artists. *A Culture of Peace* was also the title of a campaign by UNESCO, in which this UN agency called for global efforts for peace, thereby conceptualizing peace as a security problem, as analysed by Ilcan and Phillips (2006). Hence, *A Culture of Peace* addresses the issue of how to promote peace through the arts as a component of the international community's liberal peacebuilding efforts, thereby defining peace in terms of the liberal understanding of it.

McCarthy defines art as 'a conscious attempt to stir another person's emotions by means of a specialized technique' (2007: 356). In McCarthy's interpretation of the role of artists in society and the work they do, he says: 'artists are masters of experiencing, interpreting, valuing and expressing emotion' (2007: 355). For him, artists are particularly 'gifted' in reacting to present conditions. The society they live in experiences and responds to these conditions through the images they produce, which, however, are effigies that do not show reality. Similarly the artists' response is not necessarily a response for peace: it may also be in favour of violence, since 'art is transmission of a feeling. Not always a peaceful feeling', hence artists 'can use their gifts to promote love or hatred, life or death' (McCarthy 2007: 356).

There are other interpretations of how art can work for peace that go beyond the individualistic art production of the 'genius' artist and beyond individual aesthetic experience. Mani (2011), for example, suggests that, in countries of the Global South, where art has a different local value, the aesthetic experience of artworks and their production are more a communal than an individual experience, at least to some extent. In such contexts, it is not only the emotions stirred through the artwork but the whole process from the creation of the artwork to the experience of it through which the community comes together and experiences a collaborative process that makes art valuable in conflict transformation.

Theatre for Peace

Theatre can work in different ways: towards the audience, towards the actors and towards both. Flynn and Tinius stress the importance of theatre as a reflective and affective performance for purposes of politics as well as self-transformation. Dimensions of aesthetics and politics come together to imagine new forms of community, new forms of society and new forms of politics, thereby imagining transformation in the direction of a possible utopia (Flynn and Tinius 2015: 3). A political performance thus has the potential for change and transformation (Flynn and Tinius 2015: 5). Performances therefore have two dimensions, as mentioned above: what is done in the performance by the actors, and what is stimulated through the performance. At best, what is stimulated is reflexivity. This reflexivity is aimed at the observers, but it can also stimulate the

actors. What is important, then, is not only to look at the impact, as mainstream development or peacebuilding practitioners have long done,[1] but rather to look at 'the relevance of (self-)reflexivity on *how* and *what* is done and performed' (emphasis by the authors Flynn and Tinius 2015: 7).

What *Bishish* in its play *Who Killed Koko* does is to present a case that could well have happened in the communities in which they perform and they codify it. They stimulate thought about conflictual issues and underlying problems, as well as calling for discussion. Likewise, the play *Watermelon Valley* was used to call for a discussion about how the conflict over land it depicts could be solved – another example of a possible real-life conflict in the place where it was performed. For the audience, it is a way of becoming aware of a certain issue, becoming critical of it, and questioning which other possibilities than the usual answers or solutions are possible. In this way, members of the audience can find possibilities for peaceful transformation of their own conflicts. Theatre for peace aims to foster discussions through which relationships can be (re)built and transformations brought about.

For the actors in these groups, performing can be a way of learning about oneself and about the other performers, particularly when they come from different backgrounds and are working together, as was the case for John and the theatre group with which he toured southern Sudan. Theatre can also be a way of performing the imaginations, the utopias that a group develops, as in the example of the groups who worked with the Institute for the Future at the Peace Symposium and presented their utopias for Sudan in 2030.

Conclusion

Similar to what Baaz and Stern (2013) have observed with regard to 'top stories' in peacebuilding, in their case peacebuilding activities in Congo, art for peacebuilding seems to have been a 'top' method for various organisations working on peacebuilding in Sudan in the last few years. It seems as if these organizations are granting a certain 'special status' to working with art and/or artists. How can this be explained? Affect, or emotions, says McCarthy (2007), or a certain 'extraordinary standing' of art, as also highlighted by Becker (2008), may be among the reasons. Is there a 'mysterious potency' to art, as Negash (2004: 188) writes, that makes it particularly valuable for purposes of peacebuilding and conflict transformation? This special status given to art, at least in Western societies, lends credibility to it as being a possible motor for transformation as well. As I have discussed in the examples in Chapter fourteen, theatre and performance in particular seem to have an influence on both the actors and the audience, as it helps to stimulate discussions and reflections that can lead to the transformation of conflicts.

We should look at the arts beyond this special status it holds and rather see music and drama, two forms of art that seem to be predominantly used for peacebuilding by organizations, as means to bring people together. Music in particular holds a special place in Sudanese culture. Beyond looking at art through the geniality of the musician,

[1] Autesserre and other researchers of development and peacebuilding have problematized the issue of 'measuring' development, with its focus on numbers, impact factors etc. See also Plastow (2015: 108) on the issue of 'measuring' the 'impact' of theatre for development.

it is a form of getting together, of expression, a joint activity, as I have described in a vignette about the visit to South Kordofan. There the singer was not at the centre of attraction, being applauded by the audience; rather the audience joined the singer, taking it in turns to sing songs and dancing together in the middle of the square. It was a joint activity, a common aesthetic experience.

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UNDER WATCHFUL EYES: PUBLIC VIGILANCE AND SECURITY IN THE POST-9/11 UNITED STATES

KERRIN-SINA ARFSTEN

AUTHOR'S BIO

Kerrin-Sina Arfsten was a member of the Research School on Retaliation, Mediation and Punishment (REMEP) at the Max-Planck-Institute for Foreign and International Criminal Law in Freiburg, Germany, from June 2011 to June 2015. She received her PhD in Sociology from the University Freiburg in the spring of 2019. She also holds a B.A. in Political Sociology and French from Bates College (United States) and an M.A. in International Criminology from University Hamburg. Her research interests include (digital) vigilantism, visual criminology, affect theory and the sociology of emotions, and the sociology of security and uncertainty.

DISSERTATION SUMMARY

This research project examined the concept of public vigilance as a hallmark component of contemporary U.S. homeland security politics. More specifically, it asked how public vigilance is presented and constituted discursively as a governmental technology for managing the ever-present potential of another terror attack. To answer this question, the research project has turned to the so-called *If You See Something, Say Something* advertising campaign as an illustrative example of the vigilance discourse and a useful case study for exploring the participatory politics promoted by the U.S. government under the framework of its 'homeland security' program.

The *If You See Something, Say Something* campaign was originally created by the New Yorker Metropolitan Transportation Authority (MTA) in the wake of the 11September 2001 attacks to enhance security in its transit system. In 2010, however, the U.S. Department of Homeland Security (DHS) asked permission to use the trademarked slogan for its own security advertising initiative. Ever since, the DHS has been working to institutionalize the campaign nationwide. Today, the campaign is an integral part of the United States' security culture. Its messaging can be found anywhere from airports or subway stations to sports stadiums. The campaign's messages instruct members of the public to always 'be vigilant' and on the lookout for signs of emergent terror as they go about their daily lives ('see something'). They also encourage people to report any suspicious activities or persons to the relevant law enforcement authorities ('say something').

To better understand how the authorities are mobilizing and enlisting the 'eyes and ears' of the public in its anti-terrorism efforts, what the practice of being vigilant entails, and where (conceptual and practical) boundaries might be drawn, this research project has looked at the campaign from two angles: firstly, it has analysed the official MTA and DHS campaigns – their material inscriptions and surrounding discourses – and, secondly, it has explored several counter-discourses in which the campaign has been criticized, contested, or resisted. So, for example, the project includes a detailed analysis of the online investigation led by private citizens into the Boston Marathon bombing in

2013, which shows that official calls to public vigilance can develop a dynamic of their own – with sometimes unforeseen and/or unintended consequences. By taking into consideration instances where the call to vigilance has produced ambiguities, been met with severe criticism, or even segued into forms of vigilantism, the second part of this research highlights some of the limitations, as well as dangers associated with governmental attempts at institutionalizing citizen watchfulness and informing. In addition, it renders visible how members of the public, as the intended targets of the campaign, actively negotiate the messages' meanings. It shows that they are not merely passive subjects upon whom governmental regimes act, but rather that they play an active role in shaping (in)security politics throughout their everyday lives.

Theoretical Framework

The social and political thought of French philosopher Michel Foucault – especially his notion of 'governmentality' and the way it has been developed and applied by other thinkers – has provided the overall theoretical framework for the research project. Through this theoretical lens, it became possible to understand 'homeland security' as a specific way of thinking about governing the threat of future terror, which produces the need to create specific subjectivities ('vigilant citizens') and specific technologies ('vigilance'). It also became possible to see that the state is but one actor, albeit an important one, in a heterogeneous and diffuse network of governing bodies, which can include private citizens. Aside from the 'governmentality'-framework, the thesis has also built on historical research on vigilantism and (citizen) policing in the United States, as well as on research on similar advertising campaigns in other countries, such as Australia, Canada or the UK. Additionally, the research has drawn on studies of denunciatory practices/practices of informing in the United States to situate the campaign in its appropriate socio-cultural and political context and identify additional historical trajectories. Lastly, to analyse public vigilance not merely as a discursive but also a visual regime, this thesis has benefitted from insights developed in the fields of visual security studies, visual/cultural criminology, and visual culture/semiotics.

Methodology

The explorative nature of the study favoured a qualitative research design. Data for the research project was collected by using three different methods: firstly, by conducting expert interviews; secondly, by creating an 'archive' (Rapley 2007) of visual and textual materials related to the public vigilance campaign; and thirdly, by using an ethnographic approach to gather materials, which would allow for the empirical exploration of the sensory, embodied, and affective dimensions of public vigilance as a security-productive technology. The materials were analysed by using a Foucault-inspired discourse analysis, which was modified and supplemented with insights from visual-cultural studies/semiotics to account for the specificities associated with visuals. Existing research attests a unique persuasive, dynamic, and performative power as well as effects to visual materials, which made the mere application of tools commonly used for textual analysis inadequate. For this research project, which sought to explore public vigilance also as a distinctive *visual* regime of governing (in)security, it was therefore imperative to choose a methodology that could work with the visual materials on their own specific terms. As a result, a framework for analysis was created that drew heavily

on the critical visual methodology proposed by cultural geographer Gillian Rose (2012), but also took inspiration from the works of other scholars – particularly in the field of criminology – who have attempted to engage with visual materials as distinct from textual ones (see, for example, Presdee & Hayward 2010).

Findings

The *If You See Something, Say Something* campaign advertises a mode of (in)security government predicated upon individual responsibility. It endorses a specific form of state-authorized, but voluntary vigilance by private citizens. This form of vigilance takes place laterally between individuals, not top-down from the state, and requires that they literally watch each other. Throughout their daily routines and in their normal surroundings, the campaign encourages private citizens to always be vigilant and watch (out for) each other. Notably, it also asks them to learn how to distinguish the 'ordinary' from the 'out-of-the-ordinary' in their everyday, so that they may recognize emergent terror in a timely enough manner to pre-empt it. To be able to do so, they are instructed to inform themselves about indicators of potential terrorism, habitually practice situational awareness, trust their instincts, and overcome any fears associated with potential misidentifications or 'false alarms when making a report'[1]. If all citizens internalized the logic of the campaign's messaging, the official discourse proposes, then the American 'homeland' would be protected by a multitude of private eyes looking out for one another, essentially forming a virtual citizen 'army' and serving as a crucial 'first line of defence' in the fight against terror.

Public vigilance constitutes a form of visual policing that cultivates a suspicious outlook and differentiates between who or what is safe and who or what is not. The purpose of the public vigilance campaign is thus to link sight to social control action and thereby to make it security-productive. In this regard, there is nothing substantively new about the public vigilance campaign. Time and again throughout American history, U.S. government and law enforcement officials have tried to enlist the 'eyes and ears' of the public for social control purposes. Previous manifestations of citizen watchfulness range from vigilantism – as one of the earliest forms of public vigilance at the expanding nation-state's shifting borders and prior to the establishment of professional police forces – to neighbourhood watches – a long-time staple of American community policing efforts. At the same time, as this research project shows, there are also important differences between previous governmental attempts to enlist the public in social control and today's *If You See Something, Say Something* campaign effort. These differences underscore the significance of the research at hand, as they reveal novel tendencies in the way the public is mobilized and enlisted in security government. They also allow for its problematisation.

One way in which the *If You See Something, Say Something* campaign's call to vigilance differs from previous ones is that it is highly ambiguous. Previous calls to public vigilance were largely aimed at specific targets (behaviours and/or persons), such as those who consumed alcoholic beverages during the Prohibition years or – to choose

[1] Interview I conducted with the New Yorker Metropolitan Transportation Agency's (MTA) Chief Director of Marketing and Advertising Mark Heavey on 21 May 2013.

a more recent example – those who spray graffiti on subway trains. In these instances, the call to report a fellow citizen revolves around a clearly defined 'wrong': an activity that the law defines as 'illegal.' In the case of anti-terror vigilance, by contrast, individuals are not encouraged to report a crime that has already occurred or is currently taking place, but activities that *might* indicate future acts of terror. They are asked to see the world through a lens of (in)security and suspicion, to anticipate terror and foresee its occurrence even where nothing 'illegal' has taken place yet (although admittedly some preparatory acts of terror are in fact illegal). For example, they are encouraged to see such acts as the purchase of a pressure cooker or the taking of a photograph in certain locations not as harmless goings-on, but as *potentially* related to terror and therefore as *potentially* threatening. Here, the public vigilance campaign follows the anticipatory and pre-emptive logic that has come to characterize the U.S.-led 'war on terror' more generally. This widens its scope considerably.

Secondly, whereas most previous calls to public vigilance were relatively short-lived and usually subsided within weeks or months after the event that triggered them (the official neighbourhood watch schemes are, perhaps, the only other example of where this is not the case but there are other differences between these two forms of state-initiated public vigilance), the *If You See Something, Say Something* campaign has been in existence for almost two decades now. What is more, it seems here to stay. As mentioned above, with its pervasive messaging (posters, flyers, public service announcements, TV spots, etc.), it seems to have become a permanent part of the U.S.'s security culture. This has important implications. Institutionalizing a system of citizen watchfulness and informing comes with certain risks. Where the vigilant gaze is trained to focus on anything 'unusual' or 'out-of-the-ordinary,' it can easily turn on those who are somehow perceived as 'other.' Technologies of perception are, after all, profoundly cultural. In this case, the call to public vigilance risks institutionalizing a system of discriminatory practices and/or racial profiling. And even where the vigilant gaze does not turn on individuals who 'look like a terrorist,' it alters the way individuals relate to one another. Where individuals begin to look at each other suspiciously and routinely size each other up to detect signs of impending danger, public vigilance becomes a visual regime that fosters distrust. Ultimately, it can undermine communal solidarity and have a fragmentary effect on the social fabric.

Finally, institutionalizing public vigilance can significantly extend the state's reach into private spaces. By training private eyes to see like the state (i.e., like law enforcement officers or soldiers in combat) and encouraging them to report their observations to the authorities, the public vigilance campaign greatly enhances the state's social control powers. Various legal safeguards protect the privacy of individuals. For example, it is difficult for law enforcement to access a private space unless probable cause has been established and a search warrant has been obtained. A neighbour, plumber or cable repair technician acting as a 'watchful partner' of the authorities, however, does not need a warrant to have a look around one's home. If implemented successfully, then, the public vigilance campaign provides the authorities with information they may not otherwise have access to – or, at least, not as easily. Furthermore, based on tips provided by vigilant citizens, the authorities may now have grounds for interventions. Without having to formally criminalize an individual by asserting the illegality of their actions, they can search their homes or interrogate them. In this regard, the institutionalization of public

vigilance through the *If You See Something, Say Something* advertising campaign also presents pressing issues of justice, liberty, and privacy.

Overall, this study concludes that the attempt to enlist the 'eyes and ears' of the public in the government's homeland security and anti-terrorism effort seems to be driven by political and cultural goals rather than actual security concerns. It seems more akin to war mobilization efforts of the past (for example, during World War I and II) or the infamous 'naming of names' during the McCarthy era than public-private community policing schemes. The lack of data regarding the effectiveness of the campaign in the pre-emption of terror acts supports such an interpretation. The campaign communicates to the public that the government is doing 'something' to address the threat of terror and provide members of the public with empowering means to protect themselves. But more importantly, the *If You See Something, Say Something* advertising campaign seems to constitute an ideologically charged national project aimed at creating an affective identification of the public with the rationalities and technologies of the homeland security state and its ongoing 'war on terror.' Its main purpose seems to be the mobilization of popular support for the government's framing of the terror threat as well as approach for governing it. Towards this end, the campaign's messaging constantly injects subtle reminders of a terror threat that is already looming in the future into the minds of private citizens and thereby normalizes it. Through emotional and moral appeals, the campaign then asks the public to 'share responsibility' and become personally invested in the 'war' to fight it.

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JIHADI VIOLENCE – A STUDY OF AL-QAEDA'S MEDIA

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DISSERTATION SUMMARY
The REMEP project 'Jihadi violence – a study of al-Qaeda's media' investigated the ideological origins of religiously motivated violence as performed by the jihadi movement. Data from two samples were analysed using content analysis: Sample 1 consists of thirty-one transcribed video messages from al-Qaeda leaders. Sample 2 includes 196 claims of responsibilities for terrorist attacks by jihadi insurgent groups in the Iraq War (2003-2009).

The verbal content of the video messages was structured, using *frames* from Social Movement Theory (Snow and Benford) as theoretical (deductive) categories. Within these frames, the study identified eleven 'narratives', twenty-six 'themes' and fifty-five 'issues' (empirically led categories). Together they represent the thematic structure of al-Qaeda ideology.

Sample 2 was analysed to investigate how jihadi ideology is put into action by jihadi insurgents operating in Iraq after the invasion of US troops in March 2003. The results show that jihadi leaders provide doctrines and strategies describing how the use of force, including terrorist tactics, can defend Islam against its perceived three existential threats – the global conflict, apostasy, and secular governance. Theological and strategic considerations converge in al-Qaeda's rationale for violence. The results show how theological objectives can obstruct strategic expectations and vice versa. This represents the ongoing internal debate between doctrinal salafi hardliners and rather pragmatically inclined members of the jihadi movement; a dispute that contributed to the split between al-Qaeda (AQ) and the Islamic State (IS) in June 2017.

Introduction

Militant ideologies are a transmitter of political violence. The efficiency of militant ideologies to instigate violence depends on its potential to provide individuals and groups a persuasive rationale about why it is necessary, beneficial and justified to engage in violent activism. In regard to this potential, the ideology of jihadism is arguably the most successful contemporary militant ideology of non-state actors. It has mobilized follow-

ers throughout the world, who supported groups as al-Qaeda (AQ) or the Islamic State (DAESH) financially, logistically or as foreign fighters. Today, jihadi ideology is a visible factor in many conflicts across different regions of the world.

Yet, research on the ideological origins of religiously inspired violence based on primary data is still rare. This study seeks to fill this gap. It builds upon research in an academic field that links criminology, sociology of violence, political science, terrorism studies, social movement theory, Islamic studies, and radicalization research.

The objective of the study is to explore the rationale of jihadi violence as it is expressed (1) in the ideology of al-Qaeda and in (2) claims of responsibility of jihadi insurgents in the Iraq war (2003-2009). To this end several narratives, positions, themes and single issues expressed in jihadi media were identified and mapped using content analysis. The explorative design of the study is led through a set of interrelated research questions, such as:

- How does political rationality and religious/theological rationality mix in the media strategy of AQ?
- To what extent do jihadi ideologues stress theological vs. profane aspirations, and is there any discernible pattern in the text data?
- Which theological and strategic expectations about the use of force are expressed in jihadi media? What does the jihadi movement expect, it can realize through the use of force?
- On which factual and on which theological grounds does ideology justify the use of force? How are both related to each other?
- Which tactics and which targets are permissible according to the ideology?
- What other theological and political positions, claims, and sentiments are expressed in jihadi media?

In order to compare the intellectual origins of jihadism as expressed in a sample of thirty-one video statements with its actual implementation on the ground, the study analyses 196 claims of responsibility issued by jihadi insurgents in the Iraq War (2003-2009) by means of content analysis.

The thesis deliberately focuses on the ideological dimension of jihadism. This is not to deny that many individuals join terrorist groups for non-ideological reasons in the first place. Ideology seems to be one crucial part of a bigger picture in which social, cultural and psychological factors converge. The study therefore seeks to contribute to the larger body of terrorism research and research of radicalization by identifying the mechanisms through which ideologies work on the level of the individual, the group and society as a whole.

Literature review & state of the art

The empirical analysis rests on an extensive literature review. It incorporates historical research about the genesis of 'holy warfare' in Islam (i.e. jihad), rational choice approaches to political violence, socio-psychological explanations of radicalization, military and strategic studies, and classical Islamic jurisprudence about Islamic International Law (as-siyar) together with its legal stipulations about the legitimate use of force in Islam. All these efforts are necessary to fully comprehend and adequately interpret the complex and nuanced ideology of al-Qaeda in the subsequent empirical investigation.

Due to the explorative nature of the study, the literature review does not add up to a theoretical (i.e. explanatory) framework. Rather, the literature review clarifies and defines key concepts for the purpose of the study, namely political violence/terrorism and Salafism/Jihadism as to analyse the empirical data within this context. For the purpose of the study 'jihadi movement' is defined as the sum of all individuals and groups that act upon the ideology of jihadism on a regular basis, either clandestine or open. Jihadism is defined here as a contemporary form of (Sunni) Islamic fundamentalism that opposes secular influences in Islam by way of violent activism (namely jihad).

To find a pragmatic solution to the contested issue on 'defining terrorism', the working definition for this project is: *political violence is terrorism to the extent to which the perpetrator is indifferent in his choice of potential targets*. This definition avoids the complicated ethical question about the legitimacy of political violence, by taking (implicitly) for granted that indiscriminate tactics are *de facto* and *de jure* illegitimate.

Next, the literature review scoped existing empirical studies on jihadi media. Despite the wealth of available data (open source propaganda from Islamist groups), systematic content analysis of this material is still the exception. Many studies who do apply content analysis techniques remain descriptive in their conclusions. Eveslage (2013) for instance counted the number of threats against domestic and foreign targets within twenty-three public statements of the Nigerian jihadi group Boko Haram. Torres et al (2006) employed qualitative and quantitative thematic coding to summarize a sample of 2878 documents from al-Qaeda. Salem et al (2008) classified 706 media files produced by jihadi groups in regard to their production features, purpose and usage as documentary, propaganda, operational, hostage, executions, statement/communique, tribute/eulogy, training and instructional videos. Pennebaker and Chung (2009) described differences in linguistic styles between bin Laden and Zawahiri, and Beutel and Ahmad (2011) concluded from their analysis of forty-nine bin Laden speeches, that the now deceased leader of the jihadi movement cited policy-based grievances for his militancy twice as often as religious-based ones.

Descriptive content analysis of jihadi media gave researchers a first glance into the data but in order to come to more generic conclusions about the groups who communicate these messages, additional elements must be included in the design of a study. A common approach in terrorism studies therefore is to compare extremists groups who engage in violence with those who do not (Smith 2004). For example, Smith (2008) and Smith et al. (2008) coded three psychological measurement constructs (value reference, motive imagery, integrative complexity) into media content of violent and non-violent Islamist groups, and identified those variables that are statistically significant predictors to distinguish between groups. From the analysis of media content the authors concluded knowledge about psychological mechanisms that distinguish a violent Islamist group from a likeminded Islamist group that refrains from political violence. Conway et al (2011) investigated 'hidden implications of radical group rhetoric' by analysing random text samples with integrative complexity coding from violent and non-violent Islamist groups. Pennebaker (2011) identified in a text sample of 296 documents statistically significant predictors for a violent attack in the 2-6 months following the statement of the group.

Another strand of research investigates the effects of extremist media on the recipient. Rieger et al. (2013) used a randomized controlled trial with 450 male student participants to measure the 'emotional and cognitive responses' to extremist media. The results of the study show that most participants reject the position and claims in Islamist propaganda or remain neutral about a particular issue. From Rieger's study it appears that people are generally not easily influenced by extremist propaganda videos, but that a low level of education and an authoritarian personality trait make people more vulnerable to ideological messaging.

Some scholars in the field argue that 'ideology doesn't matter' insofar that knowledge about a radical ideology does not help to explain occurrences of political violence and terrorism. Most prominently Marc Sageman's (2004) 'bunch of guys' thesis argues that group dynamics provide a more powerful explanation in the biographies of jihadi terrorists than ideological beliefs do: 'social bonds play a more important role in the emergence of the global Salafi jihad than ideology' (178). Likewise, Abrahms (2008) argues that terrorists organizations seek to maximize social solidarity instead of political utility when becoming active in terrorist activities. There is also anecdotal evidence that some members of the global jihadi movement do not hold strong ideological beliefs: Muhammad al-Maqdisi – a spiritual leader of the jihadi movement – once complained in a frustrated manner, that many western pundits comprehend his writings better than some of his own followers (Worth 2009).

Methodology

How to organise an empirical study on such an indistinct and politicized thing as an ideology? On the most fundamental level ideologies operate as verbal information. A thorough study of ideologies therefore has to begin on the text level. There are a number of advantages to analysing self-generated primary text data, most notably the elimination of measurement biases of any kind. Analysing the public communication from the jihadi movement is unobtrusive and non-responsive. The partial, biased and instigative nature of the content is taken for granted and does not pose an epistemological challenge but is in fact the object of interest. Because the data is not generated by the researcher the whole research process, from the sampling stage over coding to the final analysis, is replicable.

A methodological disadvantage of analysing such material is that the researcher has no control over the setting in which the data is produced. This does not only exclude the opportunity for experimental designs, but also raises the question about the authenticity of the data. To minimize the risk that faked statements are included in the samples, only expert validated sources have been sampled. After carefully reviewing different research strategies the following research design was put into action.

Sampling

The contemporary ideology of jihadism has deep intellectual roots in Islamic history and overlaps with other Islamist ideologies. Any effort to determine a clear-cut definition of its media corpus is therefore likely to fail (Hegghammer 2005: 7). Thus, more standardized forms of randomized data sampling are impracticable. A viable worka-

round for this problem is to use some kind of pre-existing register of jihadi media.[1] For the purpose of this study I reviewed existing *expert samples* that contain a selection of the most influential ideological statements from the jihadi movement. To make sure to include as many relevant statements as possible, I combined six different expert samples of al-Qaeda statements published between 2001 and 2009. This timeframe marks the beginning of al-Qaeda's global expansion until shortly before the beginning of the Arab Revolutions in December 2010, when again a new era for the global jihadi movement began.

The combined expert sample contains 197 statements, ninety-four of which are redundant because some documents are listed in more than one of the six expert samples. This list represents the most influential messages (video, audio and written statements) from al-Qaeda leaders published between 2001 and 2009, namely Osama bin Laden, Ayman az-Zawahiri, Abu Yayha al-Libi and Adam Yahiye Gadahn.

In the next step, I collected the actual transcripts of all 103 messages either from the archive of the SITE Intelligence Group[2] or from the expert compilations itself. From this point I proceeded with purposive sampling (Teddlie and Yu, 2007: 80). In order to identify statements with a minimum of relevant content in regard to the research objectives (the rationale for the use of force) I assigned a subjective relevance score between 0 - 5 to each document. Apparently irrelevant statements with a score of 0 were excluded right away. Weighting feasibility considerations against the wealth of data, I decided to process from the remaining eighty-six documents only those that scored 4 and 5. This led to a sample with thirty-one statements. If no digital version of the transcript was available, the hardcopy was digitalised with optical character recognition software.

All thirty-one sampled documents are professionally translated transcripts of the original Arabic video statements, audio statements or written messages. They amount to a total of about 178.000 words. That corresponds to roughly twenty hours of video and audio material (if the written statements were also audio recorded). It is safe to say that these messages represent crucial characteristics of AQ's ideology (jihadism), including its argumentation why the use of force is necessary, beneficial and legitimate. But it is also important to note, that important intellectual contributions, e.g. from Abu Mussab as-Suri or Mohamaad al-Maqdisi, are missing in the sample. This is of course an important limitation to the study and the exclusion of additional statements has been made for pragmatic reasons alone.

To compare the intellectual dimension of the ideology with its practical implementation, I drew a second sample. Sample II consists of 196 claims of responsibilities issued by al-Qaeda affiliated groups during the Iraq war (beginning with the US invasion in April 2003 in Iraq) and the subsequent civil war. Various Iraqi insurgent groups claim responsibility for their operations in the form of short press releases, usually posted on Internet forums or the group's website (today on Twitter, Facebook and Instagram). Sometimes the insurgents videotape their operations to substantiate their claims.

[1] A good example of such a naturally occurring sample is Osama bin Laden's private collection of 1500 audio tapes with ideological statements (for an analysis on these documents see Miller 2011 and 2012).

[2] There are a number of other commercial intelligence providers who monitor and translate media from terrorist groups such MEMRI or the Intel Center. There is also a growing number of Bloggers who collect and republish jihadi media for journalistic and research purposes.

Different groups share centralized services for distributing their media, such as the al-Fajr Information Centre, or more recently al-Hayat, which has been the media organisation of the Islamic State for some time. Unlike the extensive statements in sample I, the claims of responsibility give short and detailed information about the target, the modus operandi, and the reason for the attack. The media strategy of the Iraqi jihadists stands in sharp contrast to what terrorism expert Bruce Hoffman concluded in 1997 about terrorists claiming responsibility, namely that 'terrorists now deliberately seek to conceal their responsibility for attacks in hopes of avoiding identification and subsequent arrest' (Hoffman, 1997: 4).

Data analysis

In the first stage, I coded the content of the thirty-one statements with a content analysis software (MAXQDA). The coding scheme has five hierarchically ordered categories to discriminate in different degrees between rather abstract content and rather precise information. The five analytical categories are

(1) Ideology as discourse
(2) Frame (theory driven)
(3) Narrative (empirically driven)
(4) Theme (empirically driven)
(5) Issue (empirically driven)

The final version of the coding scheme has four frames, eleven narratives, twenty-six themes and fifty-five issues. To visualise the thematic structure I created a mind map that depicts all ninety-six categories. It represents the thematic structure of AQ's ideology.

While the mind map is a helpful tool to visualise the data, the main reason for the time-consuming coding procedure is to carry out a number of analytical tasks: Through relational content analysis it is possible to obtain more generic information about the rationale of jihadi violence. It reveals which topics are quantitatively and qualitatively interrelated, and thereby identifies manifest and latent patterns in the content that usually cannot be identified by just reading the material without the aid of content analysis software. In large text samples the interrelations between the various narratives, themes and issues are very complex and therefore not visible to 'the naked eye'. Relational content analysis shows how the rationale of violence is embedded in the general thematic structure of the ideology. These 'meta-themes' show which narratives, themes, and issues are interrelated and to what extent (strength of statistical correlation) and what the meaning of interrelating content actually is (qualitative link between two themes). For instance: the theme classification matrix shows the researcher which frames, narratives, themes and issues are related to the narrative 'instrumentality of force', how strong they are related statistically, and what the content of these narrative links actually says.

Results

In short, the results show how both, religious fanaticism and political calculus are inseparably linked in the ideology of the jihadi movement. These findings fit into and advance research in related areas of research: Jansen (1997: xvi) Cozzens (2007) and Sedgwick (2004) have drawn attention to the *dual nature* of jihadi militancy. Its instrumental dimension can most adequately be understood in terms of strategic ends/means

relationships and therefore be explained by political theory, rational choice theory, and strategic studies. Its expressive dimension needs additional theoretical explanation; jihadi warfare is also inspired by theological reasoning, emotions, (Rice 2009, Tausch et. al. 2011) and through sentiments of solidarity (Abrahms 2008). Besides its coercive quality (e.g. resisting foreign occupation by military means) al-Qaeda assumes political violence and terrorism to be beneficial and necessary for theological reasons. For instance al-Qaeda claims theological supremacy over competing Islamist groups (such as Hamas) based on the allegations of 'defeatism', that is when other groups refrain for purely political-strategic considerations from the (alleged) religious obligation of jihad.

Both dimensions, the strategic and the theological, drive jihadi militancy and guides violent action by jihadi insurgents on the ground, as the subsequent analysis of the claims of responsibility issued by jihadi insurgents in Iraq clearly show: Tawhid wa'l jihad, al-Qaida in Iraq, the Mujahedeen Shura Council, the Islamic State of Iraq, and Ansar al-Sunna refer to the narrative of the global jihad, however to varying degrees. They all engage in different types of militant operations: assassinations, hostage taking, battles and military campaigns, commando operations (hit and run tactics).

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THE POLITICS OF ORDER: A CRITICAL THEORIZATION OF SELECTIVITY IN RELATION TO ICTY'S INDICTMENT POLICY PRACTICE

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DISSERTATION SUMMARY

In der Dissertation werden die Selektivität der Praxis internationaler Strafgerichte, sowie die Selektionsmuster und -kriterien auf der Grundlage der Anklagepraktiken des Internationalen Tribunals für das ehemalige Jugoslawien untersucht. Dies erfolgt auch im Hinblick auf die Bildung einer kritischen Theorie des internationalen Strafrechts. Denn die Selektivität in internationalen Strafverfahren stellt ganz offensichtlich ein Problem dar, das international erhebliche Aufmerksamkeit gefunden hat und aus einem Blickwinkel beleuchtet werden soll, mit dem eine Außenperspektive eingenommen wird. Es steht sicher außer Frage, dass die Legitimität des internationalen Strafrechts zu allererst von einer Praxis zu erwarten ist, die als unparteiisch und unvoreingenommen oder neutral wahrgenommen wird. Andererseits ist allerdings ebenso unzweifelhaft eine Auswahl in der Einleitung von Ermittlungsverfahren in den bisherigen Praktiken festzustellen, die fast ausschließlich Fälle (oder Situationen) generiert, die aus afrikanischen Krisenregionen stammen und deshalb eingedenk des Anspruchs auf Unparteilichkeit hinterfragt werden muss. Mit dem Anspruch auf eine umfassende und auch außerrechtliche Bedingungen einschließende Analyse stellt sich die Aufgabe, die Selektivität zum einen aus einer kritischen Perspektive zu beleuchten und die Analyse insbesondere auch aus dem Blickwinkel von außerhalb der Rechtswissenschaften stehenden Disziplinen und Theoriebeständen durchzuführen. Damit ist im Übrigen ein interdisziplinärer Ansatz verbunden, der sich vor allem auf die Politikwissenschaften und Internationale Beziehungen, jedoch auch die Rechtsethnologie stützt.

Die Dissertation ist in sechs Kapitel gegliedert. Das erste Kapitel beleuchtet den Gegenstand der Untersuchungen, nimmt Stellung zu den Zielsetzungen sowie zu den einzelnen Fragestellungen und den Methoden; und erklärt das weitere Vorgehen in der Dissertation. Im zweiten Kapitel wird der materielle Hintergrund der Untersuchung, nämlich die Situation der gewalttätigen Auseinandersetzungen im ehemaligen Jugoslawien beschrieben. Die Entwicklung der Gewalt und der Verlauf der Verhandlungen und Interventionen, die die Gewalt beenden sollten und schließlich auch beendeten, repräsentieren auch das Feld, aus dem außerrechtliche Einflüsse entstanden. Das dritte Kapitel thematisiert die verschiedenen 'Anklagestrategien', die sich über verschiedene Phasen der Tätigkeit der Anklagebehörde beim Tribunal für das ehemalige Jugoslawien und vor allem mit den verschiedenen Anklägern am Jugoslawientribunal ergeben. Das vierte

Kapitel ist der Analyse von Selektivität und außerrechtlichen Entscheidungsmustern in der Anklagepolitik gewidmet. Das fünfte Kapitel greift die Beziehungen zwischen Selektivität und 'Nicht-Rechtlichkeit', also das Einflusspotenzial im Kontext von Friedensverhandlungen und militärischen Interventionen auf. Das sechste Kapitel zieht Schlussfolgerungen und schließt die Arbeit mit einem Ausblick.

Die internationale Literatur zur Frage der Auswahl von Situationen, aus denen Anklagen gewonnen werden, und der eine Auswahl tragenden Hauptkriterien zeigt erwartungsgemäß, dass

1. Selektivität übereinstimmend als unumgänglich eingestuft wird,
2. Selektivität ganz wesentlich durch beschränkte Ressourcen determiniert ist,
3. die wesentlichen Selektionskriterien außerhalb des Rechts zu suchen sind
4. Selektivität das System internationaler Strafgerichtsbarkeit vor Herausforderungen stellt, die im Begriff der Legitimität gebündelt werden können.

Vor diesem Hintergrund ist die Fragestellung der Untersuchung einzuordnen, wobei vor allem das Auseinanderfallen von Selektivität als eines innerhalb des internationalen Strafjustizsystems auftretenden und zu regulierenden Phänomens sowie von Selektivität, die außerhalb des Rechts entsteht und wirksam wird, Beachtung finden muss. Von besonderer Bedeutung ist hier das Fehlen einer den nationalen Strafjustizsystemen vergleichbaren bürokratischen Organisation, mit der es in nationalen Systemen der Strafverfolgung in der Regel gelingt, jedenfalls den ganz überwiegenden Teil der Strafverfolgungspraktiken aus politischer Einflussnahme herauszuhalten und die Neutralität verbürgende Trennung zwischen politischem System und der dem Recht verpflichteten Staatsanwaltschaft sicherzustellen. Demgegenüber ist das System der internationalen Strafjustiz von vornherein in das System der (internationalen) Politik und der hier wirksamen Machtbeziehungen eingebettet. Dies führt zum einen dazu, dass die Institutionen der internationalen Strafjustiz selbst politisch werden, und zum anderen dazu, dass spezifische Abhängigkeiten der internationalen Strafjustiz entstehen. Insoweit wird die Fragestellung der Selektivität so gesehen, dass sie von außen an die Selektionspraktiken des Jugoslawientribunals herangetragen wird. Es geht demnach einmal um die Frage, wie außerrechtliche Kriterien in die Entstehung von Selektivität einwirken. Sodann muss die Frage gestellt werden, wie die Selektivität verstanden (und erklärt) werden kann. Insoweit geht es im Schwerpunkt nicht um eine positivistisch begründete Erklärung, sondern um ein kritisches Verständnis von Selektivität (wie sie sich in der Ermittlungs- und Anklagepolitik der Staatsanwaltschaft beim Jugoslawientribunal niederschlägt). Der Untersuchungsgegenstand ist damit auch die Gestaltung der Ermittlungs- und Anklagepraktiken des Jugoslawientribunals im Zeitverlauf. Differenziert werden die Amtszeiten von Goldstone, Arbour sowie del Ponte. Der Untersuchungszeitraum betrifft die Jahre 1994 bis 2007. Die ab 2008 laufende Amtszeit von Serge Brammertz wird nicht mehr einbezogen. Der in der Untersuchung verfolgte theoretische Ansatz bezieht sich schließlich auf die 'kritische Theorie des internationalen Rechts'.

Angeknüpft wird an die kritische Theorie des internationalen Rechts, wie sie in Texten von Koskenniemi ausgeführt wird (Koskenniemi 2012, 2011, 2009, 2007a, 2007b, 2006, 2005a, 2005b, 2005c, 2004, 2002a, 2002b, 1999, 1997; Koskenniemi and Leino 2002). Die zentralen Überlegungen der kritischen Theorie, die auch für die Analyse der Selektivität in internationalen Strafprozessen Verwendung finden können, beziehen sich auf die 'interne Inkohärenz', eine 'beschränkte Struktur' und eine 'radikale Unbestimmtheit' im Hinblick auf Diskurse des internationalen Rechts. Der kritische

Ansatz äußert sich in einer immanenten Kritik, in der Einführung einer politischen Dimension (und von Akteursperspektiven) sowie einer Positionierung, die außerhalb des internationalen Strafrechts angesiedelt ist. Ausgehend von einem kritischen Ansatz des internationalen Rechts wird schließlich ein kritischer Ansatz des internationalen Strafrechts entwickelt. Der Anstoß zur Entwicklung eines solchen kritischen Ansatzes kann zeitlich in die 1990er Jahre gelegt werden. Hier geht es zunächst um die Annahme, dass sich das Internationale Strafrecht als 'liberales (und modernes) Strafrecht' entfaltet und dass demnach der Schutz von Beschuldigten und Angeklagten im Strafverfahren im Vordergrund steht. Darüber hinaus ist damit die Hypothese verbunden, dass eine politische Einflussnahme gezähmt werden kann. Jedoch ist kritisch hervorzuheben, dies wird vor allem in den Arbeiten von Robinson (2008) thematisiert, dass mit dem Aufgreifen menschenrechtlicher Ansätze und dem humanitären Völkerrecht im Rahmen internationalen Strafrechts eine deutliche Berücksichtigung des Opfers und von Opferinteressen verbunden ist. Die Interpretation und Analyse des internationalen Strafrechts schiebt so den Opferschutz in den Vordergrund. Damit entsteht die Gefahr, dass zentrale liberalstrafrechtliche Grundsätze eingeschränkt werden und aus Gründen des Opferschutzes zurücktreten. Bemerkenswert ist auch, dass in der Argumentation auf Analogien zum nationalen Strafrecht und nationalen Strafverfolgungssystemen abgehoben wird. Hieraus kann der Schluss gezogen werden, dass ohne weitere Problematisierung die internationale Strafjustiz so behandelt wird, als ob sich die institutionellen und prozeduralen Praktiken auf nationaler Ebene im internationalen Raum reproduzieren lassen könnten.

Die Untersuchung von Anklagepraktiken stützt sich dann auf einen Begriff der 'Anklagepolitik', die – auf der Grundlage von Stellungnahmen zur Praxis der Anklage beim Jugoslawientribunal – als sich in einem beständigen Wandel befindlich angesehen werden kann. Verstanden wird eine (internationale) Anklage als das Ergebnis des Zusammenwirkens zweier Einflussgrößen: der rechtlichen Praxis der Anklagebehörde sowie der (außerrechtlichen) Praktiken anderer Akteure (Vereinte Nationen, Sicherheitsrat etc.) (Vlaming 2010).

Die Selektivität ist definiert als die 'Gesamtheit institutioneller und struktureller Verzerrungen', die durch Entscheidungen über die Anklage geformt werden. Die Entstehung von Selektivität ist bedingt durch die Verschmelzung und die Kollision von außerrechtlichen Praktiken. Von Bedeutung ist in diesem Zusammenhang die den einzelnen Akteuren zuordenbare Macht (im Sinne von Durchsetzungsmacht). Diese muss im Zusammenhang mit Selektivität Berücksichtigung finden. Macht ist wiederum aus einer 'dreidimensionalen' Perspektive definiert (Lukes 2004). Hiermit werden neben der beabsichtigten Durchsetzung von Zielen (und Entscheidungen), sowie gewollten (aber nicht durchgesetzten) Entscheidung auch Entscheidungen differenzierbar, die nicht das Ergebnis bewusster und gewollter Handlungen sind.

Methodisch stützt sich die Untersuchung auf einen interdisziplinären Zugang. Die Interdisziplinarität ermöglicht es, eine kritische theoretische Betrachtung vorzunehmen, in die die Theorie des internationalen Rechts, die Analyse der internationalen Beziehungen sowie die Rechtsanthropologie Eingang finden. Der interdisziplinäre Zugang wird kombiniert mit einem deskriptiven Zugang, mit dem die Ergebnisse der Analyse von Texten eingeführt werden. Dies dient als Vorstufe zur Theoriebildung. Insoweit ist auch das Forschungsmaterial skizziert, das im Kern aus Dokumenten besteht, die einer Textanalyse unterworfen werden. Die Datengrundlage der Untersuchung besteht aus den 137 Anklagen, die vor dem Jugoslawientribunal zwischen 1994 und 2005 verhandelt

worden sind. Hinzu treten weitere Texte, die neben autobiographischem Material, Veröffentlichungen, Presseberichte sowie Dokumente der Vereinten Nationen einschließen. In die Datengrundlage der Untersuchung fließen auch Beobachtungen ein, die die Verfasserin anlässlich eines mehrmonatigen Aufenthalts bei der Staatsanwaltschaft beim Jugoslawientribunal gemacht hat.

Die Beschreibung der Vorgeschichte der Jugoslawienkriege verhilft dazu, die Anklagepolitik einzuordnen. Auf die Darstellung der Entstehung und des Zerfalls von Jugoslawien und die Darstellung der Konfliktentwicklungen bis hin zur Beilegung der Konflikte in Kroatien, Bosnien und Kosovo folgt die Beschreibung der Geschichte der Entstehung des Jugoslawientribunals. Die Ergebnisse verweisen auf eine Positionierung des Tribunals als ein Instrument, das neben der strafrechtlichen Aufarbeitung von internationalen Verbrechen auch der Herstellung von Frieden (oder Befriedung) dienen soll. Damit wird im Übrigen ein Thema aufgegriffen, das auch heute in der Debatte über die Funktionen des Internationalen Strafgerichtshofs immer wieder zu Konflikten führt, und in der Frage aufscheint, ob Strafrecht angesichts von gewalttätigen Auseinandersetzungen (und Bemühungen, Frieden zwischen Konfliktparteien herbeizuführen) vorbehaltlos durchgesetzt werden kann.

Die Analyse der 'nicht-rechtlichen' Dimensionen in der Anklagepolitik der verschiedenen Ankläger beim Jugoslawientribunal erfasst zunächst die Beziehungen und Interaktionen zwischen der Anklage (Richard Goldstone, Louise Arbour, Carla Del Ponte) und anderen wichtigen Akteuren (Vereinte Nationen, Sicherheitsrat, die Nachfolgestaaten Jugoslawiens, NGOs etc.) (Johns 2013). Die Untersuchung stellt dabei jeweils die Ankläger vor und berichtet über den jeweiligen Kontext (Status des Konflikts etc.). Für die Periode 'Goldstone' sind insbesondere der Friedensprozess von Dayton hervorzuheben sowie Auseinandersetzungen darüber, ob und inwieweit Amnestien (und Verzicht auf Anklagen) Berücksichtigung finden sollten. Daneben spielten Auseinandersetzungen über die Finanzierung des Jugoslawientribunals (einschließlich der Ermittlungen der Ankläger) eine signifikante Rolle. Beide Gesichtspunkte (Stabilisierung und Befriedung sowie Budget) beeinflussten die ersten Ansätze einer Formulierung einer Anklagepolitik durch Goldstein. Dem Ziel, angesichts der Budgetsituation schnell Anklagen vor das Gericht zu bringen, kam dabei eine nicht zu unterschätzende Bedeutung zu. Die von Goldstone vorgelegten und fortentwickelten Richtlinien zur Anklage unterstreichen diese Zielsetzung. Die Untersuchung der angeklagten Fälle führt schließlich zu dem Ergebnis, dass es nicht die schwersten Fälle (bzw. die 'schuldigsten' Täter) waren, die zuerst vor das Jugoslawientribunal kamen, sondern (auch in den Worten Goldstones) eher Täter der unteren Ebene, also solcher Täter, derer die Anklage habhaft wurde und die schnell angeklagt werden konnten. Dies ist im Übrigen angesichts der Zeitlinien auch erwartungsgemäß, waren doch die Führer der Konfliktparteien zu diesem Zeitpunkt teilweise noch an Friedensverhandlungen bzw. am politischen Diskurs zur Beendigung der kriegerischen Auseinandersetzungen beteiligt. Die Anklagepolitik von Goldstone kann dann als 'Pyramidenpolitik' beschrieben werden. Diese setzte an den wenig problematischen unteren Teilen der Pyramide (der anklagbaren Sachverhalte) an. Die Tätigkeitsperioden von Arbour und Del Ponte werden dann einer vergleichbaren Analyse unterzogen. Für beide Perioden werden die jeweils relevanten politischen und ökonomischen Kontexte untersucht und in einen Zusammenhang mit der Entwicklung von Anklagepolitik gebracht. Die Analysen belegen die Abhängigkeiten der Anklagepolitik und eine Entwicklung, die von äußeren Faktoren stark beeinflusst wird.

Die Anklagepolitik wird dann aus der Außenwelt (der Anklage) und hier insbesondere aus Sicht von Finanzierungsfragen sowie der Befriedungsperspektive rekonstruiert. Hierfür wird eine Analyse der Finanzierung des Jugoslawientribunals durchgeführt, die auf den in der untersuchten Zeit erstellten Finanzierungspläne, Budgets sowie dokumentierte Auseinandersetzungen zu Finanzierungsfragen basiert. In diesem Zusammenhang ist von besonderer Bedeutung auch das Aufgreifen so genannter 'Performance-Indikatoren' für die Anklagebehörde (und die Anklagepolitik). Dies entspricht allgemeinen (und internationalen) Tendenzen einer 'Ökonomisierung' auch der Strafrechtspolitik, die sich seit den 1990er Jahren entfalten. Erwartungsgemäß lassen sich Anpassungen der Anklagepolitik (und der Anklagen) finden, die Effizienzgesichtspunkte deutlich aufgreifen und darüber hinaus Managementverfahren in den Vordergrund rücken. Indikatoren, Arbeitsleistungen (performance) und Effizienz werden so zu zentralen Kriterien in der Formulierung und Implementierung der Anklagepolitik. Insoweit gelingt es auch, die Art und Weise, wie Sachverhalte für die Anklage ausgewählt werden und ihre Erledigung zu erklären. Die Analyse der Befriedungsperspektive erfolgt am Beispiel der Interaktionen zwischen internationaler Politik, der Kosovoverwaltung und der Anklagebehörde am Jugoslawientribunal.

In den Beziehungen zwischen Selektivität und der außerrechtlichen Sphäre können eine praktische Ebene (der Herstellung von Entscheidungen über Anklagen) und eine systemische Ebene unterschieden werden. Die Einführung der Begriffe der Souveränität und insbesondere die von Schmitt (2005) entwickelten Ansätze tragen zur Erklärung der Bedeutung (und Dynamik) des Außerrechtlichen in der Herstellung von Selektivität bei.

Vor diesem Hintergrund können die verschiedenen Ankläger eingeordnet und charakterisiert werden. Goldstones Anklagepolitik kann dabei als orientiert an 'institutioneller Brauchbarkeit' charakterisiert werden. Arbours Anklagepolitik wiederum ist charakterisiert durch die Einbindung der Anklagebehörde in die Stabilisierungspolitik sowie durch die Anklage gegen serbische Führungsfiguren. Del Ponte's Anklagepolitik ist demgegenüber gekennzeichnet durch die Politik des Abschlusses der Tätigkeit des Jugoslawientribunals sowie durch Stabilisierung und Befriedung (die sich in einer gleichmäßigen 'repräsentativen' Verfolgung von Serben, Kroaten und Bosniern äußerten).

Die Zusammenhänge zwischen internationalem Strafrecht, internationaler Strafjustiz sowie den außerhalb dieses Rechts und der sie repräsentierenden Institutionen angesiedelten Akteure (und Rechtssysteme) haben, dies zeigt die Untersuchung deutlich, immer einen bestimmenden, gleichwohl kaum vorhersagbaren Einfluss auf die rechtlichen Praktiken (und hier auf die Anklagepraxis). Die Analyse der Anklagepraktiken vor dem Jugoslawientribunal verweist demnach darauf, dass Selektivität von außen angelegt ist und insbesondere auch kein marginales Phänomen darstellt, sondern weit verbreitet ist. Selektivität ist 'endemisch, konsistent und strukturell' (Beckett 2012). Insoweit ist unübersehbar, dass jede Anklagebehörde mit dem Phänomen der Selektivität verbunden ist, so wie jede Anklagebehörde mit mehr oder weniger erfolgreichen Versuchen assoziiert ist, die politischen Dimensionen (die bereits im Begriff der Anklagepolitik enthalten sind) zu reduzieren, das heißt den politischen Einfluss zu kontrollieren und die Staatsanwaltschaft zu einer (unabhängigen und nur dem Recht verpflichteten) Justizbehörde zu machen.

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QUASI-RECHTLICHE ELEMENTE BEI DER VERFOLGUNG VON WIRTSCHAFTSKRIMINALITÄT: EINE ÜBERSICHT ÜBER GRUNDLAGEN KONSENSUALER KONFLIKTLÖSUNGSPROZESSE

KIYOMI V. FRANKENBERG

LEBENSLAUF

Nach meiner juristischen Promotion am Freiburger MPI arbeite ich in der Gesetzgebung, der Strafverteidigung und der Wissenschaftsförderung. Daneben unterrichte ich Strafrecht an verschiedenen Universitäten und publiziere in juristischen Fachzeitschriften.

Diese Dissertation befindet sich u.a. in folgenden Bibliotheken: Freiburg, Max-Planck-Institut für ausländisches und internationales Strafrecht; Freiburg, Universitätsbibliothek; Heidelberg, Universitätsbibliothek

ZUSAMMENFASSUNG DER DISSERTATION AM BEISPIEL VON ABSPRACHEN: DIE ERZEUGUNG VON VERBINDLICHKEIT IN INFORMELLEN VERFAHREN

Insbesondere anhand von Wirtschaftsstrafverfahren, in denen namhafte Verteidiger engagiert waren und die eine besonders intensive Medienberichterstattung nach sich zogen, untersucht meine Arbeit ‘Grundlagen konsensualer Konfliktlösungsprozesse’, welche normative Ordnung Absprachen im Strafverfahren zugrunde liegt.

Die Erzeugung rechtlicher Verbindlichkeit ist in ausdifferenzierten Rechtsordnungen grundsätzlich nicht mehr relevant. Denn die garantierte Befolgung von Normen ist im modernen Rechtsstaat durch das staatliche Gewaltmonopol mit seinen behördlichen und gerichtlichen Zwangsmöglichkeiten sichergestellt. Das gilt jedoch nicht für informelle Verfahrensweisen, die nicht nur als ‘unvermeidbare Begleiterscheinung formaler Rechtsstaatlichkeit’ (Bohne 1981: 71 ff.), sondern auch als eine im modernen Rechtsstaat zunehmende Entwicklung beschrieben werden (Schnuppert 2011: 15). In Strafverfahren besteht neben der Strafprozessordnung ein informelles Regelwerk (Albrecht 1983: 1322 ff.; Geipel 2006: 784 ff.; Hamm 2006: 2089), das die gesetzlichen Vorschriften ergänzt (Hassemer 1982: 380; Rönnau 1989: 39), aber auch in Konkurrenz zu ihnen tritt (Hamm 2006: 65). Ein herausragendes Beispiel für die Orientierung an nicht kodifizierten Regeln bietet die praktische Ausgestaltung von Absprachen (Hassemer 1982: 382).

Was sind Absprachen?

In einer prägnanten Definition bezeichnete einer der in der Untersuchung befragten Strafverteidiger Absprachen als ‘gemeinsame Strafzumessung im Vorfeld’ der Hauptverhandlung. Als Kern einer Absprache vereinbaren Richter, Staatsanwälte und Straf-

verteidiger bereits nach Erhebung der Anklage, dass der Angeschuldigte ein die Beweisaufnahme reduzierendes Geständnis ablegen und dafür im Gegenzug eine mildere Strafe erhalten wird. Außerdem legen die Beteiligten fest, dass keiner von ihnen Rechtsmittel gegen das abgesprochene Urteil einlegen wird.

Die Hauptverhandlung nach einer Absprache fällt kurz aus, da über die zwischen den Verfahrensbeteiligten streitigen Aspekte bereits verhandelt wurde. Nachdem die Anklage verlesen und der Angeklagte über seine Rechte belehrt wurde, informiert das Gericht die Öffentlichkeit über die Vorgespräche zwischen den verfahrensbeteiligten Juristen und unterbricht die Hauptverhandlung ggf. zur Beratung mit den nicht an den Absprachenverhandlungen beteiligten Schöffen. Dann legt der Angeklagte wie vereinbart ein Geständnis ab. Anschließend verkündet das Gericht typischerweise eine Strafe von nicht mehr als zwei Jahren, denn oft ist die bei dieser Strafhöhe noch mögliche Strafaussetzung zur Bewährung für den Angeklagten der entscheidende Anreiz, ein Geständnis abzulegen.

Gerade in Wirtschaftsstrafverfahren erscheinen kontradiktorische Prozesse nach allen Vorgaben der Strafprozessordnung mit verhältnismäßigem zeitlichem und personellem Aufwand wegen 'immer komplexer werdenden Lebenssachverhalten, einer stetigen Ausweitung des materiellen Strafrechts sowie immer differenzierteren Anforderungen an den Ablauf des Strafverfahrens' (BVerfG, 2 BvR 2628/10 vom 19.3.2013, Absatz 119) als so problematisch, dass zur Bewältigung solcher Verfahren auf konsensuale Formen der Konfliktlösung zurückgegriffen wird (Altenhain 2007: 59 ff; Theile 2009: S. 224 ff; Turner 2006: 220). Wirtschaftsstrafverfahren sind – neben Strafverfahren wegen Betäubungsmitteldelikten – ein Hauptanwendungsgebiet von Absprachen (Altenhain 2007: 53). Auch daran zeigt sich, dass die wirtschaftliche Entwicklung die Kraft hat, formelles wie materielles Recht an seine Grenzen zu führen, dass also ökonomische Interessen zu den 'allermächtigsten Beeinflussungsfaktoren der Rechtsbildung' zählen (Weber 1972: 196).[1]

Vor diesem Hintergrund geht es in dieser Dissertation um die Frage, wie es Menschen gelingt, ihr soziales Verhalten normativ zu binden, also außerhalb rechtlicher Vorgaben Verbindlichkeit herzustellen (Popitz 2006: 64 ff.).[2]

Zielsetzung: normative Struktur von Absprachen entdecken

Im Fokus stehen der bislang kaum erforschte Prozess der Konsensbildung in Absprachen und seine Voraussetzungen. Die Studie untersucht im Wege einer auf grounded theory gestützten fallbezogenen Netzwerkanalyse von abgesprochenen Wirtschaftsstrafverfahren die Voraussetzungen und den genauen Ablauf des Konsensbildungsprozesses in Absprachen. Dieser Arbeit liegt die Annahme zugrunde, dass die Praxis der Absprachen allein im juristisch-dogmatischen Sinne informell ist.[3] Der Ablauf von Ab-

[1] Weber führt zur Begründung aus, dass 'jede eine Rechtsordnung garantierende Gewalt irgendwie vom Einverständnishandeln der zugehörigen sozialen Gruppen in ihrer Existenz getragen wird und die soziale Gruppenbildung in hohem Maße durch Konstellationen materieller Interessen mitbedingt ist.'

[2] Popitz widmet dieser Frage ein ganzes Werk und beantwortet sie u.a. damit, dass man Handlungen, Situationen und Personen typisiert, und dass man innerhalb einer sozialen Einheit in ein Beziehungsnetz von Rechten und Pflichten eingespannt ist.

[3] So versteht das BVerfG Absprachen als informell, wenn sie ohne Anwendung des § 257 c StPO durchgeführt werden, BVerfG, 2 BvR 2628/10 vom 19.3.2013, Absatz 49.

sprachen hat aber insofern normativen Charakter, als sich dafür eigene Regeln verfestigt haben, an die sich alle Beteiligten unabhängig vom konkreten Fall gebunden fühlen. Dies anhand von Experten-Interviews empirisch nachzuweisen, ist Ziel der Analyse.

Die Auswertung konzentriert sich auf das Problem der Vertrauensbildung beim Übergang vom herkömmlichen zum abgesprochenen Verfahren, d. h. vom streitigen zum konsensualen Verfahren. Dabei liegt der Schwerpunkt darauf, die Struktur von Tausch als zentralem Element von konsensualen Verhandlungen unter Bezugnahme auf die Tauschtheorie und die ihr zugrunde liegende Reziprozitätsnorm aufzudecken. Tausch (etwa von Gegenständen, Leistungen oder Informationen) strukturiert soziale Beziehungen auch und gerade dort, wo dafür noch keine differenzierteren Normen bestehen. In Situationen, in denen eine autoritative Rechtsdurchsetzung etwa aufgrund überkomplexer Sachverhalte problematisch ist, bietet Tausch einen Mechanismus, durch wechselseitige Verschuldung verbindliche Verhaltenserwartungen zu begründen bzw. zu stärken (v. Frankenberg 2015: 29 ff.).

Ein weiterer zentraler Aspekt dieser Arbeit ist die Überprüfung, welche der gegen Absprachen vorgebrachten Kritikpunkte der Konfrontation mit dem empirischen Material standhalten. Dabei geht es um die Fragen, ob Absprachen tatsächlich wie von Kritikern dargestellt einen Bruch mit zentralen Grundsätzen des Strafprozesses bedeuten und wie sich Absprachen in die Entwicklung des Strafverfahrens einordnen lassen.

Zielsetzung: die Kritik auf eine empirische Grundlage stellen

Die Praxis der konsensualen Verfahrenserledigung wird seit ihren Anfängen in den 1970er Jahren[4] kritisch begleitet, wobei der alarmistische Tonfall bis heute nicht abgenommen hat.[5] Im Zentrum der Kritik steht der Verdacht, Absprachen veränderten die Praxis des Strafverfahrens als hierarchischer und damit 'konsensfeindlicher Zwangsveranstaltung' (Hassemer 2008: 176) dahingehend, dass strafprozessuale Grundsätze vernachlässigt werden und an ihre Stelle eine informelle, von Effizienzdenken getragene Verfahrensweise tritt, die zudem bestimmte Tätergruppen begünstigt (Bussmann / Lüdemann 1995: 214 ff; Damaska 2004: 1019). Die Dimension dieses Vorwurfs aus der Strafrechtswissenschaft wird deutlich, wenn man sich klar macht, dass die Befolgung der 'schützenden Formen' der Strafprozessordnung eine elementare Voraussetzung für die rechtsstaatliche Durchsetzung des Strafrechts ist (Hassemer 2009: 222).

Kritiker befürchten, dass die Absprache-Praxis die sog. 'schützenden Formen' der Strafprozessordnung so stark verletzt, dass sich der mit der 'Sanktionsschere'[6] bedrohte Angeklagte unter Verlust prozessualer Rechte den Absichten der Staatsorgane unterwerfen müsse (Wiegend 2008: 56). Die Machtverhältnisse im Strafverfahren gerieten ins Ungleichgewicht, sodass die Beteiligten in besonderem Maße Druck aufeinander ausüben könnten und gerechte Urteile nicht gesichert seien, zumal abgesprochene Urteile der Kontrolle durch die Öffentlichkeit und durch die Obergerichte entzogen werden. Die Suche nach der Wahrheit werde vorzeitig abgebrochen, ohne dass der Sachverhalt

[4] Eine der ersten Publikationen dazu erfolgte 1982 unter dem Pseudonym Detlev Deal, StV 1982 S. 545-552.
[5] Exemplarisch der Aufsatz-Titel von Rönnau 2018 oder die Überlegung, ob Absprachen einen Wiederaufnahmegrund nach § 359 Nr. 3, 5 StPO bedeuten können, Eschelbach 2015: 648 ff.
[6] 'Sanktionsschere' bedeutet die unzulässige Drohung, die jeweilige Höchststrafe zu verhängen, wenn sich der Angeklagte nicht kooperationsbereit zeigt. Kurz: Wer nicht gesteht, wird härter bestraft.

ausreichend aufgeklärt wäre. Ein gängiges Lehrbuch behandelt Absprachen unter der Überschrift 'Die gesetzliche Struktur des deutschen Strafprozesses und ihre Sprengung durch die Urteilsabsprachen' (Roxin / Schünemann 2009: § 17). Kritik an der Absprache-Praxis erfolgte, ohne dass bekannt war, wie Richter, Staatsanwälte und Verteidiger Absprachen im Einzelnen handhaben.

Der Prozess der Konsensbildung in Absprachen

Hier wird die Struktur des Konsensbildungsprozesses zusammenfassend geschildert und in Bezug auf den besonders problematischen Übergang vom regulären zum abgesprochenen Verfahren exemplarisch vertieft.[7]

Der Prozess der Konsensbildung bei Absprachen in Wirtschaftsstrafverfahren vollzieht sich in drei Phasen. Grundlage dafür ist, dass die Schuld des Angeklagten für alle Beteiligten feststeht – auch für den Verteidiger. In dieser Situation sucht meistens der Verteidiger das persönliche Gespräch mit der Staatsanwaltschaft, um in dieser ersten, für den gesamten Konsensbildungsprozess entscheidenden Phase eine Absprache zu initiieren und den Absprache-Referenzrahmen zu aktivieren.

Dabei wird zunächst geprüft, ob der Übergang zu einer Absprache überhaupt möglich ist, nämlich ob die Beteiligten eine gemeinsame Sichtweise auf das Verfahren haben. Die Entdeckung bzw. Herstellung von Gemeinsamkeiten bei der Einschätzung des Falles erfordert bei der Gesprächsführung ein hohes Maß an Vorsicht sowie die Fähigkeit, Andeutungen des Gesprächspartners richtig zu verstehen und interessengerecht darauf zu reagieren. Denn mit der Initiierung einer Absprache ist das Risiko verbunden, dass die Gegenseite die eigentlich zum Zweck einer Absprache preisgegebenen Informationen für ein streitiges Verfahren ausnutzt. Durch wechselseitige Zugeständnisse erarbeiten Verteidiger und Staatsanwalt einen Lösungsvorschlag zur Beendigung des Verfahrens.

In der zweiten Phase des Konsensbildungsprozesses präsentieren Staatsanwaltschaft und Verteidigung ihren Vorschlag dem Gericht. Sie erläutern dem Gericht das Ergebnis ihrer Gespräche, nämlich unter welchen Bedingungen und mit welchem Ergebnis sie zur Verfahrensbeendigung bereit wären. Im Gespräch mit dem Gericht geht es darum, diesen Vorschlag u. U. nach dessen Vorstellungen zu modifizieren und seine Umsetzung in der Hauptverhandlung zu besprechen.

Das Ergebnis der Absprache wird wieder in die Form der streitigen Verhandlung eingegliedert, sodass das Verfahren mit einer kurzen Hauptverhandlung beendet wird. Hier wird der bislang nur in Aussicht gestellte Tausch von Geständnis und Strafrabatt realisiert. Alle Beteiligten verzichten auf die Einlegung von Rechtsmitteln.

a) Ausgangssituation in den untersuchten Verfahren

Die Verfahrenssituation, aus der heraus Absprachen angebahnt werden, ist in den untersuchten Fällen dadurch geprägt, dass das Vorliegen einer Straftat zwar naheliegend erscheint, dass aber Unsicherheiten bei der Beweisbarkeit der Tatvorwürfe (insbesondere im Hinblick auf den Vorsatz) oder der Subsumierbarkeit des angeklagten Verhaltens

[7] Details zu Gesprächsanbahnung, Rollen und Reihenfolge der Gesprächspartner, Verhandlungsklima, Bedeutung der nachfolgenden Hauptverhandlung, Umgang mit Öffentlichkeit, Bedeutung des Rechtsmittelverzichts finden sich bei v. Frankenberg 2013: 147 ff.

unter Straftatbestände bestehen, sodass die Durchführung eines streitigen Verfahrens in verhältnismäßiger Zeit und mit vertretbarem Aufwand problematisch erscheint.[8] Die Ermittlungsergebnisse reichen zwar für eine Anklage und deren gerichtliche Zulassung aus. Es ist aber absehbar, dass einige Sachverhaltskomplexe oder Aspekte daraus trotz Vorprozessen oder jahrelanger Ermittlungsarbeit nicht zum Gegenstand einer Verurteilung gemacht werden können, weil den Ermittlern die dafür erforderlichen unternehmensinternen Informationen fehlen. Damit zeigt sich, warum das Verfahren überhaupt fortgeführt wird, obwohl sich angesichts der Beweisschwierigkeiten eine Einstellung des Verfahrens nach dem Zweifelsgrundsatz (in dubio pro reo) aufzudrängen scheint. Denn die Zweifel bestehen nicht über die Frage ob, sondern über die Frage, in welchem Umfang sich der Angeklagte strafbar gemacht hat.

b) Übergang vom streitigen zum abgesprochenen Verfahren: Vertrauen und Tausch

Für den Übergang zu einer Absprache müssen die Verfahrensbeteiligten ihre kontradiktorisch konzipierten Verfahrenspositionen zurückstellen. So müssen beispielsweise der Verteidiger Geständnisbereitschaft und das Gericht Milde signalisieren, obwohl dies ihren Rollen zuwiderzulaufen scheint, weil der Verteidiger damit potentiell seinen Mandanten ausliefert und das Gericht befangen erscheint. Eine Absprache zu initiieren, ist daher mit dem Risiko verbunden, die eigene Verfahrensposition erheblich zu schwächen.

Eine zentrale Voraussetzung für die Initiierung von Absprachen ist Vertrauen, d.h. die Möglichkeit, so handeln zu können, als ob eine bestimmte Verhaltenserwartung begründet wäre, obwohl dies nicht durch einklagbare Rechtsnormen gestützt wird (Bussmann 1991: 71; Weichbrod 2005: 139 f.). In den Interviews wird berichtet: ‘So eine Einigung [könnte] ja im letzten Moment scheitern, weil einer ausschert. Wenn man auf der Ebene zusammenarbeitet, muss so ein gewisses Grundvertrauen da sein.’ und: ‘In aller Regel kann man sich darauf verlassen, dass ein Staatsanwalt, ein Richter, der einmal ‚A‘ gesagt hat, am nächsten Tag nicht ‚Z‘ sagt. Ohne das würde es gar nicht funktionieren.’ und: ‘Dass man sich aufeinander verlassen kann, gehört dazu.’.

Direkt gefragt, geben die Befragten an, es sei ‘schwer zu fassen’ bzw. ‘schwer greifbar’ worauf das Vertrauen zwischen den Beteiligten einer Absprache beruht. Die befragten Praktiker schildern, dass sich ein Vertrauensverhältnis zwischen ihnen im Laufe der Gespräche ‘erst entwickelt’ hat: ‘Die Verteidiger merken meine [des Staatsanwaltes] Offenheit und werden dann auch offen.’ Die Herstellung eines vertrauensvollen Verhältnisses als Grundlage für Absprache-Gespräche ‘geht nur über Menschenkenntnis’. Man muss sich ‘in die Augen schauen’, um einzuschätzen, ob sich der andere sich am Gesagten festhalten lassen wird (v. Frankenberg 2013: 137 ff.).

Im Zusammenhang mit ihren sonstigen Aussagen lässt sich erkennen, dass dieses Vertrauen durch den gemeinsamen Berufsstand, eventuelle vorherige persönliche Bekanntschaft, interne Sanktionsmöglichkeiten (insbesondere der Ausschluss von Absprachen in zukünftigen Verfahren) und ein etwaiges hohes öffentliches Interesse am Verfahren gestützt wird (v. Frankenberg 2013: 140 ff.).

[8] Vgl. BGH NJW 2006, S. 925: ‘Das Justizsystem verfügt nicht über die personellen Ressourcen, um die besonders in Wirtschaftsstrafsachen hochkomplexen Sachverhalte so aufklären zu können, wie es für eine adäquate, der Schuld angemessene Bestrafung erforderlich wäre.’

Zugleich verweisen diese Aussagen darauf, dass das anfänglich erforderliche Vertrauen bald einen Grund gewinnt: Zentral für den Übergang vom streitigen zum konsensualen Verfahren, genauer von den Regeln der Strafprozessordnung zum normativen – und nicht bloß vertrauensgebundenen – Referenzrahmen von Absprachen ist Tausch. Studien von Blau, Mauss und Ziegler (Blau 1964; Mauss 1975; Ziegler 1987) weisen darauf hin, dass Tausch ein grundlegendes Element bei der Herstellung und Aufrechterhaltung sozialer Ordnung ist. In Situationen, für die noch keine sozialen Normen bestehen, bietet Tausch eine Orientierungshilfe. Die jedem Tausch zugrunde liegende Norm der Reziprozität besagt, dass wer einem anderen etwas gibt, diesen dadurch zur Gegenleistung verpflichtet. Sie wird als wichtigste Grundregel zur Stiftung von sozialen Beziehungen angesehen, ja sie gilt sogar als 'Waffe' zur Erzwingung bestimmter Verhaltensweisen (Blau 1964: 89; Gouldner 1984: 97; Malinowski 1940: 27). Tausch als zentrales Element bei der Etablierung von Kooperationsregeln vollzieht sich in zwei Stufen. Dabei findet zunächst ein abstrakter Tausch von Gütern oder Zugeständnissen auf symbolischer oder hypothetischer Ebene statt, der dazu dient, die Regeln für Tausch festzulegen und die Verlässlichkeit der Verhandlungspartner zu prüfen. Im Anschluss daran ist das eigentliche Tauschgeschäft möglich. Diese Zweistufigkeit zeigt sich in Absprache-Gesprächen in der Form, dass zunächst hypothetische Überlegungen zu den Tauschkonditionen bzw. zu möglichen Lösungswegen angestellt werden, bevor in der Hauptverhandlung der tatsächliche Tausch von Geständnis gegen Strafrabatt erfolgt. Die zweigliedrige Struktur des Tausches ermöglicht neben der Demonstration der vom Absprache-Referenzrahmen gebotenen sozialen Normen auch die Überprüfung, ob alle Beteiligten zur Befolgung dieser Normen bereit sind. Der Referenzrahmen gibt vor, dass die Verteidigung eine bislang nicht ausreichend nachweisbare Straftat des Mandanten unter der Voraussetzung zugibt, dass Gericht und Staatsanwaltschaft im Gegenzug für dieses Geständnis bzw. diese zusätzlichen Informationen eine Milderung der Strafe und das Ende des in Frage stehenden Strafprozesses versprechen. Von besonderem Interesse für die Staatsanwaltschaft sind dabei unternehmens-interne Informationen, die ihnen nicht anderweitig zugänglich sind.

Ergebnis: Absprachen als Reaktion auf die Verfolgung von Wirtschaftskriminalität

Im Ergebnis weist die Studie nach, dass der gesamte Kommunikationsprozess in Absprachen – anders als von der Kritik unterstellt – regelgeleitet abläuft und sich unmittelbar auf die Vorgaben der Strafprozessordnung bezieht. Absprachen werden von den Praktikern nicht zur Umgehung strafprozessualer Grundsätze, sondern vielmehr zur Bewältigung besonders komplexer Verfahren eingesetzt. Auf eine konsensuale Verfahrenserledigung wird in Wirtschaftsstrafverfahren dann zurückgegriffen, wenn die Ermittlungsmöglichkeiten und / oder die bisherige Rechtsentwicklung (Gesetzgebung, Rechtsprechung) es im konkreten Fall nicht zulassen, alle Verdachtsmomente in einem für eine schuldgemäße Verurteilung ausreichendem Maße aufzuklären. Absprachen, im Kern also der Tausch von Geständnis gegen Strafrabatt, sind insofern mehr Mittel als Zweck, als sie überhaupt die Voraussetzungen dafür schaffen, auch besonders komplexe Strafverfahren durchführen zu können.

Begünstigt wird diese Entwicklung in Wirtschaftsstrafverfahren durch das strukturelle Problem des modernen Strafverfahrens, in dem sich der eigentliche Schwerpunkt des Verfahrens schon früh von der Hauptverhandlung auf das Ermittlungsverfahren

verlagert hat. Besonders deutlich wird das daran, dass das Gericht vor der Hauptverhandlung die Akten kennt und mit dem Eröffnungsbeschluss den Angeklagten schon ‘halb verurteilt’ hat (Greco 2016: 7 ff.).

Anspruch auf Wahrheitsermittlung bleibt erhalten

Exemplarisch am so zentralen Verfahrensgrundsatz der Wahrheitsaufklärung wird hier gezeigt, dass das Unbehagen der Kritiker an der Absprache-Praxis nicht in jedem Punkt in der Empirie begründet ist.

In der Literatur zu Absprachen wird die Vermutung geäußert, in abgesprochenen Verfahren werde nur noch pro forma am Aufklärungsgrundsatz festgehalten; tatsächlich aber würde die Suche nach der Wahrheit vorzeitig abgebrochen (Weigend 1992: 496; Weßlau 2002: 74).

Doch Absprachen führen nicht dazu, dass etwas nicht aufgedeckt werden würde, sondern sind umgekehrt die Konsequenz davon, dass zumindest einige Aspekte strafrechtlich relevanten Verhaltens aufgedeckt werden können – anderenfalls hätte der Angeklagte wenig Anlass dazu, ein Geständnis abzulegen. Ein vorzeitiger Abbruch der Wahrheitssuche, d.h. ein Abbruch bevor alle Ermittlungsmöglichkeiten ausgeschöpft wurden, liegt bei den untersuchten Absprachen nicht vor. Vielmehr sind Gericht und Staatsanwaltschaft erst deswegen zu einer Absprache bereit, weil sie trotz langer und intensiver Ermittlungen den Sachverhalt nicht näher klären konnten. Mit der Absprache wurde der Versuch unternommen, mit Hilfe des Geständnisses eine Lösung (ein Strafmaß) zu finden, die der Wahrheit (dem tatsächlichen Umfang strafbaren Verhaltens) eher entspricht als ein im streitigen Verfahren erwirkter Freispruch oder eine teilweise Verfahrenseinstellung.

Dabei bleibt zwar die Möglichkeit bestehen, dass auch das Geständnis keine neuen Erkenntnisse liefert, sondern ‘nur’ die – bislang allerdings nicht hinreichend beweisbaren – Ermittlungsergebnisse bestätigt, obwohl in Wahrheit weitere, bislang nicht aufgedeckte Straftaten begangen wurden. Dies steht aber durchaus im Einklang mit dem Wahrheits-Verständnis der Strafprozessordnung. Denn zwar ist die Ermittlung des wahren Sachverhalts als notwendiger Grundlage eines gerechten Urteils ein zentrales Anliegen des Strafverfahrens (BVerfGE 63, 45, 61). Die Wahrheit soll allerdings nicht ‘um jeden Preis’ (BVerfGE 20, 45, 49; BGHSt 14, 358, 365) aufgedeckt werden, weswegen die Strafprozessordnung u. a. mit dem Schweigerecht des Angeklagten und verschiedenen Beweisverwertungsverboten Mittel enthält, welche die Wahrheitsermittlung grundsätzlich einschränken. Der Bundesgerichtshof verlangt, dass die Aufklärungspflicht des Gerichts überschaubar und erfüllbar sein muss, um die Durchführbarkeit des Verfahrens nicht zu gefährden (BGHSt 30, 131, 140). Auch im streitigen Verfahren besteht also unter bestimmten Bedingungen die Möglichkeit, den Umfang der Wahrheitsermittlung einzuschränken. Dies ist in Absprachen der Regelfall, wobei jedoch die Einschränkung in den untersuchten Verfahren schlicht aus der Tatsache resultiert, dass den Beteiligten eine weitergehende Aufklärung unmöglich oder zumindest nur unter unverhältnismäßigem Aufwand möglich erschien.

Grundlegende Lösung steht noch aus

Anders als von den zahlreichen Kritikern moniert, setzen die Beteiligten Absprachen nicht zur Umgehung strafprozessualer Verfahrensgrundsätze ein. Vielmehr bedeuten

Absprachen nach den Ergebnissen dieser Arbeit ein verbindliches (und nicht willkürliches) Instrument zur fallspezifischen Überwindung sachverhaltlicher oder rechtlicher Schwierigkeiten in besonders komplexen Wirtschaftsstrafverfahren. Es bedarf jedoch grundlegenderer, d.h. nicht allein justizieller sondern auch gesetzgeberisch legitimierter Lösungsansätze insbesondere für die Ermittlungsprobleme bei Wirtschaftskriminalität[9] – nicht zuletzt, um den Verdacht zu entkräften, Wirtschaftsstraftäter würden in abgesprochenen Verfahren (zwar überhaupt, aber) milder behandelt als sonstige Straftäter in leichter aufklärbaren Fällen ohne Absprachen. Das untersuchte konsensuale Verhandeln im an sich auf Konflikt angelegten Strafverfahren bedeutet keine Aufweichung prozessualer Strukturen und Grundsätze, sondern einen Zwischenschritt bei der Bewältigung besonders komplexer Verfahren in Reaktion auf die verstärkte Verfolgung von Wirtschaftskriminalität.

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[9] Schünemann 2018: 193 f. schlägt vor, Absprachen dann als legitim anzusehen, wenn der verteidigte Angeklagte einsieht, dass eine Verteidigung gegen die Schuldvorwürfe aussichtslos ist. Voraussetzung dafür wäre u.a., dass der Verteidiger erweiterte Ermittlungsmöglichkeiten erhielte. Rönnau 2018: 177 fordert eine 'Gesamtreform' des Strafverfahrens.

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NECESSITY OR NUISANCE? RECOURSE TO HUMAN RIGHTS IN SUBSTANTIVE INTERNATIONAL CRIMINAL LAW

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This dissertation is available at the following libraries: Halle (Saale), Max-Planck-Institut für ethnologische Forschung; Heidelberg, Universitätsbibliothek

DISSERTATION SUMMARY

OVERVIEW OF THE RESEARCH TOPIC

The starting point of this research is the following: crimes under international law are, partly with the exception of war crimes, defined broadly and construed in a vague manner in the respective statutes of international criminal courts and tribunals.[1] As a practical consequence, it is up to the judges to fill the gaps left in the statutes by taking recourse to extra-statutory law. The nature and the hierarchy of these sources are stated in Article 21 Rome Statute of the International Criminal Court ('Rome Statute') for the International Criminal Court ('ICC'), whereas for the ad hoc and hybrid tribunals, the sources are enshrined in the more general provision of Art. 38 Statute of the International Court of Justice ('ICJ Statute').[2] The application of extra-statutory sources and the interpretation that this application inevitably requires can lead to legal uncertainty and to the unequal application of the law within the same court or tribunal. While this is a problem with which all courts and tribunals applying international law are faced with, international criminal courts and tribunals encounter this dilemma in an aggravated form because, as criminal courts, they have to adhere to procedural guarantees and fair trial standards. Applying extra-statutory sources, they run the risk of violating one of the cornerstone principles of the right to a fair trial, the principle of legality.

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[1] See Arts 6-8 Rome Statute of the International Criminal Court ([adopted 17 July 1998, entered into force 1 July 2002] 2187 UNTS 90); Arts 2-4 Statute of the International Criminal Tribunal for Rwanda (UNSC Res 955 [1994] [8 November 1994] SCOR 49th Year 13) [Rome Statute]; Arts 2-5 Statute of the International Criminal Tribunal for the Former Yugoslavia (UNSC Res 827 [1993] [25 Mai 1993] SCOR 48th Jahr 29).

[2] Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 145 BSP 832.

Hence, the thesis looks at one of the major external sources consulted by the judges, international human rights law, in the context of this conflict. The thesis consists of three major parts: first, the dogmatic analysis of the differing doctrinal architecture of international criminal law and international human rights law and resulting problems in the application of international human rights law in substantive international criminal law; second, the analysis of case law to establish how various bodies of international criminal law have dealt with these problems and in which areas judges are most forthcoming in their reference to international human rights law; and third, the attitudes of judges concerning the relationship of international criminal law and international human rights law, the resulting interpretative practices in their decision and judgments and the factors which influence to what extent a practitioner is open to any form of reference to human rights law.

The thesis employs two major methodologies. A larger part of the research consists of doctrinal legal analysis of statutes, treaties, decisions of judiciary bodies both in the fields of human rights law and international criminal law, as well as various international soft law instruments. This is supplemented by a qualitative study of the interpretative practices of sitting judges of international criminal law courts of human rights laws, based on interviews.

The issue of broadly constructed and vague legislative texts is not unique to international criminal law. Many domestic criminal codes also include crimes whose definition and elements are not apparent when solely consulting the letter of the law and require clarification. However, the problem is particularly pressing in modern international criminal law as an area of law still in its build up-phase, an area which is frequently criticized as susceptible to the influence of international politics. The perimeters of many crimes often remain vague and unclear, due to fragmentary codification as well as the temporarily and substantively limited number of practical cases of application.

This vagueness in content is highly problematic regarding the principle *nullum crimen/nulla poena sine lege*, one of the most fundamental principles to be adhered to by a State or institution based on the rule of law. According to this principle, an act can be punishable only on the basis of a legal act and a person may not be punished arbitrarily and without sufficient legal basis.[3] For criminal law, including international criminal law, this implicates that at the time an act occurred, a written or unwritten norm has to establish its categorisation as a crime for a person to be punished accordingly.[4]

In order to define crimes 'with the clarity, precision and specificity required for criminal law in accordance with the principle of legality (*nullum crimen sine lege*)'[5] the ICC, pursuant to Art 9, introduced the Elements of Crime.[6] These help the Court in the interpretation and application of the crimes enlisted in Arts 6-8 Rome Statute. Judges at the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal

[3] Erkin Gadirov, Erkin and Roger S Clark 2008. 'Elements of Crime', in Otto Triffterer (ed.) *Commentary of the Rome Statute of the International Criminal Court.* München: CH Beck 2008, 506.
[4] See eg Werle, Gerhard 2007. *Völkerstrafrecht* (2. Auflage). Heidelberg: Mohr Siebeck, 44; fundamental regarding nullum crimen sine lege in international law: Triffterer, Otto 1966. *Dogmatische Untersuchungen zur Entwicklung des materiellen Völkerstrafrechts seit Nürnberg*. Freiburg i. Br.: E. Albert, 124.
[5] Summary of the Proceedings of the Preparatory Committee on the Establishment of an International Criminal Court 25 March – 12 April 1996 UN Doc A/AC.249/1 (7 May 1996) para 13.
[6] Elements of Crimes (9 September 2002) Doc ICC-ASP/1/3 (Pt. II-B).

Tribunal for the Former Yugoslavia (ICTY) cannot take recourse to such elements according to their statutes.

Even though the introduction of Elements of Crimes at the ICC signalled awareness and a positive development, the Elements of Crime can only partially provide legal certainty to the practitioners and the subjects of international criminal law, because they are, again, phrased in a rather broad manner. For this reason, the judges at the ICC will continue to have to consult external sources of law for the interpretation of crimes.

Hence, judges at international criminal law are often faced with a dilemma as, by adhering to the principle of *nullum crimen sine lege* and clearly defining the punishable acts in question, they might overextend the letter of the law, when they take recourse to conventions or legal concepts outside their own statutes. In principle, judges at the ICC and other international criminal courts and tribunals are entitled to consult sources outside their statutes. When doing that, they have to respect the sources of international law pursuant to Art. 38 Statute of the ICJ (for the ICC Art. 21 Rome Statute, which also establishes a hierarchy of the sources).[7]

Apart from looking at the application of existing conventions and treaties in the specific case, judges will also consider customary international law. Customary international law, due to the fragmentary codification of international law, in particular, in the area of international criminal law, which judges might be faced with in the case brought before their chamber, is of particular importance to judges at international courts and tribunals. A norm of customary international law is generated through State practice in the belief that the act in question is legally binding (*opinio juris*).[8]

In order to determine these two elements, it is common practice to examine, *inter alia*, the acceptance of specific standards of international law within the international community. These standards cannot only be extracted through legally binding conventions or treaties, but can also be deducted from jurisprudence, decisions of treaty bodies or the UN General Assembly.[9]

With respect to international standards relevant to the work of international courts and tribunals, the reference to human rights law, especially, seems obvious and even self-evident as international criminal law and human rights law hold common roots and complement each other.[10]

Practically all relevant crimes under international law also contain violations of international human rights law and can be systematized accordingly.[11]

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[7] Statute of the ICJ (adopted 26 June 1945, entered into force 24 October 1945) 145 BSP 832.

[8] See eg Shaw, Malcolm N. 2008. *International Law* (6th edition) Cambridge: Cambridge University Press 2008, 72 ff.

[9] See eg *Prosecutor v Delalić et al (Judgment)* IT-96-21 (16 November 1998) paras 453 ff; *Prosecutor v Furundžija (Judgment)* IT-95-17 (10 December 1998) paras 160 ff; *Prosecutor v Kvočka (Judgment)* IT-98-30 (2 November 2001) paras 137 ff; *Prosecutor v Krnojelac (Judgment)* IT-97-25 (15 März 2002) para. 186; *Prosecutor v Kunarac (Judgment)* IT-96-23 (June 2002) paras 469 ff.

[10] The tribunals also were faced with the problem that a treaty provision to which the parties were bound or which was part of customary international law provided for the prohibition of a certain act, but not necessarily for its criminalisation. For this reason, the tribunals then had to look at customary law to define the circumstances under which a prohibited act triggered penal consequences: see *Prosecutor v Galić (Appeal Judgment)* IT-98-29-A (30 November 2006) para. 83.

[11] It was this knowledge that led the States negotiating the Rome Statute to include several so-called 'treaty crimes' in the Statute (as modalities of crimes against humanity or war crimes), crimes which were listed as violations of international human rights law in the respective human rights instruments but were, up until then

The area of conflict between the need to consult international human rights law as an external source and the need to adhere to the principle of *nullum crimen sine lege* are the subject of the thesis. The common roots, but also the substantial differences between the areas of human rights law and international criminal law, which allow for recourse to human rights law only under specific, dogmatically well-justified and defined conditions, will be explored. The work scrutinizes the advantages as well as the dangers that such recourse entails. It highlights the preconditions under which human rights law is most likely to be referred to in a coherent and methodologically sound manner. As such, the project seeks to contribute to the dogmatic understanding of international criminal law and its dynamic development.

Approach and Demand for Research

As examined in the following, the current practice in jurisprudence is characterized by a condition of legal uncertainty in which dogmatic ambiguity led to a situation in which similar acts are at times evaluated differently by different chambers of the same court or tribunal, leading to an unequal legal categorisation of the acts in question. This problem has presented itself, for example, in the categorisation of torture as a crime against humanity before the ICTY. Whereas one chamber required the perpetrator to be a State official or at least having acted with the consent or acquiescence of a State official, another chamber of the same tribunal deemed this requirement not necessary for the definition of torture under international law.[12] Pointing out these ambiguities, their causes and consequences, contributes to the unification of international criminal law and therefore its legal security. Furthermore, the project explicitly focuses on substantive international criminal law and its interconnection with human rights. The connection between these two fields is currently underresearched, as priority is often given, in legal research as well as in practice, to the importance of 'procedural' human rights law, in particular, to safeguarding the rights of the accused. While this is no doubt a vital part of applying international criminal law and its violations endanger the credibility of the field as a whole, the Rome Statute brings about numerous legal innovations with regards to substance. Hence, recourse to extra-statutory sources will be inevitable for judges in the future. Thereby, the ICC, as the single permanent court in the field of international criminal law, has the unique opportunity to counteract fragmentation of the practical application of the law and focus on the development of coherent jurisprudence. This research project points out the preconditions for such development.

Scope and Methodology

The thesis aims at answering the following central research questions:

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not to be found in the statutes of international criminal tribunals; see Andreas Zimmermann 'Article 5: Crimes within the jurisdiction of the Court' in Otto Triffterer (ed) *Commentary on the Rome Statute of the International Criminal Court* (2nd ed Beck Munich 2008) 129-142, 130-131; Seibert-Fohr, Anja 2009. *Prosecuting Serious Human Rights Violations*. Oxford: OUP, 1ff; Smeulers, Alette and Fred Grünfeld 2011. *International Crimes and Other Gross Human Rights Violations*. Leiden: Nijhoff; Werle, Gerhard 1997. ‚Menschenrechtsschutz durch Völkerstrafrecht' Zeitschrift für die gesamte Strafrechtswissenschaft 109(4): 808-829; Stahn, Carsten 1999. ‚Internationaler Menschenrechtsschutz und Völkerstrafrecht' Kritische Justiz 82 (3): 345-355.

[12] See *Prosecutor v Delalić et al (Judgment)* IT-96-21 (16 November 1998) para 473 and *Prosecutor v Kunarac (Judgment)* IT-96-23 (22 February 2001) paras 488-96; see in detail at Part Two Chapter One I. 1. b. and f. below.

- How do substantive international criminal law and human rights law relate to each other and how does this relationship allow for or preclude recourse to international human rights law in substantive international criminal law?
- Under which circumstances (status of a specific concept under human rights law, status of a specific crime under international and/or national criminal law, composition of chambers etc.) and within which dogmatic framework do judges of international criminal courts and tribunals refer to international human rights law?
- What are the factors (professional background, legal system in which the judge was educated/was acting professionally) that determine if and how judges refer to international human rights law?
- What are the conditions under which it is appropriate for judges of international courts and tribunals to refer to human rights law and what are the benefits of such reference?

According to the hypotheses underlying this research project, recourse to international human rights law is necessary and helpful for judges in international criminal tribunals due to a variety of reasons:

- International criminal law and international human rights law have common roots; international criminal law developed, in a large part, out of the human rights discourse. However, the differences in scope, the scenarios covered, the actors, addressees and the general framework of a penal system versus a rights- based system do often allow only for limited recourse.
- Reference to international human rights law is often indispensable for judges who have to shed light on a scope of a certain crime under customary international law, highlighting *opinio iuris* and State practice in a certain area of human rights law. This is due to the area of conflict between the broadly sketched definitions of crimes under international law on the one hand and the judges' obligation to adhere to the principle of *nullum crimen sine lege* on the other hand. Recourse to human rights law is more likely in areas of human rights, which are well-established and governed by 'robust' conventions rather than soft law. For crimes which have a counterpart in national criminal legislation, human rights law is more often consulted.
- Experts in public international law are more open to the application of extra-statutory law in general and human rights law in particular.
- Reference to international human rights law strengthens legal arguments and the persuasive power and therefore raises the legal weight of judgments in an area of law which continues to be under construction by drawing from a field of law which offers a sophisticated and well-established convolute of legal dogmatic theory and jurisprudence.
- Reference to international human rights law is a suitable tool for judges to determine the content of a crime under customary international law. However, currently, recourse to human rights law often appears as a necessary box to be ticked in judgments without a deeper understanding of the legal concept in question. In the absence of streamlined international criminal law education, a balanced composition of the Chambers, taking into account various backgrounds, as well as continuous training for judges is advisable.

Generally, reference to human rights law offers international courts and tribunals the opportunity to benefit from decades of work and experience of international human rights courts and committees and their jurisprudence.

The thesis focuses on the influence of international human rights law on the development and practical application of *substantive* international criminal law. While the majority of scholarly research in the area concentrates on the application of human rights law in procedural international criminal law, in particular the right to a fair trial, [13] this work examines why and how human rights law can and is used in substantive law in order to define crimes under international law. However, procedural international criminal law and how it is influenced by international human rights law will be also touched upon for two reasons: the first reason is that the two concepts are frequently blurred in the approaches of the persons applying the law as well as in academia. When one asks the question of recourse to human rights law in international criminal law, most of the practitioners interviewed were zooming in on one of the two aspects, procedural or substantive, dismissing or disregarding the other. The second reason why it is impossible to delve into substantive law without having first considered the rules regarding the application of human rights law in procedural matters is that both set of rules are intertwined and frequently misunderstood even by the practitioners. It is important to disentangle the provisions and rules of international law allowing recourse to human rights law in international law and scrutinize which type of recourse, procedural or substantive, they allow for.

The dissertation is divided into three broad parts which widely correlate to three different methodological approaches. Traditional analysis and interpretation of positive norms as well as literature exegesis lay the theoretical framework of the research project in Part One. Starting from case law analysis, an inventory of the use of human rights law in substantive international criminal law is created in Part Two regarding the areas of the prohibition of torture, minority rights and sexual violence. Together with the empirical part (Part Three) consisting of interviews with judges at the ICC and the ICTY, this deductive deficit analysis illustrates the perception practitioners in international criminal law have of the relationship between human rights law and international criminal law. Furthermore, it shows how their respective perception shapes the willingness of the judges to refer to human rights law in their jurisprudence and points out which dogmatic considerations are undertaken. Thereby, the thesis points out to what degree a recourse to human rights law is likely in the future of international criminal courts and tribunals. It further illustrates under which conditions such recourse is appropriate and helpful for the practical application of international criminal law.

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INTERNET AS SOCIAL CONTROL MECHANISM

ALEKSANDRE GLONTI

AUTHOR'S BIO

Aleksandre Glonti began his doctoral research in October of 2013. He studies potency and shortcomings of the Internet as a tool of social control. Prior to his doctoral research, Aleksandre was a detective in the cybercrime division of the Georgian Ministry of Internal Affairs. Since submitting his thesis, he has returned to Georgia where he works as a lead specialist in the Legal Affairs Committee for the parliament of Georgia. Mr. Glonti is the founder of the Georgian cybersecurity company 'The Project Andromeda' which mainly focuses on a scientific inquiry into cybersecurity and artificial intelligence. Mr. Glonti is an invited lecturer at the Caucasus and the European Universities where he teaches legislative aspects of cybercrime, cybersecurity, and AI.

DISSERTATION SUMMARY

The Internet is a milieu where people can express themselves more freely. The expansion in the freedom of expression has also cleared a path for those who enforce social norms on social media and informally sanction those who deviate from these norms. Today, various cases indicate that the Internet and social media provide its users with new possibilities to exert informal social control upon other users. The Internet and social media have introduced significant change in the way informal social control is exercised and in particular in the way informal sanctions and punishments are imposed. Today, it is hard to imagine any other sphere, beyond social media, where informal social control may be carried out more intensely. The Internet can be used anonymously; it is cheap, and it delivers information in a fraction of a second. All these features make the Internet a potent tool for exerting informal social control in the form of online public shaming.

Today, the ongoing process of people changing their own identities is strongly interlinked with social media. A significant number of Internet users worldwide are slowly developing online communities that influence events and situations beyond the digital medium. Social media platforms like Facebook, Twitter, YouTube, and others have only existed a little more than a decade. However, in such a short time, they've managed to play a considerable role in the further transformation of existing patterns of societal behaviour. Digital forms of interaction such as 'likes', 'upvotes', sharing, commenting, and so on, became symbols of representation for Internet users' attitudes towards other people within and/or without social media. These same digital interactions are used by members of social media to enforce informal social control upon other members.

If viewed from the perspective of social control, social media users have a powerful capacity to work as agents for the enforcement of informal regulation upon other users who deviate from particular behavioural standards. The most notable reason empowering this capacity is the borderless nature of the Internet. In this regard, borders are understood as either physical or verbal, or concern time constraints and/or restraints. Compared to previously existing information dissemination methods, a single post on

social media may be viewed by a much broader audience, thousands of kilometres away from the initial posting location, literally, in a matter of seconds, translated into a number of written languages, regardless of whether it has been posted the same day or years before. Another characteristic of social media is that it allows any post to go 'viral'. Facebook defines the term 'virality' as 'the percentage of people who created a story from a post out of the total number of unique people who have seen it.' Any popular post on social media may go viral, since the Internet users can 'follow-up' on the story through a variety of engagements, including 'likes', 'shares', 'comments', etc. The virality is a critical concept in social media because it concerns how information rapidly and seemingly uncontrollably propagates across the Internet. Furthermore, the utilization of the Internet is cost-efficient for its users. It is available free of charge in a growing number of shops, restaurants and other places of public gathering worldwide. Anyone willing to use the Internet encounters easily surmountable barriers, provided they have an electronic device that is capable of accessing the World Wide Web.

This thesis focuses on the transforming relationship between informal social control and social media (and the Internet). It analyses how online public shaming is carried out on and through the Internet, assessing its consequences and highlighting the normative questions emerging from these changes. This dissertation is also aimed at delineating online public shaming from other similar, and/or sometimes overlapping phenomena, such as cyber bullying and cyber harassment, filling the gap in the existing literature in terms of categorising different types of cases based on the motives of people who use the Internet as a mechanism of informal social control. It discerns the motive for participation in social media in the interest of online social control, and assesses the efficacy of informal control on the Internet in terms of crime prevention. Ultimately, the results of this dissertation allow for the provision of recommendations concerning a practical implementation of informal shaming sanctions in a way that does not interfere with the successful rehabilitation of offenders and also the efficacy of sanctions in terms of reducing criminal activity. This study draws from from both, socio-criminological and legal perspectives.

First Chapter

In the first chapter of this dissertation, the emphasis is put on how modern, informal social control is carried out using social networks. A range of cases are presented to delimit the margins of the types of acts that fall in the spectrum of this research.

Second Chapter

After an overview of the contemporary social normative enforcement process in the digital dimension, the focus shifts to an examination of online public shaming as a mechanism of informal social control over social networks. In this regard, the second chapter conducts a literature review of theoretical approaches to traditional shaming sanctions in contrast to contemporary online shaming, based on the classic studies of Ellickson, Posner, Bernstein, Whitman, Kahan, Massaro, Braithwaite, and the more recent works of Solove, Poerksen, and Ronson. This chapter aims to answer the questions: How did social media develop as an informal social control mechanism? And what are the differences between traditional and Internet shaming?

Third Chapter

The third chapter is devoted to presenting the state of the art research on this topic. Through this, online public shaming will be categorised into major groups and sub-groups based on the data examined in the case studies. Scholars and journalists who devote their publications to online public shaming often mention only a single category: an individual initiating the online public process against someone who deviated against certain social norms or committed a crime. However, less attention has been granted to categorizing online public shaming, whereas online public shaming may be motivated by various factors, may have different consequences depending on the role of actors and other circumstances. It may serve as a mechanism of social control in different ways. In this chapter the author approaches online shaming as a part of an individual or collective strategy which seeks:

- Compliance;
- Punishment;
- Revenge;
- To trigger law enforcement;
- To support law enforcement (systematically);
- Commercial benefits (such as to catch a predator).

This is achieved through stigmatising public exposure which eventually shames the transgressors of social norms.

Fourth Chapter

The fourth chapter elaborates on normative issues relating to online public shaming. Emphases are made on the notion of freedom of speech and personal data protection laws as well as the practical enforcement of the European Union's right to be forgotten. This part of the dissertation analyses existing normative approaches, legal debates and court decisions in the United States, Russia and the European Court of Human Rights. Further, the author examines current legal responses to informal social control on the Internet, assessing their effectiveness in terms of human rights protections, and attending to cases where the jurisdictions of several countries are involved. This chapter also includes the empirical findings of the conducted online survey.

Fifth Chapter

The final chapter of this dissertation examines possibilities for the practical implementation of informal shaming sanctions in a way that does not interfere with the successful rehabilitation of offenders, while also striving for efficacy in terms of the reduction of criminal activity.

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AN AMERICAN CRIME. THE REGULATION AND ENFORCEMENT OF INSIDER TRADING IN A COMPARATIVE PERSPECTIVE

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AUTHOR'S BIO

Csaba Győry is a researcher at the Hungarian Academy of Sciences' Institute of Legal Studies, and Assistant Professor at the Centre for Law and Society at ELTE University, Faculty of Law. He previously worked as a researcher at the Max Planck Institute of Foreign and International Criminal Law in Freiburg, Germany. He holds a JD from ELTE University School of Law and defended his PhD (law) at the University of Freiburg, Germany. He has been a visiting professor at Manchester University School of Law and the Faculty of Economics at the University of Porto. He is the current holder of a 2019/2020 re:constitution fellowship at the Forum für Transregionale Studien in Berlin. Mr. Győry also serves on the executive board of the European Society of Criminology. His research interests include comparative law, financial crimes, financial regulation and sentencing.

DISSERTATION SUMMARY

INTRODUCTION

The starting question of my dissertation was this: How did insider trading come to be a major civil and criminal offense in securities law and attain considerable political and cultural significance in the United States, while it had not been prohibited in most of the major capitalist economies in Europe? This dissertation is a comparative study of the development and everyday enforcement of insider trading prohibition in US federal and German law. The dissertation is organised into three major parts. The first tracks the political-economic context of the prohibition. The second concentrates on legal discourses concerning the prohibition. Finally, the third part describes everyday practices of enforcement. This is based on a long-term qualitative study conducted at enforcement agencies both in Germany and the US. The dissertation thus straddles criminology, law and society and socio-legal comparative law.

The Conundrum of Insider Trading

Insider trading, at its most abstract, is an economic action that takes place in the institutional context of the capital market. It means that those who are privy to non-public information about a company which, if public, could influence its share price, are capitalising on the information asymmetry that exists between them and other market participants. Because this form of information asymmetry is perceived to be detrimental for a variety of reasons, including negative effects on market entry, the cost of capital and price finding, insider trading is prohibited in most developed economies. Yet how and why insider trading should be prohibited still represents a conundrum. The core of the insider trading conundrum is that it concerns a nexus that is fundamental to the market: information asymmetry and information advantages. Any insider trading prohibition

needs to draw the line between legitimate and illegitimate information advantages. This is not easy, because information advantages are problematic both from an economic and moral point of view.

The Political Economy of Insider Trading and its Prohibition

The first research question of the dissertation asked what could explain the different national approaches to insider trading: while in the United States, it has been prohibited and aggressively pursued since the 1960s, in Germany, insider trading was not prohibited until 1995.

The starting point of the thesis was that in order to understand national differences in insider trading regulation, the research had to move beyond the disembedded view of both economic action and legal regulation used in law and economics. Utilizing a theoretical framework from political economy and economic sociology, the research assumed that the institutional constellation of national varieties of capitalism diverge, and due to this differing national context, so too does economic action. Thus, the meaning, the form and the likely effect of insider trading also depends on the institutional arrangement of the national varieties of capitalism. These institutional arrangements, in turn, also determine the state's reaction to economic action: it is not the abstract disembedded economy that is the subject of the political reaction of the state in the form of economic policy and regulation, but the empirically existing economic action in the context of the unique institutional arrangements of the national varieties of capitalism.

Prohibiting (or not prohibiting) insider trading is such a state reaction and can only be understood against this background. This is what can be called the *economic and political determinant* of insider trading prohibition. The analysis identified the capital markets and the corporate governance regime as the two major institutions that shape insider trading as an economic action.

A Level Playing Field and the Retail Investor: the US Case

The dissertation showed how diversified ownership led to unchecked managerial power in American corporations, putting the corporate management (and its agents such as attorneys or investment bankers) in a unique position to abuse its privileged access to information and harm shareholders. In the context of American capitalism, however, the possible harmfulness of such an abuse was much greater than the financial harm caused to outsider investors. This is because the major source of capital on the capital markets are household savings and the trust of households in capital markets is thus crucial to securing the flow of capital. This in turn becomes an imperative for state intervention via securities law and financial regulation guided by the concern to maintain the investors' trust in the 'integrity' of capital markets. This goal is served by a robust disclosure regime and strict corporate transparency rules. The insider trading prohibition serves the same purpose: maintaining the trust in the 'integrity' of the market and creating a level playing field for all market participants.

The dissertation also analysed how these characteristics of the American economy shaped the social discourses and shared attitudes on investing and capital markets, and the cultural practices of everyday investment: the idea of the 'shareholder nation' and the common experience of household savings depending on the success and integrity of capital markets.

The social discourse on investment and the shared cultural practices of everyday investment in turn also explains the political significance of the regulation safeguarding market integrity, including that of the prohibition of insider trading. This is the reason why securities regulation and its enforcement are the subject of constant political scrutiny in the United States. This is even more so for the regulation and enforcement of the insider trading prohibition, because insider trading perfectly embodies the inherent power imbalance that exists between retail shareholders and management, large shareholders and retail shareholders.

From Deutschland AG to Finanzplatz Deutschland: The German Case

In Germany the economic institutions were radically different. There was no significant retail investor presence on the capital markets, and corporate ownership was concentrated. Corporations received most of their capital in form of long-term loans. The capital market was dominated by large industrial corporations, commercial banks and insurance companies. By owning a large number of shares in each other, these corporations and financial institutions created a dense cross-ownership network, with their representatives sitting on corporate executive and supervisory boards. The capital market in such an economy serves more as a vehicle to exchange blocks of shares between large shareholders, than a real market where investors constantly engage in transactions to capitalise on price movements. As a consequence, there was no considerable information asymmetry between market participants because investment decisions by large investors are not made based on market prices and publicly available information. Insider trading was thus inherent to the logic of the system and did not pose a danger to the supply of capital.

Opportunistic insider trading by individual corporate insiders, though subject of condemnatory scholarly discourses in German legal academia, and reported in the media as unethical actions, did not lead to a similar politicisation of the insider trading prohibition as in the United States. The cultural aversion to stock market investment and the ensuing relative indifference of the German public towards stock markets was one reason for the lack of political attention. The lack of considerable 'outsider' foreign capital was another. And finally, the fact that due to their presence on the supervisory board, representatives of the labour force, the only interest group that arguably had the capability to politicise the issue, were themselves potential beneficiaries of the system which might also have contributed to the lack of problematisation of insider trading in everyday political discourses. These factors together created an equilibrium that prevented the prohibition of insider trading.

The impulse to implement an insider trading prohibition into German law came from an EU-wide policy effort to create a common European securities market. This coincided with fundamental changes in the German political economy: the unwinding of the cross-ownership system, the increasing emphasis of large German banks on global capital markets and investment banking as opposed to long-term lenders of German industry, and the government's effort to attract more foreign capital to the German capital markets, as well as to induce German households to invest their savings on the capital markets. In these efforts, the introduction of the insider trading prohibition served a crucial communicative function: it symbolised the end of insider capital markets.

Agency of the Legal Form: The Legal Determinants of Insider Trading

The starting point for analysing the legal differences was a rejection of the theoretical approaches to law that view it as a neutral and flexible instrument creating economic institutions and shaping economic action. This is how it is viewed in institutional economics and much of economic sociology, as well as those who take the opposite stance and see law only as an apparatus employed by an existing economic and social order to maintain and reproduce its institutions, such as Marxian-inspired critical theories. Partly informed by the findings of the empirical research, the thesis employed a theoretical framework inspired by system theory and Pierre Bourdieu and took the relative autonomy of legal discourses seriously. It is this internal logic of the legal discourses that can be described as the *legal determinants of the insider trading prohibition.* The analysis in the present thesis identified several of such determinants: the constitutional frame for regulatory law-making, and the constitutional status of regulatory and enforcement agencies, the relationship between criminal, administrative and civil liability, as well as the doctrinal framework of criminal, administrative and civil law.

Trapped in Fraud: The US Prohibition

In US federal law, the form and scope of the current prohibition is the result of the interplay of several factors. The most important of these is the constitutional frame for congressional and administrative law-making and enforcement. The U.S. Securities and Exchange Commission (SEC) as an independent agency is tasked both with law-making and enforcement. It has extensive authority to promulgate rules under the powers given to it by Congressional acts, as well as powers to enforce those rules. The acts governing securities markets, mainly the Securities Act of 1933 and the Securities Exchange Act of 1934 only outline the general structure and governing principles of primary and secondary securities markets, leaving the adoption of large swaths of detailed regulation to the regulator, the SEC. Congress did not enact a general insider trading ban in federal securities law, but a general securities fraud provision, which, based on the historical reconstruction of the considerations before its enactment, meant to cover all kinds of fraud on the securities markets, including insider trading. The acts gave the power to promulgate rules defining fraud committed on the securities markets. While the SEC did do this, it chose to formulate a generic fraud rule only, to be applied to wide ranging forms of fraud on the securities markets.[1] By promulgating the rule, the SEC elected not to break it down to individual forms of fraud, instead elaborating more on the general fraud rule.

The constitutional frame also shapes enforcement. A crucial factor here is the procedural setting of enforcement: under the due process clause as interpreted by the Supreme Court, only disciplinary sanctions can be meted out in inquisitorial administrative procedure, and the more serious, intrusive ones, such as fines, can only be pursued in civil, thus adversarial procedure. The fact that most insider trading cases pursued by the SEC are governed by rules of civil procedure fundamentally shapes the enforcement of the insider trading prohibition.

[1] The so-called Rule 10b(5). In 17 C.F.R. 240.10b-5. See: https://www.govinfo.gov/bulkdata/CFR/2019/title-17/CFR-2019-title17-vol4.xml

The second important factor shaping the prohibition is the doctrinal framework. Because neither Congress nor the SEC defined insider trading, the prohibition emerged through adjudication in the form of federal common law, to a large extent driven by strategic litigation by the SEC trying to have courts establish its interpretation of the insider trading prohibition as a securities fraud. This strategy, however, led the prohibition down a path that is marred with contradictions and ambiguities. By using the general definition of securities fraud in Rule 10(b)-5 to pursue insider trading, a rule that echoed the common law concept of fraud, the SEC enforcement situated the prohibition in the doctrinal frame of fraud. The common law approach to fraud is a moral concept that is based on deception, an abuse of trust for personal gain. The application of such a concept on anonymous and largely automated securities markets where transaction counterparts are matched randomly is highly problematic, mainly because many requirements of fraud are not present prima facie. Because the parties are matched randomly, no relationship of trust can exist between them. The evolution of the insider trading prohibition in the United States is driven by the SEC's and the court's effort to define the extent and scope of the prohibition within the doctrinal framework of fraud. Despite the SEC's attempt to extend the scope of the prohibition towards a general insider trading ban based on the parity of information principle, regular conservative corrections from the Supreme Court pushed it back towards the core concept of fraud.

The third major factor is overlapping administrative, criminal and civil liability. Federal securities law does not demarcate administrative/civil and criminal breaches and liability clearly and concurring liability is possible. Both the Securities Act of 1933 and the Securities and Exchange Act of 1934 simply declare all wilful breaches (a non-standard term of criminal law) of any of their sections as well as of the rules promulgated thereunder by the SEC, a criminal offense. This leaves both the required objective and subjective elements of the criminal breaches of the act undefined. Another important consequence of the overlapping liabilities is the possibility of parallel administrative/civil and criminal procedures, a characteristic of the prohibition that has a fundamental influence on its enforcement.

Pragmatic EU Regulatory Approach: The German Prohibition

The German prohibition follows a very different logic. Its constitutional frame is very different. The prohibition is based on EU law. As such, it was part of a sweeping regulatory reform with the general policy aim of creating the Common European Capital Market. Thus, the prohibition was adopted by a supranational law-making body, and the German legislator was under the legal obligation to adopt a prohibition in German law as outlined by EU law. This meant that in the context of insider trading, the supreme law-making body of the land, in this case the German parliament, was bound by the external legal framework of EU law. BaFin, (*Bundesanstalt für Finanzdienstleistungsaufsicht*) the German regulatory agency, on the other hand, does not have a law-making authority to define insider trading.

A development of the prohibition as it happened in the United States also would not have been possible in Germany due to the constitutional requirements towards criminal and administrative law. For prosecutors, simply pursuing insider trading cases based on the extended interpretation of such core criminal law concepts such as that of fraud (*Betrug*) or the breach of trust (*Untreue*), would have gone against the *nullum*

crimen principle enshrined in the German Basic Law. This also means that the doctrinal frame, which is such an important factor in shaping the US prohibition, plays a much lesser role in German law.

In German law, administrative and criminal breaches and liabilities are also clearly demarcated and the law does not allow for concurring liability. This makes the enforcement process also more linear and straightforward, lacking the complex interactions between different procedural logics in American federal law.

Everyday Enforcement of the Prohibition

The largest part of the research project was taken up by an empirical analysis of the enforcement of the insider trading prohibition in the United States and Germany. The analysis presented the enforcement of the insider trading prohibition as a process, where possible cases of insider trading are filtered out at any major step: in the detection of insider trading, in the investigative phase assembling the available evidence and, finally, in pursuing a resolution of the case in administrative and criminal proceedings.

The detection and the investigative phase of the enforcement process constitute another instance of engagement between the empirically existing economic action and the unique institutional arrangements of the national varieties of capitalism, on the one hand, and the legal discourses on the other. Insider trading as an economic activity is different in the context of the American and German capital markets, and with it, the target of enforcement. For the same reason, the challenges that arise in the collection of evidence and applying the respective prohibitions also differ.

Here, the main conclusion of the research is that both in the US and German cases – even if for entirely different reasons – the major input enforcement has on the legal discourse is maintaining the prohibition's vagueness. The enforcement process in both studied cases creates a *self-perpetuating cycle of ambiguity*: the ambiguity of law shapes the enforcement process, and enforcement process maintains and reproduces this ambiguity.

Reproducing Ambiguity: the US case

The vagueness of the prohibition is, due to its historical evolution, more apparent in the United States. This ambiguity is constantly reproduced by the enforcement process, with each step of the process contributing to it. The greatest shortcoming of the insider trading detection stems from the contemporary functioning of the capital markets: most trades are automated and triggered by algorithms, not human beings. This abstracted and mathematized market, at the same time, is a layer between enforcement and the real social world of the market with its personal connections and information flows. This layer needs to be pierced first to enable an investigation into the social context of trading and information flows. Yet algorithms can also be instructed to hide suspicious trades and deceive other algorithms programmed to spot suspicious trades. The result of this is the likely effect of sophisticated insider trading executed by complex algorithms remaining undetected. This results in a lack of case law about the application of the insider trading prohibition to electronic algorithmic trading. Instead, the detection is geared towards finding more simple insider trading cases that might have remained undetected a couple of decades ago.

In the US context, by far the most important force in reproducing ambiguity is the interaction between the equivocality of the prohibition and the procedural frame of enforcement. The bulk of insider trading cases are pursued by the SEC in civil procedures. These cases thus underlie the same logic as civil cases in general: they end with settlements. Settlements take the legal form of a summary judgement and neither contains the facts of the case nor the admission of liability. Because of this practice, judgements in insider trading cases are rare, and the ambiguities of the law are preserved. This, in turn, incentivises both the SEC and the defendant to settle a case, because the ambiguity of the law presents a hardly calculable risk should it come to trial.

Because of the law's ambiguity, the boundaries between the criminal and administrative/civil offense of insider trading are vague, with the only difference being the requirement of intentional action, a 'wilful' breach of the prohibition for criminal liability. Due to the nature of the offense, this requirement is met in a large proportion of insider trading cases. Yet, of these, only a few are prosecuted, mostly cases without legal and evidentiary problems against high-profile defendants entailing serious penalties. The analysis uncovered several reasons for this selectivity: the higher evidentiary standards in criminal cases, the overwhelming concern about the public perception of the case, affected by factors such as the severity of the applicable sentence, the identity of the defendants and the general 'story' of the case, as well as the career trajectory of the American legal elite and corresponding considerations of individual prosecutors. The result of the selection process is the same: the boundaries between criminal and administrative offense are not addressed and clarified in court decisions, nor are more difficult questions of law about the scope of the criminal prohibition, maintaining the law's ambiguity. This, however, induces prosecutors to steer clear of such cases in the future when making prosecutorial decisions.

Enforcement Process as a Mutual Enforcement of a Trial: The German Case

The empirical analysis of the German enforcement process detected similar mechanisms, despite the differences in both, the doctrinal and procedural frame. In the logic of the German prohibition, most cases pursued are criminal cases. In Germany, parallel proceedings are not possible, because there is no parallel administrative and criminal liability under German law. Therefore, most cases are referred by the regulator BaFin to the prosecutor for criminal prosecution. Here, however, in the examined period, between half and two-thirds of the cases are dismissed for lack of evidence or for lack of prosecutable offense annually, with the rest predominantly dealt with in alternative proceedings that do not lead to judgement: provisional dispensing of court action or penalty order. Only a couple of cases proceed to a full criminal trial and, repeatedly, there are years when there are no insider trading cases that reach the trial phase at all. The analysis uncovered several reasons why this is the case: evidentiary challenges to prove the subjective element of the offense; the minor profits reached in the case, which would result in relatively mild sanctions; the difficulty of pursuing such cases before a specialised chamber of the court, which makes them a lower priority for the prosecution; and finally, the ambiguity of the prohibition and the lack of case law that makes the outcome of the cases in trial hard to predict. This, in turn, also creates incentives for the prosecution to avoid a trial. Because of the lack of cases that go to trial and result in a

judgement, eventually, from a higher court, the ambiguity of the prohibition is preserved.

There remains, however, a crucial difference between the USA and Germany. The analysis uncovered several mechanisms through which this ambiguity is consciously used by the enforcement agencies in the United States to influence the conduct of market participants in general and steer the procedural dynamics of insider trading enforcement. A wide range of regulatory tactics and tools are founded on the ambiguity of the law: from pressuring defendants into settlements, to steering market conduct through settlement practice or using the large number of small and simple cases to represent their own abilities and the relentlessness of enforcement. The research did not uncover similarly deliberate attempts by the German regulators and prosecutors to capitalise on the ambiguities of the law.

INTERNATIONAL ARREST WARRANTS IN ONGOING CONFLICTS

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DISSERTATION SUMMARY

The dissertation project adopted a normative approach to the (regrettably) often termed 'justice vs. peace dilemma,' better described as a conflict between the need (or will) to use criminal law to punish perpetrators of international crimes and the need to end hostilities, thus preventing combat and the commission of further crimes.

The thesis aimed to establish normative criteria to resolve the above-mentioned conflict, where political conditions impede the simultaneous pursuit of criminal prosecution and the implementation of peace agreements. The project focussed on the work of the International Criminal Court (ICC) in two of the situation countries - Northern Uganda and Darfur (Sudan). The then ongoing nature of the conflicts made it, as was argued by many at the time, impossible to make the necessary arrangements to end hostilities whilst supporting prosecution against some of the main stakeholders. The discussions around the arrest warrants issued against the Ugandan rebel leader, Joseph Kony, and the (then) sitting president of the Republic of Sudan, Omar Al-Bashir, were pertinent examples of the wider so-called 'peace vs. justice' debate.

It was one aim of the dissertation to determine whether the issue of 'peace', often portrayed as political, could be viewed through the lens of international law. Alain Pellet (1988: 41) once perfectly described the practical implications: 'In fact, what is called 'politicisation' only shows that the legal system is accepting rules and principles that the critics do not like.' Dencker (2008: 303) also cautioned against the view of seeing criminal prosecutions as the 'legal' approach and conflicting considerations as merely 'political':

> 'Dabei geht es nicht etwa um ein schlichtes Zurückweichen des Rechts vor der (verbrecherischen) Macht, es geht um das Abwägen von Rechten: Gegen das Recht (der Weltgemeinschaft) auf Bestrafung des Verbrechers gegen die Mensch-

lichkeit hat zwar dieser rechtlich nichts, aber auch gar nichts zu erwidern, wohl aber ist das Recht all derer zu bedenken, die durch die Geltendmachung dieses Strafanspruchs zu Opfern werden könnten.'

A cursory review of relevant sources already reveals the conflicting obligations and rights. On the one hand, international conventions (such as Art. IV of the Genocide Convention) and customary international law (e.g. punishment of crimes against humanity) set out an obligation or at least a right to punish the main perpetrators, while on the other hand, international law (especially the UN Charter, a number of human rights treaties, as well as the concept of 'Responsibility to Protect') favour the prevention of future crimes and hostilities.

The primary aim of the dissertation was to evaluate whether international law (either *in abstracto* or *in concreto*) favours one of these legal obligations or rights. For that matter, the concept of *jus cogens,* as well as Article 103 of the UN Charter were analysed. Furthermore, the legal dimension of the concept of 'Responsibility to Protect' was discussed in order to determine whether there is a hierarchy of norms in international law and, if such a hierarchy exists, whether this hierarchy is pertinent to the cases examined in the dissertation. Hence, existing theories regarding conflicts of norms (in international law) were analysed.

Based on this analysis, the dissertation discussed the procedural consequences of the finding that there is no valid claim for the primacy of the criminal law approach in international law. It discussed the concrete decisions that were and could be taken in the cases of Northern Uganda and Darfur (Sudan). It evaluated the possibilities *de lege lata* of the Office of the Prosecutor and the Pre Trial Chamber of the ICC to take into account the normative framework when deciding if an arrest warrant should be issued (Art. 57 III (a) Rome Statute) or withdrawn, or an investigation opened or closed (Art. 53 II (c), III (a)-(b) Rome Statute). It also provided an analysis of the ability of the UN Security Council to act under Article 16 of the Rome Statute or on the basis of Chapter VII of the UN Charter.

Finally, it addressed the legal consequences of such decisions by the Prosecutor or the Pre-Trial Chamber for future national or international criminal proceedings (especially the doctrine of abuse of process).

The dissertation is based on a comprehensive review of international conventions, national and international jurisprudence, literature, and written media sources. This was supplemented by an analysis of non-binding international documents and governmental statements in order to explore the content of the relevant customary international law based on a 'modern positivist' approach.

The main conclusions

It is an often-discussed fact that international law is heavily fragmented (see Koskenniemi/Leino 2002: 553). National sovereignty is regularly invoked to hinder the expansion of international norms and regulations. Even in an era where human rights law and humanitarian law is widely codified and where there are – at least on paper – accepted limitations to what a State is entitled to do to individuals under its control, the legal obligations to prevent individual harm and suffering beyond the borders of the nation state are rather limited. In the absence of an effective control over the territory of another state, current human rights law does not require a state to take positive actions to pre-

vent human rights abuses outside its own territory (Hiéramente 2013: 102). Same applies to humanitarian law as laid down in the Geneva Conventions. There is, however, an obligation under customary international law – and to agree under the Genocide Convention of 1948 – to abstain from any acts which contribute to the commission of international core crimes such as genocide, crimes against humanity and war crimes (Hiéramente 2013: 127). This norm could, in certain circumstances, conflict with a right to prosecute.

International law lacks clear rules on how to address such a possible conflict of norms. While the concept of *ius cogens* – an often-misunderstood concept – can be invoked to argue that certain prohibitions – such as the prohibition of the commission of genocide – is absolute, the concept lacks relevance for determining the legal status of the resulting right to prosecute (Hiéramente 2013: 187). Same applies in the particular case to the principles *lex specialis derogat lex generalis* and *lex posterior derogat lex prior*. It is therefore to be concluded that the right to prosecute individuals for international core crimes is not *per se* to be prioritized (Hiéramente 2013: 192). There has to be a 'practical concordance' (praktische Konkordanz) that weighs the underlying values (nature and gravity of the crimes, possible victims, etc.) in consideration of the uncertainties of the situation at hand (Hiéramente 2013: 192-210).

This is the moment where fundamental discussions about the purposes of criminal punishment and the sense of criminal prosecutions in international criminal law as well as the question of agency of (individual or collective; primary or secondary) victims (and possible future victims) comes into play. The *raison d'être* for international criminal prosecutions is a hotly contested issue. As Tallgren (2002: 564) puts it:

> 'The unambiguously devastating quantity and quality of the suffering of the victims of serious international crimes calls for intuitive-moralistic answers, in the manner of certain things are simply wrong and ought to be punished. And this we do believe. To feel compelled nevertheless to subject also international criminal law to the question 'why' bears the risk of being misunderstood, the risk of being defined in terms of for or against the violence and injustice the crimes represent.'

If one opts for a 'practical concordance' of the right to prosecute and the obligation to prevent one needs to reflect on 'why' those (allegedly) responsible for the commission of international crimes should be punished – e.g. retaliation, deterrence, special and general prevention – and why a criminal trial should take place in the first place – e.g. individualization of guilt, 'truth' seeking, victim participation. The picture is everything but clear and the normative framework itself is relatively mute on this fundamental issue. The fact that neither the Rome Statute nor the jurisprudence of the existing international criminal courts and tribunals have provided for a definitive answer to these to questions leaves us with the question of whose perspective matters. The question is three-fold: First, which actor in the field of international criminal justice should be entrusted with the decision to determine the purposes of punishment and criminal prosecution? Second, who should make the call to decide on whether these goals can be achieved through other means (e.g. Truth and Reconciliation Commissions, grassroots mechanisms)? Third, which actor(s) should be allowed to decide if – in a specific case – the need to prevent future atrocities takes precedence over criminal prosecution?

In the doctoral thesis it was assumed that such decisions are – at least in practice – to be made by the Office of the Prosecutor (OTP) when determining whether to pursue

a case is in the 'interests of justice' (Art. 53 (1) (c), (2) (c) of the Rome Statute). This leads to an automatic decision-making bias as it can be assumed that the OTP has its own prosecutorial agenda (Nouwen/Werner 2010: 941 et seq.) and will – at best – only consider the interest of the victims participating in the case. The OTP will hardly be willing to accept the views of (potential) victims of future atrocities that lack representation and agency at the ICC. The OTP itself stated in the Policy Paper on the Interests of Justice (ICC 2007: 1): *'[...] 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 Office of the Prosecutor.'* This assessment, while not being sound from a legal perspective, is surely an apt description of the OTP's past and present policy.

Current Developments

In a recent decision the Pre-Trial Chamber II of the ICC (12.04.2019, ICC-02/17-33) declined to authorize investigation by the OTP into the situation in Afghanistan. The judges declared that the ICC has jurisdiction and that they believed that war crimes and crimes against humanity might have been committed by the Taliban, Afghan National Forces, the US Army and the CIA. The judges nonetheless declined authorization of the investigation and argued that it would not be in the interests of justice. They stated:

> 'The Prosecution, consistently with the approach taken in previous cases, does not engage in detailed submissions on the matter and simply states that it has not identified any reason which would make an investigation contrary to the interests of justice. As for the victims, 680 out of the 699 applications welcomed the prospect of an investigation aimed at bringing culprits to justice, preventing crime and establishing the truth. […] In summary, the Chamber believes that, notwithstanding the fact all the relevant requirements are met as regards both jurisdiction and admissibility, the current circumstances of the situation in Afghanistan are such as to make the prospects for a successful investigation and prosecution extremely limited. Accordingly, it is unlikely that pursuing an investigation would result in meeting the objectives listed by the victims favouring the investigation, or otherwise positively contributing to it. It is worth recalling that only victims of specific cases brought before the Court could ever have the opportunity of playing a meaningful role in as participants in the relevant proceedings; in the absence of any such cases, this meaningful role will never materialise in spite of the investigation having been authorised; victims' expectations will not go beyond little more than aspirations. This, far from honouring the victims' wishes and aspiration that justice be done, would result in creating frustration and possibly hostility vis-a-vis the Court and therefore negatively impact its very ability to pursue credibly the objectives it was created to serve.'

The decision has been criticized for many reasons – e.g. the timing just after the US government had threatened sanctions against the ICC if it proceeded with the Afghanistan investigation. It also lays bare the blatant disregard for the wishes expressed by the victims. In light of this, it is hard to assume that victims – actual or potential – will be allowed any agency in determining whether prosecutions are warranted or should be set aside to allow for a peaceful resolution of conflict.

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MARAS. A STUDY OF THEIR ORIGIN, INTERNATIONAL IMPACT, AND THE MEASURES TAKEN TO FIGHT THEM

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DISSERTATION SUMMARY

The Mara Salvatrucha and the Eighteenth Street Gang became notorious for their expansion throughout Mexico, Honduras, Guatemala, El Salvador and most states within the United States. This expansion relates to the origins of Hispanic gangs inside the United States and its subsequent deportation policy.

The formation of Hispanic groups within the United States can be traced back to the Mexican war (1846-1848), in which Mexico lost half of its territory to the United States. Within the space of two years, thousands of Mexicans found themselves living in the United States instead of Mexico. Afterwards, the number of Hispanics increased steadily for decades due to different factors, such as the Californian Gold Rush, and due to the need for manual labor during industrialization and the construction of the railroads. From the beginning, Spanish-speaking groups, often perceived as immigrants, experienced discrimination at the hands of Anglo-Americans. For instance, a law was passed in 1855 forbidding school instruction in Spanish; courts favored Anglo-Americans over Mexican Americans in property claims because the latter were unable to provide an 'American Documentation of Ownership'; other laws banned the practice of Mexican cultural traditions (De Lorca 1997: 10). As a consequence, Mexican Americans moved away or were segregated to certain parts of cities where they could speak their language and keep their cultural practices. These barrios eventually became territories for gangs, which emerged from the strong ties forged between their residents. Rivalries resulted from the interaction between barrios.

Despite the existence of the above laws, a historical review reveals no consistent migration policy on behalf of the American government. It became clear that the government stimulated the immigration of Latin-Americans when it was in need of a cheap work force, but swiftly deported many immigrants back to their country of origin once that need was met. For example, the Bracero Program was implemented in 1942 to meet the need of industry and farm workers caused by the Second World War. The program would allow Mexican workers to migrate temporarily with the condition that its participants 'would not be subjected to any discriminatory act, […would] receive free hous-

ing, medical treatment, transportation, and fair wages' (White 2007: 274). Some 4.6 million Mexicans participated in this program. However, their deportation back to Mexico began with Operation Wetback in 1954 (White 2007: 275).

From 1970 onward, the migratory flow was also influenced by the push factors present in Central America. Guatemala was immersed in a civil war that would last thirty-six years and cost approximately 200,000 lives. The situation in El Salvador was similar, with political violence during the 1970s and a civil war from 1980 to 1992 that left an estimated 75,000 dead.

The Maras, as with many other gangs, emerged as a consequence of the migration from Central America and Mexico and barrioization within the United States. The Eighteenth Street Gang originated in the 1960s and comprised mostly Mexican members. The Mara Salvatrucha was first seen in the 1980s and grouped primarily Salvadorans fleeing the civil war in their country.

The subsequent expansion of the Maras in Guatemala, El Salvador and Honduras can also be explained through the migration phenomenon. In this case, the deportation policy of the American government, especially from 1996 on, had the consequence of sending thousands of gang members to these countries. In 1996, the U.S. Congress approved the Illegal Immigration Reform and Immigrant Responsibility Act (IIRAIRA). Its aim was to make immigration from the south more difficult and facilitate the deportation of those who were either illegally on U.S.-American soil or, although legally there, were causing trouble by participating in criminal activities. After two years of enforcement, the consequences of the IIRAIRA were evident. From 1996 to 1998, the number of aliens returned to El Salvador and Guatemala more than doubled, and the number of those returned to Honduras increased by more than ninety percent.[1]

Since the Central American countries lacked the resources to cope with large numbers of incoming gang members, the Maras and American gang culture spread among the local gangs.

Guatemala

In the twentieth century Guatemala had only two brief periods of relative democratic stability. In the remaining time, the country was either under the control of a dictator or had to endure the consequences of a civil war.

It is relevant to note that the civil war affected Guatemalan youth directly. They actively fought the government, were involved in the government's civilian defence patrols, or suffered its violence.

The war also brought violence to the local communities. The government's plan of creating civilian defence patrols obliged normal citizens to use violence and provided them with weapons to do so. This is one of the factors that can explain why communities (not to mention criminals) have been willing to resort to violence to solve their problems (the other factor being the government's inability to impose the rule of law).

The Maras emerged in Guatemala in the mid-1980s. The reaction of the Guatemalan state to the Maras has been more lenient than the Salvadoran or the Honduran reaction. Most notably, Guatemala has not passed a law to fight them. Even though as many

[1] U.S. Department of Homeland Security 2008.

as five bills were presented to the parliament with this purpose, none of them was enacted because the crimes they tried to introduce already existed in other legal instruments.

Guatemala did carry out the Broom Plan during the months of August and September 2003, which consisted in a series of raid and law enforcement activities undertaken in the capital city. However, the magnitude of the Broom Plan, its duration and territorial extent were considerably less ambitious than its equivalents in El Salvador and Honduras. During the Broom Plan, allegations of police corruption and human rights violations were common. For instance, the average stay in police custody lasted thirteen hours, more than double the legal period. Many detainees remained locked up at the police station for hours or even days (Rodrìguez Barillas and Pèrez Castillo 2005: 45).

Pretrial detention was ordered regularly, even though most detentions appeared to be arbitrary. In August 2003, judges ordered pretrial detention in half of the cases, while 40.6 percent of the cases were dismissed due to a lack of evidence. Interestingly, the percentage of dismissals increased to 59 percent in September and pretrial detention was ordered in only 22.7 percent of the cases. This change might indicate that the judicial control instances had become aware of the irregularities of the Broom Plan and therefore were more reluctant to order pretrial detention (Rodrìguez Barillas and Pèrez Castillo 2005: 49, 56).

Other consequences of the Broom Plan were felt in the penitentiary system. The prison authorities apparently lost control to the Mara gangs, who then fought each other to gain control over the prison, giving rise to riots, murders and vendettas. The prisons have thus become, according to some, the headquarters of the Maras, where imprisoned leaders organize criminal activities and send their orders to their comrades on the outside.[2]

Honduras

Honduras is an extremely underdeveloped (poverty, ineffective social investment and unemployment). It has suffered the effects of regional conflicts (El Salvador's civil war, Nicaragua's war), natural catastrophes (Hurricane Mitch) and internal conflict (coup d'état on Zelaya).

Honduran youth have been especially affected, as they constitute more than half the country's population. In comparison with its neighbours, Honduras' youth are most affected by poverty and have the lowest average level of education. In addition, at the national level, young people are more affected by unemployment and, since the *maquilas* prefer to hire women, young men in particular are deprived of work opportunities. Such factors push Honduran youth into joining street gangs.

The Maras's presence in Honduras became noteworthy in 1997, when the media speculated about the existence of some 60.000 gang members. President Flores was the first one to deal with the issue towards the end of his administration (1998-2002). He proposed an approach which focused on prevention and rehabilitation, but he did not follow through on the enforcement of his initiatives. His successor, President Maduro

[2] Interview with Zoel Franco Chen, Coordinator, ICCPG, in Guatemala City [01.09.2009]

(2002-2006), did not pursue Flores' proposal, preferring instead to resort to repression in dealing with the Maras.

Maduro made national security the first priority and the fight against the Maras his main concern. His political discourse divided society in two: on the one hand there were the law-abiding citizens whose rights had to be protected at all costs; on the other the Maras, enemies of the people who had to be eradicated and whose rights would be respected only second to the rights of the citizens.

His approach included massive raids and enactments of legislation. Although not an Anti-Maras Law as in El Salvador, Maduros's reform to the penal code, which punishes membership in the Maras with twenty to thirty years imprisonment, can only be described as draconian. Drastic as it might have been, Maduro's approach yielded some results, remarkably, a steep drop in the homicide rate, which then remained stable during most of his term. From 2002 to 2003, the homicide rate dropped from 55.9 to 33.6 homicides per 100,000 citizens, bottoming out in 2004 at 31.9. During the last three years of his administration, the homicide rate remained relatively stable. However, as soon as his successor took office, it began to increase rapidly, reaching 57.9 per 100,000 citizens in 2008.[3]

However, the drawbacks of Maduro's policy were many, though it did not overburden the penitentiary system as expected. This was more a result of reforms that reduced the number of persons serving pretrial detention rather than effective penitentiary administration. In fact, the penitentiary administration is held accountable for two incidents that resulted in the death of almost 200 persons, most of them gang members.

Finally, Maduro's personal involvement met, as a consequence, with a corresponding personal reaction from the Maras. They tried to reach Maduro and to negotiate with him. They even published a letter in a newspaper disapproving of Maduro's opposition to dialogue. After that, the Maras left messages at many crime scenes challenging or insulting Maduro.

El Salvador

Many factors influenced the emergence of the Maras in El Salvador. On the one hand, the polarization of society between a rich, landowning oligarchy, and the poor, landless peasants played an important role. On the other hand, the civil war brought repression and violence to the civilian population. Some were engaged in combat as guerrilla fighters, while others decided to migrate to other countries, especially the United States, where they established contact with the American gang culture.

Another factor involved is the significant percentage of young persons in El Salvador's population and their lack of opportunity, poverty and unemployment which leads to migrating or resorting to other means, such as joining gangs that can provide an alternative way of life. In 2006, it was estimated that 485,047 (36.04 percent) of the 1,345,769 persons between fifteen and twenty-four years old were living in poverty; of those, 147,011 (10.92 percent) were living in extreme poverty (Secretarìa de Juventud 2007: 8-9).

[3] Observatorio Centroamericano sobre Violencia (n.d.): Tasas de homicidios dolosos en Centroamérica y República Dominicana.

The government reacted to the Maras by declaring them enemies in possession of national territories which had to be reclaimed. To do so, it turned to repression, i.e. the politics of the so-called Hard Hand and the implementation of Anti-Maras Laws. El Salvador is the only country to have passed an actual law listing Mara-specific crimes and misdemeanors, and providing a special procedure to try the Maras. The first law was passed in 2003 and was to be applied to persons aged twelve years or older. Membership to Maras or a gang was punished with two to five years imprisonment. The second law was passed in 2004, after the first one was declared unconstitutional by the Supreme Court. Its most relevant innovation concerned the criminal procedure against the Maras: the Maras were to be considered criminal organizations during the procedure, could not be put on probation, could not conciliate with a victim or repair the damage, could not apply for plea bargaining, and pretrial detention could not be substituted by other measures.

As mentioned, these laws did not enjoy the support of the judicial branch. A characteristic of the Salvadoran case is the continuous and notorious opposition of the judiciary to the implementation of Anti-Maras Laws. In pointing out the unconstitutionality of these laws, the judiciary openly refused to take part in the plans of the administration. In the end, the massive arrests undertaken by the executive government resulted in massive dismissals by the judiciary.

Although the judiciary did not send the Maras to prison and there was thus no relevant increase in the number of prisoners, the penitentiary system experienced two massacres, one of them immediately after the implementation of the Hard Hand Plan, that was linked to administrative deficiencies in handling the Maras. On August 19, 2004, thirty-one inmates were killed and thirty-six others were injured in a clash at the Hope Penitentiary. The fight started when a gang member detonated a self-made bomb. At that moment the population of the prison was three times larger than the installed capacity. The second massacre, with a death toll of twenty-one, occurred on January 5 and 6, 2007.

The organization of the Maras from within became manifest in their ability to coordinate strikes or kidnappings in several prisons at the same time and later engage in negotiations with the government.

Concluding remarks

Since the 1980s, youth gangs have attracted the attention of the Central American governments. Even though they were recognized as a potential menace it was only during the 1990s that the Maras began to differ from 'normal' youth gangs. This was due to the deportation of Mara members from the United States. It is incorrect to assert that the gangs were 'exported' from the United States, for Central America had plenty of native gangs. It was rather the know-how of the American Maras that was adopted by the native gangs, which slowly started to mutate and disappear in their original form. It was then that the governments started perceiving the Maras as a matter of national security. For various reasons, they made use of diverse legislative methods to counter the Maras: in Guatemala, no law was enacted even though five bills were presented to parliament; in Honduras, reforms to the Penal Code were passed; and in El Salvador, Anti-Maras-Laws established a temporary regime to fight Maras. Another measure consisted in massive raids that led to the arbitrary detention of thousands of persons. Such measures

represented a strain to law enforcement agencies (for instance, overcrowded prisons) and were opposed by many. The Salvadoran judiciary system, for example, was reluctant to try persons arrested in the raids and eventually ruled the Anti-Maras-Law unconstitutional.

The reaction of the Maras to these measures was to some degree homogeneous in Honduras and Guatemala, where they responded by committing crimes and leaving messages to the authorities at the crime scene. Other reactions of the Maras have been reported in all countries. It was suggested that an improvement in the organization of the Maras was a side-effect of the measures. Since the authorities decided to group the gang members according to their affiliation, the prisons became a meeting point for them.

The effects and by-products of the measures taken against the Maras show that punishment alone does not suffice to cope with a problem so deeply rooted in society. Such measures lead at best to a momentary reduction in crime, but are unable to prevent the problem from emerging as soon as enforcement is relaxed. A more viable option would be preventive measures similar to those undertaken in Guatemala, which have a chance of tackling the structural problems that are pushing youth to join the Maras.

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CHANGING PATTERN OF INTERETHNIC CONFLICT AND MEDIATION BETWEEN THE HAMAR AND DAASANECH PASTORALISTS OF SOUTHERN ETHIOPIA

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DISSERTATION SUMMARY

The present dissertation explores changes in the patterns of conflict management in the Omo basin. The ideas and arguments in it are presented in nine chapters. The first chapter briefly introduces the research question, fieldwork experiences and methods of data gathering. Differently from earlier work in the area which focused largely on warfare and conflict, the present study pays due attention to exploring the changing conditions and strategies of dealing with conflict. Focusing largely on changes in the nature of conflict management across time in the area, the study draws our attention to an understanding of pastoralists' perspectives on peace, development, law and order in national and political processes in Ethiopia.

The study contributes to debates in the fields of conflict and integration studies which are among the central themes in the field of political anthropology. Its contribution to conflict studies is through an investigation of the ways that culture, history and power shape ideas and practices in regulating violent interaction between the Daasanech and their pastoral and non-pastoral neighbours. Thus, in doing so, the dissertation considers the features of pastoral and non-pastoral relations at the periphery, not only as a result of the prominence of the centre on the periphery (Turton 2002) but also the emerging dynamics of domination at the periphery itself (Markakis 2011). A state of peace in the Omo basin is, therefore, presented to be a cause and result of a combination of these conditions. An 'imposed model of statehood' in the pastoral areas (Schlee 2013) conforms to Almagor's (2002) understanding of a particular form of institutionalization of a fringe territory that involves an 'extreme case of restructuring' of state institutions in the lower Omo basin. The study's contribution to the fields of state-building and national integration focuses on showing how culturally, historically, intellectually and politically less informed strategies of conflict management could hamper the role of smaller groups like Daasanech and their neighbours in state building processes.

Employing official structures of conflict prevention and resolution, like peace committees, the Ministry of Federal and Pastoral Development Affairs of Ethiopia,

through lower administrative structures, claims to have incorporated customary ideas, symbols, and practices into statutory institutions of conflict management. This new model of conflict management appeared to replace the self-initiated pastoral model of reconciliation which has been in use for a long time. The new model combines the role of political offices and influential pastoral actors, designed in a way that it distributes power between pastoralists and local state authorities. Here the study employed the idea of 'travelling models' (Behrends, Park and Rottenburg 2014) to see how certain practices, ideologies and strategies of conflict management currently in use have evolved and translated in the Omo basin. In light of these and other related models, the study examined the nature and extent of social and political integration of the Daasanech and their neighbours and the level of incorporation of pastoral norms and practices into wider contexts. The phrase 'conflict management' is purposely used in the present study due to the fact that dealing with conflict in the area is largely about notions of regulating collective actions of violence across time rather than resolving a onetime clash between two or more groups. An investigation of the present theme adds depth to our understanding of the dynamics of social interaction, the state of peace, social and political integration, ethnic relations and patterns of cultural revitalization in the lower Omo basin as a whole. The data for this research was drawn from a one-year long fieldwork among the Daasanech and Hamar of southern Ethiopia. The study was conducted from bases in Daasanech, Naykeya and Omorate, and subsequent visits to different villages in Daasanech, Nyangatom and Hamar. To help facilitate the data collection process and communication, I studied the Daasanech language but largely depended on native translators and interpreters. A combination of qualitative approaches including participant observation, case studies, structured and semi-structured interviews and a general survey was employed to obtain the data. In both areas, I worked closely with local political elites and development workers, some portion of the immigrant population as well as religious groups to include their views in the study. Blending historical evidence with ethnographic case studies, the dissertation shows how the Daasanech have survived socio-political and environmental changes and integrated into wider scales of socio-economic, cultural and political situations in the country and beyond. The following four closely connected questions are addressed in the present text: (1) How are conditions of managing conflict transformed over the course of time in the Omo basin? (2) How are the interethnic relations between Daasanech and their neighbours placed in wider scales of social, cultural and political interests across time? (3) How far do current strategies of conflict management contribute to the broader political picture and state of peace in the basin? (4) How are questions of power and ideology expressed and integrated into the processes of conflict management in the region?

The second chapter of the dissertation presents the socio-cultural and environmental setting of Daasanech. The Daasanech are agro-pastoral groups that live in the Omo delta, numbering 48,067 (CSA 2007:85) and speaking *af* Daasanech, a language of the Eastern Cushitic language family. The area inhabited by them comprises today's south Omo zone in Ethiopia and adjacent parts of Kenya. They practice transhumant agro-pastoralism that combines rearing of livestock and flood-recession agriculture. As with other pastoral groups in east Africa, livestock plays a central role in their social, economic and ritual life but a great deal of their everyday food comes from grains produced in flood-recession agriculture in 'good times' and fishing in times of drought and fam-

ine (Houtteman 2011). Their territory shares a boundary with the Turkana, Nyangatom, Kara, Boran and Hamar agro-pastoralists and is bordered on the south by Lake Turkana, 'the largest of desert lakes in the world which receives 90 percent of its inflow from the Omo River' (Avery 2013: 49). The Daasanech have a patriarchal ethos and a strong sense of autonomy, independence and self-rule. They are organized along eight named sections whose clan members were said to have arrived in the Omo basin from different locations in East Africa. These territorial sections include the Shir, Elele, Riele, Nyarich, Inkoria and Oro, Randale and Korou. Oral stories indicate that six of the sections had established themselves in the Omo-Turkana basin in the first half of the nineteenth century while populations in the Randale and Korou sections were said to have joined them during the close of the nineteenth century. Each of the sections, except Randale and Oro who live scattered among the Shir, has its own territory that shares boundaries with other rival agro-pastoral groups and is governed by a council of elders called *arra*. The *arra* are 'fathers of the land' who are responsible for brokering peace and cooperation and mediating conflict, representing their respective sections.

The third chapter explores the link between macro-politics, environmental and livelihood challenges, conflict formation and management in the Omo-Turkana basin across time. The chapter looked into practices of state-building which in different ways has contributed to transformations in pastoralists' ideas and approaches to one another and towards their neighbours. It showed that the need to control resources by the Ethiopian state has reconfigured patterns of social interaction, boundary-making processes, conditions of accessing resources and understandings of borderlands and territories in the Omo-Turkana basin. The colonial administration and policy in Kenya as well as the incorporation of the Daasanech and their neighbours into the Ethiopian state by the end of the nineteenth century – resulting in the plundering of pastoral economies – were said to have intensified local-level conflicts between pastoralists living in the Omo-Turkana basin and the Rift Valley. The Anglo-Italian war of liberation in 1940-41, the proliferation of modern weapons, the civil wars in the then Sudan and environmental resource degradation and desertification all across the basin are among conditions that had remarkable effects on historical and contemporary relations between Daasanech and their neighbours. Thus the recent conflicts in the Omo basin and adjacent areas are closely connected to these antecedents but have much intensified due to a renewed interest by the state in the natural resources of the area in the name of investment and development. The recent rhetoric on growth and transformation have furthered the existing diversity of actors and interests and protracted the cause and effect of conflict more than expected – the scale of it going far 'beyond the local' and the nature of it 'beyond pastoral'.

The fourth chapter deals with external conflict management strategies of the Daasanech. These are practices that seem violent but are used by the pastoralists to avoid and deter external aggression and regulate customary power balances. These practices include livestock raiding and counter-raiding, homicide and counter homicide, occasions of celebrating masculinity and patriotism such as the *any bisiet* and circumcision rituals and evening songs and dances. All of these practices entail initiations that mark transition from one social status to the other and involve a wealth of symbolic acts that are used to convey messages to neighbouring pastoral groups. The practices are not related simply to violence but also function as instruments to regulate the local balance of power between Daasanech and their neighbours. The disruption of such equilibrium,

often caused by differential military intervention, resource dispossession, the uneven distribution of firearms and anthropogenic factors are believed to result in an undesired outcome. Hence, the return to the normal state of peace becomes difficult.

The fifth chapter shows the social embeddedness of conflict management. Largely, it discusses the self-initiated conflict management strategies of the pastoralists in which social structures and spaces play a central role in ordering relations and conditions. The chapter begins with a description of a state of peace among Daasanech whose conception oscillates between what they call *shimit naanna* (or *yeriitia*), which represents a splendid version, marked with the joys of life and intimacy in everyday encounters, to *shimit elabora*, the most sterile form, expressed in extended periods of isolation, suspicion, offense and revenge. The two versions vary with time and neighbour depending on contexts and realities. The chapter shows how the customary institutions of conflict management tend to operate and have been transformed in the pastoral context. Coresidence, elementary forms of exchange and kinship are among non-ritualized and nonviolent expressions which are used to invoke a particular sense of honour, humour, respect, benefit and intimacy among pastoralists across the basin. It is discussed how by sharing of residences, exchanging gifts and properties as well as intermarriage and friendship between herdsmen in different contexts are used to reduce hostility among different groups. Dyadic bond-friendship, created in times of peace, is, for example, used to negotiate peace in times of need, scarcity and conflict. The role of senior people in structuring social relations and regulating conflict between neighbours is addressed in length. Being patriarchal and age-based territorial sections, the Daasanech and their neighbours rely heavily on these structures and rules of seniority to deal with matters of public concern such as cross-border conflict and raid and conditions of sharing resources along bordering areas. As has been depicted, leadership in the customary context is largely voluntary, authoritative and charismatic in nature but has progressively lost these qualities due to external interest and intervention. Authoritative governance, which draws legitimacy from wisdom in seniority, has been replaced and dominated by paternalistic leadership, consisting of young political elites who invented their own structure and criteria to attract particular groups of people such as elders, women and youth whose role and contribution are largely contested. Building clientalist relations between the young elites and their favourites, the new structure tends to have overlooked the cultural norms and practices as well as notions of seniority which hold a central position in the lives of pastoralists. In most of the government-initiated peace gatherings, these elders are systematically compelled to publically support the premature political ideologies and perspectives of the young elites on peace, modernity and change. A particular connection between conflict formation and management practices and places such as central *naab*, *shades* of age-sets and homesteads of ritual leaders and changing conditions of using these spaces is another theme explored in the chapter. These places are attached to particular social functions and symbolic of the pastoral spaces. Different from modern venues of gathering, they are thought to produce a particular feeling of consonance which invokes trust and hence are relevant to building peace and fostering cooperation. Such places also serve as platforms to develop ideas, share new information and make important communal decisions, including conditions of provoking war and initiating peace. What makes such places different from others is that they give more 'space' to notions and practices that are cultural and pastoral in na-

ture than political, shared than personal and sacred than profane. Due to their symbolic nature, they are thought to craft a better sense of agreement, trust and respect among participants of a gathering when compared to the corrugated iron-sheets or meeting halls of an administration centre or NGOs as the participants often mention.

The sixth chapter explores the place of rituals in conflict management and the centrality of ritual practices in the lives of Daasanech and their neighbours. The chapter discusses how ritual practices and symbols are used to create a situation that invokes harmony and eases decisions in peace events. Despite the diversity of ritual objects, symbols, and practices across time, the Daasanech and their neighbours adhere to the values and particular orders of rituals in their everyday life and through interactions with their neighbours. Both self-initiated reconciliations in the past and government-initiated peace gatherings at present, recognize an inherent link between rituals and the lives of agro-pastoral groups in the Omo basin. Ritual prayers, cursing and blessing, practices that symbolize unification and integration such as wearing of the fatty-sheet of the stomach of smaller stock, smearing of body parts with viscera, sharing of meat from the same dish and drinking from the same calabash, wearing of skin stripes on legs, arm wrists and thumbs, making of oathes in the name of girls, as well as adorning with special objects such as white ochre on their heads are used to ease agreements, enhance mutual conversation and further communications in order to get rid of 'bad feelings' and openly express reunification with members of rival pastoral groups. Replacing the roles of non-governmental organizations in August 2009, with the declaration of Societies and Charities Proclamations, government-backed local level and interethnic pastoral peace gatherings tend to overwhelm peace-building processes in the Omo basin, with a remarkable shift of attention to revitalizing the role of culture in general and rituals in particular. Nonetheless, it has been shown that the way that 'culture' is understood and valued remains problematic. Due to their affiliation with politics and state structures and their diverging views on change and modernization, the identity of those who participate in such rituals and practices of conflict management has largely been criticized.

The seventh chapter discusses the nature and role of state-initiated conflict management strategies. This has been one of the conflict management models which have existed since the time of incorporation of the Daasanech and their neighbours into the imperial state. The chapter begins by comparing the pastoralists' views and orientations towards state officials who visited the Daasanech and their neighbours at different times, concerning the conditions of managing intergroup conflict. It is shown that a state-initiated top-down approach to conflict management primarily focuses on transforming the pastoral ways of life, strengthening modern administration, police and the court system and enforcing statutory law. In this regard, the chapter discusses the impact these officials and the roles played by networks of police stations across the Daasanech and their neighbours in mediating conflict. The official speech and advice of Emperor Haile Selassie II's to the Daasanech to live in peace with Turkana and subsequent reconciliation meetings held at Nemrebus, Kalam and other place by the police are first discussed. Then, President Mengistu Hailemariam's visit to the Daasanech and Hamar in the Narama area and his approach to deter interethnic conflict between herdsmen of these groups is detailed. Finally, the chapter presents the aims and legacies of the late Prime Minister Meles Zenawi on a visit to the Lower Omo basin in 2011. Prime Minister Meles officially declared a transformation of the pastoral mode of pro-

duction, settling pastoralists, introducing irrigation agriculture, sugar factories and initiating an urban way of life. His approach to peace closely linked to the national economic policy and development narratives, in which he thought to find solution to conflict in the pastoral area. However, it often comes out in discussions with pastoralists, that the official approach and effort to invoke peace fails to capture local realities, disrupts the customary power balance between neighbouring groups and fails to satisfy the Daasanech and their neighbours. This is so, largely because the investment practices and development narratives in the Omo delta and neighbouring pastoral areas appear radical in the way that it directly influences social relations and rules of natural resource allocation and management. The emerging pattern of resource distribution in such a way has induced the transfer of households to new locations which initiated the reconfiguration of the nature of families, their roles and social relations. The dispossession of resources such as land, water, routes to and from grazing areas and relocation of households precipitated by investment practices have introduced new lines of resource-related conflicts that diversified actors and strategies of approaching disputes across Daasanech and their neighbours. This has given birth to renewed resistance among pastoralists in many areas against state-initiated peace and development ideas and practices. To make a coordinated response to the growing degree of resistance, on the one hand, the state repeatedly organizes interethnic dialogues on peace and development in Daasanech and neighbouring areas. On the other hand, it has formulated local regulations that help to promote peace and improve interethnic relations. The formulation of a pastoral modality agreement that contains provisions on arms control and alcoholic drinks and substances like *chat* is an indicator of a renewed approach to peace by state actors in the area. Maintenance of border posts and rural and urban policing are also evidence of the renewed measures of the state in the recent years. It is indicated in the chapter that the new approaches to peace, security and development are facing challenges. This is because the renewed measures of institutionalization of these regulations is primarily aimed at protecting the interests of immigrant populations (political authorities, businessmen and labourers, development workers and investors) who are intrinsically connected to the political offices of the incumbent government. The argument is that this approach to peace and development is designed largely to assure state control over pastoral populations and resources rather than improving the human condition, at least for the moment.

The eighth chapter focuses on the methodological and ideological shifts observed in the fields of conflict management in the recent years. The issue of participation has received particular emphasis and I show how it has come to dominate every layer of conflict mediation and is entangled with various problems. The rhetoric of participation and inclusion is so rampant in recent years that governmental institutions claim to have abandoned the so-called top-down approach and strived to adopt a bottom-up approach. Participation in the present situation overlaps with the bottom up approach and hence seems to have recognized voices and practices of those who are directly affected by a state of peace in the basin. In this way, the new approach appears to have officially recognized the role of previously excluded groups such as women and the youth and has accommodated new ideas, practices and symbols of peace and security. Grassroots level organizations such as peace committees are established in order to ensure inclusion and participation. However, the pattern of participation in the present form failed to meet the expectations of the majority of pastoralists as they often question the procedures, the

individuals chosen and the weight of their voices in decision-making. Although the methodological and ideological shift is considered part of politico-administrative measures of decentralization in the post-1991 period, it is very much sharpened by the recent rhetoric on development and transformation plans and security structures in the country. More precisely, the approach is framed in a way that it ensures the security of state-backed 'development projects' rather than improving the human condition. The politicized producers of inclusion and processes of decision making in government-initiated peace events extended to reveal itself in particular programs of IGAD on conflict prevention, regional cooperation on economic development and security governance and even in the Catholic Church's project on 'Biblical peace and social development' in the area.

The dissertation concludes that recent transformations in the conditions of conflict management in the Omo basin are rooted both in history and contemporary realities of pastoralism that have given it particular shape. The result of the recent conflict management effort is that it fails to satisfy the Daasanech and their neighbours. It has become highly politicized and is driven much by the government's plan of controlling natural resources and population in the area. Similarly, it is dominantly shaped by institutions and ideologies of the state and the economic interests of emerging political elites and immigrant businessmen, labourers and bureaucrats of non-pastoral origin''. Hence the degree of integration of the Daasanech and their neighbours into the state system through institutions and practices of conflict management remain minimal and appear problematic.

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EHRE IM SPIEGEL DER JUSTIZ: EINE UNTERSUCHUNG ZUR PRAXIS DEUTSCHER SCHWURGERICHTE IM UMGANG MIT DEM PHÄNOMEN DER EHRENMORDE

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ZUSAMMENFASSUNG DER DISSERTATION

HINTERGRUND, FRAGESTELLUNG UND ZIELE DER STUDIE

Seit der Ermordung der jungen Deutsch-Türkin Hatun Sürücü im Februar 2005 wird das Phänomen der sogenannten Ehrenmorde in Deutschland öffentlich diskutiert. Gegenstand der Debatten ist unter anderem der Umgang der deutschen Justiz mit diesen Taten. Den Richtern wird von einigen Seiten vorgeworfen, Ehrenmörder zu milde zu bestrafen: Die Rede ist von ‘kulturellem’[1] oder gar ‘Islam-Rabatt’.[2] Vor diesem Hintergrund ist die Relevanz der Frage, wie Ehrenmorde von deutschen Schwurgerichten bewertet werden, evident. Dennoch wurde diese Thematik bisher noch nicht umfassend aufgearbeitet. Zwar wurde verschiedentlich die Entwicklung der Rechtsprechung des Bundesgerichtshofs hinsichtlich der Einordnung ehrbezogener Tötungsdelikte analysiert.[3] Jedoch wurde nie die Umsetzung dieser höchstrichterlichen Rechtsprechung durch die Landgerichte überprüft.

Die Auffassung des BGH zur Bewertung des Ehrmotivs hat sich in den letzten Jahrzehnten grundlegend gewandelt. Es ist dabei zwischen drei verschiedenen Phasen

[1] So u.a. *Rasche* in der Frankfurter Allgemeinen Zeitung vom 25.03.2014.
[2] *Engelberg et al.* in der BILD-Zeitung vom 31.03.2014.
[3] *Erbil* 2008; *Grünewald* 2010; *Burmeister* 2011; *Valerius* 2011.

zu unterscheiden, deren Übergänge teilweise durch divergierende Entscheidungen der verschiedenen Strafsenate geprägt sind. So wurde die aktuelle Rechtsprechungslinie des Bundesgerichtshof, wonach das Ehrmotiv grundsätzlich als niedriger Beweggrund zu werten ist und bei Ehrenmorden nur ausnahmsweise wegen der starken Verhaftung des Täters in seinen heimatlichen Wertvorstellungen eine Bestrafung wegen Totschlags erfolgen kann, zwar schon 1994 durch eine Entscheidung des zweiten Strafsenats eingeleitet. 1997 wiederholte der vierte Senat die frühere Auffassung des BGH: Demzufolge sollten bei der Bewertung der Niedrigkeit des Beweggrundes die heimatlichen Wertanschauungen des Täters schon auf objektiver Ebene berücksichtigt werden, so dass dieses Mordmerkmal in der Regel abgelehnt wurde. Erst mit einer Entscheidung aus dem Jahr 2002 bekräftigte der BGH die aktuelle Rechtsprechungslinie.

Ob und inwieweit sich die höchstrichterlichen Vorgaben und Divergenzen in den Urteilen der deutschen Landgerichte widerspiegeln, wurde bisher noch nicht untersucht. Auch die Frage, ob die Strafkammern Ehrenmorde anders bewerten als vergleichbare Tötungsdelikte ohne kollektiven Ehrhintergrund, wurde bislang noch nicht aufgearbeitet. Nur mithilfe eines solchen Vergleichs kann jedoch die These, dass deutsche Richter Ehrenmörder besonders milde sanktionieren, empirisch überprüft werden. Aufgrund der fehlenden empirischen Daten war bisher auch unbekannt, ob es regionale Unterschiede in der Ahnung von Ehrenmorden gibt oder ob die Taten deutschlandweit einheitlich sanktioniert werden. Ziel der Studie war es, diese Forschungslücken zu schließen und die aufgeworfenen Fragen zu beantworten. Zudem sollte durch den quantitativen Vergleich der Strafzumessung in den beiden verschiedenen Tötungsstichproben ein Beitrag zur deutschen Strafzumessungsforschung geleistet werden, da eine solche Kontrastierung bisher in Deutschland noch nicht vorgenommen wurde.

Methodisches Vorgehen und Zusammensetzung der Stichproben

Die Studie basiert auf der Strafaktenanalyse von achtundsiebzig in Deutschland zwischen 1996 und 2005 begangenen versuchten und vollendeten Tötungsdelikten, die auf Grundlage folgender Arbeitsdefinition als Ehrenmord im engeren oder weiteren Sinn eingeordnet wurden: Ehrenmorde sind vorsätzlich begangene, versuchte oder vollendete Tötungsdelikte, die im Kontext patriarchalisch geprägter Familienverbände oder Gesellschaften vorrangig von Männern an Frauen verübt werden, um die aus Tätersicht verletzte Ehre der Familie oder des Mannes wiederherzustellen. Die Verletzung der Ehre erfolgt durch einen wahrgenommenen Verstoß einer Frau gegen auf die weibliche Sexualität bezogene Verhaltensnormen, z.B. durch eine von der Frau vollzogene oder beabsichtigte Trennung von ihrem Ehemann, eine tatsächliche oder vermeintliche Untreue der Frau oder eine von der Familie einer jungen Frau nicht tolerierte (in der Regel voreheliche) Intimbeziehung.

Die Fälle wurden mittels Recherchen in polizeilichen Datenbanken und in Medienarchiven gefunden. Ziel war eine Vollerhebung aller im Zeitraum zwischen 1996 und 2005 bekannt gewordenen Fälle von Ehrenmord in Deutschland. Dieses Ziel ist, abgesehen von zu erwartenden Aktenausfällen, auch weitestgehend realisiert worden.

In die juristischen Auswertungen wurden nur die Fälle einbezogen, in denen mindestens ein Täter vor einem deutschen Gericht verurteilt wurde. Dabei handelt es sich um sechzig der achtundsiebzig Fälle (76,9 %). Für die verschiedenen quantitativen Analysen wurden außerdem weitere der sechsundachtzig in Deutschland verurteilten Täter

herausgefiltert: zum einen die nach Jugendstrafrecht Verurteilten und zum anderen die Täter, die nur wegen eines Körperverletzungsdelikts oder als Gehilfen i.S.v. § 27 StGB verurteilt wurden. Der Großteil der bivariaten und multivariaten Analysen basierte auf einem Subsample von einundfünfzig (Haupt-) Tätern/Fällen.

Als Vergleichsstichprobe dienten 110 Fälle, in denen männliche Täter ihre aktuelle oder frühere Intimpartnerin getötet hatten. Die Motive in diesen Fällen waren Eifersucht, Wut, Hass, Besitzdenken oder Rache. Die Tatanlässe ähnelten denen in den Ehrenmordfällen, meist folgten die Taten einer von der Frau initiierten oder geplanten Trennung, oftmals auch der (angeblichen) Aufnahme einer anderen Intimbeziehung, entweder parallel zur Beziehung zum Täter oder nach dem Ende der Partnerschaft mit diesem. Im Unterschied zu den Tätern in den Ehrenmordfällen wurden die Beziehungstäter aber nicht aktiv oder passiv durch ihre oder die Familie ihrer Frau und/oder ihren Bekanntenkreis bei der Tatplanung und/oder -begehung unterstützt oder gar zur Tat gedrängt. Es handelt sich bei ihnen um Einzeltäter, welche die Tat aus rein individuellen Motiven begingen. Die für die Ehrenmorde typische kollektive Komponente fehlt in diesen Fällen also.

Die Daten stammen aus vier verschiedenen Bundesländern: Mit Hamburg wurde ein Stadtstaat in die Stichprobe einbezogen, Sachsen wurde als ostdeutsches, Niedersachsen als norddeutsches und Baden-Württemberg als süddeutsches Flächenbundesland ausgewählt. Aus den vier Bundesländern wurden die Akten aller auffindbaren durch Männer begangenen Partnertötungen aus den Jahren 1998, 2000, 2002 und 2004 angefordert. Die rechtlichen Auswertungen beruhen auf den fünfundneunzig der 110 Fälle (86,4 %), in denen der Täter verurteilt wurde. Auch hier wurden für die meisten der quantitativen Analysen die Verurteilungen wegen Körperverletzung herausgefiltert, so dass ein Subsample von einundneunzig Tätern übrigblieb.

Fazit und Ausblick

Nach Auswertung der Ergebnisse ist zu konstatieren, dass sich die Bewertung von Ehrenmorden durch die deutschen Strafkammern im hier untersuchten Zeitraum stark gewandelt hat. In den früheren Urteilen aus den Jahren 1996 bis 2001 entschieden sich die Richter noch häufiger, das Mordmerkmal der niedrigen Beweggründe aufgrund der Verankerung des Täters in den Wertvorstellungen seines Heimatlandes abzulehnen. In den Entscheidungen der Landgerichte aus diesem Zeitraum spiegelte sich die damalige Divergenz in der Rechtsprechung des BGH wider: Ein Teil der Gerichte folgte schon den Vorgaben der 1994 durch den zweiten Strafsenat eingeleiteten und bis heute geltenden Rechtsprechungslinie, wonach das Motiv der Wiederherstellung der Familienehre auf objektiver Ebene grundsätzlich als niedriger Beweggrund zu werten ist und nur ausnahmsweise auf subjektiver Ebene das Vorliegen dieses Mordmerkmals abgelehnt werden kann, wenn der Täter noch sehr stark in den heimatlichen Wertvorstellungen verhaftet ist. Andere Strafkammern entschieden hingegen im selben Zeitraum noch entsprechend der früheren, 1997 durch den vierten Strafsenat nochmals bekräftigten Rechtsprechung des BGH, nach der die heimatlichen Wertanschauungen des Täters schon auf objektiver Ebene bei der Beurteilung der Frage des Vorliegens eines niedrigen Beweggrundes berücksichtigt werden sollten, was in der Regel zur Ablehnung dieses Mordmerkmals führte. In einigen Fällen aus diesem Zeitraum wurde der kulturelle Hintergrund der Tat zudem strafmildernd berücksichtigt.

In den jüngeren Ehrenmordurteilen ab dem Jahr 2002 wurden deutlich mehr lebenslange und signifikant höhere zeitige Freiheitsstrafen verhängt als in den älteren Urteilen. Die Strafkammern folgen der aktuellen Rechtsprechungslinie des BGH seit dem bekräftigenden Urteil aus dem Jahr 2002 somit weitaus häufiger als früher. Dies zeigt, dass klare Vorgaben seitens des BGH zu einer einheitlicheren Rechtsprechung der Landgerichte und damit zu mehr Rechtssicherheit führen.

Die Befunde machen auch deutlich, dass die Handhabung des Mordmerkmals 'niedrige Beweggründe' den Strafkammern offenbar generell schwerfällt. In einem nicht unbedeutenden Teil der ausgewerteten Urteile beider Stichproben wirken die Ausführungen zu diesem Mordmerkmal eher floskelartig und abstrakt als fallbezogen. In anderen Urteilen wurde bei den Darlegungen zu diesem Mordmerkmal hingegen ein sehr hoher Begründungsaufwand betrieben. Dies deutet darauf hin, dass die zuständigen Kammern das Merkmal möglicherweise als Schwachstelle im Hinblick auf eine drohende Revision bewertet und daher solche ausführlichen Begründungen verfasst haben. Insofern belegen die Befunde auch die Reformbedürftigkeit des § 211 StGB bezüglich dieses Mordmerkmals.

Regionale Unterschiede in der Beurteilung von Ehrenmorden konnten nicht nachgewiesen werden. Die Taten werden also in Gegenden mit einer hohen Ehrenmordquote nicht anders bestraft als in Regionen, in denen sie seltener verübt werden.

Hinweise auf einen Einfluss der öffentlichen Diskussionen auf die Strafhöhen in den Ehrenmorden wurden ebenfalls nicht gefunden. Allerdings konnte diese Frage auf Grundlage der hier untersuchten Fälle nur ansatzweise überprüft werden, da die letzten Urteile aus dem Jahr 2006 stammen, die öffentliche Debatte aber erst 2005 eingesetzt hat. Eine Untersuchung jüngerer Fällen könnte hier zusätzliche Erkenntnisse erbringen.

Der Vergleich des Strafmaßes in den Ehrenmord- und in den Partnertötungsfällen hat einige Parallelen und einige Unterschiede aufgezeigt. Parallelen wurden insbesondere hinsichtlich der Faktoren festgestellt, die das Strafmaß beeinflussten. In beiden Stichproben waren die Anzahl der Todesopfer, die Schuldfähigkeit des Täters, die Tatplanung und -vorbereitung sowie das Vorliegen einer konfliktverschärfenden Vorszene von Bedeutung für die Höhe des Strafmaßes. Zudem wurden in keiner der beiden Stichproben Belege für einen strafmildernden Einfluss des Geständnisses gefunden.

Der Hauptunterschied zwischen beiden Stichproben und das zentrale Ergebnis dieser Studie ist der signifikante Trend zu höheren Strafen in den Ehrenmordurteilen ab 2002 bei gleichmäßiger Bestrafung der Partnertötungen über den untersuchten Zeitraum. Dass die Partnertötungen über den gesamten Untersuchungszeitraum gleichmäßig sanktioniert wurden, spricht gegen einen generellen punitiven Trend bei der Sanktionierung von Tötungsdelikten in Deutschland. Vielmehr untermauert dieser Befund die These, dass der Trend zu höheren Strafen bei den Ehrenmorden auf die Entscheidung des BGH aus dem Jahr 2002 zurückzuführen ist, welche die 1997 eingeleitete neue Rechtsprechungslinie des BGH bekräftigt hat.

Die bivariaten und multivariaten Befunde dieser Untersuchung sind aufgrund der recht kleinen Fallzahlen teilweise mit Bedacht zu bewerten, insbesondere, wenn eine Auswertung nach Ehrenmordtypus vorgenommen wurde und dadurch sehr kleine Subgruppen entstanden. Da es sich bei den untersuchten Ehrenmorden allerdings – im Gegensatz zu den Partnertötungsfällen – nicht um eine Stichprobe im statistischen Sinne handelt, sondern aufgrund des angestrebten Ziels einer Vollerhebung zumindest ein sehr

großer Teil der im Untersuchungszeitraum in Deutschland polizeilich bekannt gewordenen Ehrenmordfälle analysiert werden konnte, entfalten die Ergebnisse trotz der kleinen Fallzahlen eine große Aussagekraft. Statistisch robustere Ergebnisse könnten aufgrund der insgesamt geringen Anzahl von Ehrenmorden in Deutschland nur durch eine deutliche Ausweitung des Untersuchungszeitraumes erreicht werden. Eine solche Ausdehnung der Analysen auf jüngere Urteile wäre vor allem auch zur weitergehenden Überprüfung des in dieser Studie festgestellten punitiven Trends aufschlussreich. Die Befunde dieser Arbeit legen die Vermutung nahe, dass sich der punitive Trend bei der Ahndung der Taten seit 2005/2006 noch verstärkt hat. Dafür spricht zum einen die Bekräftigung der 1994 eingeleiteten Rechtsprechungslinie in weiteren BGH-Entscheidungen. Zum anderen ergibt sich ein solcher Eindruck aus der Medienberichterstattung über Ehrenmordprozesse in den letzten Jahren. In diesen Verfahren wurden hohe, häufig lebenslange Freiheitsstrafen verhängt.[4] Besonders erwähnenswert sind die teilweise sehr hohen Sanktionen gegen mehrere Familienmitglieder in zwei recht ähnlichen Fällen der Tötung junger Frauen durch das Familienkollektiv.[5] Diese Urteile deuten an, dass die Justiz in jüngster Zeit vermehrt auch die Familienangehörigen bestraft, die nicht unmittelbar an der Tatausführung, aber federführend an der Tatentscheidung und -planung beteiligt waren. Es ist vorstellbar, dass diese Entwicklung auch auf die intensive öffentliche und wissenschaftliche Diskussion über die Ehrenmorde zurückzuführen ist.

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[4] So beispielsweise im Fall der Tötung von Morsal O., vgl. *Hans* 13.02.2009; sowie von Gülsüm S., vgl. die Meldung bei Spiegel Online vom 29.12.2009; http://www.spiegel.de/panorama/justiz/vater-und-bruder-verurteilt-lange-haftstrafen-im-ehrenmordfall-guelsuem-s-a-669382.html [17.07.2019].

[5] Vgl. die Berichterstattung zur Tötung von Arzu Ö., beispielsweise bei *Wyputta* 04.02.2013.

DAS MONGOLISCHE STRAFRECHTLICHE SANKTIONENSYSTEM: EINE VERGLEICHENDE ANALYSE ZU ENTWICKLUNG, GELTENDEM RECHT UND REFORMEN

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DISSERTATION SUMMARY

Seit dem gesellschaftlichen und politischen Umbruch von 1989 sind Themen wie die Kriminalitätsentwicklung und deren Bekämpfung in der Mongolei – wie auch in anderen Transformationsländern – heute noch zum aktuellen Diskussionsgegenstand sowohl in der Wissenschaft als auch in der Öffentlichkeit geworden. Die Mongolei hat sich nach einem 70-jährigen totalitären Rechtssystem mit der Annahme einer neuen Verfassung 1992 dazu entschlossen, einen demokratischen und humanen Rechtsstaat nach westlichem Vorbild aufzubauen. Das mongolische Strafgesetzbuch – und mit ihm das Sanktionensystem – wurde in seinen wesentlichen Grundstrukturen in den 1920er Jahren konzipiert und hat seither einige bedeutende Fortschritte für das Rechtsleben der Mongolen durch mehrmalige Neugestaltungen, Änderungen und Reformen gemacht. Das neueste und reformierte Strafgesetzbuch ist von 2015.

Die Forschungsarbeit greift im Allgemeinen die grundsätzlichen Fragestellungen zum mongolischen strafrechtlichen Sanktionensystem auf. Ziel dieser Arbeit ist es, die Diskussion um Wesen und Zweck der Strafe sowie ihren Einfluss auf die Ausgestaltung des kriminalrechtlichen Sanktionensystems darzustellen und die damit zusammenhängenden Probleme im mongolischen Strafrecht sowie die Auswirkungen des Strafrechts auf den praktischen Strafvollzug zu untersuchen.

Ursprüngliches Vorhaben dieser Arbeit war es, die Entwicklung des strafrechtlichen Sanktionensystems einschließlich des Geltungsbereichs des geltenden Strafgesetzbuchs von 2002 zu behandeln. Da zu der Zeit der Abgabe der Dissertation im Rahmen einer Justizreform erneut ein Entwurf eines neuen 'Verbrechensgesetzes' entwickelt wurde, wurde die Arbeit in ihrem Umfang noch ausgedehnt. Ohne diese Erweiterung wäre die Arbeit eventuell – ungewollt – ein rechtsgeschichtlicher Beitrag geworden. Im Hinblick auf die grundsätzliche Fragestellung meiner Dissertation soll daher neben der bisher erfolgten Sanktionsreformen im geltenden Gesetz auch der aktuell stattfindende Reformprozess unter den Fragestellungen untersucht worden: Welche Beweggründe sind es, die die Initiatoren der Strafrechtsreform veranlassen, das Sanktionensystem neu zu gestalten? Von welchen Zielen und welchen Handlungsprogramm lassen sie sich leiten? Wie wird das neue Sanktionensystem von der Strafrechtspflege angenommen und in die praktische Wirklichkeit umgesetzt werden?

Das Ziel dieser Arbeit ist es deshalb, einen wissenschaftlichen Beitrag sowohl in theoretischer wie praktischer Hinsicht zu der weiteren Entwicklung der mongolischen Strafrechtswissenschaft zu leisten.

Um ein kulturell angepasstes und zukunftsorientiertes Konzept für das strafrechtliche Sanktionensystem in der Mongolei entwickeln zu können, muss man all diese Besonderheiten unbedingt mitberücksichtigen. Aus diesem Grund wird die durch die besondere Geschichte der Mongolei mitgeprägte historische Entwicklung des Strafrechts in dieser Arbeit mit einbezogen. So wird sie in ihrem historischen Kontext bezogen untersucht, welchen Weg die mongolische Gesetzgebung und Wissenschaft zum Wesen und Zweck der Strafe zurückgelegt haben, wie sich die damit zusammenhängenden Fragen im Laufe der Zeit veränderten, sowie welchen Einfluss sie auf den heutigen Stand der Entwicklung des strafrechtlichen Sanktionensystems haben.

Zusammenfassung

Im ersten Kapitel dieser Untersuchung wurde das mongolische Sanktionensystem seit seinen Anfängen und seine stufenweise historische Entstehung über die heutigen Landesgrenzen hinaus in mehreren Geschichtsepochen dargestellt und die wichtigen Entwicklungsstufen bilanziert. Dies hat den Zweck, einen Überblick über das bisher nicht ausreichend erforschte Feld zu geben, wo das heutige Strafrecht und darunter das strafrechtliche Sanktionensystem der Mongolei seine Wurzeln hat, und welche holprigen Wege es genommen hat, die teilweise bis in die Gegenwart führen. Hier zeigt sich, dass es in der Mongolei oft jahrhundertelang beibehaltene Rechtstradionen und Gebräuche gab. Erst im 20. Jahrhundert wurde ein komplett neues sozialistisches Rechtssystem eingeführt, das mit verschiedenen Modifikationen rund siebzig Jahre Bestand hatte. Nach der Demokratisierung wurde ein grundlegend neues Strafrecht eingeführt, in dem jedoch noch einzelne aus dem Sozialistischen Rechtssystem stammende Elemente erhalten blieben. Dazu gehören z. B. die Berechnung von Strafen nach dem Mindestlohn oder die Zwangsarbeit, was speziell auf die sozialistische Planwirtschaft zugeschnittene Sanktionen sind, die sich in der heutigen Marktwirtschaft jedoch sehr schlecht praktisch anwenden lassen. Auch die als Repressionsmittel gedachten abgestuften Haftformen bis zur Kerkerhaft wurden übernommen.

Im zweiten Kapitel geht es um die Situation und die Lagebeurteilung der bisherigen Entwicklung des mongolischen Sanktionenrechts von heute. Dabei wird versucht herauszukristallisieren, inwieweit sich die gesetzgeberischen Erwartungen in Verbindung mit der Rechtsreform in der Mongolei erfüllt haben und wo die Verwirklichung hinter dem Reformprogramm zurückgeblieben ist.[1] Dabei wurde das mongolische strafrechtliche Sanktionensystem sowohl aus kriminalpolitischer Sicht bewertet, als auch anhand von rechtlichen Regelungen und statistischen Angaben ausführliche Analysen zu jeder einzelnen Sanktionsarten durchgeführt.

Anschließend wurden im ersten Abschnitt des dritten Kapitels das deutsche Sanktionensystem und sein erreichter Stand der Entwicklung kurz dargestellt, um eine Beurteilung des mongolischen Sanktionensystems aus der Sicht des deutschen Strafrechts zu ermöglichen. Im zweiten Abschnitt wurde versucht zu verdeutlichen und zu beurteilen,

[1] Монгол Улсын Эрүүгийн хууль (Strafgesetzbuch der Mongolei), Ulaanbaatar, 2008.

welche Besonderheiten aus deutscher Sicht bei der Strafgesetzgebung, der kriminalpolitischen Diskussion, der Rechtsprechung sowie der Rechtswissenschaft in der Mongolei bestehen. Dies ist nicht nur strafrechtlich oder strafrechtsgeschichtlich bedeutsam, sondern ist auch kriminalpolitisch von aktuellem Interesse.

Im dritten Abschnitt des dritten Kapitels wurde die Lage grob skizziert, welche die Mongolei zurzeit zur Neugestaltung des strafrechtlichen Sanktionensystems sowie zur Veränderung der Sanktionswirklichkeit veranlasst hat.[2] Bei dieser Untersuchung spielte neben der bisherigen systematischen Problematik im mongolischen Strafrecht auch die Rechtsangleichung mit weltweiten Trends eine gewisse Rolle. Die Erfahrungen in Deutschland, in denen freiheitsentziehende Sanktionen schon zum Teil erheblich eingeschränkt worden sind und sich auch stärker am Gedanken der sozialen Wiedereingliederung orientieren, wirkten als gutes Vorbild für die Neugestaltung des strafrechtlichen Sanktionensystems.

Die Ziele der Strafgesetzgebung im Allgemeinen dienen vor allem zum Schutz von Allgemeinheit, Bürgern und Staat vor Verbrechen sowie zur Herstellung der Gerechtigkeit in der Gesellschaft. Dabei spielen die Politik der gerade regierenden politischen Kräfte, die Rechtstradition und -kultur, die Rechtsideologie, das Rechtsbewusstsein sowie die Werte der jeweiligen Gesellschaft und des Zeitalters eine besondere Rolle. Die Mongolei erlebte seit dem ersten modernen Strafgesetzbuch von 1926 insgesamt sechs eigenständige Strafgesetzbücher, die sich im Hinblick auf die Begrifflichkeit von Wesen und Zweck der Strafe sowie bezüglich der Ausgestaltung der strafrechtlichen Sanktionen teilweise sehr voneinander unterscheiden.[3] Seit dem Erlassen des StGB von 2002 sind weiterhin mehrmalige Grundänderungen vorgenommen worden und dadurch wichtige Reformwünsche teilweise verwirklicht worden. All diese Teilreformen seit den 1990er Jahren in der Mongolei haben natürlich das Bestreben nach einer Gesamtreform in ganz erheblichem Maße gefördert, aber es kommt immer noch der Wunsch nach einer Neukonzeption. Das Erlassen eines völlig neuen Gesetzes alleine löst die Probleme nicht. Es bestehen weiterhin die Bedürfnisse, notwendige Anpassung an die immer mehr gewandelten gesellschaftlichen Verhältnisse nachzuholen, die Regelungslücken zu schließen bzw. bei den geltenden Gesetzen beobachtete Mängel zu beheben. Die neuen Arten von Kriminalität oder die Häufigkeit einiger Delikte, die aufgrund der immer mehr gewandelten gesellschaftlichen Verhältnisse entstehen, erfordern die Notwendigkeit neuer Regelungen bzw. besserer Durchsetzungsmittel des Rechtsstaates.

Durch den Systemwechsel stellten sich vielfältige Anforderungen an das Rechtssystem der Mongolei, insbesondere für das Strafrecht. Das Strafgesetzbuch von 2002 war ein großer Schritt dabei, dass sich die Mongolen zunächst einmal vom sozialistischen Denken gelöst haben und ein den in der Verfassung verankerten Menschenrechten entsprechendes Strafrecht erschufen (Kajuth 2003: 503).

Wie die Betrachtung des Sanktionensystems des StGB von 2002 zeigt, erweisen sich u. a. einige Neuregelungen des StGB als Ursache, warum sich das mongolische Sanktionenrecht zu einem punitiven System entwickelt hat. Einer der wichtigsten Mechanismen, der zu dieser punitiven Entwicklung führte, ist die Einteilung der Taten in

[2] Гэмт хэргийн тухай хууль (Verbrechensgesetz), Ulaanbaatar, 2012.
[3] БНМАУ-ын Эрүүгийн хууль (Strafgesetzbuch der mongolischen Volksrepublik), Ulaanbaatar 1987.

vier Kategorien, bei der es sich um eine willkürliche Festlegung handelt, und die mit diesen Kategorien verbundenen vorgeschriebenen Sanktionen.

Bei den beiden Strafarten der Geldstrafe und der Zwangsarbeit, die als Hauptstrafen Alternativen zu Gefängnisstrafen sein sollten, zeigen sich wie bereits mehrfach erwähnt massive Probleme wegen der schlechten Umsetzungsmöglichkeit in der Praxis.

Was die Geldstrafe anbetrifft, ist die Erhöhung der Strafrahmen der Geldstrafe von 2000–500 000 MNT auf 70 000–7 Mio. MNT ohne einen nachvollziehbaren Grund ein extrem weiter Sprung, der eine Umsetzung von vornherein unmöglich macht. Bei der Anwendungsebene der Geldstrafen durch Gerichte finden sich ebenfalls willkürliche mathematische Festlegungen, die sehr realitätsfern gewählt sind und völlig überhöhte Strafmaße fordern, die von größten Teilen der Bevölkerung in der Realität unmöglich bezahlt werden können und damit in den meisten Fällen von vornherein nicht einklagbar sind.

Auch die Neuregelung der Zwangsarbeit scheitert in der Praxis in vielen Bereichen, weil oft die Voraussetzungen fehlen, diese Zwangsarbeit in der geplanten Form überhaupt durchführen zu können. Daher spielen beide Strafarten nur noch kleine Rolle und werden durch Gefängnisstrafen ersetzt, was jedoch kontraproduktiv ist. Die Strafformen der Geldstrafe und der Zwangsarbeit sind bei richtiger Ausgestaltung nicht nur für die Verurteilen leichter zu leisten, sondern sind auch für den Staat wesentlich kostengünstiger. Gefängnisstrafen sind dagegen die teuerste Lösung. Weil durch die Neuregelung des StGB außerdem die Möglichkeiten eingeschränkt sind, Haftstrafen zur Bewährung auszusetzen, und andere Modelle fehlen, führt eine Verurteilung mittlerweile in 87 % aller Fälle zur Verhängung einer Gefängnisstrafe bzw. Einzelhaftstrafe. Mittlerweile hat sich der viel kritisierte Prozess der ‘gefängnisorientierten’ Behandlung der Gesellschaft[4] sehr stark durchgesetzt und das wiederholte Begehen von Straftaten nimmt zu. Speziell die weitverbreitete Anwendung der Freiheitsstrafe bringt enorme negative Folgen für die mongolische Gesellschaft.

Der mongolische Gesetzgeber ging hauptsächlich davon aus, dass er erstens mit härteren Strafen eventuellen schweren Verbrechen vorbeugen bzw. die Allgemeinheit abschrecken will (unter Gesichtspunkten der Generalprävention nach dem Prinzip ‘viel hilft viel’) (Meier 2006: 28 ff.) und zweitens mit einer strikten Vergeltungspolitik versucht, den Schwerstkriminellen damit eine Genugtuung für sein Unrecht zu verschaffen. Diese Art und Weise der Verbrechensbekämpfung in der mongolischen Kriminalpolitik existiert nach wie vor als feste Auffassung sowohl des Gesetzgebers und in Juristenkreisen sowie auch zum Teil in der Gesellschaft.

Es liegen keine empirischen Erkenntnisse in der Mongolei vor, dass durch eine härtere Bestrafung von Schwerverbrechern eine erhöhte generelle Abschreckungswirkung erzielt werden kann. Der aktuelle Anstieg der Kriminalität kann jedenfalls nicht auf ein vermeintlich zu mildes strafrechtliches Vorgehen zurückgeführt werden. Dass dies keine wirkungsvolle Lösung ist, zeigen auch die Ergebnisse der ausländischen Untersuchungen.[5]

[4] Narangerel. S., (2015): 2002 оны Эрүүгийн хууль шоронжуулсан хууль болсон (Das StGB von 2002 hat zur Prisonierung geführt). Interview. Unter: http://www.erkhzui.mn/lawyer/3/content/1225.htm (31.05.2015).
[5] Vgl. hierzu die Ergebnisse der kriminologischen Sanktionsforschungen, Meier, 2006, S. 27 ff.

Bei Strafaussetzungen zur Bewährung sollten wie im deutschen Strafrecht noch die Auflagen erweitert werden, wie z. B. die Zahlung eines Geldbetrags zugunsten einer gemeinnützigen Einrichtung (Geldauflage) oder die Erbringung sonstiger gemeinnütziger Leistungen (Arbeitsauflage). Derjenige Täter, dessen Freiheitsstrafe zur Bewährung ausgesetzt wird, soll im Ergebnis nicht weniger spürbar belastet werden als ein anderer Täter, dessen weniger gravierende Tat mit Geldstrafe geahndet wird. Dies kann unter Schuldgesichtspunkten Belastungsgleichheit ermöglichen. Für die Bemessung der Höhe der Geldstrafe sollte das Gericht jedoch neben der Tat und die Persönlichkeit des Täters auch auf seine finanzielle Lage Rücksicht nehmen. Für diejenigen Täter, die aufgrund der finanziellen Situation nicht in der Lage sind eine Geldstrafe zu zahlen, könnte vor allem die Arbeitsauflage in Betracht kommen. Der Begriff der 'gemeinnützigen Leistung' ist jedoch nicht dem der 'Zwangsarbeit' gleichzusetzen, die im mongolischen strafrechtlichen Sanktionensystem eine eigenständige Strafart darstellt. Er ist darunter vielmehr ein Begriff entsprechend der 'Community Service Order' im englischsprachigen Raum zu verstehen. Sowohl die Geld- als auch die Arbeitsauflage sollten ihre Legitimation allein aus dem Gedanken des Ausgleichs für das begangene Unrecht beziehen, ihr Umfang aber nach der Schuld des Täters auf der einen und seiner Leistungsfähigkeit auf der anderen Seite gerichtet sein. Unzumutbare und nicht leistbare Anforderungen dürfen an den Verurteilten nicht gestellt werden.

Der Vollzug der Freiheitsstrafen sollte in Zukunft im Einklang mit der internationalen Reformtendenz erfolgen, wobei die Abschaffung der als besonders diskriminierend und resozialisierungsfeindlich wirkende Kerkerstrafe gefordert wird. Bei der Freiheitsstrafe ist daher keine abstrakte Unterscheidung nach Vollzugsregime im Sinne des geltenden mongolischen Strafrechts mehr nötig, sondern eine sinnvolle Differenzierung nur nach der Persönlichkeit des Täters und der Dauer der Strafe kommt in Betracht. Es ist selbstverständlich nicht zu bestreiten, dass eine getrennte Unterbringung von schweren Kriminellen und leichteren Ersttätern, sowie von Erwachsenen Verurteilten und Jugendlichen im Vollzug sehr wichtig ist, damit die Gefahr der kriminellen Ansteckung vermieden werden kann.

Bei der Zieldiskussion spielte der Gedanke der Resozialisierung eine wichtige Rolle. Es ist davon auszugehen, dass die Verwirklichung dieses Gedanken erst beim Strafvollzugsgesetz seinen gesetzlichen Ausdruck finden wird.

All diese Probleme führen zu dem Schluss, dass das jetzige Strafgesetzbuch soziale Bedürfnisse nicht ausreichend befriedigen kann und die Interessen der Allgemeinheit und des Staates nicht vor solchen Strafhandlungen schützen kann.

Wo liegen die potentiellen Defizite? Die Strafrechtsreform von 2002 wurde ohne zureichende wissenschaftliche Begründung und Evaluation, die auf empirischen Befunden basieren, durchgeführt. Dies kann in manchen der besagten Problembereiche beobachtet werden. Die Untersuchungen führen zu folgenden Schlussfolgerungen, was die kriminalpolitischen Zielsetzungen der Mongolei betrifft:

- An manchen Stellen hat sich der mongolische Staat zu hohe, eher utilitaristische Ziele gesetzt. Das Sanktionensystem des mongolischen Strafrechts hat sich seit der Reform von 2002 in eine mehr repressive bzw. punitive Richtung entwickelt.
- Dennoch sind mehrere humane und entschuldigende Sanktionsmodalitäten da. Leider sind die Anwendungsbereiche dieser Möglichkeiten ziemlich eingeschränkt.

- Das Ziel des mongolischen Gesetzgebers ‘mit härteren Sanktionen gegen Schwerstverbrecher’ vorzugehen trifft nicht nur diese spezielle Zielgruppe, sondern auch diejenigen, die als mehrmalige Wiederholtäter der mittleren Kriminalität zugehören sowie auch bei Straftaten anwesende, nicht oder nur geringfügig beteiligte Personen, die wegen zu eng formulierter Gesetzesbestimmungen automatisch wie Schwerkriminelle Haupttäter behandelt werden. Solche Strafen treffen nicht selten insbesondere jugendliche Täter, die nicht aktiv an einem Raub teilgenommen haben und sich meist nicht der Absichten des Haupttäters bewusst waren. Solche Fälle sind nicht selten. Raub in Mittäterschaft wird mit sehr hohen Freiheitsstrafen geahndet. Das StGB bietet den Richtern keinen Entscheidungsspielraum an, daher wird Raub in Mittäterschaft vom Gericht zu hart bestraft, weil das unterste Niveau der angedrohten Sanktion schon recht hoch ist.

Eine der Schuld jeden Täters angemessene Sanktion im mongolischen Strafrecht ist unabdingbar. Dieses Problem betrifft nicht das Sanktionensystem selbst, sondern eher die Regelungen zur Strafbemessung. In dieser Hinsicht ist das empfehlenswert, was in der mongolischen Weisheit gesagt wird: ‘gegen Härte hilft das mildere Mittel’. Denn die praktischen Erfahrungen der bisherigen Kriminalpolitik mit punitiven Gehalt zeigen schon erhebliche Folgen, die in einen Teufelskreis münden, wie z. B. die Verallgemeinerung der Freiheitsstrafenanwendung, eine im internationalen Vergleich hohe Gefangenenrate, die Gefängnisüberfüllung, eine erhöhte Anzahl von Rückfalltätern, die Verschlimmerung des Lebens der Entlassenen in aller Hinsicht (soziale, gesundheitliche, psychische usw.) sowie hohe Justizkosten von Seiten des Staates.

Schließlich hängt es nicht unbedingt davon ab, ob die Reduzierung von Kriminalität und deren Vorbeugung durch Abschreckung und die Androhung von härteren Strafen erfolgversprechend ist. Natürlich ist es richtig, wenn jemand gegen die Normen der Gesellschaft verstößt, dass er dafür ‘bestraft’ bzw. zur strafrechtlichen Verantwortung gezogen werden muss. Die freiheitsentziehende Sanktion muss aber nicht unbedingt das vorrangige Mittel dafür sein, wie im mongolischen Strafrecht praktisch der Fall ist.

Dass der Gesetzgeber die Reue durch sein Verhalten nach einer leichten Straftat und die Wiedergutmachung der Schäden als unverzichtbare Gründe zur Milderung der Strafe gemacht hat, ist sehr begrüßenswert. Weiterhin sollten diese Möglichkeit auch für Straftäter bei schweren und besonders schweren Verbrechen angeboten werden, damit sie auch einen besseren Anreiz und Anlass haben sich zu verbessern, sei es psychisch als auch aus erzieherischer Sicht. Das kommt auch dem Opfer zugute.

Schließlich sollte das Hauptziel der Strafe nicht nur auf die Bestrafung gerichtet werden. Die Strafe sollte vor allem das Ziel haben, die Wiederholung des Fehlers des Täters zu verhindern. Als solche Mittel eignen sich die Wiedergutmachung, Täter-Opfer-Ausgleich und soziale Sanktionen, wie z. B. Bekanntmachung des Urteils, schuldangemessene, vom Täter bezahlbare Geldstrafen, die gemeinnützige Arbeit und weitere gut überdachten Strafmodalitäten, die möglichst bei richtiger Anwendung mehr Erfolg versprechen und gleichzeitig geringe Nebenwirkungen verursachen.

Mit Sanktionen sind in der Regel durch Gesetze angedrohte Strafmaßnahmen gemeint, die darauf ausgerichtet sind, konkretes Fehlverhalten zu unterbinden und damit Normen durchzusetzen. Die Gesetze, die Sanktionen bestimmen, müssen von der jeweiligen Gesellschaft akzeptiert und legitimiert sein.

Im Strafrecht dienen Sanktionen gemäß den Strafzwecktheorien dazu, den durch das missbilligte Verhalten gestörten Rechtsfrieden wiederherzustellen. Zusätzlich sollen potentielle Straftäter hierdurch mittels Abschreckung von eigener Delinquenz abgehalten werden. Sanktionen dienen hier also auch der Kriminalprävention. Andererseits ist die Strafe eine Art Gewalt, die Stigmen verursacht. Da jeder Mensch immer mehr auf die Gesellschaft angewiesen ist, wächst die Bedeutung der Stigmatisierung durch strafrechtliche Sanktionen in den heutigen Gesellschaften enorm.

Gegenwärtig entwickelt sich der weltweite Trend im Bereich der strafrechtlichen Sanktionen in eine immer positivere Richtung, in der Differenzierung des kriminalrechtlichen Sanktionensystems und indem man der Angemessenheit der Sanktionen mehr Beachtung schenkt. In den vergangenen Jahren traten jedoch im mongolischen Sozialleben verschiedene Ereignisse ein, die sich einerseits als große Herausforderung für das Strafrecht darstellten, und andererseits den Mongolen ermöglichten einzuschätzen, wie gut das geltende Strafgesetzbuch ist. Bei drei Fällen stand die Entschädigung der Opfer im Vordergrund. Als Beispiele sind hier einige in der Öffentlichkeit für Aufsehen sorgende Fälle genannt:

- Nach einem folgenschweren Brand im Einkaufszentrum SAPU GmbH bekamen hunderte Kleingeschäftsleute ihren Schaden kaum ersetzt.
- Durch Insolvenzfälle der sechsundzwanzig Spar- und Kreditgenossenschaften seit 2005 haben 8301 Geldanleger ihre Spargelder in Höhe von 72,4 Mrd. MNT ganz verloren.[6]
- Beim 'Sparbank-Fall' mit 14 Mrd. MNT Schaden, deren Verantwortliche immer noch nicht klar sind.

Zwei andere prominente Fälle gerieten wegen der Strafzumessung in die Diskussion. Die Taschendiebin Altantuya wurde für einen Diebstahl mit einem Schaden in Höhe von 18 000 MNT (umgerechnet 9 Euro) zu zehn Jahren Freiheitsstrafe verurteilt, weil es ihr vierter Diebstahlsfall war. Der mongolische Ex-Präsident N. Enchbayar wurde wegen Korruption verurteilt, die beim Staat und anderen einen Schaden von 7 Mrd. MNT (umgerechnet 3,5 Mio. Euro) verursacht haben soll, und erhielt dafür eine Freiheitsstrafe von vier Jahren, aus der er nach einem Jahr entlassen wurde.[7]

Andere Fälle erregten wegen der großen Zahl der Opfer Aufsehen wie der 'Wodka-Fall' der 'Asiatischen Wolf' GmbH, die Wodka mit zum Verzehr ungeeignetem Alkohol produziert und massenweise Vergiftungen verursacht hatte. Beim '1.-Juli-Fall' wurden bei Demonstrationen nach der unfairen Parlamentswahl von 2008 vier Menschen durch Polizeischüsse getötet, 700 Demonstranten verhaftet und 270 davon zu Freiheitsstrafen von sechs Monaten bis zu fünf Jahren verurteilt.[8]

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[6] Durch den Beschluss Nr. 242 (2007) „Über die Schadenswiedergutmachung auf Rückzahlungsbedingungen' hat die mongolische Regierung entschieden, die Hälfte der Gesamtschäden aus Steuergeldern zum Zwecke der Schadensersatzes an den Hauptverantwortlichen der Spar- und Kreditgenossenschaften zu leihen. Einem Medienbericht vom 18.01.2012 in http://news.niigem.mn/content/27246.shtml (15.08.2012) zufolge wurden im Rahmen dieses Beschlusses zwischen 2007 und 2010 insgesamt Beträge in Höhe von 35,1 Milliarden MNT an 7290 Opfer gezahlt. Dieser Beschluss der Regierung dürfte zustande gekommen sein, weil etliche der beteiligten Politiker selbst zuvor durch die Spar- und Kreditgenossenschaften ihr Geld verloren hatten.

[7] Am 12.08.2012 wurde er verurteilt und ist ein Jahr später am 02.08.2013 durch den (Entschuldigungs-) Erlass vom amtierenden Präsidenten Ts. Elbegdorj aus der Haft bzw. Gefangenenklinik entlassen worden, wo er während seiner Haftzeit 263 Tage behandelt wurde.

[8] Siehe 'Der 1. Juli und Menschenrechtsverletzung', Forum mongolischer NGOs, Ulaanbaatar 2009. S. 1.

Diese spektakulären Fälle und andere, die in der Öffentlichkeit nicht bekannt sind, werden immer noch vor Gericht verhandelt. Dies führt zu dem Schluss, dass das jetzige Strafgesetzbuch soziale Bedürfnisse nicht ausreichend befriedigen kann und die Interessen der Allgemeinheit und des Staates nicht ausreichend vor solchen Strafhandlungen schützen kann.

Durch den Systemwechsel stellten sich vielfältige Anforderungen an das Rechtssystem der Mongolei, insbesondere für das Strafrecht. Das Strafgesetzbuch von 2002 war ein großer Schritt in die Richtung, dass sich die Mongolen vom sozialistischen Denken gelöst und den in der Verfassung verankerten Menschenrechten ein entsprechendes Strafrecht geschafft haben (Kajuth 2003: 503).

Daraus ergeben sich folgende Überlegungen, die bei der weiteren Entwicklung des strafrechtlichen Sanktionensystems mitberücksichtigt werden sollen:

1. Nicht nur die Sanktionen, sondern auch die grundlegenden Begriffe wie das Verbrechen, seine Rechtsfolgen, die Strafzumessung sowie die Einstufung der Straftaten, die materiellen und formalen Tatbestandsmerkmale, die Subsumptionsgrundlage und vieles mehr sollen theoretisch besser diskutiert und klar und unmissverständlich definiert werden, da die theoretische Ansätze zum Strafrecht nicht populär sind und wenig in der Praxis berücksichtigt werden. Häufig werden die rechtlichen Bestimmungen auch unter dem Einfluss der Tagespolitik beschlossen oder abgelehnt und als Machtmittel der Tagespolitik benutzt, ohne sich um eine langfristige und nachhaltige Perspektive in der Gesetzgebung zu kümmern.

2. Es ist in der Mongolei leider üblich, dass der Gesetzgeber bei der Festlegung der Sanktionen ohne fundierte Forschungen tätig wird. Die Bestimmungen der Maßstäbe bzw. die Länge und Härte der Strafen, insbesondere bei den Geld- und Freiheitsstrafen, basiert nicht auf Forschungsergebnissen oder praktischen Erkenntnissen, sondern auf willkürlich festgelegten mathematischen Zahlenschritten, denen jeder Bezug zur juristischen Wissenschaft fehlt. Es gibt kaum eine aussagekräftige Sanktionsforschung in der Mongolei. Weiterhin sollten in diesem Bereich Nachwuchswissenschaftler gezielt durch Politik ausgebildet und gefördert werden. Selbst die Ergebnisse der wenigen Forschungen werden bei den Gesetzesvorhaben nicht sinngemäß berücksichtigt.

3. Seit Januar 2014 wurden durch ein Strafrechtsänderungsgesetz strafrechtliche Sanktionen für juristische Personen im StGB der Mongolei neu eingeführt. Aber die Durchsetzung dieser neuen Sanktionen ist in der Praxis mit sehr vielen prozessrechtlichen und sonstigen Schwierigkeiten konfrontiert, da die Regeln unklar definiert sind, wie z. B. die Frage welche Person in einen Unternehmen haftbar gemacht werden kann oder soll, ob ein Unternehmen wegen eines Fehlverhaltens eines seiner Gründungsmitglieder sanktioniert werden darf und vieles mehr. Außerdem sind für die Implementierung dieser Vorschriften keine ausreichenden Vorbedingungen geschaffen worden. Es scheint eher eine unüberlegte direkte Übernahme eines ausländischen Strafgesetzes zu sein. Dies ist wiederum ein Beispiel zu den oben gemachten Bemerkungen.

4. Die Zwangsarbeit im Sinne einer gemeinnützigen Arbeit ist an sich, im Gegensatz zur Freiheitsstrafe, sowohl für den Täter als auch für die Gesellschaft eine deutlich weniger schädliche Strafe. Sie wird in anderen Rechtssystemen sehr häufig als *community sanction* angewandt. Bei dieser Strafe wird die Teilnahme des Täters an gesellschaftlichen und privaten Geschehnissen nicht völlig unterbunden. Deshalb verursacht diese Strafe keine Zusatzmaßnahmen wie Resozialisierungsmaßnahmen. Sie ist aber in

der Mongolei mangels ausreichender Umsetzungsmechanismen nicht im erforderlichen Umfang und effektiv praktizierbar. Nicht nur die Bezeichnung dieser Strafe, sondern auch die Bedingungen zur Vollstreckung müssen geändert werden. Trotz der hohen Arbeitslosigkeit in der Mongolei gibt es nach Angaben der Arbeitsagentur genügend freie Arbeitsplätze, die keine besonderen beruflichen Anforderungen stellen. Es fehlen vielmehr ein gezieltes und gut organisiertes Management, der richtige Wille zur Durchsetzung der Normen und eine effektive Zusammenarbeit zwischen den Behörden. Wenn die Angebote in der Privatwirtschaft nicht ausreichen, gäbe es außerdem die Möglichkeit, dass der Staat diese benötigten Stellen selbst schafft. Dies ist für die Gesellschaft, für den Staat und die Resozialisierung der Täter immer noch eine weitaus bessere Lösung und erheblich kostengünstiger, als Gefängnisse für Ersatzhaftstrafen zu bauen.

5. Die im mongolischen StGB festgesetzten Unterscheidungen der Vollzugsregime haben sich in der Vollstreckungspraxis als weitgehend überflüssig und oft auch als schädlich erwiesen. Dies benachteiligt teilweise auch die Rechte der Gefangenen in Bezug auf internationale Standards. Die unzureichenden Bedingungen insbesondere für langjährige Insassen in Vollzugsanstalten der Mongolei entsprechen nicht immer dem Minimalstandard. Speziell wäre zu prüfen, mit welcher Berechtigung es die aus dem stalinistischen StGB von 1942 stammende Kerkerhaft immer noch im heutigen Strafvollzug gibt. Es ist daher unbedingt zu beachten, dass seitens des Gesetzgebers nicht nur an die Härte der Sanktionen, sondern auch an die eigentlichen Ziele der Strafe und an praktischen Umsetzbarkeit der Sanktionen gedacht wird.

6. Einige Begriffe müssen in Fachkreisen sowohl theoretisch diskutiert als auch gesetzlich festgelegt werden, was z. B. unter einer milden Strafe zu verstehen ist oder wie lange die ‘kurze’ Freiheitsstrafe konkret sein soll. Die bisher als die mildeste Strafe bezeichnete Geldstrafe verdient diese Bezeichnung nicht, weil sie nicht den Tatsachen entspricht. Sowohl bei der Bestimmung der Geldstrafmaßstäbe im materiellen Strafrecht als auch bei der Vollstreckungsrate in der Praxis ist es ersichtlich, dass sie weder den Effektivitäts- noch der Wirkungsansprüchen der Strafe entsprechen. Solche Verbesserungen im Sanktionenrecht werden auch bei erweiterter Anwendung von weiteren Sanktionsbestimmungen positiv wirken.

7. Die Todesstrafe muss durch ein Änderungsgesetz sowohl aus der Verfassung als auch aus dem StGB möglichst bald ganz gestrichen werden, da sie sonst von mongolischen Gerichten weiterhin verhängt werden kann, trotz dem Beitritt der Mongolei zum Zweiten Fakultativprotokoll zum Internationalen Pakt über bürgerliche und politische Rechte zur Abschaffung der Todesstrafe im Jahr 2012. Dafür muss nicht bis auf ein völlig neues StGB gewartet werden, da die Mongolei international an die Umsetzung der von ihr beigetretenen Konvention gebunden ist.

8. Positive Erfahrungen des dt. Strafrechts in Bezug auf Wiedergutmachung, Täter-Opfer-Ausgleich, Auflage und Weisungen in Verbindung mit der Strafaussetzung, Einstellungen vor Gerichtsverhandlungen sowie Jugendstrafen können für mongolische Verhältnisse näher untersucht und dann nach Möglichkeit in das mongolische Strafrecht übernommen werden, damit sich die Mongolei dem Welttrend etwas nähert.

9. Die politische Instabilität und Unreife[9] in der Mongolei hat ihren negativen Einfluss auf allen Ebenen bei der Entwicklung neuerer Rechtsvorschriften. Ob ein Entwurf gut oder schlecht ist, spielt keine Rolle. Es scheint viel wichtiger zu sein, wer das Gesetz initiiert und wessen Idee dahinter steckt, und danach wird beurteilt. Dies ist ein Grund, warum die Entwicklung der verbesserungsbedürftigen bzw. neuen Vorschriften in Bezug auf das materielle sowie prozessuale Strafrecht verlangsamt wird.

10. Während ein Gesetzesentwurf ausgearbeitet wird, werden Stellungnahmen der wenigen erfahrenen Fachjuristen, Wissenschaftler und Forschungseinrichtungen nicht ausreichend eingeholt. Ein gutes Gesetz kommt allen in der Gesellschaft zu Gute, daher sollte die Arbeit an einem Gesetzentwurf nicht von einer Einzelperson oder einer einziger politischen Körperschaft als ihr 'persönliches intellektuelles Eigentum' verstanden werden, wie es in der Mongolei in den letzten Jahren leider der Fall ist.

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[9] Hiermit ist der ständige Wechsel der Regierung und der Minister in der Mongolei gemeint. Jedes Mal, wenn ein neuer (Justiz-)Minister berufen wird, werden alle Abteilungsleiter im Ministerium, Leiter der dem Ministerium gehörigen Agenturen und sonstigen Behörden samt ihrer Personalien in wichtigen Positionen ausgetauscht. Durch diesen Umstand können sich die nötigen Fachkräfte nicht über einen längeren Zeitraum entwickeln und halten, und durch die ständigen Wechsel der Bearbeiter und die Brüche bei den Konzeptionen werden die Gesetzesvorschriften nicht mit der notwendigen Sorgfalt erarbeitet.

CHIEFS AND WITCHES IN A GENDERED WORLD: LEGITIMACY AND THE DISPUTING PROCESS IN THE SOUTH AFRICAN LOWVELD

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DISSERTATION SUMMARY
Die Dissertation beschäftigt sich mit der Legitimität traditioneller Autoritäten in Südafrika. In dieser Arbeit untersuche ich, wie Konfliktbehandlung den Prozess der Legitimierung traditioneller Strukturen und deren AkteurInnen in einem rechtlich pluralen Raum beeinflusst. Die Studie basiert auf einer sechzehnmonatigen ethnografischen Feldforschung, die zwischen 2007 und 2011 in der Provinz Mpumalanga im östlichen Südafrika (zwölf Monate) sowie im Hhohho Distrikt im Nordwesten Swasilands (vier Monate) durchgeführt wurde. Der Titel der Arbeit ('*Chiefs and witches in a gendered world*') verweist auf drei Grundkomponenten dieser Forschung. Zum einen liegt das Hauptaugenmerk auf traditionellen Autoritäten wie Chiefs und anderen Oberhäuptern und deren Autoritätsansprüche. Zum anderen gilt die Aufmerksamkeit zwei sozialen (Konflikt)Feldern, die empirisch wie auch analytisch von zentraler Bedeutung sind: einerseits die Hexerei, daher der Bezug im Titel auf Hexen (*witches*) und andererseits die durch Gender geprägte soziale Welt (*gendered world*). Wie diese unterschiedlichen Komponenten zusammenhängen und was sie mit der Legitimität traditioneller Autoritäten zu tun haben, werde ich im Folgenden genauer erläutern.

Mit der Transformation des politischen Systems Südafrikas in den frühen 1990er Jahren, vom rassistischen Apartheidstaat hin zu einem demokratischen Mehrparteienstaat, ging eine konstitutionelle Anerkennung traditioneller Autoritäten einher. Dieser kontroverse Schritt kam für viele überraschend. Die Institution der *Chieftaincy*, die am besten – jedoch nicht unproblematisch – mit dem deutschen Begriff des Häuptlingstums zu übersetzen wäre, galt in vielen Kreisen als ein politisches Vermächtnis der vergangenen Ära. Eine Vielzahl von ihnen kollaborierten als 'indirekte HerrscherInnen' (*indirect rulers*) mit den Kolonial- und Apartheidregierungen gegen die Interessen der mehrheitlich ländlichen Bevölkerung. Deren Anspruch, genau diese Bevölkerungsteile auch im neuen demokratischen System zu repräsentieren, stieß verständlicherweise auf erheblichen Widerstand. Auch in der Wissenschaft gibt es dazu unterschiedliche Standpunkte.

Mahmood Mamdani (1996) zum Beispiel argumentiert, dass die Institution abgeschafft werden muss, um den Weg für ein wahrlich demokratisches Südafrika ebnen zu können (vgl. Ntsebeza 2005). Ich meine jedoch, dass die vorherrschenden sozialen wie auch politischen Gegebenheiten auf lokaler Ebene einen anderen Ansatz erforderlich machen. Verschiedene Studien haben gezeigt, dass Menschen in Afrika und auch in Südafrika in vielerlei Hinsicht auf traditionelle Autoritäten angewiesen sind, um ihr Alltagsleben zu organisieren (siehe z.B. Beall et al. 2005; Friedman 2011; Oomen 2005; Ubink 2008). Folglich versuche ich konkret zu erforschen, unter welchen Bedingungen und auf welche Art und Weise diese Autoritäten politische und normative Macht auf lokaler Ebene etablieren und ausüben können. Diese Fragestellung ist relevant, weil bis heute die Gründe warum Menschen diese Institutionen trotz deren umstrittener Vergangenheit weiterhin anerkennen und aufsuchen, nicht völlig geklärt sind (Oomen 2006; Ray und van Rouveroy van Nieuwaal 1996; Ubink 2007). In der wissenschaftlichen Literatur gibt es verschiedene Ansätze, die diese Frage zu beantworten versuchen. Sie reichen vom 'Vermächtnisargument', das besagt, dass traditionelle Autoritäten weiterhin Macht aufgrund der Kolonial- und Apartheidpolitik der 'indirekten Herrschaft' ausüben, bis hin zum 'schwachen Staat Argument', in dem sie eine Art Vermittlerrolle zwischen dem modernen Staat und dem Bereich der Tradition einnehmen. Weitere Studien stellen die Interaktion zwischen traditionellen Autoritäten, staatlichen und nicht-staatlichen AkteurInnen sowie der lokalen Bevölkerung in den Mittelpunkt. Um meine einleitende Frage zu beantworten, warum Menschen diese Institution in meinem ländlich und kleinstädtisch geprägten Forschungsfeld im südafrikanischen Tiefland (*Lowveld*) aufsuchen, bieten diese theoretischen Ansätze jedoch nur partielle Antworten. Die genannten Erklärungsmuster vermögen nicht zu erklären, warum eine substanzielle Anzahl von Menschen, die in einer urbanen Township leben und damit nicht unter den Einflussbereich traditioneller Autoritäten fallen, die ländliche Institution der *Chieftaincy* nicht nur befürworten, sondern vor allem auch regelmäßig aufsuchen. Mein Argument ist, dass wenn wir die Produktion von Lokalität, das heißt einer gewissen Raumimagination und damit einhergehend die Konstruktion von Grenzen als Mittel der Governance miteinbeziehen, wird ersichtlich, dass staatliche Anerkennung, Landverteilung und Entwicklungsprojekte die Grundlage traditioneller Machtansprüche in ruralen Gegenden bilden. Es zeigt sich jedoch auch, dass Konfliktmanagement zum Machterhalt, aber besonders zur Machtausdehnung in urbane Gebiete beiträgt. Um diese Prozesse zu analysieren, untersuche ich die Dynamiken, die in unterschiedlichen Arenen der Streitbeilegung zwischen traditionellen Autoritäten, staatlichen und nicht-staatlichen AkteurInnen sowie der lokalen Bevölkerung auftreten. Ein Schwerpunkt liegt dabei auf den unterschiedlichen Wegen der Konfliktaustragung, insbesondere im Hinblick auf Streitigkeiten, die einerseits im Zusammenhang mit dem Glauben an spirituelle Kräfte stehen, wie zum Beispiel Hexerei und Magie, und andererseits aus Beziehungsproblemen entstehen. Beide Angelegenheiten betreffen ländliche und städtische Bevölkerungsgruppen gleichermaßen. Um ein besseres Verständnis der lokalen Gegebenheiten in eMjindini/Barberton zu erreichen, stelle ich meine Analyse in einen breiten historisch-politischen Kontext von siSwati (Swasi) SprecherInnen im südlichen Afrika. Dabei werden gesellschaftliche Umstände und soziale Praktiken in Swasiland, wie auch relevante grenzübergreifende Dynamiken zwischen Südafrika und dem Königreich miteinbezogen. Mit diesem Ansatz wende ich eine Perspektive an, die die Ideologie des Nati-

onalstaates in Frage stellt und gleichzeitig auf den transnationalen Charakter der Schaffung einer territorialitätsbasierenden Lokalität und Identität aufmerksam macht (vgl. Beck 2007; F. und K. von Benda-Beckmann und Griffiths 2005; Glick Schiller 2006).

Im ersten Kapitel dieser Arbeit, der Einleitung zu dieser Dissertation, beschreibe ich generelle Aspekte der *Chieftaincy* in Südafrika in Bezug auf Rechtsprechung und Territorialität sowie die wichtigsten Zuständigkeitsbereiche traditioneller Autoritäten. Diese reichen von rituellen Feierlichkeiten und kulturellen Zeremonien, über Landvergabe und gewisse administrative Tätigkeiten, bis hin zur Streitbehandlung. Letzteres wird übereinstimmend auf lokaler Ebene wie auch in der akademischen Landschaft als die bedeutendste Aufgabe traditioneller Autoritäten eingestuft. Konflikte über Land, Wasser und Vieh gehören hier genauso dazu wie Diebstahl, Familienangelegenheiten und Hexerei. In einem weiteren Schritt gehe ich auf zwei grundlegende Konzepte dieser Arbeit ein. Ich diskutiere die Begriffe 'Tradition' und 'Gewohnheitsrecht' (*customary law*) in ihren südafrikanischen und akademischen Kontexten. Tradition beschreibe ich hier als die Weitergabe von Handlungsmustern, Überzeugungen und Glaubensvorstellungen, die ständig neu interpretierbar, anpassungsfähig und daher wandelbar sind. Tradition stellt eine Ressource dar, die zu Legitimations- oder Ablehnungszwecken gegenwärtiger Praktiken mit der Referenz auf Vergangenes herangezogen werden kann. Es ist somit weder eine statische, noch begrenzte oder normativ definierte und einschränkende Kategorie im Sinne einer zeitlosen und unveränderbaren Tradition. Ähnliches gilt für den Begriff des Gewohnheitsrechts. Hier unterscheide ich folgend zwischen Gewohnheitsrecht im Sinne des Swasi *customary law*, dem ideellen Gegenstück des europäisch geprägten staatlichen Rechts, und Swasi *law and custom* als Repräsentation des göttlichen Königtums in all seinen Dimensionen und als essentieller Teil dessen, was es bedeutet, ein Swasi zu sein (Wastell 2007). In diesem Verständnis verkörpert der König als Person und Institution die gesamte Swasi Nation, das bedeutet alle Menschen, die sich kulturell und nicht unbedingt nur ethnisch als Swasi identifizieren. Dies spiegelt sich auch im Macht- und Autoritätsverständnis von siSwati SprecherInnen in Südafrika gegenüber traditionellen Autoritäten wider. Ich behandle im einleitenden Kapitel verschiedene theoretische Ansätze zur Macht und Legitimität traditioneller Autoritäten und argumentiere, dass Legitimität am besten im Sinne von 'multiplen Legitimitäten' zu verstehen sei, um Wertvorstellungen, Gesetzesrecht aber auch Interessen von Menschen in ihrer Bewertung und Einschätzung der *Chieftaincy* zu berücksichtigen. Performanz, das heißt ein gewisses Leistungsverhalten, stellt dabei eine grundlegende Komponente des Legitimationsprozesses dar, die ich in dieser Arbeit am Beispiel des Konfliktmanagements untersuche. Zu diesem Zweck bespreche ich theoretische und methodologische Aspekte wie Rechtspluralismus und '*forum shopping*', was so viel bedeutet wie das Abwägen der zur Verfügung stehenden Instanzen, um der Durchsetzung der eigenen Ziele während eines Streits die besten Erfolgsaussichten zu verschaffen. Des Weiteren behandle ich Transformationsprozesse von Streit, das heißt ich beleuchte die unterschiedlichen Phasen des Streitschlichtungsverfahrens, und gehe dann abschließend noch auf verschiedene Modi des Konfliktmanagements wie Vermeidung, Vergeltung, Mediation und Adjudikation ein. Mit all diesen analytischen Konzepten über Macht, Legitimität und Streit ist es möglich der Frage wie die unterschiedlichen Dimensionen von Prozessen des Konfliktmanagements mit den Macht- und Legitimitätsansprüchen traditioneller Autoritäten in eMjindini/Barberton zusammenhängen auf den Grund zu gehen.

In Kapitel zwei beschäftige ich mich mit den historischen Entwicklungen in jenem Teil des südlichen Afrikas, in dem siSwati die Mehrheitssprache darstellt. Ich beginne mit der Entstehung der ethnischen Gruppe der Swasis, diskutiere zeitliche Abschnitte des 19. Jahrhunderts die von Expansion und der Konsolidierung des ersten Swasi-Staates gekennzeichnet waren und beschreibe die Perioden des Kolonialismus bis hin zur Transition des südafrikanischen Apartheidstaates in den frühen 1990er Jahren. Diese geschichtliche Aufarbeitung dient der Frage wie und warum bestimmte historische Entwicklungen, wie zum Beispiel die koloniale Grenzziehung zwischen Südafrika und Swasiland, Einfluss auf die Landpolitik, die Trennung ethnischer Gruppen (*racial segregation*) und den Zugang zur Justiz ausgeübt haben. Bei dieser Untersuchung bringe ich nicht nur die nationale und lokale Ebene zusammen, sondern erfasse ebenso grenzübergreifende Dynamiken und deren Auswirkungen auf der Lokalebene in eMjindini/Barberton. Damit soll den LeserInnen ein Verständnis vergangener sozio-politischer und rechtlicher Erfahrungen vermittelt werden, die heute das Leben in der Forschungsregion noch immer beeinflussen und prägen. Zudem soll diese Herangehensweise helfen zu verstehen, wie und warum Kontinuität und Wandel mit den Autoritätsansprüchen traditioneller Autoritäten zusammenhängen.

Im darauffolgenden Kapitel drei gehe ich auf diese Autoritätsansprüche genauer ein, in dem ich lokale und grenzübergreifende *Governance*praktiken sowie die Produktion von Lokalität in eMjindini/Barberton in den Mittelpunkt stelle. Ich untersuche soziale Beziehungsmuster und politisch-rechtliche Konstruktionen von Raum und Grenzen, die im Zusammenhang mit Praktiken der *Governance* entstehen und diese wiederum formen. Einleitend beschreibe ich die aktuelle grenzübergreifende Konfiguration mit ihren fließenden Grenzen und analysiere dann wie die traditionellen Autoritäten von eMjindini ihre spezifische Auffassung von Lokalität konstruieren. Ich argumentiere, dass dies auf dreierlei Wegen geschieht: erstens in Bezug auf Land, genauer in Bezug auf wiedergewonnenes Treuhandland; zweitens das historische Argument, dass eMjindini ein Ort des Swasi Königs ist und die Menschen seine Gefolgschaft darstellen; und drittens durch die Aushandlung von Autoritätsgrenzen, vor allem durch die Streitbearbeitung.

Beim ersten Punkt beschreibe ich den Prozess der Landrückgewinnung in den 1990er Jahren, bei dem sich eine Gruppe von Menschen zusammenschloss, um ein Stück Land zurückzufordern, von dem ihre Vorfahren vertrieben wurden. Diese Gruppe gründete infolgedessen den sogenannten eMjindini Trust, ein rechtliches Gebilde welches seither das Land in Treuhand verwaltet. An der Spitze steht der amtierende Chief, ein Nachkomme früherer Chiefs und Mitglied der königlichen Swasi Familie. In diesem Zusammenhang argumentiere ich, dass das Gebiet von eMjindini Trust die Grundlage für die Machtansprüche der traditionellen Autoritäten in der Region darstellt. Es verleiht ihnen Autorität, weil sie Land an ihre Gefolgschaft verteilen können, die dadurch Nutzungsrechte erhalten, was wiederum bedeutet, dass sie den Chief anerkennen und ihm Respekt zollen. Dies konstituiert eine bedeutende Machtkomponente der traditionellen Autoritäten in eMjindini. In diesem Abschnitt werden außerdem relevante Aspekte der südafrikanischen Landreform wie auch Praktiken der Landvergabe inklusive ihrer Genderdimensionen besprochen.

Beim zweiten Punkt, dem historischen Argument, dass eMjindini ein Ort des Swasi Königs ist und die Menschen seine Gefolgschaft darstellen, zeige ich wie die traditio-

nellen Autoritäten die *Chieftaincy* als Teil des historischen Königreichs Swasiland unter Mswati II konstruieren. Dieses Reich wurde im 19. Jahrhundert mit der kolonialen Grenzziehung zwischen Südafrika und Swasiland auf zwei Nationalstaaten aufgeteilt (siehe auch Kapitel zwei). Die traditionellen Autoritäten versuchen vor Gerichtsverhandlungen mit der regelmäßigen Rezitation von Genealogien und Abstammungslinien der gegenwärtigen und vergangenen Oberhäupter und deren Beziehung zur Monarchie in Swasiland ihre Machtansprüche über Land und Menschen in der Region zu festigen. Die Grenzen dieser Region werden von ihnen anhand einer skizzenhaften Landkarte, die ein Apartheidethnologe in den 1940er Jahren gezeichnet hat, festgelegt. Diese Karte dient ihnen noch heute als historischer Beweis ihres Einflussgebietes.

Auf diese Weise betrachten die traditionellen Autoritäten die urbane Township, die Stadt Barberton, wie auch umliegende Farmen, als ihren Herrschaftsbereich. Gleichzeitig meint die lokale Kommunalverwaltung, dass nicht nur die Stadt und die Township, sondern auch die *Chieftaincy* in eMjindini Trust unter ihren Einfluss fällt. Die politische Kontroverse spiegelt sich auch im rechtlich pluralen Feld wider, das zurzeit durch eine unklare Jurisdiktion gekennzeichnet ist (siehe auch Kapitel eins). Ich behaupte, dass diese Ambiguität der rechtsprechenden Gewalt momentan Vorteile für DisputantInnen und traditionelle Autoritäten birgt, da ersteren, und hier vor allem TownshipbewohnerInnen, die Möglichkeit geboten wird zwischen verschiedenen Foren in ihrem Konfliktmanagement zu wählen, das heißt '*forum shopping*' zu betreiben. Und letzteren ermöglicht es Autorität unter Menschen zu erlangen, die außerhalb des Treuhandgebietes leben.

Kapitel vier beschäftigt sich aus diesem Grund mit dem institutionellen Pluralismus auf der lokalen Ebene, um eine solide Basis für die zwei darauffolgenden Kapitel über die Prozesse des Konfliktmanagements zu bieten. Es dient auch als eine weiterführende Einleitung zu meinen Feldforschungsorten und deren lokalen Machtkonfigurationen. Ich widme mich an dieser Stelle in der Dissertation den strukturellen und prozeduralen Aspekten relevanter Foren der Streitbearbeitung in eMjindini/Barberton und im nordwestlichen Swasiland. Traditionelle Gerichte (*chief's courts*) und Amtsgerichte (*magistrate's courts*) gehören hier genauso dazu wie Familienräte und die Konsultationsräume traditioneller HeilerInnen. Des Weiteren untersuche ich die Rolle bestimmter AkteurInnen in Prozessen des Konfliktmanagements und in der Streitbearbeitung, wie zum Beispiel des lokalen Chiefs, seinen AssistentInnen, StadtbezirksrätInnen, SozialarbeiterInnen und anderen. In dieser Darstellung werden rural-urbane Verbindungen implizit mitdiskutiert und schließen somit an frühere Abhandlungen von translokalen und grenzüberschreitenden Beziehungen an. Es ist die in diesem Kapitel beschriebene Vielfalt an AkteurInnen und Institutionen, die Menschen in der urbanen Township wie auch in ländlichen Gegenden ermöglichen in Streitfällen zwischen unterschiedlichen Foren zu wählen.

Praktiken des '*forum shopping*' kommen auch in Kapitel 5 vor, wo ich das 'Unsichtbare in der sichtbaren Welt' (*the invisible in the visible world*) erkunde. In diesem Kapitel behandele ich den Themenkomplex von Hexerei und Magie in Prozessen des Konfliktmanagements und stelle die Frage in welcher Beziehung dies mit den Machtansprüchen der traditionellen Autoritäten steht. Mit Bezug auf verschiedene ethnografische Beispiele aus dem südafrikanischen Tiefland und dem Nordwesten Swasilands frage ich, wie Menschen auf Erfahrungen von Ungerechtigkeit und Konflikt reagieren.

Genauer noch, wie der Glaube an Hexen und Magie sich zu sozialen Handlungen, wie der Verwendung von *muti* (Medizin oder auch Gift) und Anschuldigungen von Hexerei, verhält, und folglich, wie Menschen darauf reagieren. Die Möglichkeiten und Wege, die Betroffenen zur Verfügung stehen, sind vielfältig und beeinflusst von der rechtlich und institutionell geprägten, pluralen Ordnung. Foren wie der *equality court* im südafrikanischen Amtsgericht, das Swasi-Nationalgericht (*Swazi National Court*) in Swasiland und die Konsultationsräume traditioneller HeilerInnen sind dabei bedeutende Arenen im Kampf gegen die gefürchteten Taten von Hexen. Noch wichtiger sind jedoch traditionelle Gerichte (*chief's courts*), da sie von der Mehrheit der Bevölkerung als die effektivsten Institutionen angesehen werden, um Anschuldigungen von Hexerei zu überprüfen, jene zu bestrafen, die Leid und Unglück verursacht haben und insbesondere um Menschen deren Reputationen beschmutzt wurde zu rehabilitieren. Damit stellt das traditionelle Gericht eine signifikante soziale Einrichtung in der Region dar. Diese bedeutende Stellung der *Chieftaincy* ist eng mit der Zuerkennung von Legitimität durch Dorf- und TownshipbewohnerInnen verbunden. Ich argumentiere infolge, dass die traditionellen Autoritäten von eMjindini Fälle von Hexerei und Hexenanschuldigungen bevorzugt bearbeiten, um ihre eigenen Interessen der Machtausübung über die Grenzen des Treuhandgebietes hinaus zu verfolgen.

In Kapitel sechs, dem letzten ethnografischen Kapitel, widme ich mich dem zweiten sozialen Konfliktfeld dieser Dissertation, den Beziehungsproblemen in ehelichen und nicht-ehelichen Partnerschaften. Ich wende dabei eine Genderperspektive auf Recht und Streit an, die es mir ermöglicht einen speziellen Blick auf Fragen von Maskulinität zu werfen und zu untersuchen, wie sich eine spezifische Männlichkeitskonstruktion, die sich hauptsächlich auf Tradition bezieht, von Streitparteien und traditionellen Autoritäten in Beziehungsstreitigkeiten angewendet wird. Mein Interesse gilt hierbei vor allem der Frage, wie sich traditionelle Männlichkeitskonstruktionen in Prozessen des Konfliktmanagements auf die Machtansprüche traditioneller Autoritäten auswirken. Um diese Diskussion in einem breiteren Rahmen zu positionieren, behandle ich zunächst Themen wie Familienstrukturen und deren Veränderungen im südlichen Afrika, Heirats- und Beziehungsformen inklusive Polygynie und der weitverbreiteten Praxis von mehreren gleichzeitig aktiven Partnerschaften (*multiple concurrent partnerships*). Des Weiteren stelle ich den Verhandlungsprozess von *lobola*, dem sogenannten Brautpreis, der ein essentieller Bestandteil der gewohnheitsrechtlichen Ehe ist, detailliert dar. Für die Analyse des Verhältnisses zwischen Beziehungsproblemen in ehelichen und nicht-ehelichen Partnerschaften und den Machtansprüchen traditioneller Autoritäten gebe ich, wie schon in Kapitel fünf, verschiedene ethnografische Beispiele, die sich mit Themen wie Unterhaltsansprüchen, Ehebruch, mehreren gleichzeitig aktiven Partnerschaften und der Nichtbeachtung traditioneller Reinigungsrituale beschäftigen. Hierbei wird unter anderem ersichtlich, dass das traditionelle Gericht in eMjindini Trust in vielen Fällen als eine alternative oder zusätzliche Arena genutzt wird, um die eigene Position gegenüber seinem Partner oder seiner Partnerin in einem andauernden Streit zu stärken. Damit wird wiederum dieser Institution und ihren AkteurInnen Legitimität zugesprochen.

Im Schlusskapitel meiner Dissertation fasse ich meine Ergebnisse des Legitimationsprozesses traditioneller Autoritäten im südafrikanischen Tiefland zusammen. Ich argumentiere, dass durch einen geschärften Blick auf Konflikte und Streitbehandlung ersichtlich wird, wann, das heißt in welchen Phasen des Prozesses, und warum die Insti-

tution der *Chieftaincy* als eine Arena der Streitaustragung ins Spiel kommt und welche Auswirkungen das auf den Legitimationsprozess traditioneller Autoritäten haben kann. Solch eine Perspektive ermöglicht es dann, zu erklären warum der Chief und die Institution der *Chieftaincy* große Unterstützung in der urbanen Township finden. Die räumliche Dimension des Legitimationsprozesses betreffend kann festgehalten werden, dass die Verfügbarkeit des traditionellen Gerichtes ein öffentliches Forum bietet, um Gewissheit, Sicherheit und Gerechtigkeit im Falle von Hexereiproblemen und ihren sozialen Auswirkungen zu erlangen. Dies stellt eine Option dar, die Menschen in urbanen Townships anderswo in Südafrika größtenteils verwehrt bleibt (Ashforth 2005). Aber auch die zeitliche Dimension des Legitimationsprozesses, ihr dynamischer und veränderbarer Charakter, wird durch die angewendete Perspektive ersichtlich. In rechtlich und institutionell pluralen Gesellschaftsordnungen bedarf es einer politischen Positionierung der unterschiedlichen Drittparteien, die in der Streitbehandlung involviert sind. Dass traditionelle Autoritäten Dispute von großem öffentlichen Interesse, wie zum Beispiel Hexerei, bevorzugt bearbeiten, garantiert ihnen die Gefolgschaft, genau genommen Menschen, die den Chief anerkennen und respektieren, um politische und normative Autorität ausüben zu können. Hierbei müssen die traditionellen Autoritäten die Erwartungen und Interessen der Menschen erfüllen, was bedeutet, dass sie gewisse Leistungen erbringen müssen. Wenn ihre Fähigkeiten der Streitbearbeitung positiv bewertet werden, also wenn Menschen mit den Resultaten zufrieden sind und die Institution infolge auch künftig aufgesucht wird, wird den traditionellen Autoritäten weiterhin Legitimität gewährt. Gleichermaßen kann ihnen aber auch die Gefolgschaft verweigert und somit Legitimität abgesprochen werden, wenn sie den Menschen keine Vorteile verschaffen oder wenn sie deren Erwartungen nicht entsprechen können. Legitimität ist somit ein stark umkämpftes soziales Feld zwischen den Herrschenden und den Beherrschten, in dem die Rollen der Chiefs und Hexen in der von Gender geprägten Welt des südafrikanischen Tieflands noch lange nicht determiniert sind.

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COMPLIANCE AND MONEY LAUNDERING CONTROL BY BANKING INSTITUTIONS IN CHINA

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Dr. Jing Lin is currently an associate professor at the China University of Political Science and Law, Beijing where she also holds a master's degree (LLM). She further holds a master's (LLM) from the University of Freiburg, Germany (summa cum laude). In 2009 she enrolled in IMPRS REMEP at the Max Planck Institute for Foreign and International Criminal Law in Freiburg i.Br. and was awarded a PhD by the University of Freiburg in 2014 (magna cum laude). Since then she had been working as a senior researcher at the MPI until January 2018. Her research interests range from comparative criminal justice, comparative evidence rules, to corporate crime and its control.

This dissertation is available at the following libraries: Freiburg, Max-Planck-Institut für Ausländisches und Internationales Strafrecht; Freiburg, Universitätsbibliothek; Halle (Saale), Universitäts- und Landesbibliothek Sachsen-Anhalt; Hamburg, Max-Planck-Institut für Ausländisches und Internationales Privatrecht

DISSERTATION SUMMARY

PURPOSE AND RESEARCH TOPIC

Since a series of corporate scandals such as the cases of Enron, Siemens and WorldCom occurred, the academic field has been mired in debates about how to control economic crime. Strategies of compliance promotion and crime/deviance prevention have been widely studied, ranging from traditional formal control approaches such as penal control to informal approaches such as corporate governance (self-control). Hitherto, it has been widely recognized that criminal law has limits, and has therefore been suggested that in addition to punitive control approaches, persuasive (cooperative) control approaches should also be used to address white-collar crime (Scholz 1984; Braithwaite 1985; Sigler & Murphy 1988; Ayres & Braithwaite 1992; Simpson 2002; O'Brien 2007).

Unlike punitive approaches, persuasive/cooperative approaches do not focus on fault-based *ex post facto* punishment, but rather on efficiency-based *ex ante* prevention. In other words, the primary aim of persuasive/cooperative control is to facilitate compliance and self-control by firms through various strategies.

If we concede that punitive control approaches have limitations and accept the concept of persuasive (cooperative) control approaches, a critical question is: 'To what extent should persuasive control strategies be involved?' In response to this key question, Braithwaite (1985) developed a strategy of 'responsive regulation', arguing that compliance is most likely when a regulatory agency displays an explicit 'enforcement pyramid'. The pyramid model requires the regulator to be armed with a wide range of responses to various activities of firms that escalate in severity from education and persuasion at the base, through various hybrid strategies (persuasive and punitive) to crim-

inal sanctions at the apex of the pyramid (Braithwaite 1985; 2002; Ayres & Braithwaite 1995).

The corporate crime control approaches mentioned above are based on a Western legal context, which is quite different from the Asian legal context. First, unlike Western countries, law was traditionally not the primary guiding principle of Asian societies, and to some extent, still is not in many parts of Asian countries. This leads to the second noteworthy feature: shame rather than guilt, so-called 'face culture' (mianzi,面子), plays a significant role in maintaining social order and achieving security (Lin 2019). This leads to the questions:

Is criminal law an ideal instrument for controlling corporate crime? Are there other instruments of control to fight against corporate crime? Are control theories developed in the context of Western culture applicable in other regions? Taking money laundering control by banking institutions in China as an example, this study provides answers to these questions.

Methodology and Research Design

In addition to a theoretical framework based on John Braithwaite's responsive regulation (1985, 1992) and Julia Black's risk-based responsive regulation (2010), this study samples empirical material from official documents (annual reports of the People's Bank of China, the Supreme People's Procuratorate and the Supreme People's Court), evaluations of Financial Action Task Force (FATF), relevant news reports and interviews with professional staff. The core part of the study consists of five chapters: an introductory background is followed by three main chapters that each focus on a control approach (self-control, administrative control and penal control), which then leads to an analysis of the linkages between these approaches.

The first chapter presents background information, starting with an introduction to the general situation of money laundering and mechanisms for controlling it in China. It then introduces the Chinese banking industry and analyzes the relationship between money laundering (control) and banking institutions. Banking institutions are, on the one hand, both a vehicle and victim of money laundering activities; on the other hand, they are significant actors in the prevention of money laundering through the enforcement of control obligations such as custom due diligence (CDD) and suspicious activities reports (SARs).

In the second chapter, the self-control approach to banking institutions is presented. Starting from 'what-who-how', compliance cultures and internal policies (what to be complied with within an institution), organizations and their role in compliance promotion (who, and to what extent, should be responsible for compliance promotion), and internal control procedures (how to promote compliance within an institution) are assessed. The advantages and limitations of internal control as a control instrument will then be evaluated. The concept of compliance culture implies not only adherence to the letter of the law, but also adherence to the spirit of the law, linked to aspects of duty such as doing what ought to be done, moral obligation, accountability, propriety, answerability, and acting morally and ethically. Who should take responsibility for compliance promotion in banking institutions? The concept of 'tone at the top' indicates the critical role of top-level boards of directors and senior management in compliance promotion. A compliance function is taken on by a department or group of professionals

tasked especially with compliance supervision. The top level of an institution decides on an internal policy for compliance promotion, while the compliance function carries out the internal policy. The Basel Committee on Banking Supervision (BCBS) set up international standards for their responsibilities with respect to compliance promotion. Whether these international standards are currently met by Chinese legislation will be studied. How should compliance be promoted? A rule-based approach is easy for banking staff to follow, yet facilitates the development of counter-measures by criminals. Thus, a switch from a rule-based approach to a risk-based approach is recommended by the FATF. If and to what extent a risk-based approach is accepted in today's China is explained in this chapter.

The third chapter addresses administrative control approaches. In general, an internal control approach focuses on persuasive strategies, while a penal control approach focuses on punitive strategies. Under administrative control, however, persuasive and punitive strategies are equally important. Persuasive strategies such as issuing guidelines and publishing handbooks as well as on-site and off-site supervision facilitate compliance. Punitive strategies, that is, administrative sanctions deter and punish non-compliance. Accordingly, this thesis evaluates the advantages and limitations of the administrative approach as a control instrument.

The last resort – a penal control approach – is presented in the fourth chapter. A corporate criminal liability arrangement and its effect on deterrence are analysed. And the legal basis for anti-money laundering (AML)-compliance punishment in China is introduced. In accordance with current law, self-laundering is not criminalised. That is, banking staff will not be penalized for activities of laundering their own criminal proceeds, but only penalized for the predicate offense. Whether such an arrangement undermines the deterrent effect of penal control is presented in this chapter. Both sanction certainty and sanction severity are perceived as factors that determine the deterrent effect of a penal approach. In this chapter, severity and certainty of penal sanctioning in present China is laid out. Like other control approaches, a penal approach also has limitations and advantages, which are carved out in this chapter.

Based on the above analyses on self-control, administrative control and penal control approaches, the fifth chapter will study how these control approaches are linked to each other from both practical and theoretical perspectives. Theories concerning the linkages between control approaches, such as tit-for-tat regulatory philosophy, responsive regulation and interactive compliance are analysed, followed by a test of whether, and to what extent, they can be utilized in present China.

Findings

This study argues that none of the individual control instruments alone is capable of successfully controlling white-collar crime and promoting compliance. Control instruments are interdependent; each is incomplete without the other. Therefore, a comprehensive control approach that includes various control instruments is essential for sound compliance.

In comparison to street crimes, the situations and social bonds within an organization create an environment which is crucial for misconduct and white-collar crimes (Alaheto 2003: 335-355). Thus, based on the proposition that white-collar crime can, to a large extent, be prevented by reducing opportunities (situational prevention), oppor-

tunity-reducing methods are highly recommended (Clarke 1997; Korsell 2005). An internal control approach has obvious advantages reducing opportunities for misconduct, which is therefore of great significance in compliance promotion. Though developed in Western countries, a compliance program (internal control approach) is quite in line with Asian legal culture. It is an informal control approach, which encourages internal prevention and detection. It enables companies to solve problems within itself and save its reputation at the same time. An old saying, 'Don't wash your dirty linen in public' (*家丑不可外扬*), is deeply embedded in Chinese society. From this perspective, a compliance approach as an internal control instrument is logically consistent with this social value (Lin 2019).

In addition to the involvement of various control instruments, a sound control approach requires a proper way to link these instruments. China has a comprehensive control approach in place. The problem is not the absence of control instruments, but rather the efficient enforcement of these instruments. Key elements to achieving efficient enforcement are the proper linkages between various instruments. Through a normative analysis, this study finds that the link between self-control, administrative control, and penal control are recognized and accepted in China. Yet, on balance, the linkages among the control instruments in present-day China are deemed loose and reactive. The link between self-control and administrative control focuses on negative interplay, i.e., self-control is recognized as a legal obligation, which is supervised by state government. Failure to establish and enforce internal control mechanisms may result in administrative sanctions. The link between self-control and penal control is looser. Unlike the legal situation in the United States, where 'effective corporate compliance programs' are recognized as a justification for the mitigation of a corporation's sentence provided by 'organizational guidelines' (U.S. Sentencing Guidelines Manual § 8 B2 1(a) 2018), self-control (compliance program) has no criminal implication yet in present-day China. That is, a positive link between self-control and penal control is not currently recognized in China. In contrast, a close link between administrative control and penal control can be identified with normative and practical perspectives. Under certain circumstances, the demarcation line between administrative control and penal control is vague, since both administrative and penal agencies may be involved.

Based on the above study, a 'distinction approach' is provided, which abandons the concept of 'one size fits all'. Under this 'distinction approach', the optimal control approach should be decided on a case-by-case basis. In deciding control approaches for individual cases, special attention must be given to 1) the position of criminals in banking institutions (taking into consideration whether misconduct/crime is determined/executed by senior managers or other employees); 2) the root causes of non-compliance (analysing whether the root causes of non-compliance are due to lack of willingness or ability); 3) the records of criminals (assessing whether criminals are recidivists or first-time offenders); 4) the social context (examining whether the financial market is mature or relatively immature, which determines the costs of one's reputation for non-compliance).

To sum up, a comprehensive approach including persuasive punitive strategies can, and should, be taken by developing countries to control white-collar crime. To answer the question as to what extent persuasive approaches should be involved in the overall process of control, a 'distinction approach' (case-by-case analysis) was suggest-

ed. The key point concerning control should be to promote self-control by firms and facilitate real compliance-internalization and commitment to norms.

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YOUTH AND VIOLENCE IN BRAZIL: AN ETHNOGRAPHIC STUDY ON YOUTH STREET VIOLENCE RELATED TO DRUGS AND SOCIAL ORDER IN BRAZIL'S VIOLENT CITY OF MACEIÓ

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AUTHOR'S BIO

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DISSERTATION SUMMARY

This study explores the social dynamics of youth street violence in urban areas of Maceió in northeast Brazil. The capital of Alagoas' State has been portrayed as one of the most violent cities for youth in Brazil (Waiselfisz 2016; 2014; 2013; 2011; 1998). Maceió attracted the media spotlight in 2008, after it was identified as the most violent place in Brazil (Waiselfisz 2013) and the fifth most violent city for youths across the world in 2013 (Seguridad Justicia y Paz 2014).

The emergence of Maceió as one of the most violent cities in Brazil leads to questions concerning why a medium size city in Brazil became a dangerous hub where youths from certain parts of the city have the high probability of being a victim of lethal violence (Alves et al. 2014). An analysis of this phenomenon must consider where those cases of lethal violence took place; who the youths involved are, as well as their motivations, and the economic and social structures behind these violent acts. By analysing where homicide cases were committed, two crucial locational distinctions provide clues to embarking on this analysis: most of the homicides took places in disadvantaged areas of the city and were committed on the streets and other public areas (Núcleo de Estatísticas e Análise Criminal - NEAC/SSP-AL). According to NEAC/SSP-AL, around 94% of the homicides from 2012 until 2016 took place in areas called *'Vias e Locais Públicos'* (Road and Public Places) and *'Casa ou Imediações'* (Houses and Surroundings). The term 'Road and Public Places' combines homicides committed on large streets and squares all over the city; while 'Houses and Surroundings' refers to victims' homes and the small streets and alleys surrounding, which includes all sorts of streets unable to be reached by car and narrow alleys between the houses in the *grotas*.[1] Therefore, streets in a broad sense appear in both 'Road and Public Places' and 'Houses and Surroundings' as a subcategory, which indicates that streets are the main sphere where

[1] *Grota* is used to indicate an inclined space between two mountains. In Maceió the term is also used to indicate deprived areas in the city built on the slanted ground.

lethal violence takes place in Maceió. Understanding the meaning and the role violence plays in youths' lives in Brazil may, on one side, provide clues to explain the increase in lethal violence among them, and, on the other side, may indicate the relation between violent acts and social-economic transformations, the social rules in different communities, the drug trade and patterns of youth's behaviour.

This study aimed to identify processes that contribute to the involvement of male youths in street violence in Maceió. Therefore, it was necessary a) to examine the role that violence plays for individuals and/or criminal groups (Jacobs and Wright 2012) and social order on the streets of Maceió (Black 1983; Anderson 2000 ; Harding 2010) and b) explore the exact processes that result in interpersonal violence, gang violence and other forms of collective violence (Moore 1990). Another important topic is the significant relevance that status, role models, peers and money play in an individual's decision to join drug dealing groups and to commit violent acts. This study also investigates risk factors (individuals, families, peers, schools and communities) that may be related with individual orientations towards violence and criminal activities (Loeber and Le Blanc 1990; Le Blanc and Loeber 1998). This thesis analyses the 'universe' of drug trafficking, in order to understand why this business has become so attractive to youths, as well as investigating how street violence is related to drug dealing and how can it be used as an instrument of punishment to establish informal social control in the communities of Maceió.

Methods

The thesis draws from an empirical approach to address the research questions. An ethnographic study including two distinct methods was set up: observation and interviews (Maxfiled and Babbie 2011, 297). Data collection took place between January and July 2013, thus seven months of fieldwork. The primary sources of data for this dissertation are twenty-four semi-structured interviews with male youths from fifteen to twenty-five years of age who were perpetrators of violent street crime, as well as observations of several locations related to youth street violence. The interview techniques used in this research (Kruse 2014; Helfferich 2011) provided the appropriate mechanism to explore an individual's progression into the behaviour of street violence in Maceió. Secondary sources consulted included judicial and police records, photos, expert interviews with judges, prosecutors, teachers, professors, lawyers, social workers, psychologists, security agents, community members and semi-structured interviews with the youths' mothers. In addition, photographs from prison and internment units for adolescents subsequently taken by the author of this work in January 2016 were included into the analysis, since this access was not allowed in 2013.

Each interview with the youths was divided into at least three different meetings, and each session was based on three different topics, taking around forty minutes. In the first part of the interview, I asked about biographical information, family relations, a description of the community, entertainment inside/outside the neighbourhood, school, relationships, dangerous experiences and personal conceptions of status and identity. In the second block, I focused on work experiences, work opportunities, informal economies, migrations from rural areas, social rules in the communities, street violence and the drug trade in their neighbourhoods. The content of the last part of the interview per-

tained to the role of peers, their involvement in street violence, street gangs and drug-selling groups.

Once the interviews were collected and transcribed, their content was divided into 129 codes. The codes were established considering both the *Leitfragebogen* (key questions) and the prior findings on structure and the meanings of street violence in Maceió, that is, individual or collective violent acts, drug trade, delimitation of the spatial domain, and so on. The codification process allowed for an in-depth analysis of the interview text and systematized the data into different categories (Kruse 2014, 379). Each code was analysed considering the similarities and differences in the narratives regarding the same subject. This process revealed a set of relations concerning the causes and meaning of youth street violence in Maceió and shaped the content of this research. Therefore, the way youth street violence in Maceió is presented in this study is a direct consequence of the findings of the evaluation process.

The Content of the Chapters

The dissertation is divided into five chapters. The first is devoted to methods, data and qualitative analyses. This chapter includes a description of my preparation prior to the fieldwork, challenges faced during the data collection and the way the data was processed and analysed.

The second chapter investigates diverse aspects concerning the space, social conditions and the growth of violent crime in Maceió over the last years. *Favelas, Gratas* and *Conjuntos Habitacionais* (Public Housing Project)*,* are the direct consequence of a disorganized expansion of the urban area of the city, which experienced horizontal growth from the 1970s onwards (Japiassú 2015, 15). Considering general patterns of urban population increase in Brazil, Maceió had one of the most significant urban expansions in the country, according to the Brazilian Institute of Geography and Statistics. The growth of the population, the rise of new urban areas and uneven income distribution over the city demonstrated a relation between space and poverty. Since the expansion of urban areas occurred due to the absence of work opportunities in the countryside, a significant number of migrants came to Maceió with a low level of education and were unqualified to have a formal working position. Without the proper work qualifications to compete in the formal market, the unemployed were compelled to find alternative ways of having an income. As a consequence of this phenomenon, two sectors gained importance in these communities: informal activities based on the trade of goods and the supply of services (bricklayers, plumbers etc.), and illegal activities (the sale of stolen goods, the drug trade etc.). This chapter also explores poverty, the level of education, school dropouts, peer influences, the inefficiency of family control and precarious living conditions narrated by the interviewees as a determining effect in their path towards violent acts and criminal behaviour. The second chapter also offers an analysis of the geography of crime in Maceió, based on a quantitative study provided by the Public Safety Department of Alagoas' State – SSP – AL and studies on lethal violence in Maceió, as well as analyses of the youth's conception of space and crime in Maceió. For these purposes, the geography of crime is conceived as an investigation into the spatial appearance of crimes with respect to social and cultural aspects (Georges 1978, 2).

The third chapter discusses meanings and dynamics of streets in Maceió. Dwellers living in the areas considered middle and upper-class, likely consider streets as a place

where they are vulnerable and susceptible to be victims of crime. However, in some deprived areas of Maceió, streets are a field for interpersonal communication, entertainment, informal and illegal activities. In Maceió, male youths use the streets both for economic activities and as a stage for displaying masculinity, status and power. Streets are also places where conflicts and violent acts take place.

Chapter four describes the micro-level of the drug trade in Maceió and its relationship to violent street crime, as well as structural aspects of *bocas*[2] and drug trafficking networks and their dynamic over the city. Drug trafficking seems to have discovered the perfect environment to expand - 'grotas' and deprived neighbourhoods of Maceió – where dealers found similar social conditions to those in Rio de Janeiro's Favelas: poverty, a lack of opportunity and male youth looking for a profitable occupation. The growth of drug consumption over the city intensified the engagement of youths at the end stage of the drug business, retail selling, and increased the proliferation of *bocas*. The concept of a *boca* elaborated by youths covers both small businesses and structured *bocas* with task divisions. The *bocas* in Maceió were described in several ways: a set of locations for drug retail selling; a room or a house where the drug is processed and distributed for retail sale; the territorial domain of sellers and *donos* (owners of the *boca*). The term *ponto*, on the other hand, is used to indicate a spot on the streets or beach areas, where the youths sell the drug directly to consumers. In order to systematize the analysis, *bocas* were divided into three different categories: small, medium and large-sized bocas, based on size, structure and the number of members and tasks reported in the interviews.

The fifth chapter explores the terms *rixa*, *treta* and *bronca* commonly used by youth in Maceió to simplify or even hide the reasons behind street violence, motivated by the 'no crossing rule', and also the term *cabueta*, which labels individuals who report criminal activities to the authorities. The 'no crossing rule' and the rule of silence integrated an informal code of behavior created and enforced by *bocas* (drug-selling spots and/or spatial domains of drug dealers) and criminal groups in Maceió. Those who do not follow these norms are consequently punished through violent acts and/or death by criminals in order to express power and control over their domain.

Conclusion

The youths' interviews and the secondary data presented in this research highlight that youth street violence in Maceió is immersed in a sea of factors. The qualitative data displayed in this dissertation provide researchers a range of analytical problems. However, the conclusion of this study took as its focus the street violence as a mechanism that involves actors, their social environment, the informal market, drug trade and criminal organization. The youths' interviews demonstrated their lack of schooling and professional training. Youths living in impoverished areas such as *grotas*, favelas and public housing projects in Maceió, have limited access to school for different reasons: schools in their neighborhoods or communities are not able to meet demand in deprived areas; the interactions provided on the streets; the weak parental control and

[2] *Boca* is the abbreviation of the expression *boca de fumo*, slang used in Brazilian favelas for places where people could buy drugs.

substandard conditions of the schools drives them to drop out; and poverty and low-household income compel them to engage in informal or criminal activities. Considering that engagement in violent street crimes appears as a choice towards obtaining 'easy money' and youths' patterns of consumption, it's undeniable the role education and professional training can play as a preventive policy.

Illegal and disorganized urban occupation combined with governmental neglect has accentuated social inequalities and segregation of the poor over the city. Once the residents are unemployed and lack professional training, the informal economy became a strategy of survival. Indeed, Carvalho assumed that two out of three active workers in the deprived areas of Maceió receive household income through the informal economy (Carvalho 2012, 17). In this context, youths are the main target for engaging in the drug market as an alternative to overcoming the absence of formal labour opportunities (Albrecht 2003, 409).

The drug trade and access to firearms are the leading causes of violent street crimes in Maceió committed by youth. While the illegal drug trade does not necessarily lead to armed street violence (Reuter 2009, 275), the model of the drug trade implemented in Brazil and Latin America, especially with the rise of cocaine trade after the 1980's (Misse 2007; Olmo 1990), adopted armed violence to both strengthen and expand the drug market, and build a front-line defense against repressive policies adopted by the governments. This violent model of drug trade is the primary cause of lethal violence among youth throughout the country. Medium-sized Brazilian cities, such as Maceió, become alternatives for the expansion of the drug trade since male youths in these areas are prone to engage in such dangerous activity to access money. The drug trade, therefore, not only affects street violence in the activities of the trade itself, but the firearms provided by *bocas* and *facções* lead youths to commit serious predatory street crimes such as robbery and carjacking, as well as lethal violence.

The violent situation presented in this research shows that street violence in Maceió is also related to a code of informal rules. These rules are mainly enforced by drug dealers who possess the power to establish rules and order in their environments. This code works as an informal system of social control (Black 1983; 2004), which uses violence to punish those who transgress the rules and establish discipline among individuals in deprived areas of the city. In addition, drug dealers and criminal groups use violence as a tool to express power in order to gain respect and status.

The analysis of the different levels of *bocas* in Maceió neighbourhoods provides a significant contribution to understanding the structure of the drug trade in the city and the various tasks attributed to youth. Individuals placed at the base-level of the trade, the street sellers and soldiers, have a higher probability of engaging in an interpersonal armed confrontation and becoming victims of violent street crimes. These conclusions are based on the fact that all adolescent perpetrators of violent street crimes under internment were placed at the base level (retail street-sellers and soldiers) of the drug trade, while the imprisoned adults had a higher position in the business (managers and *boca* owners). In other words, the youths' narratives suggest that the likelihood of an adolescent being involved in violent street crimes is greater than adults occupying leadership positions in the trade since they rarely act on the streets. The placement of adolescents at the base represents a common strategy of the drug market in Brazil. This strategy occurs because, first, impoverished adolescents are more vulnerable and likely

to be attracted to illegal activities seeking profit and status; and secondly, they experience lighter punishment by the law that prohibits youths' internment for more than three years.[3] The brief length of internment induces both drug dealers and adults in criminal groups to hire adolescents for criminal activities. The dealers have the advantage of having adolescents doing the dangerous tasks on the streets, and adults compel them to take the blame for a crime committed by adults in criminal groups.

The outcomes described above shows that youth violence in Maceió operates within a cycle. Once the youths get involved in this cycle, it is difficult to get out of it. It is a cycle that usually begins in the streets and leads to an early dependency on informal activities and criminal behaviour. The cycle continues with internment units for adolescents or prisons for adults. Rather than ending the cycle, release from prison generally precipitates entering it all over again, since the social circumstances do not provide those released with the means to cease their criminal activities.

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BY THEIR OWN ACCOUNT: QUANTITATIVE ACCOUNTABILITY AND THE NATIONAL PROSECUTING AUTHORITY IN SOUTH AFRICA

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AUTHOR'S BIO

Johanna Mugler conducted her PhD at the Max Planck Institute for Social Anthropology. She joined the Institute for Social Anthropology at the University of Bern as a lecturer and researcher in 2012. In her on-going postdoctoral work, funded by the Swiss National Research Foundation, she extended her interest in accountability, quantification and law to the fiscal accountabilities of global taxpayers and explores the negotiation of international tax norms, rules and standards within the *G20 OECD Base Erosion and Profit Shifting* initiative. Her publications include: *Measuring Justice. Quantitative Accountability and the National Prosecuting Authority in South Africa*; the co-edited volume *A World of Indicators. The Making of Governmental Knowledge Through Quantification* (both Cambridge University Press, 2015) and 'Regulatory Capture? Fiscal Anthropological Insights into the Heart of Contemporary Statehood' (*The Journal of Legal Pluralism and Unofficial Law*, 2018)

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DISSERTATION SUMMARY

My thesis is about accountability. Accountability, or the way people explain and justify specific social situations, 'is part of the general fabric of human interchange' (Strathern 2000: 4). It is a concept of central importance to the understanding of social action. Furthermore, public accountability is evidently required for good governance, redistributive justice and fair resource allocation as it can minimise unpredictability and arbitrariness and can control discretion.

More specifically, my thesis is about quantitative accountability and the National Prosecuting Authority (NPA) in South Africa. I was interested in how prosecutors, who have the power to call others to account for wrongdoing, are themselves held accountable. Central to my study is the role played by recently introduced performance measurement systems in the way prosecutors are held accountable. I explore how these measurement systems shape and influence South African prosecutors' understanding of accountability and their prosecutorial practices. I ask whether there are significant implications for legal work, as the language of 'performance statistics', 'indicators', 'targets', 'rates' and 'rankings' is becoming common parlance within the judicial system.

While numerical representations are gaining increasing importance for the demonstration of accountability in many government and non-government settings in the twenty-first century, the effects and consequences of this for our social, institutional and political life are relatively opaque (Merry 2011; Rottenburg et al 2015). We know little

about what numbers do in and to organisations, or what professionals do with them at work and whether and how they affect operations, decisions, the allocation of resources and their accountability. Numbers provide people with universalised and standardised language, but we know that this does not translate into the purpose and effect of numbers being the same in different settings.

My thesis follows a small number of court and managerial prosecutors through their everyday work life in the NPA. By ethnographically exploring the role that numbers play in their prosecutorial (account giving) practice and prosecutors' reflections on the relationship between accountability, quantification and law, my aim was to contribute to a more nuanced and textured social scientific understanding of the effect and impact of the increasing use of quantified knowledge in many professional and organisational settings worldwide. Mapping multiple ways of understanding the relationship between accountability and quantification in the NPA allows me to problematize the widespread idea that quantitative forms of accountability always and inevitably subsume other more qualitative forms of account giving. While various studies show the concern, frustration and fear of professionals about the damaging fects these quantitative forms of accountability have on the creativity, freedom and collaborative nature of expert systems, I show that the reactions and attitudes of the legal professionals of this study differ substantially. They did not feel that the numbers diminish their discretion, undermine the authority of law or force them to make decisions, which were 'good for the stats' but 'not good for justice'.

In summary, my thesis seeks to make five points. Firstly, the meaning, use and effect of quantitative accountability are context-dependent and time-specific. That knowledge is situational and relational is something which social anthropologists stress in most research settings. It is a key analytical concept in the methodology of the discipline (Emerson, Fretz and Shaw 1995: 169ff.). This professional invocation of context somehow seems to be applied less often when it comes to numerical representations. This is no doubt connected to the reason why numbers were (or are) propagated and used in many contexts in the first place: namely, that they seemingly provide actors with a more objective, precise and impartial way of knowing, which is supposed to eliminate the importance of the contextual knowledge that is often associated with subjectivity, favouritism or more generally with equivocality (Porter 1995).

My research has shown that performance statistics, rates, indicators, targets and rankings were a common feature in the working world of most South African prosecutors I observed, shadowed and interviewed in state courts and NPA head offices between 2008 and 2012. These numbers were central to how lower court prosecutors talked about their work and accounted for it to their seniors; and further, for how managerial prosecutors managed their staff and the NPA on a regional, provincial and national level; and lastly for how members of the NPA upper management accounted for the organisations' work to the public, namely to parliament and the media. The commonly raised concern, however, that quantitative forms of accountability supersede other non-quantitative and deliberative forms of accountability, that they narrow actors' understanding of their work and options to account for their work and limit their professional discretion, cannot be confirmed for this setting. I showed throughout the thesis that concepts like professionalism, legal accountability/liability and personal ideas and ideals of justice and public service were strong alternatives for how court prosecutors

understood and practiced their accountability. In other words, they had some control and flexibility over how their reputations were defined and what good prosecutorial performance should entail.

I have provided, for example, descriptions which demonstrate that court prosecutors were indeed aware of cases where guilty pleas, mediations or diversions were 'good for the stats' because they took less time to finalise and would consequently count positively towards their finalisation rate performance indicator. However, this did not mean that prosecutors perceived other more complicated cases as 'bad for the stats'. In contrast, I argued that a 'trial', the most time-consuming way to finalise a case for a prosecutors, was what the majority favoured since their professional identity was closely linked to being a litigator and not to being a case administrator. I also showed that prosecutors' interest in speedy alternative dispute resolution mechanism could not only be explained by their pressure to reach a certain target of finalised cases each month, but also by an awareness that not all complainants can afford and/or enjoy adversarial legal court battles as much as they do. For example, mediation gave prosecutors, especially those whose understanding of professional accountability also included the desire to ensure high levels of courtesy for their 'customers', the opportunity to accommodate complainants who demanded the informal involvement of an official criminal justice employee for their dispute management, but not the formality and infinity of a trial or a criminal conviction.

That these prosecutors did not feel torn between making decisions which were 'good for the stats' and ones which were 'good for justice' was also evident when I discussed their approach to the NPA performance indicator conviction rates. While convictions mattered to most prosecutors, to which phrases such as 'no one likes to lose a case' attest, it was not the number of convictions that counted most when prosecutors talked with their colleagues about 'their trials'. The focus in these conversations was predominantly on *how* they obtained the convictions: in which types of cases and in spite of which obstacles. Harshness towards the accused and/or clever cross-examination tactics, the sophistication of a case strategy or the style of legal argumentation and case law used to 'take apart' the 'smart private defence lawyer', as well as the intricacies of the specific case, were what made them visibly proud or portrayed them as well-performing prosecutors in their own and in their colleagues' eyes.

In a second step, I showed that managerial prosecutors' understanding and practice of accountability are also wider than having 'good stats'. While they use the quantitative performance information for internal management purposes to create economic awareness and for adhering to external accountability demands, I provided examples which demonstrate that they were clearly aware of its limits and shortcomings. The managers in the observed meetings I described did not treat the quantified performance information as completely objective, precise and accurate. In other words, they did not perceive the information as containing simple and straightforward facts. Despite emphasising the way that quantitative performance information can enable oversight by assisting them to know 'all things relevant to our work […] will know exactly each court in each province', when prosecutorial managers made sense of the stats in front of them, they always relied on their own and other trusted people's judgement, discretion and interpretation. It was clear to them that numerical representations are selective, of-

ten more ambiguous than they might first appear and that they did not tell them everything they needed to know to manage a situation or make a decision.

Therefore I would suggest, and this is my second point, that the dominance of quantitative forms of accountability depends upon how much power, faith and credibility powerful actors in organisational setting place on numerical representations. As Vormbusch (2007: 61) writes, 'the power of numbers, to a large extent, relies on the social construction of calculations remaining hidden' (own translation). Being aware of this is 'the basis for a new, in a sense, clarified instead of enlightened handling' of numerical information; and a sign for a more 'reflexive approach to numbers' in certain societal domains (2007: 61). Prosecutors' awareness of the limits and shortcomings of the constructedness and constructiveness of the quantified performance information, and their insistence and reliance on other forms of knowledge and accountability when assessing a situation or making a decision are more clear signs, I argue, that professionals in this setting were not so easily disciplined into 'auditable selves'. Through their daily involvement with numbers, they gained, as I would call it, *numerical reflexivity*.

For most of the observed prosecutors there was no inherent contradiction between being concerned about quality and quantity; there was more of an assumption that one is helpful, or needed, to preserve the other and that they are capable of having simultaneous, but differing thoughts. Prosecutors' notions of the relationship between quantity and quality are important, because when one always presumes there is a contradiction between the two, it becomes difficult to evaluate the adequacy of the relationship more closely in different settings and at different times. There is always the underlying feeling that one exists at the cost of the other (Stinchcombe 2001). This hinders the establishment of a set of factors (e.g. institutional, historical, economic, political or metric specific) by which one can make normative judgements about quantification and accountability.

My third point offers some guidance for building such a framework. The individual numerical reflexivity of relevant actors is essential when trying to understand the meaning, use and effect of quantitative accountability in specific settings. I suggest that the institutional setup of an organisational field, and how entrenched quantification is historically therein, are equally important factors in this scholarly endeavour. Espeland and Sauder (2016) showed in their study on the effects of the USN Law School Rankings that professionals can be clearly aware of the constructedness and constructiveness of numerical representations, but can nevertheless still fail to protect their professional discretion and lose the authority to define the central parameters within which their work is evaluated. Although the law school leaders depicted deeply resented the methodology of the public law school ranking, they felt forced to take them seriously. This was because external audiences relied on them to make far-reaching decisions which affected the law school's status and resources, both human and financial, in such a tangible way that they could not simply be ignored.

I emphasized in the thesis that the professionals in my research setting had conciliatory attitudes towards their organisation's performance measurement system. Most prosecutors were not afraid of them and felt that their professional discretion remained intact despite being required by South Africa's Public Finance Management Act of 1998 to account quantitatively. I suggest that this is the case because the allocation of resources in the NPA and the Department of Justice and Constitutional Development

are not tightly coupled to the NPA's performance measurement system. I argue that the authority of specific legal principles like 'equality before the law', 'due process' or 'jurisdiction', which are enshrined in the country's criminal procedure act and its constitution, slow down or even prevent active competition between courts for clients, cases and funds. The rules of law require that each court in the country functions in the same manner; that the accused and complainants are treated equally; and that cases are heard where the court has the jurisdiction to hear that case. As a result, resources are allocated on a needs basis and not on a merit in this setting. In other words, a well-performing court does not get more resources than a poorly performing court. Furthermore, I show that the rules of law also limit the choice of all involved legal actors as prosecutors cannot cherry-pick their cases, nor can complainants or their attorneys/advocates take their case to the best-ranked court of the province or country.

Alongside the authority of certain legal principles, which temper resource competition via performance measurement figures in this setting, I argued that the lack of (sophisticated) quantification chains slows down the proliferation of such painful and unproductive effects in this organisational field. Cases are classified in a limited fashion; according to district, regional or high court matters; and as serious or less serious crimes. There are currently no further attempts to classify and quantify the complexity of these cases. This means that there is no clear score or parameter on which prosecutors can easily choose a case which is 'good for the stats' over one which is 'bad for the stats'. That most NPA performance numbers do not travel far means that they are not made public and do not leave the organisation. This prevents images such as 'best ranked court' or 'prosecution cluster' from emerging and circulating in the public realm, which in turn means that poorly performing courts and clusters are not subject to immense pressure.

I argued lastly on the point of resource allocation. Indeed, the NPA intended to introduce performance-related pay mechanisms for their employees in order to create a more competitive work environment, but this plan never quite materialised. Promotions, demotions, praises and sanctions were not clearly coupled to prosecutors' quantitative performance information. This was firstly due to there being insufficient funds to pay out such bonuses or increases, and, secondly, due to a twenty-year-old struggle for a raise in salary for all prosecutors. Since the occupational group of prosecutors achieved professional status in the 1990s, their claim for better remuneration became unignorable. Furthermore, over the last years, the objective of transforming the profession of prosecutors into one that is attractive to talented and skilled lawyers seemed more important for the NPAs than singling out underperformers.

My fourth point is simply that empirical research about the 'doing of numbers' is important. It provides knowledge that can shift discussions pertaining to the social studies of numbers beyond the point where numerical representations' 'reality-obscuring-capacity' is repetitively emphasised. While a critical stance towards the quantification of complex social phenomena and quantitative accountability is no doubt essential, I argue that the 'taken-for-granted mistrust' in numbers, which is particularly prevalent among anthropologists, can be as damaging as the 'taken-for-granted validity of numbers' many scholars are rightly concerned about. The aim of my study is not to advocate for a disregard of these concerns entirely – not at all – but to say that if one focuses too narrowly on these poles when analysing people's interactions with numbers, then it be-

comes possible to miss the larger spectrum of locally relevant ways of working with numbers in various settings.

In the thesis, I described a professional work environment in which some of the numerical representations the organisation produces are called 'creative' and 'inflated' by some external audiences. The NPA is accused of misleading the public with its conviction rate instead of informing it of the 'real' workings of the organisation. I showed that one could certainly interpret prosecutorial managers' insistence on their own conviction rate counting standard as straightforward numerical interest politics. I argued, however, that this form of analysis neglects how these actors use these numbers as valid sense making and rationalising tools. They carved out, with these numerical representations which they call 'not perfect' and 'not 100% correct', a specific narrow area of the wider working landscape of the criminal justice system that would not be visible otherwise. In doing so, important aspects and subtleties become apparent that are not visible from the perspective of other used or proposed conviction rate standards. While it is suggested that the NPA uses its good conviction rate to avoid criticism and reject responsibility for the country's overall conviction rates, I argued that the different rates allow for important debates and negotiations – about the division of labour and accountability attributions between the different state criminal justice actors – to emerge. In that sense, the conviction rates contribute to public accountability and do not obscure it. These types of nuances can assist us in engaging seriously and trying to understand the context-specific meanings, uses and purposes of numerical representations. This is essential when living in a world surrounded by ever-increasing amounts of numbers and at a time when increasing demands for quantitative accountability coincide with scarcities of public resources, both in South Africa and elsewhere.

My last point provides an outlook. This thesis describes how accountability is made in practice; which methods and tools people and organisations use in that process; and how they reflect upon it. It does not explain what accountability is. I discussed the most prominent accountability concepts for the NPA, namely accountability as the separation of powers, representation and professionalism and as a performance measurement. I made clear that accountability has more logical, visible, tangible and technological aspects to it (e.g. performance statistics, annual reports, legal acts, legal reviews, meetings, architecture or skin colour). It also has more implicit, bodily, informal and invisible aspects (e.g. trust, gut feeling, ethics, courtesy, gender, informal conversations). The different forms of accountability I presented herein are not equally important at all times for all parts of the prosecuting authority, since different constituencies can have different accountability demands and these can have dissimilar effects on disparate parts of the NPA, on the people who work in these units and on the cases they handle.

Performance measurement systems play an important role to hold lower court prosecutors accountable for the court resources they spend on the several hundreds of cases they often have to deal with per month. The prosecutors are faced with the difficult job of 'having to do the right thing' and be fair, but also to ensure that all of this is being done in a reasonable amount of time. Owing to the fact that law works incredibly slowly, even if it is not slowed down as a result of mistakes, negligence or through the intentions of actors, it requires time to operate effectively and therefore, large amounts of public money. The fear that critics of performance measurement systems hold is that when a measurement is put on justice, there is the risk that justice falls by the wayside.

Justice should not have a price like any other commodity since it is considered a right, a human right that everyone is entitled to. The South African prosecutors, as well as the magistrates and judges I worked with, would confirm that statement wholeheartedly. Currently there is no price on justice and for good reasons.

Nevertheless, justice has a price. Where does the money come from to pay for this human right/for justice? How is it raised and from which part of society? Where and how are the public finances for redistribution and collective action negotiated? And lastly, who decides how much a country's justice system receives from public (tax) money and which justice issues will be addressed with it? These are basic questions relating to the economic side of justice, which my research has not answered – they do not form part of the going concerns of most of the prosecutors I worked with – but somehow, they raised themselves strongly while writing this thesis. Despite the fear that there should not be a price put on justice, paying attention to the economic side of justice is crucial for future in-depth anthropological understandings of justice, public accountability and the working of state apparatuses.

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RETRIBUTIVE VS RESTORATIVE JUSTICE IN THE NORTHERN UGANDA CONFLICT: A CASE FOR SELECTIVE JUSTICE; THE APPLICATION OF DIFFERENT FORMS OF CRIMINAL JUSTICE

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DISSERTATION SUMMARY

The northern Uganda conflict was a local civil war that expanded to other countries such as South Sudan, Democratic Republic of Congo and Central African Republic. It immensely drew the attention of the international community, so much so that the United States of America sent troops to boost local armies. The conflict begun as a rebellion against the ruling government and was to a certain extent locally supported. However, it gradually developed into a heinous and atrocious war. The rebellion's leader, Joseph Kony, became a hardened guerrilla fighter, who effectively eluded combined national armies for over two decades. He is still not captured and is hiding somewhere. The conflict's criminal actions particularly presented serious challenges to many: Invisible actors and perpetrators, the victims 'attitudes and involvement of other quiet but significant parties. As communities struggled to reconstruct social order (after undergoing the said conflict for long), justice needed to be administered. However, the form of justice, a mixture of attitudes of victims to perpetrators, the actions of perpetrators and those supporting them all created complications. Moreover, applicable forms of justice (local traditional forms, national and the International Criminal Court) took a parallel rather than a complementary role in addressing the aftermath of the conflict.

In order to start understanding this legal pluralism, this study was about the forms of justice and the general complication of dealing with criminality in the conflict, as well as the restoration of social order. The study dealt with the general question of 'which form of justice could be applied in the aftermath of the conflict, given the complexity of stakeholders (including victims, perpetrators, perpetrators behind perpetrators, justice administrators as well as the views of all of them)?' The study populations

included members of the victim communities in the conflict area and their leaders. These underwent and suffered the atrocious actions either directly or indirectly. Some of these community members double as victims and perpetrators. They were considered and chosen as crucial, because they provided insights into the meaning of justice and the appropriate forms. They also provided insights into reconciliatory and restorative possibilities, which envisaged social order, peace and stability. Opinions were also sought from humanitarian workers, local and religious leaders as well as media persons. These were sought after because they helped to provide a neutral analysis of the conflict. Overall, a representative sample was drawn from the above-mentioned categories of populations using snowball and convenience sampling techniques. Hence, using a triangulation of methods of data collection (including face-to-face interviews, observations and documentary analysis), qualitative data was collected. It was analysed with the help of computer aided qualitative data analysis software called MAXQDA.

The study found out from the respondents in the field that atrocities were committed by all conflicting parties; the extent of which could only be revealed by victims to courts of law if they felt well protected, and assured of their security and/or safety. Respondents revealed that as much as rebels committed atrocities, the government soldiers also did the same in some ways. They killed people, looted their properties and displaced them. For instance, one local leader stated that;

We can't be sure of who killed us. These different groups. Armed people were coming to fight, and what people know is that they were sandwiched between the two and both. All these fighters committed atrocities against the people… because they all wore the same uniform and behaved in a similar way…you wouldn't distinguish.

It was also found out that many of the perpetrators (on the side of rebels) were victims of the same atrocities. They were innocent young children who were abducted, indoctrinated and turned into hardened fighters and killers. The best example is Dominic Ongwen, who is still at the time of writing this summary at the International Criminal Court in The Hague. Indeed, the separation of victims from perpetrators was and is still very difficult even at local community levels.

With regard to the forms of justice, it was established that the victim communities were caught between formally retributive and informally restorative forms of justice. While some (especially local illiterate) members of the affected communities thought local forms such as Mato Oput were the best option, others (especially among the formal elites) pushed for formalized forms of justice, including the national courts and International Criminal Court.

It was further found out that there existed strong retaliatory feelings among the local community members. This was something very peculiar at the time of doing the field research for this thesis. The local members feel that some individuals in the government intended to kill them in large numbers in order to create space to graze their cattle on the locals' land. When locals see long-horned cattle that the president's tribesmen rear, they feel cheated, because their cows were taken away, some of them were looted purportedly by government soldiers. They now do not own as many cattle as the other so-called intruders from the western parts of Uganda. As a consequence, it was observed that latent conflicts and their triggers were wide-spread. At time, there was a looming feeling by most people that they were living in a precarious region, prone to conflicts and even war.

Drawing on the findings, some conclusions and recommendations were made on how to apply justice. It was, for instance concluded that both retributive and restorative forms carry some form of punishment and that different forms of justice in that conflict situation could be applied together. This could even help in resolving some of the problems, such as differences in processes and proportionality of punishments. While formalized retributive forms attribute responsibility on individual offenders and punish them in proportionate ways, informal restorative forms spread responsibility to families and clans. In this way, the whole clan or community pays for an individual's offense. This then bestows upon communities a responsibility of controlling crime. Shaming is for example a form of punishment, which, by some, may not be perceived as such. Yet in traditional restorative mechanisms, such as the rituals in Mato Oput, the individual is made to undergo a kind of shaming, producing deterrence, or, in other words making it clear to others that it is not good to offend. It is under such contexts that confining the aspect of punishment to retributive forms of justice only may be considered unfair. Further, taking perpetrators to the International Criminal Court yielded justice on one hand, but may also be viewed as a fulfilment of the politics of law on the other. In fact, unless all alleged perpetrators are similarly indicted, tried and punished; and victims satisfactorily compensated, the International Criminal Court's work continues to be perceived as a grabber of justice from those who needed it. Moreover, the processes, procedures and limitations of the International Criminal Court make it hard for it to ably handle most of the allegations. For instance, it cannot handle offenses that took place before July 2002. This means that some level of discriminations has inevitably to occur. This then floated the idea and recommendation of selective justice in its positive sense.

With regard to victims' perceptions on selective justice, it was found out that the victim community members recognize the difficulty and the unfairness of punishing every perpetrator in a similar way. For instance, if formal courts of law are to be the only applicable form, then almost everybody in the region may be arrested. However, there is also a vivid understanding that top leaders may need to be handled in a somewhat different arrangement than those below them. It was a disturbing fact that there is persistent denial by both sides that each of the sides committed atrocious actions on the people. It would be easily perceived as unfair to have Kony taken to the International Criminal Court, but not the top commanders of the government soldiers, who were alleged to have overseen the commitment of atrocities in the region. Therefore, selective justice can be understood in a positive sense by victims only if perpetrators of similar crimes are differentiated according to ranks and/or differentiated as captors and captives. Otherwise, those at the same levels need to be handled under similar forms.

The co-existence of retributive (mainly formal) and restorative (mainly informal) forms of justice was not new in Uganda. Even without consideration of the conflict, in case of homicide, formal courts of law would first handle the case. After such formalities (including sentencing and serving of such sentence), traditional ritualistic forms would also take place. However, in the aftermath of the war in northern Uganda, there were some dilemmas in regard of the selection process of the justice system. This question is deeply related to the question of what people generally understood as justice. Justice is as multidisciplinary as the many subjects that contribute to its conceptualization, involving several different perspectives and fields of expertise. Therefore, a harmonious interplay of the forms of such an interdisciplinary aspect of society seemed

difficult. It was within such difficulties that the parallel co-existence of modern formal retributive forms and traditional informal restorative forms were not only inevitable but also useful. While traditional forms of justice appeared to jeopardize formal forms, they did cover a psycho-social gap that might have been created by purely retributive forms.

THE USE OF ALTERNATIVE DISPUTE RESOLUTION MECHANISMS AND RESTORATIVE JUSTICE FOR CASES OF HONOUR-BASED VIOLENCE AND FORCED MARRIAGES IN EUROPE

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DISSERTATION SUMMARY

HONOUR-BASED VIOLENCE AND FORCED MARRIAGES

In the last 20 years, the related phenomena of honour-based violence and forced marriages have received increasing attention at the international and European level. Honour-based violence is an umbrella term which includes a variety of conducts such as forced and early marriages, female genital mutilation, controlling or coercive behaviour, domestic violence, female infanticide or pre-natal sex selection. It is a form of negative social control aimed at limiting freedom of women and girls within the family or the community and a form of punishment for not conforming to the social and cultural norms of the group. These forms of control and violence are typical of collectively organized societies and might be accentuated in the migration context, where they become a way of keeping the integrity of the group and enhancing cultural and ethnic identities, in a situation in which the encounter with different systems of norms might put the preservation of the group and its practices at risk. Currently in Europe, these forms of violence are experienced mainly within immigrant minorities, especially within groups coming from the Middle East and South Asia.

Although no commonly agreed definition of honour-based violence exists, the United Nations Developing Legislation on Violence against Women and Girls (2011) has enumerated three elements that characterize it. First, the control, or desire to exert control, over a woman's behaviour. Second, a male's feeling of shame over his loss of control or perceived loss of control over her behaviour. Third, the community or familial involvement in augmenting and addressing this shame. While the first two elements are typical of any form of violence against women and girls, the third, collective element differentiates this type of violence from other types of domestic violence. The definition honour-based violence refers primarily to the motivation given by offenders (and usually confirmed by victims) for the violence: a punishment for breaching the group's code of conduct and a way of re-establishing the honour of the family or the entire group (thereby counterbalancing the shame caused by that breach). Conducts that

might amount to a breach of the honour code can range from pre-marital to extra-marital sex, a relationship or friendship with somebody from another faith or ethnicity, refusal to marry somebody from within the family or the community, inappropriate attire, homosexuality and more. Responses to the breaches of the honour code are usually enforced by the parents or the brothers of the victims (sometimes by the husband or his family). Such responses may vary according to the persons involved, the circumstances of the case and, most importantly, the level of public display that the case has reached, as gossip and rumours are capable of affecting the honour and reputation of a family more than the actual conduct of the woman (Cooney 2014: 412; Oberwittler and Kasselt 2014: 653). These violent reactions might go from threat to psychological and physical abuse (that can amount to murder), controlling behaviour (limiting a woman's freedom and autonomy), exile from the family or group, and coercion, especially in the form of forced marriage.

The causes of honour-based violence are to be found in patriarchal social and cultural norms where both gender and age power relations (hierarchy) play a role. Other factors, such as social influence and economic interests can also play a role and this is particularly evident in the case of forced marriages, where family alliances are established and, in communities that practice endogamy, family assets are protected. In the diaspora, one of the triggering factors of this type of violence is the conflict deriving from the encounter of two different sets of values and norms. Conflict that becomes particularly evident when second or third generation migrants are involved. On the one hand, in fact, there are often poorly integrated parents, born and raised in a different context and time, who have brought their social and cultural norms and codes of conduct with them in the new country. On the other, there are young girls, second or third generation migrants, socialized in the 'host' country, well integrated, and conducting a life that adapts to the standards of the new society, which often conflict with the rules imposed by the family. The conflict between these different cultural and social norms might result in violence.

The Response of European Countries

Recent International and European conventions and reports have increasingly focused on honour-based violence and have encouraged states to adopt legislation in this field. In Europe, strong responses towards this type of violence have been adopted, including legislation and policy actions containing direct references to the concepts of honour, culture, and tradition and ad hoc criminalization targeting forced marriages as a separate offence (next to existing general provisions on coercion). This has been due, at least partially, to the adoption of the Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention, 2011), which has now been ratified by most signatory countries. The Convention specifically refers to the concepts of 'culture, custom, religion, tradition or so-called "honour"' and calls upon the criminalization of forced marriages by State parties. Specific strategies in this field have also been adopted by European states. These include specific training for police and other practitioners working with victims, specialized risk assessment and victim support services.

Despite the adoption of specific measures, data concerning reporting and prosecution rates for these crimes remain very low. Existing figures show high levels of under-

reporting (Mulvihill et. Al. 2018: 1). Even where reporting of these crimes is increasing very few cases are prosecuted and the number of convictions remains very low. When accessing the justice system and after reporting the violence, victims of honour-based violence encounter three major sets of difficulties. First, victims of honour-based violence encounter problems that are typical of any other form of domestic and family violence. These have to deal with privacy concerns, fear of reprisal and especially close relationship with the offender (Felson et. Al. 2002: 617). A second set of reasons is linked to intersectionality issues. Ethnic and immigrant minority women victims of violence are often oppressed by multiples spheres of domination deriving from the intersection of gender, race, religion and other factors (for examples socio-economic conditions) that might undermine their capacity to seek help and worsen their position both within their communities and within the wider society (including the criminal justice system) (Crenshaw 1994). Third and in addition to these factors, other elements, specifically linked to honour-based violence and the context in which it takes place contribute to maintain reporting rates very low. Victims of honour-based violence, and in particular of forced marriages, are often girls or young women who experience violence from their parents, their siblings or other family members. The majority of them have been raised in close-knit communities and show great loyalty to the family and the community they belong too. Depending on how long they have been in the new country, they might have little or no network outside their own community. As a result, their capability or willingness to turn to the authorities and break the ties with the entire family (as it is often required by European criminal justice systems for this type of crimes) cannot be taken for granted (Roberts, Campbell and Lloyd 2014: 9). Moreover, within communities characterized by high levels of social control, the fear of stigma and ostracism and the pressure exercised on victims to maintain privacy on family issues (given the importance of gossip and rumours in these societies) might be very high. A further obstacle to victims' access to formal justice, of particular relevance for this thesis, is represented by the way in which conflicts are resolved in communities where honour-based violence takes place, in particular in Middle-Eastern and South Asian societies. In these societies, the existence of alternative (informal) resolution mechanisms is particularly widespread and the resort to the formal justice system by the victim (especially in cases involving family issues and sexuality) might increase the chances of retaliation or escalation of violence. Alternative mechanisms exist in Middle Eastern and South Asian countries but also within ethnic and immigrant minorities coming from these countries and settled in Europe. These mechanisms are creating increasing concerns at the international and European level in terms of respect of the rights and interests of the participants, in particular of women and girls. However, these same mechanisms might also be able to better respond to the needs of the victims, especially those needs emerging from situations of normative and identity plurality that often characterize their situations and that the criminal justice system is not able to address.

Alternative Dispute Resolution Mechanisms and Restorative Justice

In Europe, a negative attitude towards the use of mediation and similar practices for cases of honour-based violence has so far prevailed. On the one hand, there is a general scepticism towards the use of alternative dispute resolution mechanisms (ADR), or in the criminal justice sphere restorative justice, for cases of violence against women,

mainly for reasons of safety and power imbalance. Recently, the Istanbul Convention at article 48 has adopted this view and has prohibited the use of mandatory alternative dispute resolution processes for the crimes covered by the convention. On the other hand, scepticism is even stronger where mediation and conciliation processes are offered within ethnic and immigrant communities with little or no control of state authorities. Community alternative dispute resolution mechanisms brought from the home country (or developed in the diaspora) are often accused of enforcing norms (secular or religious) that might conflict with the law of the state. Such mechanisms have been criticized for being detrimental to victims, especially women and children: next to the mentioned concerns about safety and power imbalances, issues of gender equality and discrimination, autonomy (coercion) and access to (formal) justice emerge. The CEDAW report on the UK and Northern Ireland 2013 urges the State party to 'ensure effective access by women to courts and tribunals, in particular women victims of violence (…) [and] [p]rotect women from informal community arbitration systems, particularly those which violate their rights under the Convention.' These mechanisms are therefore seen as a further barrier for access to formal justice by women and girls victims of violence within ethnic and immigrant minorities.

Research Question and Outline of the Study

The study aimed, therefore, at answering the following question: do alternative solutions exist that, when applied to cases of honour-based violence and forced marriages, are capable of avoiding, on the one hand, the shortcomings of criminal law-based responses and, on the other, the problems generally associated with alternative dispute resolution mechanisms? In order to answer this question this study proceeded in two steps.

First, it analysed existing literature to identify on the one hand, major shortcomings linked to criminal law-based responses to honour-based violence and forced marriages, and, on the other, major problems (but also potentials), associated with the use of alternative dispute resolution mechanisms (both community alternative dispute resolution and restorative justice).

Second, the hypotheses developed through the mentioned analysis of the literature were tested through an empirical analysis of case studies. Existing programs making use of ADR or restorative justice for cases of honour-based violence and forced marriages were identified and analysed through expert (and when possible victims') interviews. In the United Kingdom, mediation and other forms of restorative justice or ADR are strongly discouraged at the official level for cases of honour-based violence. However, community bodies and organizations sometimes engage in dialogue, mediation, negotiation or arbitration with the parties. Here, two community-based programs were examined. The first one is the case of a women NGO, which often intervenes in cases of honour-based violence and forced marriages taking place within the Muslim community of the region in which it is based. The NGO is composed by a few women that enjoy full respect within the community and that are directly contacted by the parties (especially by the victims) in cases of family conflicts and violence. The second case analyzed concerns the work of the London Kurdish Peace Committee (KPC) and relied extensively on the work of Dr. Latif Tas who conducted ethnographic research on the Committee. The KPC is an informal Kurdish tribunal created in 2001 in London to

serve as a dispute resolution system based on customary (secular) norms (Tas 2014: 79). It is a secular or non-religious body formed by eight judges, including a minimum of two women. Judges are elected every year through elections within the community and must be 'respected leaders, trusted by the community and with recognized wisdom, negotiating skills and authority as well as having an unblemished personal reputation and a specific knowledge of Kurdish traditions and customs'(Tas 2014a: 83). The procedure resembles that of an adjudication or arbitration in which decisions are taken based on a hybrid between Kurdish customary law and English law. Particular attention is paid to the concept of family honour, and to social structures such as family and kinship, which are the basis of the Kurdish society. In order to support women in the community and to respond to possible criticism on the respect of women's rights during proceedings in front of the KPC, the Kurdish community established the Kurdish Women Organization. A subgroup of this organization, the Roj Women's Association, is operating within the Committee dealing with sensitive cases such as domestic and sexual violence, honour-based violence and forced marriages (Tas 2014a: 92).

In Norway, instead, restorative justice is currently used by the state-based National Mediation Service (Konfliktrådet) both as an alternative and as an addition to criminal trials for cases of honour related violence. Here, the work of two agencies of the National Mediation Service specialized in these cases was taken into account. One of them, under the supervision of the Ministry of Justice, developed a three-year pilot project that handled forty-two cases of honour-based violence and forced marriages. The second agency acting on its own initiative outside the framework of a project also handled several cases of honour crimes with the same restorative mechanisms. Both agencies make use of a type of mediation called 'cross-cultural transformative mediation' that was developed by a Danish mediator specifically for cases of honour-based violence. The work relies on a multi-agency approach and is accompanied by continuous training of all practitioners involved.

Findings

To answer the research question, the abovementioned case studies were analysed from two different perspectives. On the one hand, taking into considerations the dangers that are usually associated with restorative justice and alternative dispute resolution mechanisms. On the other, looking at how such programs could overcome the shortcomings of the criminal justice system in cases of honour-based violence and forced marriages.

Safety issues are at the centre of the criticism that accompanies the use of mediation in cases of honour-based violence. All programs analysed seem to have safety as a priority. Despite their formal or informal character, cooperation with the police is ensured at least for medium- and high-risk cases. Both NGOs working with victims in the UK and mediators taking care of the Norwegian mediation programs are specialized in risk assessment for such cases. In case of Norwegian practitioners, specific training on the subject compensates the lack of community expertise, which is higher within community NGOs. Moreover, in all serious cases, the victim (especially if under 18) is taken out of the family and placed in a refuge or a foster home. The Norwegian system can count on a close cooperation among authorities, including child welfare service, police and mediation office that renders procedures standardized and monitored by state agencies. However, British NGOs working with victims are well integrated in the system of

multi-agency cooperation (MARAC), can rely on specialized refuges to host women and girls and are assisted when necessary by the police. Some differences exist during the follow-up phase. While for NGOs the possibilities to follow up on cases are rather limited (they usually rely on victims keeping in touch with them), the Norwegian National Mediation Service, in cooperation with the police, provides a detailed follow-up plan of at least one year.

The second criticism directed towards mediation is that of maintaining or even worsening the power imbalance existing between victim and offender(s). All practitioners interviewed working with mediation in honour-crimes were aware of this risk and worked to counteract it. In all cases, next to safety, empowerment seemed to be the major goal of the mediation or negotiation. Several elements in the mediation process contribute to empower women and girls. First, the fact that these mechanisms leave the choice on how to deal with the conflict primarily to the victim. Having in mind that in certain cases, for safety reasons, the police are involved and a criminal trial might be initiated, the victim has a choice on whether she wants to initiate a negotiation with the parents or not. In case she decides to do so, she will be supported by the competent organization (NGO or mediation agency) but she will also receive the assistance that other victims of violence (who are not involved in a mediation process) receive. Second, the mediation process is itself aimed at removing the power imbalances existing within the family. This is achieved, for example, by posing certain conditions upon the parents before they can meet the girl; by providing the girl with one or more support persons during the meeting with the family; by arranging the room in a way that might contribute to reduce the hierarchy among the parties. The mediation process itself seems to be understood as a chance for victims to become empowered and freely decide whether to re-build a relationship with the parents and possibly return home or, instead, break the family ties counting on qualified support.

Connected to the issue of safety and (dis-)empowerment is the risk of secondary victimization. Critics of the use of mediation for cases of honour-based violence argue that parents might use the meetings to manipulate the daughter, instil in her a sense of guilt for having brought shame on the family or try to bring her back home with false promises. Countermeasures are taken to avoid this manipulation. On the one hand, community expertise might serve to better understand the behaviour of the parents and their real intentions. Even where this expertise is lacking, before deciding whether a common encounter between the parents and the girl is feasible or advisable the mediators usually conduct one or more individual meetings with the parents. During these meetings, the parents are informed of their obligations and their intentions and requests are tested and clarified. When the girl is supported by the police, the social services and by victim organizations (or mediation agencies) working on her side, it is in the parents' interest to cooperate. The threat of involving the police and moving the girl to a secret location works as a partial deterrent in this sense. Of course, the experience and training of the mediators is paramount to reduce the chances of failure.

The risk of coercion and pressure experienced by girls to participate in the alternative mechanisms does not seem to apply to the programs analysed. All programs are victim-focused and the victim has the choice to engage in such a process or not, as well as to stop it at any time. In the UK, the majority of the requests come from victims (only a few from the parents). In Norway, the offer of mediation is made by the police in one

of the first encounters with the victim and she can decide whether to have a first individual meeting with the National Mediation Service (which in the meantime might have a first meeting also with the parents to assess the situation). No coercion seems therefore to be exercised on victims.

Also the risk of discrimination towards women and girls does not seem to be an issue in the programs analysed. Several reasons contribute to make the programs victim-focused and gender-sensitive. In the British informal setting, the mechanisms are run almost entirely by women. The NGOs pay particular attention to bring non-discriminatory interpretations of religious or traditional norms within the community. In Norway, Norwegian law constitutes a framework for the programs and the police monitors on the respect of the law by the parties. The parents are reminded at the beginning, and when necessary during the meetings, of their duties and obligations under Norwegian law and on the rights of children and youth.

As for the shortcomings of the criminal justice system, the programs analysed seem to, at least partially, overcome them. As already mentioned, one of the major problems related to this case is underreporting. This is due to the many obstacles encountered by women and girls in accessing the formal justice system and to the specificities of these cases. The programs analysed, far from pushing victims away from the criminal justice system, seem to provide a further alternative to seek help and constitute a bridge towards the formal system. Informal mediations run by NGOs in the UK have the big advantage of being easily accessible by victims within the communities. Moreover, the community and case expertise that these practitioners have makes it easier for them to contextualize the case, understand its dynamics and therefore better assess the risk for victims. Even when these programs are institutionalized, like in the case of Norway, the existence of intermediate solutions capable of keeping the victim safe while avoiding (or limiting) the serious consequences of a criminal trial might encourage victims to come forward and to persist in their intent to exit the situation of violence. All practitioners agreed that what makes these programs work and families cooperate to reach an agreement is the fact that no police are directly involved in the meetings. Given the high mistrust, particularly widespread among ethnic and immigrant minorities, towards the police and law enforcement agencies, the separation between the role of the mediator and that of the police (or more in general, the state) helps building trust and facilitates the dialogue among the parties. Moreover, the fact that the mediation procedure is confidential and not public like a criminal trial reassures the families about possible gossips and rumors and encourages them to share information. Trust and respect go hand in hand with sense of legitimacy and authority that the parties, especially the parents, feel towards the mediators. Several factors contribute to build this sense of authority and respect. Very important are also the similarities between these procedures and the way in which the same communities in which honour-based violence is more widespread are used to solve their conflicts.

For NGOs working within communities, gaining the respect of the parties might be easier. However, the mediators interviewed in Norway explained that a major part of their work focuses on building trust and respect and in the majority of cases, they are successful in doing so. Even the fact of being a female mediator does not seem to cause problems in terms of trust and respect. On the contrary, for particularly conservative

men, it is often easier to talk about family issues in front a woman, especially if older than them, instead of facing a man, something that could cause a bigger shame.

The fact of taking the parents' perspective and values system into account does not only assist mediators in building trust and respect but helps providing a broader perspective on the case, which might contribute to ensure long-term safety for women and girls. Identifying the context in which violence takes place, the requests of the parents and the role of different family members in the conflict allows to understand whether a reconciliation is possible or whether, instead, a complete break-up (and possibly also a new identity for the girls accompanied by extra safety measures) is needed.

Conclusions

The analysis presented so far seems to reveal that the programs analysed are capable of avoiding on the one hand the shortcomings linked to the criminal justice system and on the other the problems typically associated with community ADR. Community expertise on honour-based violence and the cooperation between women organization and statutory agencies might be able to ensure long-term safety for victims and provide a bridge between the community level and the formal justice system. A bridge that might fill the gap that often hinders immigrant women's access to justice. The countries object of this study certainly present peculiarities that could hardly be reproduced in other contexts. In the UK, the old and stable presence of immigrant communities and the degree of autonomy left to them concerning their organization and their interaction with state institutions (including law enforcement agencies) has favoured the development of community-based dispute resolution mechanisms that are still unknown in other European countries. Different is the situation in Norway where migration is a quite recent phenomenon. Here, the presence of formal restorative justice mechanisms dealing with cases of honour-based violence could be explained by the strong centralization of mediation services (depending on the Ministry of Justice) coupled with the various attempt of integrating (newly arrived) immigrants through a discussion on values and customs. What makes the Norwegian experience unique and difficult to reproduce in other countries, is the availability of resources that allows a thorough preparation, implementation and follow-up of the mediation process, something that guarantees the safety of victims and that would be nearly impossible to replicate in other contexts.

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TRANSFORMATION IN GUMUZ – OROMO RELATIONS: IDENTITY, CONFLICT AND SOCIAL ORDER, WESTERN ETHIOPIA

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DISSERTATION SUMMARY

An enormous literature exists that deals with the various links between ethnic identity and contemporary conflict, whether from a primordialist perspective assuming fixed ethnic hatreds and loyalties, a constructivist perspective concerned with collective identification, or an instrumentalist perspective focusing on identity politics. Scholars emphasize that ethnic groups have their own cultural identities and that those cultural identities have become politically relevant and play a key role in wider social identification processes and political systems. The distinction between cultural identity in general terms and politically relevant cultural identities is the major interest of the present study. Whether or not ethnic (cultural) identity becomes a part of the dynamics of violent conflict is dependent on the comparative functionality of state institutions. The identity of most ethnic groups in Ethiopia, as in other parts of the world, stands in marked contrast to the identity of the group that dominates the political and economic centre. Ethnic groups that are not considered legitimate contenders and holders of power at the centre, and that in turn have been dominated by the ethnic group that forms the core of the governing class generally, have much less political and economic influence. Yet, channelling identity politics into peaceful political competition is a critical facet of the social order.

Since the 1970s, a broad amount of anthropological research has concentrated on ethnicity and nationalism, and by extension ethnic conflict and conflict resolution (Crawford 1998; Eriksen 2001, 2002). In Ethiopia the dominant approaches to conflict have involved ethnic federalism, with a focus on ethnic affiliation, and have consisted of basic stereotypical images of ethnic groups and ethnic federalism: that is, ethnic identity is explained as something 'invented' and ethnic federalism as 'divisive' and 'a bearer of conflict' (Abbink 1997, 2006; Asnake 2004, 2009; Teka 1998). Despite frequent refutations, some of the literature contends that there are aspects of ethnic identity

which are not chosen, but which are nonetheless used for the group's self-identification. Parts of the literature also suggest that the tension between ethnic groups has been evident throughout Ethiopian history (Asafa 1998; Keller 1995; Vaughan and Tronvoll 2003). In the past, unlike the present, the state would not publicly entertain cultural differences among ethnic groups. The stereotypical negative images of ethnic federalism also neglect those instances where cultural identities have become politically relevant and where the institutions of state and economy have channelled identity politics into a peaceful political competition.

The questions that I pose in my research to look at this topic are as follows: What is the status of ethnic groups in the context of ethnic federalism? In what ways do the groups differ from one another? What is the status of state institutions in the federal system? In what ways does the current federal system differ from the former unitary system? From here I argue that ethnic conflict depends on the relationship between ethnic identity and political identity, and whether ethnic identities are channelled into peaceful political competition depends on the institutions of the state.

With these issues at the fore, this work examines the role that ethnic identity plays in the shifting alliances and relational dynamics between the Oromo and Gumuz peoples in western Ethiopia. The study also analyses the root causes of conflicts in the area, including, but not limited to: attempts at transforming multiethnic/regional parties into a dominant party formed around a single political identity; contested representations of ethnic parties; and limitations of the current ethnic federalism with respect to addressing ethnonational questions. With regard to the latter, the most contested, but still unanswered, ethnonational questions for the Oromo and Gumuz peoples relate to power and resource sharing. The Oromo are the largest single ethnic group in East Africa. In Ethiopia, the Oromo constitute about 34.5 per cent of the total population (CSA 2008). They occupy an area that extends from north-eastern Ethiopia to northern Kenya and from Sudan in the west to Somali-inhabited land to the east. The Gumuz have been grouped with the Nilotic peoples along the Sudanese-Ethiopian border. Approximately 160,000 Gumuz live in Ethiopia, half of which live south of the Blue Nile River (hereafter the Abbaya). The people speak the Gumuz language, which has been classified as Nilo-Saharan. The Oromo, who speak a language that belongs to a different family, Cushitic, had enjoyed a good relationship with the neighbouring Gumuz before entering into violent conflict situations following the new political order in 1991. The overall objective of this study is to examine the transformation in Gumuz-Oromo relations with a particular emphasis on the formation of ethnicity and ethnic conflict and on the social order.

Examining the history of transformation in Oromo-Gumuz relations, which begins with their early contact in the nineteenth century, requires relying on both oral and written historical accounts. To this end, I have interviewed male elders and have examined various types of literature that deal with slavery, early state conquest and resistance to the state, population movements, and political and economic reforms. Above all, to gather pertinent data, a multilocal approach has been employed. Relevant sources that reflect on the historical and political complexity of shifting ethnic alliances, processes of identification, and conflict formation – and how these are inextricably linked to the wider political configuration – have been consulted. In general, the theoretical framework explored in this thesis entails theories of conflict and integration.

On the ground, intensive fieldwork was carried out from December 2013 to December 2014 along the common border areas of the neighbouring Gumuz and Oromo communities. The border area includes the Sassiga district in the East Wallaga zone of the Oromiya National Regional State (ONRS) and the Balo Jeganfoy district in the Kamashi zone of the Benishangul Gumuz Regional State (BGRS). This area is of particular interest, primarily because it is where conflicts are pervasive in the context of border and land claims. In addition to village-based ethnographic data, pertinent data have been gathered from district-, zonal- and regional-level officials. The sources of such data are as follows: scanned literature; official documents; and interviews with key informants from governmental, non-governmental, academic and other relevant institutions in the above-mentioned regional states.

This thesis is organized into nine chapters. The structure of the thesis more or less follows the sequential order of political and economic change, and more specifically the history of economic and political consolidation based on centre-periphery relations. Chapter one opens by providing a general background. With respect to the idea that ethnic conflicts in Ethiopia are a culmination of the historical process in state formation, this thesis argues against the contention that ethnic identity or ethnic federalism is the source of conflict in Ethiopia. The emphasis is on how cultural and/or ethnic identities are transformed into political identities, and how these politicized ethnic identities are triggering conflict, rather than regarding conflict a priori as 'ethnic'. The chapter then clarifies the focus of the current study and provides a description of the study settings. It also sheds light on the contemporary explanatory theories of identity and conflict within societies. Concepts such as identity, identity politics and instrumental factors are used to examine competing explanations with regard to intergroup conflicts, as well as to address the concept of social order, conflict resolution and peacebuilding by viewing them through the lens of theoretical perspectives. Lastly, this chapter provides an account of the methodology employed to carry out the fieldwork, particularly in light of the censorship and evasiveness encountered at various levels.

Chapter two offers a historical account of Oromo-Gumuz relations. The chapter discusses the origins, contacts and interactions between the two peoples within the process of state building. Some important observations can be summarized here. The current study has found that while the literature generally claims that the Oromo people had moved to the western part of the country during the sixteenth century, oral accounts claim that the Oromo had lived in the area for long times. It was also shown that the original homeland of the Gumuz is the historical Agawmidir as far as Lake Tana. Whether this was their original habitat is still debatable. It was from parts of the region that several Gumuz communities gradually moved southwards in the nineteenth century, most likely as a consequence of being pushed by the Agaw and Amhara, and being subjected to Anglo-Egyptian slavery and serfdom. By then a small segment of them crossed the Abbaya and occupied land south of it and settled in more peaceful areas of the former Wallaga, under the protection of the Oromo hereditary rulers of *Leeqaa Naqamte*. In most cases, early writings were based on an idealized bond relationship between the Oromo and Gumuz peoples.

The study shows that despite the perceived protection granted by, and the generally integrative nature of, the Oromo culture, the relations of the Gumuz and Oromo were asymmetrical. It appears that the Gumuz were an important labour resource in the feu-

dal economy, working in cotton fields and extracting forest resources for the intermediary rule of *Leeqaa Naqamtee*. The extreme exploitation of the Gumuz through the levying of heavy land taxes increased during the 1940s, with the advent of Emperor Halie Sellasie's modernization policy. This led to open resistance by the Gumuz in 1953, resulting in the attack on the Gumuz carried out by imperial troops. In discussing the centralization of land as a source of local conflict, it is important to remember this revolt. While the idea that the Oromo and Gumuz have lived together as good neighbours for a century does not preclude conflict in the past, in those conflict situations they were able to resolve matters in a peaceful manner through their own conflict management mechanisms. Elders arranged an arena where the disputing parties could sit together and resolve conflicts. This contrasts sharply with state interventions in conflicts, such as in 1953 and thereafter, as later chapters will explore.

After providing an overview of early contacts and interactions of the Oromo and Gumuz, chapter three sheds light on the advent of ethnic federalism, its adoption (1991–95) and its impact on the newly structured regions along ethnic lines. Most studies of Ethiopian ethnic federalism have focused on its effect on interethnic conflict. The current study shows that the present conflict is rather the result of the absence of genuine ethnic federalism and the lack of effectively functioning state institutions. There has been a deficiency of political will to fully implement federal structures and inculcate such policies in everyday life. The chapter asserts that the nature of the Ethiopian state and centre-periphery relations has not encouraged significant change and instead has used ethnic federalism to facilitate the perpetuation of political and economic consolidation.

Chapter four examines the conflict situation following the implementation (at least in the constitution) of ethnic federalism. It emphasizes how political elites look upon and interpret historical situations retrospectively and selectively to fit them into current situations. The present study shows that political uncertainty exposed political parties and their respective groups to ambiguous relationships immediately after 1991. The Gumuz political elites were ambivalent about whether to prolong their old relationships with the Oromo, primarily because the elite found themselves caught between two important political parties: the Oromo Liberation Front (OLF) and the Tigrean-led Ethiopian People's Revolutionary Democratic Front (EPRDF). In the current political climate, where politics is organized along ethnic lines, the Gumuz face two major dilemmas: their awkward position in the political body of a Berta ethnic group-dominated Benishangul Gumuz Liberation Movement in the new Benishangul Gumuz region and their uncertain ethnic autonomy under the umbrella of the OLF. In the early 1990s, the Berta groups were assumed to be legitimate affiliates of the current ruling party and holders of power in the regional state. By 1992 the OLF left the political body of Ethiopia. It appears that this unsettled the Gumuz elites as it has placed them in the position of being co-opted by the winning side.

The study therefore examines ethnicity as the sources of power, provided that political parties are being loyal to the political identity of the incumbent party. Switching loyalty is significant among the political parties because it can provide a way to become more powerful under the auspices of the central government. The findings of this study show ethnicization and the switching of loyalties has reinforced the polarized relationship between both regional and local Benishangul Gumuz and Oromiya state authori-

ties, making it difficult to find mutual solutions to pending interregional boundary issues. In short, chapter four shows that disputes over border claims are symptoms of local conflicts and are connected hierarchically and situationally to the ethnic/political identity of the different layers of the structure of the state.

As a continuation of the issues presented in chapter four, chapter five deals with land-based conflicts that are a recurrent source of local conflicts. The chapter examines how this mode of land-based conflicts has been interpreted in present times. Local land-based conflicts reflect the nature of the Ethiopian state. Since the establishment of Ethiopia in its current configuration, land in the physical and political periphery was not entirely given over to local authorities or locals and remains under the control of the state, and thus can easily become subject of state-formulated large-scale agricultural projects and resettlement schemes. The current government under EPRDF has not encouraged much change in this regard. The government has begun the territorialisation of land in the context of ethnic federalism, which permeates what Schlee (2010) refers to as 'territorialized ethnicity', followed by 'land registration'. Land registration simply means the 'territorialisation' of state power in a rural milieu. Between 2000 and 2015, the Ethiopian government has been in the process of registering peasants' land in rural areas. This registration is carried out under the banner of development projects funded by foreign agencies, and through their support the registration is intended to increase land tenure security, reduce conflict and support state macro-economic planning.

Nevertheless, land registration also serves as a vast 'land expropriation' implemented by the Ethiopian government. It is a legal framework to define land itself as 'occupied' and 'unoccupied'. In bordering regions – namely, the ONRS and BGRS – the latter in particular is a region where the federal government has assumed responsibility for the leasing of contiguous land (which it considers 'unoccupied') for industrial crops produced for exportation. The complementary role of land registration such as in Benishangul Gumuz is also about determining 'residents' (landholders or users) and 'outsiders' (non-users) and then excluding those 'outsiders' from the expected benefit of land redistribution. 'Resident' has proven to be an elusive term. In the context of 'nations, nationalities and peoples', only the Berta, Gumuz, Komo, Mao, and Boro-Shinasha groups are defined as autochthones in BGRS, as are only the Oromo in ONRS. The idea of outsiders presupposes the exclusion of ethnically categorized populations such as the Oromo in BGRS from the benefit of land redistribution as well as their eviction and forced displacement. Land taken from the evicted farmers is then set aside in the federal land bank before being distributed to investors.

By so doing, the state entangles economic interest with its political influence over the chain of power that extends to local state authorities and the peasantry. The local authorities act as intermediary agents between the state and the peasantry. They are the ones who define both 'unused' land for the state and the 'ethnic land' that represents the axis about which ethnic identity rotates and which is instrumental for its mobilization. Both are sources of power. The economic value of land has also compelled local state authorities to collaborate with Gumuz political elites to break up communal land through illegal sales. The Gumuz political elites view this as a necessity, preferable to receiving their share through commodification before communal land is expropriated by the state. The demand for land has increased among the seasonal immigrants working as daily labourers in investment projects.

Altogether, large-scale land leases, expropriation through land registration and villagisation, and land commodification have not only created land shortages, but also have challenged the formerly flexible land tenure arrangements (lease and sharecropping) between Gumuz and Oromo farmers. Local authorities also attempt to dissuade their people from practicing the previously flexible land tenure arrangements and instead to promote the view that regional state boundaries between the two groups are essentially impermeable. It was in such context that the fight over a plot of land, which was merely a symptom rather than the root cause of the conflict, escalated in May 2008. Thus, the minor land conflict between an Oromo and a Gumuz, where a *Gojjame* immigrant wanted to rent a piece of land, only served as a pretext, resulting in hundreds of death (mostly Oromo), extensive property destruction in little more than an hour, and the rapid breakdown of social order. Afterwards, each side expelled farmers from their regions and interregional boundaries became further rigidified.

Chapter six explores the danger that the aforementioned relationships portend for all members of the communities. It discusses the proliferation of guns and state preferential disarmament among the neighbouring Gumuz and Oromo communities, and shows when and why guns are used as an instrument of violence. It reveals that the proliferation and divergent dispersion of modern guns in the areas can be traced to three primary causes: military activity in the western part of the country during the 1980s and 1990s; the demand and supply network that makes acquisition possible; and differential state disarmament. The study shows that, at present, the Gumuz are by far the best-armed group in the western borderland; conversely, state differential disarmament has left the Oromo largely without firearms.

The inequitable position of the current ruling government vis-à-vis Gumuz and Oromo ethnic groups is based on its 'divide and rule' policy that complicated disarmament. The main factors appear to be the state's lack of trust towards the Oromo and the geography of the area that works to the advantage of insurgent groups such as the OLF. The state relies on Gumuz militias that support its political and social policies to act as a supplement to government security forces in their pursuit of the 'securitization' of ethnic relations. Such state practices and their effect on long-term social order have been well recognized by people in that the state appears to favour an increasing disorder so as to maintain power. Logically, this depends in one way or another on maintaining a monopoly over firearms, without which the ruling party would not have room to manoeuvre in the local and national arenas.

Chapter seven discusses matters of conflict resolution. After conflict and the disruption of the social order, mediation is put in place to resolve the conflict between disputing parties and restore the ruptured social order. A huge problem posed by meditation, however, has been whether it can address the root causes of the conflict and produce any genuine solutions. Therefore, mediation is not enough in and of itself, as the overwhelming narrative evidence presented in this study bears out. Some important observations can be summarized as follows. While mediation in the study area has produced the demarcation of boundaries, the mediation processes have not adhered to the principal modality in the state constitution for resolving or 'redefining' interregional borders – through referendum. The mediators did not pursue a facilitated negotiation, but reached a decision swiftly before the concerned parties were 'ready to do so'. Some people viewed this hasty decision-making as a 'cooling-off' strategy. Others contend

that border demarcation is relevant to the targeted interests of the mediators and state, in that it does not allow the Gumuz and Oromo to practice their formerly flexible land tenure arrangements. The work on mediation and restoration of day-to-day relations has not gone smoothly, as political rulers on each side work on behalf of fixed ethnic differences. The neglect of land tenure arrangements in conflict resolution and the mounting claims due to contested boundaries has caused conflicts to be complex and conflict resolution to become increasingly problematic.

Chapter eight examines peacebuilding. Here I describe the peacebuilding efforts undertaken in post-violence settings. When looking at peacebuilding, it is vital to determine who is and who should be involved. The study shows that different actors from state authorities, local communities and religious institutions (such as the Ethiopian Evangelical Church Mekane Yesus) have taken part in the peacebuilding process. The findings of this study will also show that peacebuilding activities on the ground have failed to go beyond 'showcase' reconciliation meetings. There is a tendency on the government side not to perceive itself as responsible for any breakdown in local amity. Action has not been taken with respect to government policies and political gamesmanship that may occur and recur around land resources and issues of competition over political power arising from real or perceived differences of wealth and status. Peace is a multidimensional process, in which each actor has a stake. Achieving peace in the area requires an overall willingness from regional states and federal institutions.

Lastly, if there is one word that comes closest to summarizing the causes of the current conflicts, it would be *consolidation*, in its military/security apparatus, political and economic forms. Indeed, such consolidation reinforces (and is reinforced by) the manipulation of ethnic identity and conflict with an intent to retain power both at the centre and at the periphery.

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INTERNATIONAL CRIMINAL JUSTICE ON TRIAL: AN EXAMINATION OF THE LEGAL IMPLICATIONS OF THE ICTR/ICTY REFERRAL PRACTICE OF CASES TO NATIONAL COURTS AND POSSIBLE RELEVANCE FOR THE ICC

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AUTHOR'S BIO

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DISSERTATION SUMMARY

INTRODUCTION

The 20th century has witnessed the rapid proliferation of a variety of *ad hoc* international and mixed or internationalized criminal courts and tribunals (ICTs), whose creation have been justified by the International Community's resolve to punish perpetrators of the gravest international crimes (the so-called 'core crimes': genocide, crimes against humanity and war crimes) so as to contribute to restoring peace and justice to conflict and post-conflict regions.[1] A comparison between the various international courts and tribunals reveals a range of different 'justice' models, with specific legal frameworks and jurisdictional features determining each tribunal or court's relationship with relevant sources of law, national judicial institutions and where applicable, alternative justice mechanisms. The specific contours of the relationship between the various ICTs and relevant national accountability mechanisms continue to be subject of some uncertainty, not least in light of the fact that national courts have now increasingly begun to prosecute crimes of an international character.[2] This increased prosecution of interna-

[1] These were created directly by or with fundamental involvement of the United Nations Security Council, whose increasingly frequent intervention over the last decade in matters, which are directly or indirectly juridical in nature inevitably is the result of a general increase in activity since the 1990s.

[2] Indeed, many recent examples demonstrate that national courts are taking on the arduous challenge of prosecuting genocide and modes of participation in genocide (see for instance the Canadian Supreme Court's

tional crimes by national accountability mechanisms ('nationalization of international criminal law') is also consonant with the jurisdictional set-up of the new permanent International Criminal Court (ICC), which is premised on the understanding that national courts are best suited to prosecute international crimes themselves.

Given the sheer scale of the crimes committed, and the limited resources of ICTs, it is crucial that these courts function in parallel with national and/or local courts in a pluralistic integrative system of international criminal law. At the same time, parallel judicial activities on the international, national, and in some instances, local levels, are giving rise to an array of complex legal conundrums. Contemporary legal discourse is therefore increasingly focusing on the practical and theoretical implications of a certain 'diversification' (frequently also referred to in a more negative sense as 'fragmentation') of the body of international criminal law (ICL), not just on an institutional level but on a procedural and substantive one as well.[3]

Many academic contributions have focused on the *deferral* of cases from national courts to ICTs. For instance, the international *ad hoc* criminal tribunals for the former Yugoslavia and Rwanda, ICTY and ICTR respectively, are authorized to order national courts to defer cases to them on the basis of the subsidiarity principle. However, less attention has been paid to the opposite occurrence, namely the *referral* of cases from these international tribunals to domestic courts.[4]

The referral practice of the ICTY and ICTR to national courts as a crucial component of the U.N. Security Council formulated Completion Strategy, which sets a date by which the ICTY and ICTR are meant to wind down definitively trial and appellate activities,[5] illustrates – in a highly concrete manner – various legal challenges arising out

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judgment in the Léon Mugesera case of 2005 (Minister of Citizenship and Immigration v. Léon Mugesera et al., [2005] 2 S.C.R. 100, 2005 SCC 40], available at: http://scc.lexum.org/decisia-scc-csc/scc-csc/scc-csc/en/2273/1/document.do [accessed: 08.07.14].

[3] These two terms have been employed by the Grotius Centre (Netherlands), which has recently held two conferences on the 'Diversification and Fragmentation of International Criminal Law' and has subsequently launched a research agenda on fragmentation of international criminal justice, which has also resulted in a recent publication: The Diversification and Fragmentation of International Criminal Law, van der Herik & Stahn, eds., Martinus Nijhoff Publishers, 01.10.12. The word 'fragmentation' was originally used by the International Law Commission (ILC) in its comprehensive report on the issue as it relates to international law generally, for further information see: Fragmentation of ICC: Difficulties arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, finalised by Martti Koskenniemi, A/CN.4/L.682, 13.04.06, available at:
http://www.un.org/ga/search/view_doc.asp?symbol=A/CN.4/L.702 [accessed: 08.07.14]. This research project will employ both terms throughout.

[4] It is noteworthy at this juncture that the term *referral* in the Statutes of the ICTY/ICTR connotes the transfer of a case *from* the international tribunals *to* national states, whereas *deferral* signifies the transfer *from* national courts *to* the tribunals. In the context of the Rome Statute of the ICC, *referrals* and *deferrals* have an altogether different meaning. That is, in the Rome Statute, *referral* connotes the act of a State Party referring a situation in which crimes are allegedly committed *to* the ICC Prosecutor under article 14, whereas *deferral* signifies the act of putting on hold an investigation or prosecution, following the request by the UN Security Council, under article 16.

[5] Set forth in U.N. Security Council resolutions 1503 (2004) and 1534 (2004). The Completion Strategy generally refers to the method of steadily reducing trial and appellate activities by the date foreseen. The date has been changed on several occasions, and while the most current date for 'closure' is 2014, the Completion Strategy report of 2013 indicates that many trials, such as that of *Radovan Karadžić* for instance, will reach beyond that date. See Assessment and report of Judge *Theodor Meron*, President of the International Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council

of pluralistic accountability mechanisms in the prosecution of international crimes. In essence, the effective Completion Strategy of the ICTY and ICTR are contingent on the tribunals' very ability to transfer cases and investigative files to national jurisdictions for prosecution. With respect to the former category, one particularly pertinent problem is the disparate definition of core international crimes between the ICTY/ICTR and national legal systems, which can, where these legal systems are directly juxtaposed, engender prosecutorial challenges related to the principle of legality as a vital precondition to *jus puniendi*. In fact, the ICTR found the disparity in the definition of crimes between its own constitutive statute and national law to result in incompatibility and thereby to impede the successful transfer of cases to the domestic courts in question.[6] Although the ICTY had significantly more 'success' in transferring cases to courts of countries of the Former Yugoslavia (notably to Bosnia and Herzegovina, BiH) than the ICTR in the beginning phase of the practice[7], the national prosecution following its referral has unveiled some divergences in sentencing practices between the ICTY and the BiH State Court, the latter mandated to receive transfer cases, as well as between the various national courts themselves.[8] Other legal problems impeding the successful referral of cases – notably in Rwanda – include national courts' lack of jurisdiction over the crimes in question, and the inability to provide sufficient procedural guarantees (such as fair trial rights).

Although the ICTY and ICTR have, from the time of their creation, been *ad hoc* in nature, the exact dates and modalities for the termination of their work were proffered only years later by the U.N. Security Council imposed Completion Strategy. This may explain, in part, some of the legal conundrums that are now being faced as the tribunals are in a race against time to terminate their work. It also suggests that the nationalization process – *via* the referral practice – is motivated more by time constraints (and the objective to try a number of 'big fish' before ultimately closing their doors) than by

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resolution 1534 (2004), and covering the period from 16 November 2012 to 23 May 2013, Annex I, § 14f, available at:
http://www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_23may2013_en.pdf [accessed: 21.06.14]. See also Report on the completion strategy of the International Criminal Tribunal for Rwanda as at 5 May 2014, S/2014/343, 15.05.14, Annex II, available at: http://www.unictr.org/Portals/0/English/FactSheets/Completion_St/S-2014-343e.pdf [accessed 26.06.14].

[6] See for instance the case of *The Prosecutor v. Bagaragaza,* Decision on Rule 11*bis* Appeal, Case No. ICTR-05-86-AR11*bis*, 30.8.06.

[7] Eight cases were referred to national jurisdictions, six to BiH, one to Croatia and one to Serbia (status: June 2013). As observed by Petrig, the transfer of some of these cases was arguably based purely on formalistic considerations, which did not take into account the reality – both political and judicial – of the referral States, such that in some cases, the referral requests should have been denied. Petrig, Case referral, p. 25.

[8] See for instance the *Prosecutor v.* ***Gojko Janković*****,** Decision on Referral of Case pursuant to Rule 11*bis*, Case No. IT-96-23/2 PT**, 22.07.05; see also the ICTY's discussion in** *Prosecutor v. Milan and Sredoje Lukić,* Decision on Referral of Case pursuant to Rule 11*bis* with Confidential Annex A and Annex B, Case No. IT-98-32/1-PT, 05.04.07, §§ 58-59. **See also discussion in Diekmann/Kerrl, UN Ad Hoc Tribunals Under Time Pressure, p.100.** In the case of Rwanda, for instance, while the death penalty was abolished, Rwandan courts (including the *Gacaca* courts), impose life imprisonment in isolation, a punishment highly criticized by human rights based organizations. See for instance, HRW, 'Letter to Rwanda Parliament regarding the Penalty of Life Imprisonment in Solitary Confinement', 29.01.09, available at: http://www.hrw.org/en/news/2009/01/29/letter-rwanda-parliament-regarding-penalty-life-imprisonment-solitary-confinement; [accessed: 01.07.13], see also in this context, HRW, Law and Reality: Progress in Judicial Reform in Rwanda, July 2008, available at:
http://www.hrw.org/reports/2008/rwanda0708/rwanda0708webwcover.pdf [accessed: 1.7.13].

efforts to 'leverage the benefits of domestic trials'.[9] Despite this, the interaction of plural accountability processes, and the interplay of normative actors and sources of law in the adjudication of international crimes, is part of a greater trend in the international criminal justice system, which is becoming increasingly relevant as the ICC starts building its case law. In the different contexts of Bosnia and Herzegovina and Rwanda, this nationalization process, resulting from concerted international efforts to strengthen national accountability mechanisms, has taken the regrettable shape of disjointed and even incoherent criminal law reform, leading to a fragmented legal framework for the adjudication of international crimes. The European Court of Human Right's recent judgment in the case of *Maktouf and Damjanović* [10] has by no means clarified this situation.

A cursory examination of the different experiences in the referral practice by the ICTY and ICTR to national jurisdictions[11] reveals that the legal conundrums must be viewed in a much greater context, that is, against the backdrop of various root causes, notably socio-political factors, all of which are in complex interaction with each other in a legally pluralistic criminal accountability structure. In both contexts, international, national, and local judicial processes are actively engaged in war crimes prosecutions at various levels. Emblematic of the 'nationalization of the accountability process',[12] the referral practice of the ICTY and ICTR lends itself well to a detailed examination as it evinces the complex interplay between normative actors, legal orders, sources of law and other normative projections, against the backdrop of a growing debate regarding the diversity of international criminal law norms.

Research objectives and scope

While the referral of cases from the *ad hoc* international criminal tribunals to national judicial institutions appears to be a useful mechanism *in theory*, its *practical* implementation is at times accompanied by some rather adverse results. In light of the fact that the referral practice is a novel instrument of 'highly experimental character',[13] the legal complexities resulting from its implementation have not been subject of much in-depth academic analysis to date.[14]

Although the referral practice sheds light on the diversification or fragmentation of ICL norms on a number of levels, this dissertation's primary focus is on the substantive aspects of this phenomenon, namely the interaction between different legal systems and

[9] Petrig, Case referral, p. 9.

[10] *Maktouf and Damjanović v. Bosnia and Herzegovina* [GC], nos. 2312/08 & 34179/08, 18.7.13, available at: http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122716 [accessed: 1.7.14].

[11] The ICTY has transferred eight cases to countries of the Former Yugoslavia and the ICTR only two cases to France in the beginning; after failed attempts to transfer cases to Rwanda, Norway and the Netherlands, the ICTR has since transferred more cases than the ICTY, a total of ten cases, eight to Rwanda, and two to France.

[12] Petrig, Case referral, p. 8.

[13] (Ibid: 25).

[14] It is noteworthy that while at the beginning of this research project, little in-depth academic research appeared to exist on the topic, by the time of its conclusion in 2014, this topic had attracted more attention in the academic world (i.e. see in this context Lindemann, Referral of Cases from International to National Criminal Jurisdictions, 2013.). A particularly interesting aspect of Lindemann's project is her exploration of the applicability of extradition law to ICTY and ICTR referrals, and the influence of the referral practice, notably in the context of the ICTR, on national extradition decisions of genocide suspects to Rwanda (see in particular pp. 188ff, 213ff).

norms in the prosecution of international crimes. In light of the fact that this complex interplay is intricately tied to the functional relationship between international and national courts adjudicating international crimes, some discussion of this relationship is inevitable in so far as it sets the backdrop against which the referral practice must be viewed.

While this dissertation focused on the practical parameters of one relevant aspect of the *ad hoc* tribunals' completion strategy, the issues and considerations arising therefrom are emblematic of the complexities resulting from an increased legal pluralism in the international criminal law sphere as a result of the nationalization process generally. Consequently, and drawing on the analysis of the concrete referral practice from the ICTY and ICTR to national courts, this dissertation's ultimate goal was to participate – to some small extent – in a much broader discussion about legally pluralistic interactions in international criminal law today.

As a result of the foregoing, this dissertation's four main research objectives were the following:

The dissertation's first research objective was to identify the most significant substantive and procedural legal issues that have arisen in the implementation of the referral practice to national courts both *pre*-transfer, and to the extent relevant, *post*-transfer.

For the purposes of this study, the term 'referral' was construed broadly to describe both the transfer of cases, requiring a judicial decision under rule 11*bis* of the Rules of Procedure and Evidence (RPE), as well as the transfer of investigative files (the so-called 'Category II cases' in the ICTY context), which is based on Prosecutorial discretion and which is administrative in nature.[15] These files can either be trial ready or in need of additional investigations before adjudication by domestic courts of referral states.[16] As was elucidated in the project, the distinction between these two categories of 'cases', has a decisive impact on the extent to which the *ad hoc* tribunals can participate in the adjudication of the crimes at the national level.

In support of the *first research objective* (Chapter two), this research project examined formal criteria for referral under rule 11*bis* RPE, which comprise the need for a jurisdictional basis on the part of a referral state (including through universal jurisdiction), procedural aspects, such as adequate fair trial guarantees, and additionally, in the context of the ICTY's rule 11*bis* RPE, the substantive aspect of the gravity of the crimes and the level of responsibility of the accused. The latter set of criteria acts as a bar against transfer to national jurisdictions, criteria also prominently reflected in the Rome Statute as a threshold for admissibility of a case before the ICC. The ICTR's rule 11*bis* RPE does not include these criteria and any examination thereof in the case law has to date been entirely absent. Nevertheless, the ICTR Completion Strategy Report of May 2007 states that in coming to a decision about which individuals to try at the ICTR, 'the Prosecutor will be guided by the need to focus on those who are alleged to have been in positions of leadership and those who allegedly bear the greatest responsibility

[15] Møse, The ICTR's Completion Strategy, p. 672. While the ICTR felt unable to transfer cases to national courts in Rwanda under rule 11*bis* RPE, the Prosecutor transferred a total of sixty investigative files to Rwanda and one to Belgium.
[16] (Ibid: 672).

for the genocide.'[17] In examining these dual criteria closely, some interesting trends may be gleaned about the profile of persons being prosecuted at the international as opposed to the national level. The relevance of this issue is particularly apparent in the ICTR context, where members of the Rwandan Patriotic Front (RPF), who are allegedly responsible for a large number of killings immediately following the 1994 genocide, have not been indicted by the ICTR.[18]

Although not explicitly stated in the ICTY and ICTR's rule 11*bis* RPE, but prominently discussed by the respective ICTY and ICTR referral benches, pre-conditions for the referral of a case include another substantive aspect, which were subject of extensive analysis in Chapters two and three, namely the need for an adequate legal framework, which 'criminalizes the alleged conduct of the accused and provides an adequate penalty structure' at the national level.[19]

In light of the fact that the ICTY and ICTR may monitor the judicial proceedings of transferred cases in receiving states under rule 11*bis* (D)(iv) of both tribunals' RPE, this research project will incorporate an analysis of these national proceedings post-referral, where relevant, into its research ambit. The monitoring function is not only crucial to avoid unfortunate discrepancies in the treatment of these cases, but has concrete relevance by virtue of rule 11*bis* (F), under which the Referral Bench may, before the accused is found guilty or be acquitted by a national court, ask for an already transferred case to be deferred back to the Tribunal. Questions about what recourse, *if any*, the Tribunals have, *after* the national court's decision has been rendered, such as where the punishment is inadequate, or where the verdict does not reflect the evidence, are dubiously left unanswered in the rule itself.

The dissertation shows that rule 11*bis* RPE and its judicial interpretation have been at least partially inadequate to meet the various challenges posed by this complex process.

Based on the examination carried out pursuant to the *first research objective*, this dissertation's *second research objective* (Chapter three) was to scrutinize some possible root causes behind the aforementioned legal conundrums.

Although the ICTY has also transferred cases to other countries of the Former Yugoslavia, namely one case to Croatia, and one case to Serbia (the latter which was never tried due to the fact that the Accused, *Kovačević*, was deemed unfit to stand trial),[20] the great majority of its cases have been sent to Bosnia and Herzegovina (BiH), the place where the bulk of the crimes in question were committed. As a result, the focus of this research project is on Bosnia and Herzegovina's experience with prosecuting such crimes, notably that of the BiH State Court to which such transfers were made.

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[17] ICTR Completion Strategy Report, S/2007/323 §15, 31.5.07, available at: http://www.unictr.org/Portals/0/English/FactSheets/Completion_St/s-2007-323e.pdf [accessed: 02.07.13].

[18] See in this context, exchange of letters between HRW and ICTR's Chief Prosecutor, *Hassan Jallow,* available at: http://www.hrw.org/en/news/2009/08/14/letter-ictr-chief-prosecutor-hassan-jallow-response-his-letter-prosecution-rpf-crime [accessed: 19.06.13].

[19] *Prosecutor v. Bagaragaza*, Decision on Rule 11 bis Appeal (AC), Case No. ICTR-05-86-AR11bis, 30.08.06, §9.

[20] *Prosecutor v. Vladimir Kovačević*, Decision on Referral of Case under Rule 11bis, Case No. IT-01-42/2-I, 17.11.06.

While the relationship between international and national judicial mechanisms is inevitably complex and gives rise to a myriad of different considerations of relative weight, depending on the particular situation, some general tendencies can nevertheless be gleaned when analyzing and comparing the singular contexts of Bosnia and Herzegovina and Rwanda. The causes can be divided into two general categories: *normative* and *contextual*.

Normative causes include, *inter alia*, the use of different legal traditions, norms, and sources of law. *Contextual* causes include, *inter alia*, the presence of a working and independent judiciary as well as financial and logistical assistance from the international community.

Although it is understood that the conceptual frameworks of both fora are distinct in many fundamental ways, an inquiry was made on what basis such a 'mechanical' transfer can be justified without compromising important legal notions, such as the principle of legality and the right to equality before the law. Chapter three's hypothesis was that a mechanical transfer of cases from the international to national forum, without consideration of the comprehensive (socio-political) context in which the referral practice is embedded, presented difficulties to the effective implementation thereof.

The dissertation's *third research objective* (Chapter four) was to devise lessons learned from the ICTY and ICTR referral practice and to formulate tangible solutions to some of the legal conundrums identified (*first research objective*), based on a careful, albeit non-exhaustive, examination of possible root causes (*second research objective*). Viewing the referral practice as a symbol for the shifting dynamic between the main actors (ICTs and domestic courts) in the adjudication of international crimes, in turn, contributed to a better understanding of the interaction of pluralistic accountability processes.

The dissertation showed that despite the inevitable diversity between international and national criminal law norms (*basic assumption*), and the fact that some solutions will be case-specific,[21] the body of international law dictates a minimum standard of fundamental human rights, including fair trial rights, which are applicable to *all* transfer cases, irrespective of the country of referral. In this context, this research project explored whether and upon what basis states are under an obligation to incorporate core international crimes into their domestic legislation and to provide for adequate punishment structures, an issue which has taken centre-stage pre-ceding and following the coming into force of the Rome Statute of the ICC. Some discussion of this issue in the concrete context of the referral practice is provided. What 'margin of appreciation' individual states have to divert from such standards (even to go further than the international ones), however, is far from clear in present day legal discourse[22] and merited a brief analysis in the scope of this research project. In this sense, the discussions helped

[21] For instance, in the concrete setting of Rwanda, one solution has been to await an authoritative clarification about the interplay between relevant laws (the Transfer Law March 2007 on the one hand and the Death Penalty Abolition Law July 2007 on the other), so as to indicate which respective penalty structure (imprisonment vs. imprisonment in isolation) is applicable to transfer cases.

[22] The 'margin of appreciation' has been coined by the European Commission and European Court of Human Rights and plays a prominent role in the jurisprudence of the ECtHR. One prominent author argues that reliance on this doctrine impedes unity of international norms at the European level. For a critical appraisal of this doctrine, see: *Benvenisti*, 31 N.Y.U. J. Int'l L. & Pol. 843 (1998–1999) p. 43.

glean some insight into the ardent debate about the 'ideal' international criminal justice model.

Another aspect that was briefly examined is how the referral practice can contribute to the achievement of the assorted (and highly ambitious) aims of the international criminal courts, notably the secondary goals of promoting national reconciliation. To this end, the discussion considered the overall merits of sending cases back to the country where the conflict occurred versus sending them back to 'neutral' third countries.

The dissertation's *fourth research objective* (Chapter five) was to ascertain the pertinence of the ICTY and ICTR experience for the work of the ICC, the latter which could face a number of similar referral-related legal issues in the future. This dissertation argued that the referral practice bears great relevance for the future work of the ICC. Situations in which referral to national systems may become relevant include: 1) case referral following a successful challenge by a state to ICC's admissibility under article 19 of the Rome Statute 2) case referral as part of an ICC Completion Strategy from a situation and 3) referral of investigative materials and other evidence under article 93(10) of the Rome Statute. Not only do these three referral scenarios have a formal basis in the ICC legal framework, but recent ICC case law has already deliberated referral in the first and third scenarios listed above.[23]

Research methodology and proceedings

In a first step, and in a highly preliminary manner, in order to convey the context in which the referral practice is embedded, the introduction includes a brief description of the goals of the ICTY and ICTR, justifications for their establishment, and the formal relationship between the ICTY and ICTR, and the respective national accountability mechanisms. To this end, this dissertation briefly examines the provisions of the constitutive Statutes of these international tribunals, and where relevant, case law. As noted previously, a comparison between the jurisdictional framework of the *ad hoc* tribunals and the permanent ICC is of some importance in this context as it lays the groundwork for the discussion about the relevance of the ICTY/ICTR referral practice to the ICC.

In order to identify the various legal problems arising prior to the transfer of cases from the *ad hoc* tribunals to national courts (*first research objective,* Chapter two), an analysis of judicial decisions on the various criteria set forth in the oft-amended rule 11*bis* of the respective tribunals' Rules of Procedure and Evidence (RPE), has been undertaken. Aspects of publicly available transcripts of deliberations throughout the

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[23] First scenario: See in this context, *Situation in Libya*: *Decision on the admissibility of the case against Abdullah Al-Senussi*, ICC-01/11-01/11, 11.10.13, available at: http://www.icc-cpi.int/iccdocs/doc/doc1663102.pdf [accessed: 10.6.14]. See also: *Situation in Libya: The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on the admissibility of the case against Abdulla al-Senussi, ICC-01/11/-01/11, 11.10.13.
Third scenario: In this context, see *Situation in Kenya: Decision on the Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence*, ICC-01/09-63, 29.6.11, available at: http://www.icc-cpi.int/iccdocs/doc/doc1100546.pdf, [accessed: 10.6.14], § 33–34. See also, *Decision on the Second Request for Assistance Submitted on Behalf of the Government of the Republic of Kenya Pursuant to Article 93(10) of the Statute and Rule 194 of the Rules of Procedure and Evidence*, ICC-01/09-97, 12.7.12, available at: http://www.icc-cpi.int/iccdocs/doc/doc1440979.pdf [accessed: 10.6.14], §17.

judicial proceedings, which are oftentimes lengthy and detailed, as well as other relevant legal documents, were examined where relevant.

Due to the fact that most in-depth analyses of legal problems, notably in the ICTY context, is contained in judicial decisions (referral decisions) and deliberations (transcripts), an in-depth analysis primarily of these judicial sources proved most suitable to effectively achieve the *first research objective*.

To further supplement the initial research phase, face-to-face interviews with practitioners (judges and prosecutors) who work directly with the referral of cases and investigative files at the ICTY and ICTR, and those working at the national level with rule 11*bis* RPE cases, were undertaken. A research visit to the ICTY in The Hague was made in October 2009, and an interview with the War Crimes Unit of the State Prosecutor's Office in Paris, France, was held in October 2011. Telephone interviews and extensive email communications with various experts from the ICTY and ICTR (both Office of the Prosecutor and Chambers), national courts and national prosecutors' offices, as well as OSCE staff members, were carried out throughout the entire research period. The primary purpose of these interviews was to gain background information in the initial research phase on the modalities of the ICTY and ICTR referral practice, and to explore significant problems encountered throughout, so as to more concretely focus the research objectives of the project. Of the thirteen interviews conducted, only one interview led to information relied upon in this research project, which was not otherwise readily available through publicly redacted sources.[24]

In a second step, in seeking to assess possible root causes behind the aforementioned legal conundrums (*second research objective*), a broad analysis of relevant documents, such as academic contributions, NGO reports, empirical studies was embarked upon, and some discussions with experts were held. Throughout much of the research phase, a number of major difficulties were encountered with regard to access to information. In the context of the Former Yugoslavia, locating reliable translations of legal documents (notably old codes and laws) proved to be a very cumbersome and time-consuming undertaking. In the context of Rwanda, locating transcripts and/or local information about the *Gacaca* justice system (the *Gacaca* court system's official website having been shut down definitively in early 2012) significantly hampered the research process.

In a third step, in attempting to glean 'lessons learned' and to devise possible tangible solutions to the practical conundrums identified in the *third research objective*, this research project relies on relevant documents, such as academic contributions, NGO reports, empirical studies (where available) and discussions held with experts.

In this context, certain questions were evoked in the specific context of the ICTY and ICTR referral practice that could in turn be relevant for a more general debate about pluralistic interactions of different legal systems and norms in international criminal law. Complex questions surrounding the relationship between international and national/local criminal law norms against the backdrop of an increasingly inter-connected

[24] Interview with member of French War crimes Unit of the State Prosecutor's Office, Paris, October 2011 [interview transcript with author], see also fn 750 & 754. However, no confidential information was obtained in the context of the interview, nor has any statement or personal views expressed in the interview been directly cited.

global legal community include, *inter alia*, the impact of international criminal accountability mechanisms on national reconciliation, and the scope to which genuine diversity can and should be reconciled with a certain degree of uniformization. To this end, Chapter four draws on findings made in the first three research objectives, as well as upon jurisprudence emanating from the ICTY and ICTR generally, commentaries thereto, as well as NGO reports and empirical studies.

In a fourth step, in attempting to ascertain the relevance of the ICTY/ICTR experience for the work of the ICC, despite its different jurisdictional features (*fourth research objective*), the research project engages in large part in a textual analysis of the Rome Statute.

YOUTH – POLICE RELATIONS IN MULTI-ETHNIC CITIES: A STUDY OF POLICE CONTACTS AND ATTITUDES TOWARD POLICE IN GERMANY AND FRANCE

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AUTHOR'S BIO

Anina Schwarzenbach is a postdoctoral fellow at Harvard Kennedy School's Belfer Center. As part of the International Security Program, she researches strategies to counter violent extremism and radicalization adopted by democratic states. Her research is concerned with the legitimacy and effectiveness of extremism prevention, particularly in the area of religious extremism. Previously, she was a graduate researcher at the Max Planck Institute for Foreign Criminal Law in Germany, where she worked on experiences of institutional discrimination of immigrant youths in Europe's multi-ethnic cities and on the effect of discriminatory police activity on trust in the police. Anina holds a Ph.D. in Sociology from the University of Freiburg, Germany, and an LL.M. and M.A. from the Universities of Bern and Zurich in Switzerland.

DISSERTATION SUMMARY

Verschiedene Städte Europas wurden in der Vergangenheit Schauplatz wiederkehrender Krawalle. Im Besonderen haben die Unruhen in den *banlieues* in Frankreich im Jahre 2005 verdeutlicht, in welchem Spannungsverhältnis die Jugendlichen zur Polizei stehen. Die Unruhen in Frankreich haben mit denjenigen in anderen europäischen Städten gemeinsam, dass es sich oft um männliche Jugendliche mit Migrationshintergrund handelt, welche sich - unter anderem - gegen die Polizei auflehnen.

Länder wie Frankreich berichten von besonders gewaltsamen Jugendkrawallen, in anderen wie Deutschland scheinen die Unruhen aber nicht die gleiche Intensität zu erreichen. Dieser Umstand wirft Fragen auf. Im Allgemeinen gilt es dabei zu verstehen, wie sich das Verhältnis junger Menschen zur Polizei in Städten definiert und warum es in manchen Ländern zu Spannungen und gewaltsamen Revolten kommt und in anderen nicht. Im Besonderen interessiert, ob gewisse polizeiliche Handlungspraxen, wie beispielsweise routinemäßig durchgeführte Identitätskontrollen, von jungen Menschen mit Migrationshintergrund als Diskriminierung empfunden werden und ob dieses Verhalten allfällige Konsequenzen für deren Einstellung und Kooperation mit der Polizei hat.

Obwohl sich schon einige Arbeiten mit dem Verhältnis junger Menschen zur Polizei auseinandergesetzt haben, fehlt es bis anhin an einer umfassenden länderübergreifenden Analyse, welche sowohl Einflussfaktoren auf individueller Ebene als auch kontextuelle Elemente gebührend berücksichtigt. Beruhend auf einem Originaldatensatz untersucht dieses Dissertationsprojekt das Verhältnis zwischen Jugendlichen und der Polizei in zwei vergleichbar gepaarten Städten (Deutschland: Köln und Mannheim sowie Frankreich: Lyon und Grenoble). Dieser Zusammenhang wird anhand dreier As-

pekte näher beleuchtet: die Häufigkeit der Polizeikontakte junger Menschen, ihre Einstellungen zur Polizei und ihre Bereitschaft, mit der Polizei zu kooperieren beziehungsweise Selbsthilfe auszuüben. Zwei Fragestellungen stehen dabei im Zentrum:

Mikroebene: Gibt es länderübergreifende Gemeinsamkeiten im Verhältnis zwischen Jugendlichen und der Polizei?

Makroebene: Wie bedeutend sind die Unterschiede im Verhältnis zwischen Jugendlichen und der Polizei in Deutschland und in Frankreich?

Diese Arbeit geht davon aus, dass eine Vielzahl von Prädiktoren die Art und Häufigkeit des Kontakts, sowie die Einstellung junger Menschen zur Polizei beeinflussen. Neben der ethnischen Herkunft der Jugendlichen berücksichtigen die Analysen den möglichen Einfluss weiterer sozialer und demographischer Merkmale, wie Geschlecht, Alter und gesellschaftlicher Status. Da das Verhalten der Jugendlichen, und besonders ihre eigenen Erfahrungen mit Delinquenz oder derjenigen ihrer Freunde, sowohl die Kontrollhäufigkeit als auch die Einstellung zur Polizei beeinträchtigen kann, sind diese Prädiktoren in der statischen Modellierung berücksichtigt worden. Gerade die Einstellung zur Polizei ist möglicherweise durch das jeweilige soziale und kulturelle Umfeld geprägt. Daher werden in dieser Arbeit der Einfluss der Variablen ausgeprägte Religiosität und mangelnde Integration analysiert.

Aus theoretischer Perspektive basiert diese Arbeit, unter anderem, auf T. Tylers (2004) Überlegungen zu den Voraussetzungen polizeilicher Legitimität und den Auswirkungen einer fehlenden Legitimität auf die Kooperationsbereitschaft der Bürger.[1] Im Weiteren spielt die Konflikt-Theorie eine wichtige Rolle, insbesondere als Erklärungsmodell zu denkbaren Diskriminierungspraxen der Polizei. Neben weitgehender Übereinstimmung, zeigen sich auch bedeutende Unterschiede im Verhältnis zwischen Polizei und Jugendlichen in Deutschland und Frankreich. Sowohl in Frankreich als auch in Deutschland spielen der soziale und kulturelle Hintergrund der Jugendlichen, ihre religiösen Wert- und Normvorstellungen sowie die Identifizierung mit der Gesellschaft in der sie leben eine wichtige Rolle. Jedoch wird ihre Wirkung auf die Wahrscheinlichkeit eines Polizeikontaktes, auf die Einstellung zur Polizei und die Bereitschaft mit der Polizei zu kooperieren in vielen Analysen durch andere Variablen vermittelt (zum Beispiel: persönliche Einstellung und Erfahrung mit dem Begehen von eigenen Straftaten oder jener ihrer Freunde; Einstellung zur Delinquenz).

In Frankreich und Deutschland scheinen Erfahrungen mit Kriminalität und dem kriminellen Milieu sowie die erhöhte Bereitschaft Straftaten zu begehen das Verhältnis zwischen Jugendlichen und der Polizei maßgeblich zu beeinflussen. Delinquente Jugendliche oder solche, die in ihrem Umfeld eine hohe Bereitschaft zur Begehung von Straftaten aufweisen und oft auf der Straße anzutreffen sind, haben im Durchschnitt häufigeren Kontakt zur Polizei. Ihre Einstellung zur Polizei ist jeweils negativer im Vergleich zu Jugendlichen, die sich normkonform verhalten.

Die Ergebnisse der Studie bestätigen zudem, dass sich ein wiederholter polizeiinitiierter Kontakt negativ auf die Einstellung Jugendlicher zur Polizei auswirkt. Jugendliche, welche besonders häufig den verdachtsabhängigen und -unabhängigen Kontrollen der Polizei ausgesetzt sind, zu denen auch die *stop-and-search*-Polizeikontakte gehören, haben eine kritischere Einstellung gegenüber der Polizei. Ein Teil dieser Arbeit beschäftigt sich mit der Bereitschaft junger Menschen mit der Polizei zu kooperieren, oder umgekehrt, Selbstjustiz zu üben. Diese Analysen beruhen

aber nur auf den Daten aus Deutschland; im französischen Fragebogen ist diese Fragestellung nicht aufgeführt.

Die Ergebnisse dieser Untersuchung zeigen eine positive Korrelation zwischen Einstellung zur Polizei und entsprechender Kooperationsbereitschaft. Umgekehrt neigen Jugendliche, die den Eindruck haben, dass Polizeiorgane sich im Umgang mit den Bürgern respektlos und unfair verhalten zu alternativen Konfliktlösungsstrategien und sind eher bereit Selbsthilfe anzuwenden. Wie oben erwähnt, werden trotz vieler Parallelen auch bedeutende Unterschiede im Verhältnis zwischen Polizei und Jugendlichen in Deutschland und Frankreich ersichtlich. Sie betreffen vor allem den Einfluss eines möglichen Migrationshintergrundes auf die Häufigkeit der Polizeikontakte und die Einstellung zur Polizei. In Deutschland werden Jugendliche mit Migrationshintergrund unter Berücksichtigung relevanter Prädiktoren im Durchschnitt gleich oft von der Polizei kontrolliert wie diejenigen deutscher Herkunft. Die Einstellung zur Polizei ist, von wenigen Ausnahmen abgesehen, bei Jugendlichen mit oder ohne Migrationshintergrund durchwegs positiv. In Frankreich deuten die Ergebnisse auf eine systematische Diskriminierung Jugendlicher nordafrikanischen Ursprungs (Maghreb-Region) seitens der Polizei hin. Im Vergleich zu jungen Menschen französischer Herkunft, und unter Berücksichtigung relevanter Prädiktoren, erhöhen sich die Chancen eines «stop-and-search» -Polizeikontakts um mehr als das Doppelte. Die Einstellung Jugendlicher maghrebinischen Ursprungs gegenüber der Polizei ist signifikant schlechter als diejenige der übrigen jungen Menschen in Frankreich (französischer sowie anderer ausländischer Herkunft).

Jugendliche multiethnischer oder multikultureller Herkunft welche gut in die Gesellschaft integriert sind, positive Bindungen zu Familie und Schule aufweisen haben im Durschnitt ein besseres Verhältnis zur Polizei. Polizeihandlungen, die gezielt gegen Angehörige gewisser ethnischer Minderheiten gerichtet sind und damit den Anschein einer unfairen und diskriminierenden Haltung der Polizei vermitteln, können dieses Verhältnis jedoch schwer beeinträchtigen.

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WITHIN THE LAW: CRIMINAL LAW AND POLITICAL REPRESSION IN BRAZIL (1889-1930)

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DISSERTATION SUMMARY

The so-called 'First Republic' (1889-1930) in Brazil is commonly depicted as one of the most turbulent periods in the country's national history. This period started with a military coup whose leaders implemented a new model of government and installed a 'Presidential Constitutional Republic', replacing the previous Parliamentary Constitutional Monarchy that had been in place from 1822 to 1889. The new government pursued an ambitious and violent process of institutional and social 'modernisation', aiming to 'raise' Brazil to the same level as European 'civilized nations', which resulted in a massive wave of social segregation. On top of that, with the abolition of slavery in 1888, and welcoming policies that led to immigration flows coming from all over the world, Brazil faced an intense transformation in its social and population profile. With that, the perfect ingredients for several types of social upheaval were on the table: a new government, managed by new institutions, intended to control a new population. This multiplicity of structural changes paved the way for the emergence of multiple political conflicts that compromised the harmonious image forged by the official discourses by the time. From a legal perspective, the 'new' republican political order brought with itself a whole institutional apparatus aimed at controlling and repressing those who its leaders perceived as outsiders, or as different – and therefore as 'enemies' of the regime.

Historians, both of legal and social historical background,[1] usually depict the regular recourse to the state of emergency (including countless exiles and arrests that followed), the creation of laws that led to the expulsion or mass deportation of foreigners, and the harsh police repression of workers' movements as the blueprint of such institutional apparatus. Building up on that, these measures would represent the standard legal responses to a specific part of these 'deviant behaviours': political dissent. Such a perspective is backed by a more general theoretical assumption, which is the one that over

[1] Some examples of research that apply this interpretive framework to explain repressive policies in the First Republic are: Mendonça (2007), Guerra (2011), Cancelli (2001), Ribeiro (2009), Lopreato (1996), Menezes (1996) and Alves (1997).

the First Republic, under a liberal and democratic façade, there were different categories of citizenship or, as suggested by the Italian legal-historian Mario Sbriccoli (2009), 'two levels of legality.' While political and economic elites had access to the classical guarantees of modern criminal law (namely the legality principle and due process), the undesired 'disrupters of order' had to face the juridical limbo of exception. Outside Law, they would be excluded from the judiciary's discretion to become the preferred target of police officers, chiefs of police and ministers of justice.

In my PhD research I intend to challenge such an interpretation. I argue that the dichotomy rule *versus* exception, or criminal law *versus* executive and police measures does not withstand a more empirical analysis through criminal court cases dealing with political conflicts. I claim that some specific uses and interpretations of codified criminal law that can be traced in the records of selected exemplary cases contradict the idea that 'ordinary' criminal law constituted a zone of legality and protection, in opposition to a space of insecurity and contingency represented by administrative and executive measures. Throughout the analysis of court cases within different time periods and jurisdictions, legal doctrine and newspapers coverage I am tracing networks of practices and discourses suggesting that there is not such a thing as rule and exception, but instead a logic of overlapping uses of jurisdictions, legislation, and personal networks that all together formed patterns of legal reasoning leading to the criminalization of some political conflicts.

More specifically, what I suggest is that ordinary criminal law and its 'due process' did not remain isolated from the repression of political conflicts, nor was it exclusively applied to a group of individuals. As I show throughout the chapters, distinct social actors involved in political conflicts were addressed by the criminal justice system and made strategic uses of legal devices (laws, doctrinal concepts, moral statements) in order to navigate the judicial sphere. On the one hand, these individuals could be deemed as 'undesired' and 'threatening' by state authorities (e.g anarchists and immigrants), but on the other hand, they could also be high-rank opponent politicians or middle-rank military personal. In this sense, legal responses to political deviance were not 'exceptional'; they did not create some sort of second-class citizenship by manipulating or bypassing the limits imposed by the laws. They were instead within the Law, in the sense that they accommodated different paths and models to repress political deviance within an alleged liberal and republican legal order.

In order to better illustrate and exemplify these theoretical claims, I am exploring the notion of 'criminalization' in my research in a narrow sense, investigating under what circumstances criminal law – and not police, or administrative law – was triggered as a legal response to particular political conflicts. My goal is therefore to combine legal history and social history by distinguishing which of these conflicts came to the appreciation of the judiciary and how legal actors settled and disputed the interpretation of legal provisions, doctrinal concepts, and moral arguments while pursuing their interests. I further added newspaper coverage to my analysis, since my sources indicate that it played a strategic and influential role in formulating narratives that would feed and meld with the legal reasoning appearing in the court cases.

To understand the potential uses of criminal law within this specific approach, I analysed in the first chapter six habeas-corpus procedures (from a broader sample of forty files) discussed at the Federal Supreme Court for an in-depth analysis crossing

social profile of the plaintiffs, nature of the conflict and patterns of legal reasoning. Three of them are related to the Army Revolt of 1893 and 1894, which was led by navy commanders who opposed the military at the government. After having already provoked the resignation of President Deodoro da Fonseca in 1891 during the First Army Revolt, they claimed for the resignation of President Floriano Peixoto and the convocation of a referendum for the population to decide on the form of government. The fourth case addresses two public employees arrested after the assassination attempt against the then-president Prudente de Moraes in 1897. They were accused of taking part in a conspiracy plan involving high-rank politicians and members of the Military opposition. The last two cases depict a factory worker accused of taking part in a strike and soon after arrested for his 'anarchist activities' in 1919 and a group of low-rank military accused of plotting to dismiss Campos Sales from the presidency in 1900.

In the next chapters, I tackle three criminal court cases (one for each chapter) exemplary of how different social actors and political disputes came into discussion in lower courts. They also cover distinct geographic locations and historical periods within the First Republic. The first case concerns the assassination attempt against the then-president Prudente de Moraes in 1897, the same one already analysed in the first chapter. On 5 November a low-rank soldier – Marcelino Bispo – assassinated the Minister of War and tried to kill Prudente de Moraes, when he and his committee welcomed a group of militaries recently arrived from a bloody civil war taking place in the city of Canudos, northeast of Brazil. Under the suspicion that a great conspiracy to overthrow Prudente de Moraes was underway, on 12 November 1897 the National Congress approved a decree ruling the state of emergency, which was later extended until 23 February 1898. Simultaneously, the Chief of Police quickly conducted a criminal investigation with the aim of collecting evidence for a future criminal court case against the alleged perpetrator and possible accomplices.

The second chapter deals with the arrestment of Edgar Leurenroth in 1917. He was a well-known journalist, writer and publisher, who created and edited several leading anarchist newspapers in Brazil during the early decades of the twentieth century. During a strike that took place in the city of San Paolo in 1917, he was arrested on charges of 'anarchism'. Amongst the accused, he was one of the few nationals. Since it was not possible to apply the standard administrative measures for foreigners used in such kind of situation (namely deportation and expulsion), the question emerged how to cope with his case? Under his particular circumstances, a court decision would be necessary to keep him arrested. The solution was to prosecute him on charges of 'intellectual authorship' of robbery and incitement to crime.

The third and last chapter covers the Copacabana Fort revolt, taking place in Rio de Janeiro in 1922. It was a military revolt, mostly led by lower and middle-rank military and civilians. They objected that the president-elect Arthur Bernardes took office and called for a radical change in the scheme of power alternation that had been guiding the presidential elections since 1894. At the end of the revolt, hundreds of individuals were arrested, and an extensive criminal case to ascertain criminal liability to those involved was filed both in criminal and military jurisdictions.

Although these court cases do not cover all the political conflicts that occurred in the First Republic, they function as some sort of window that allows access to variations in the use of criminal law as a mechanism to control political activity during that period.

Through them, I am able to open a window of understanding how social struggles over state building, political participation and power dominance were framed and translated into the criminal justice system in the First Republic in Brazil.

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THE PROCEDURE OF THE EUROPEAN COURT OF HUMAN RIGHTS REGARDING COUNTRIES IN TRANSITION: THE ECTHR'S TRANSITIONAL JUSTICE CASES AGAINST LATVIA

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AUTHOR'S BIO

Inga Švarca worked as a case-processing lawyer at the Registry of the European Court of Human Rights. Thereafter she was as a research fellow at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg. Additionally, she was a PhD student at the International Max Planck Research School on Retaliation, Mediation and Punishment (IMPRS REMEP). She is a certified mediator and CEO of the Institute of European Mediation and Arbitration (IEMA).

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DISSERTATION SUMMARY

When Latvia and other post-Soviet countries joined the European Convention on Human Rights' ('Convention') system[1] in the 1990s, they were still countries in transition facing specific judicial problems (as I show in Chapter D, Chapter E, Section III., Chapter F). Their level of development in respect of democracy, the rule of law and in particular human rights differed profoundly from those of the established democracies, i.e. the founding Members of the Convention and the European Court of Human Rights ('ECtHR') (Chapter D, Chapter E, Section III., 1., Chapter F). The transition of these countries to rule-of-law democracies respecting human rights has been guided by the standards set by the Convention and the ECtHR (Chapter E, Section III., 3. and Section IV.). Moreover, tools of transitional justice applied by such countries in transition led to applications submitted to the ECtHR (Chapter E, Section III., 2.). So the ECtHR has been called to examine whether human rights guaranteed by the Convention were violated as a result of transitional justice. Consequently, national transitional justice mechanisms were subjected to the scrutiny of the ECtHR that adjudicated transitional justice in certain cases (Chapter E).

The main focus of the thesis was on the ECtHR's cases against Latvia involving transitional justice issues as a result of the application of transitional justice mechanisms by Latvian state authorities (Chapters F and G). The cases were analysed regarding the ECtHR's (specific) procedural approach in adjudicating them (Chapter G).

One of the results of this analysis is that the ECtHR did not apply a consistent legal procedural approach to transitional justice cases coming from Latvia (Chapter G, Section III.). This is a startling result because it seems that different approaches have so

[1] https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c

far been applied under the auspices of the Convention. The thesis therefore urges the ECtHR to consider the following recommendations (Chapter H) when adjudicating transitional justice cases:

First of all, the ECtHR should use clearer language on transitional justice, i.e. explicitly mention and admit the transitional justice context of the respective cases, as it has been done so far only in its dissenting opinions.

Secondly, the ECtHR should consistently and explicitly differentiate between transitional justice cases and non-transitional justice cases.

Thirdly, the ECtHR should take a consistent approach as to whether and to what extent it contributes to the transitional justice processes of its Member States, choosing between judicial restraint and judicial activism. If preferring judicial activism, namely deciding to adjudicate transitional justice cases, the ECtHR should modify its procedure in order to adopt the particularities of such cases and countries in transition.

Only quite recently the notions of 'transitional justice' (Chapter C) and 'reconciliation' (Chapter C, Section III., 6.) have been addressed in respect to inter/supranational courts. It used not to be the task of an international court to re-conciliate nation states in transition. However, the ECtHR cannot deny its important role and contributions to the legal development of countries in transition.

As the goal of the ECtHR is to safeguard the human rights standards set by the Convention and create justice in the individual case, the factual and legal peculiarities of Member States in transition have to be taken into account at least procedurally.

The thesis therefore proposes that the ECtHR should consider introducing reconciliation and mediation, as well as specific transitional justice mechanisms, e.g. truth-seeking, in transitional justice cases.

The implementation of the aforementioned recommendations – with the necessary consent and co-operation of Member States – is feasible due to the ECtHR's procedural flexibility and its almost unrestricted competence to decide on its tasks (Chapter A, Section VI., Chapter B, Section V.). Accordingly, the thesis recommends amending the procedure of the ECtHR in two ways: through judge-made law (*de lege lata*) and eventually by introducing amendments to the Rules of Court (*de lege ferenda*).

WHEN PROTEST BECOMES CRIME: POLITICS AND LAW IN LIBERAL DEMOCRACIES

CAROLIJN TERWINDT

AUTHOR'S BIO

Carolijn Terwindt is an author and activist. After studying law (LL.M.) and anthropology (M.Sc.) at Utrecht University, she received her LL.M. and J.S.D. at Columbia Law School. In 2012, she graduated from the International Max Planck Research School on Retaliation, Mediation and Punishment. From then until 2019, she worked in the Business and Human Rights program at the European Centre for Constitutional and Human Rights, where she collaborated closely with workers and their families in Pakistan and Bangladesh on cases of corporate liability in the textile industry. She further developed novel litigation on socio-economic rights in relation to the agribusiness in India. She has been invited as an expert to the United Nations and has published on a wide range of topics, including identity politics, anti-terrorism legislation, supply chain and auditor liability, as well as the liability of pharmaceutical companies offshoring their clinical trials.

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DISSERTATION SUMMARY

As one Chilean prosecutor put it, he knows that a Mapuche activist burning down a plantation to pressure private owners of historically indigenous land is not the same as a random pyromaniac, but he also maintains that it should in no way affect his job. In liberal democracies, prosecutors are not supposed to get involved in politics. Their role is to execute the law and prosecute crimes as they are defined in criminal legislation. They are tasked with initiating criminal proceedings in the public interest, but what do they do when the public is divided and interest groups advocate for radically different ways to apply the law? The thesis and the resulting book (hence, the book) is about the fuzzy territory that prosecutors wade in as they attempt to eschew political considerations, while taking into account the relevant wider social context in which crimes occur.

When Protest Becomes Crime constitutes an in-depth study of what the criminalization of social protest means beyond the fact that people may end up in prison or a movement's resources and focus may be diverted. It relies on rich ethnographic research in three liberal democracies – Chile, Spain, and the United States – to explore how competing definitions of harm, public interest, and legitimacy feed into the struggle of interpretation that is part and parcel of initiating and building criminal prosecutions in liberal democracies. By focusing on the construction and broader effects of prosecutorial narrative in contentious politics, it digs into the multiple layers constituting the shift from political protest to criminal treatment of an issue, activists, or a movement.

The book begins from the starting point that even democratic societies can be deeply divided on key questions of governance, such as the independence of a portion

of the country, the use and ownership of natural resources, or the extent of minority rights. It also acknowledges that the formal procedural tools of liberal democracies for resolving political conflict – parliamentary deliberation, legislative reform, round table negotiation, constitutional amendment, and legal adjudication through civil lawsuits – may fail to deliver a solution that adequately meets everyone's needs and interests. In such cases, those unhappy with the status quo may decide that the stakes are too high or urgent to abide by such slow and uncertain procedures. Instead, they may take justice into their own hands, bringing their grievances to the street in public forms of protest or organizing in underground resistance movements. Some of these tactics may transgress existing laws, justified by the perception that such laws are unjust or the ends justify the means. Protest actions may thus include public rallies, the physical occupation of buildings or lands, property destruction, or even killings.

Whether prosecutors intervene in such protest actions depends primarily on their understanding of such conduct as crime. In determining the criminality of protest, the prosecutors interviewed during the research for this book invariably emphasized that they 'simply apply the law.' Yet, this book demonstrates how applying the law is usually far from simple. It involves myriad choices in the construction of what the book calls 'prosecutorial narratives.' Once prosecutors get involved in responding to protest over a divisive social issue, their framing of context, selection and interpretation of facts, and charging choices create a powerful narrative about events, groups, and motives. Defendants as well as their supporters and critics all struggle to influence this narrative, which not only becomes the key to influencing the initiation, scope and course of criminal proceedings, but also a major truth-producer about political events and the legitimacy of grievances and even identities. Prosecutorial narratives simultaneously provide the basis for the choices made in specific criminal prosecutions and fulfil the function of legitimizing the very endeavour of dealing with an issue in the criminal justice arena.

This book is based on empirical research in three different liberal democracies. It traces prosecutorial narratives in Chile in relation to the so-called 'Mapuche conflict' between 1990 and 2009; in Spain vis-à-vis the terrorist organization ETA and the Basque independence movement from 1978 to 2009; and in the United States with respect to 'eco-terrorism' from 1979-2009. This research explores how similar patterns and mechanisms of prosecutorial narrative-making hold across distinct types of political protest cases in different democratic contexts.

Drawing on empirical examples, the book shows how criminal proceedings become the site of political mobilization and how prosecutorial narratives and charging choices change as a consequence. For example, animal liberation actions in the United States were initially prosecuted as property destruction, but later redefined as terrorism. Similarly, ceremonies celebrating the return of former ETA prisoners in the Basque Country were once viewed as protected speech, but later turned into the glorification of terrorism. The book demonstrates how, through their contextualization of conduct, prosecutors respond to the claims of different interest groups that either push for or reject criminalization. For example, Chilean prosecutors spent large parts of trials debating whether defendants actually represented a Mapuche constituency or not. In a case against animal rights activists who ran a mobilization website in the US, the prosecutor announced a shift in focus from the 'foot soldiers' to the 'generals,' adopting the language of a scientist targeted by animal rights protests.

During my interview in 2003 with Regional Prosecutor Vidal in the south of Chile, she emphasized that her job was simply to 'apply the democratic mandate of the law.' Her references to the law as the basis and final arbiter of her job supposedly closed the discussion about the choices she made along the way as she conducted criminal proceedings against Mapuche activists. *When Protest Becomes Crime* is a lengthy response to Ms. Vidal, arguing that 'just applying the law' is where the discussion begins rather than ends. Importantly, the book goes beyond diagnosing an incidental 'gap' between ideal and practice. It argues that the contentious processes described in the construction and functioning of prosecutorial narrative are built into the very premise of the rule of law. Because crime is not a pre-given category and because liberal legalism is not necessarily able to provide substantive as opposed to procedural justice, criminal proceedings become an important arena for collective claim-making, polarization and conflict escalation, sparking a potentially infinite re-framing of events and innovation of criminal vocabulary.

Resorting to the criminal justice system to solve socio-political problems in democracies is all too common, despite the structural inability of the liberal legalist framework to address the complexities inherent in long-running conflicts for which no clear consensus exists. In liberal legalism, criminal law is designed to reduce complex situations to concrete acts committed by single perpetrators against one or more specific victims. Addressing this tension head on, this book uses in-depth ethnographic material to make an important theoretical contribution to understanding protest, prosecution and the politics of contentious criminalization in liberal democracies.

Rationale

The main themes and objectives of the book

This book is intended as a wake-up call to those politicians and scholars who expect too much from criminal law and the criminal justice system. It further aims to provide prosecutors with a more articulate understanding of their role and performance within the social context of the cases in which they engage. The examples show how criminal law is often stretched to fit complex narratives about contested topics, such as how to qualify a terrorist organization or determine causal links between speech and violence. In particular, the book warns against the overly broad use of criminal law to deal with unresolved socio-political conflicts in society.

All too often, it is assumed that when both sides of a political conflict are dissatisfied with the performance of the criminal justice system and its proceedings, the system is actually performing as it should. Yet, the opposite is often true. Rather than finding a satisfactory middle ground, the state is failing both sides. Shifting issues over which there is no societal consensus into the logic and language of criminal law can lead to proceedings that are both needlessly oppressive towards defendants *and* ineffective in satisfying victims in their search for protection. The rich examples offered in this book are intended to make people sceptical of the 'truth' produced in democratic courtrooms and lead them to critically question the underlying interests and logic of prosecutions: what narrative does the prosecutor present? Who pushes this narrative in society? What other narratives are marginalized as a result?

Why it is needed

Criminal proceedings function as a site of political struggle in contentious episodes beyond those selected in this book. For example, in 2016, several European politicians called for the criminalization of people who supported refugees along the Balkan route to Europe. When prosecutors responded to such calls by initiating criminal investigations, their prosecutorial narratives often built on specific protectionist discourses about the right to asylum and the role of smugglers, in contrast to the narrative of open borders proclaimed by the refugee supporters themselves. The examples and analysis offered in this book facilitate a better understanding of how prosecutorial narratives influence criminalization in liberal democracies. The book highlights common features in how discursive mobilization influences prosecutorial narrative, shaping criminal investigations, driving prosecutorial choices and feeding back into political contention.

What makes the book special, original, important and marketable

The book is based on in-depth ethnographic research, including participant observation in trials and protests as well as interviews with a wide range of actors. For example, in Chile, I interviewed activists of the most radical indigenous political organization as well as representatives of the big forestry corporations that they are in conflict with over land rights. In Spain, I interviewed both the right-wing organizations representing victims of terrorist attacks by the underground left-wing Basque nationalist organization ETA, as well as members of ETA itself. In the United States, I interviewed (the lawyers and supporters of) animal rights and environmentalist activists put in prison on terrorism charges and the prosecutors defending such charges in court.

The book's core strength comes from its comparison of prosecutorial narrative development in three different countries and contentious episodes. In each of the episodes, prosecutorial narrative changed significantly over time. The common patterns identified over time and across cases strengthen the claim that these changes in criminal prosecution cannot be dismissed as the result of one rogue prosecutor or dysfunctional justice system. Instead, the observations point to the significance of the role played by interest groups and their discursive mobilization in the criminal justice arena in all liberal democracies.

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PUNISHMENT AND SENTENCE ENFORCEMENT FOR SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW COMMITTED IN THE FORMER YUGOSLAVIA

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AUTHOR'S BIO

Filip Vojta holds a Master of Law degree (mag.iur.) from the Faculty of Law, University Zagreb and a Doctor of Law degree (Dr. iur.) from the Faculty of Law, University Freiburg. He joined the IMPRS REMEP at the MPICC in 2012 and graduated in 2018 (summa cum laude). Filip Vojta is currently a postdoctoral researcher in the Criminology Department at the MPICC. His research and publications focus on penal sanctions and sanctioning systems, international criminal justice, criminology of international and transnational crimes, restorative justice, international crime control and prevention, and transitional/post-conflict justice. He is also a research associate of the Max Planck Partner Group for Balkan Criminology and a member of several working groups within the European Society of Criminology.

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DISSERTATION SUMMARY

BACKGROUND, RESEARCH QUESTIONS AND METHODS

The thesis represents a comprehensive interdisciplinary analysis of the vertical system for enforcement of sentences imposed by the International Criminal Tribunal for the Former Yugoslavia (ICTY).

The activation of the ICTY in 1993 marked the 'rejuvenation' of international criminal justice after World War II. Besides providing at the time a much-needed momentum for prosecution and adjudication of international crimes, the ICTY established a system for enforcement of sentences where, in the absence of official international prison facilities, convicted persons are being transferred to national prisons in those states that entered into special agreements for that purpose with the tribunal, to serve their sentences there. From the onset of the Tribunal's mandate, the possibility to enforce the sentences in the former Yugoslavian states has been dismissed by the UN Security Council.[1] As a result, the ICTY convicts are either serving or have already served their sentences in prisons of fourteen different European states.[2]

[1] Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993) (S/25704, 3 May 1993).

[2] Austria, Belgium, Denmark, Estonia, Finland, France, Germany, Italy, Norway, Poland, Portugal, Spain, Sweden, United Kingdom. At the time the project was officially concluded (July 2018), 58 ICTY prisoners have been effectively incarcerated in different European prisons.

Such a setup challenges the legitimacy of the established enforcement system and of internationally-imposed sentences, especially in the context of contemporary human rights perspective on rehabilitation of offenders that demands a certain standard of imprisonment and certain principles according to which the prison treatment should be implemented (see e.g. the Nelson Mandela Rules [United Nations 2015]; Van Zyl Smit and Snacken 2009; Rotman 1990). In particular, it raises concerns regarding possible inequality of the prison treatment provided to the ICTY convicts in different states as well as possible inequality of treatment between the ICTY convicts and domestic prisoners in these states. It also prompts a fundamental concern about the purposefulness of imprisonment in foreign states where, arguably, prison conditions and treatment are tailored towards risks and needs of ordinary domestic offenders and not foreigners who committed international crimes elsewhere (for discussions on the micro-aetiology of perpetrators of international crimes, see e.g. Smeulers 2008; Waller 2007). Consequently, the outcome of such an enforcement system and the extent of achieved rehabilitation of the ICTY prisoners has a direct impact on the transitional momentum in the post-Yugoslavian states, given that many ex-prisoners tend to return there after their release. In many of these states, the ICTY convicts might still be recognized as important moral actors in popular/political narratives about the conflict. Without adequate rehabilitative attention, once they are back they might decide to restore their past reputations by adopting the same narrative that justified mass atrocities back in the 1990s and that effectively taps into collective sentiments, emotions and memories of the conflict-traumatized population. Subsequently, the violence that surrounds the topic of membership and inclusion or exclusion between polarized groups can reoccur anytime (Albrecht 2006). It is therefore of fundamental importance that the ICTY prisoners themselves recognize the wrongness of committed crimes and that they distance themselves from any narrative or activities that would justify their commission. In that way, not only would they hinder the maintenance of such false narratives as well as destabilization of the fragile peace, they might in fact even decide to proactively oppose their creation; e.g. by publicly supporting the human rights ethos as well as peace and equality between former warring groups.

Described challenges were conceptualized as research problems that were, in turn, addressed through three main research questions: What purposes govern the enforcement of the ICTY sentences? How are the ICTY sentences enforced in practice? What is the outcome of the enforcement? Answers to the questions were expected to shed light on the realities of the enforcement practice and to empirically support a comprehensive assessment of the enforcement system's legitimacy. Considering almost exclusively normative analyses and scant empirical information on the enforcement of the ICTY sentences prior to the commencement of the project (e.g. Hoffmann 2011, Van Zyl Smit 2005, Penrose 200), qualitative methods were decided as the best approach to gather the data. Consequently, the data was gathered from the case law decisions, media reports and from personally-conducted interviews with a variety of subjects who have all in a different capacity been involved in the enforcement of the ICTY sentences. These include the ICTY/MICT personnel in The Hague, members of the prison staff in German and Estonian penitentiaries, and the ICTY prisoners in Finland, Germany and Estonia as well as their defence attorneys.

INTERNATIONAL PENOLOGY UNDER SCRUTINY: SUMMARY OF THE RESEARCH RESULTS

In line with the concerns that prompted the study, the results show that rehabilitation is not the governing goal of the ICTY enforcement system. At best, it is a desirable side effect of a system that is to a large extent governed by a pragmatic concern of solely enforcing the international sentences. Much of it has to do with the basic setup of the system that argues against the enforcement in home countries of the prisoners and that places monetary burden of enforcement on those states that eventually accept the prisoners. Especially because of the latter, the ICTY could never have demanded that other states accept the prisoners and has been forced to manoeuvre through the criteria discretionally imposed by the states – such as being willing to enforce only the sentences of a certain duration or only a limited number of sentences (altogether or within a certain time frame) – when negotiating a state of enforcement. This means that convicted persons are often not being allocated to domestic prisons on the basis of the latter's suitability to contribute to their rehabilitation, but rather on the basis of any state's willingness to actually accept the convicts. In short, a convicted person can end up in better or worse prison conditions depending on the state that is – at the time the judgment becomes final – actually willing to accept the enforcement of the sentence. This reduces the designation of an enforcement state to something of a lottery system.

Once the enforcement state has been designated, the quality of prison conditions and treatment offered to the ICTY prisoners will to a large extent depend on the domestic penal policy of that state. Analyses of European penal systems indicate that wealthier countries tend to feature more humane prison conditions and more proactive approach to the rehabilitation of prisoners (See e.g. Cavadino and Dignan 2006). To that end, it is not surprising that those ICTY prisoners transferred to Scandinavian states (Norway, Sweden, Finland, Denmark) expressed overall greater satisfaction with conditions and treatment provided in prisons than the prisoners incarcerated in Central/Western European states.

In particular, given that Scandinavian domestic penal policies are oriented towards normalization of the prison conditions and enabling the prisoners to efficiently reintegrate into society upon release, the ICTY prisoners have been able to benefit from visitation policies and work details in prisons that are aimed to assist the inmates in surmounting the detrimental effects of imprisonment. For example, despite considerable geographic distance from their home states, the remuneration the ICTY prisoners receive for their work in Scandinavian prisons enables some of them to monetarily help their family members to visit more often than they otherwise would. Additionally, the aggravating impact of serving the sentence in a distant and foreign socio-cultural environment has been mitigated by other progressive means of communication, such as Skype in prisons.

Further, general aptitude of the prison staff in Scandinavian states to speak English can benefit foreign prisoners in terms of quicker adaptation to the prison environment and can positively facilitate their participation in programs focused on dealing with crime aetiology and consequences of committed crimes. The enforcement states do not receive any monetary assistance that would prompt the development of such rehabilitation programs specially-suited for international prisoners; therefore national prison staff in foreign prisons might be unable or reluctant to provide more suited assistance to the

ICTY prisoners in this regard. However, the experience of some Scandinavian states, such as Finland and Denmark, shows that under auspices of a proactive rehabilitation policy the existing services in prison can be adapted to also address the risk factors of international prisoners. This above all pertains to the implementation of a continuous psychological assistance to the prisoners, grounded in communication and introspective reflection, which can in turn help the prisoners to come to terms with consequences of their crimes and to develop remorse as well as inclination to somehow repair the harm done.

Contrastingly, the ICTY prisoners transferred to Central/Western European prisons were much more critical of provided conditions and treatment. Next to prison conditions that are generally of lesser quality than those in Scandinavian states, the criticism pertained to the way the ICTY prisoners are perceived and integrated in Central/Western European prisons due to their status as foreigners and convicted international criminals. In particular, it was observed that those factors can have a significant impact on the quality of treatment in prison, dictating a higher level of prison security, more restrictions on contacts with family members and restrictions on access to other services, such as work, adequate health care and psychological counselling. Regarding the latter, interviewed ICTY prisoners criticized general ignorance and prejudice which national prison staff tend to have when it comes to discussion about the post-Yugoslavian conflicts or the circumstances of their respective cases. Additionally, it does not help that, opposed to the Scandinavian states, the prison staff in Central/Western European states are generally less inclined to speak English or other foreign languages, which further hinders any meaningful rehabilitative assistance.

The apparent inability of some enforcement states to ensure the safety of the ICTY prisoners in their prisons was reported as a significant aggravating factor, enhancing the feelings of anxiety, fear and isolation. It seems that in those enforcement states that feature a high quota of prisoners with Muslim background, such as the UK, France or some German federal states, a lack of attention has been given to allocate the ICTY prisoners to a facility where they might not be under a constant threat of attack from those prisoners, given the circumstances of their crimes, which were in many cases committed against the Bosnian Muslim population. Due to violent attempts on their lives, some ICTY prisoners were forced to spend parts of their sentences in an isolated confinement, which has substantively hindered any potential progress along a rehabilitative path. It is plausible to argue that it has also consolidated these prisoners in their previous unrepentant and negative attitudes towards committed crimes and received punishments. Once such prisoners are released to their home countries – and the general practice of the ICTY has been to do so after they have served two thirds of their sentence, without any additional conditions to their release – such attitudes might come at forefront, and in turn negatively impact the transitional momentum in those countries.

RECOMMENDATIONS IN BRIEF: TOWARDS A NEW SYSTEM FOR ENFORCEMENT OF INTERNATIONAL SENTENCES

Presented results prompted the development of following recommendations, which are aimed as guidelines for the international criminal tribunals and national criminal justice officials to create an improved sentence enforcement system that is based on the standardization of the prison treatment, and cooperation between justice institutions at inter-

national and national levels. It is estimated that the implementation of these recommendations would assign more legitimacy to the international sentence enforcement system and positively contribute to the overarching transitional aims under which international criminal tribunals operate (i.e. maintenance of peace, reconciliation between former warring parties). The recommendations are of particular relevance for the future enforcement practice of the International Criminal Court (ICC), given that the ICC follows the dispersion model of the ICTY, albeit with some practical modifications (see Vojta 2018).

First, inequality due to the current policy of dispersion of prisoners ought to be avoided by creating regional prison centres that can host offenders from conflicts occurring within a single region (see also Penrose 2003). For example, concerning the ICTY prisoners, Poland might provide enough geographical detachment to hinder malevolent social influence of politicians who turned war criminals, yet it is within close enough geographical proximity to the post-Yugoslavian countries to allow regular family visits and more familiar socio-cultural environment for prisoners, including lingual similarity. However, given the end of the ICTY mandate, it seems more probable that the ICC or other tribunals such as the recently established Kosovo Specialist Chambers would benefit from such restructuring. For example, the ICC could benefit from the creation of regional prison centres on the basis of geographical proximity of the situations/cases that fall under its jurisdiction. Further, by taking over monetary expenses of enforcement, international tribunals could commission a single prison facility, or a part thereof, where international prisoners can be allocated to equal conditions and receive standardized treatment from the officials who are familiar with their language and culture.

Second, standardizing the prison conditions in accordance with international human rights instruments should reduce harmful detrimental effects of imprisonment and simultaneously provide a basis for rehabilitative assistance tuned to the crime aetiology and risk-assessment of individual prisoners. In particular, it has been observed that the crime aetiology of international criminals can go well beyond the lack of basic problem-solving or social skills, towards which general offending behaviour programs are oriented (Vojta 2018: 33). Many perpetrators are members of political or military elites, highly educated and socially intelligent, who nevertheless mandated commission of atrocious acts. Similarly, there is a plethora of 'ordinary men' among the perpetrators who, induced by extraordinary war-time circumstances and under auspices of state policies, committed grave crimes (see e.g. Browning 1992). Many of them lack criminal identity as they consider their offences as acts of obedience and not deviance, therefore they might be (self-) assured they did nothing wrong. Offering an informed and therapeutic communication as a staple of the rehabilitative treatment in prison should therefore positively influence (moral) change in the perpetrators, allowing them to understand the gravity and wrongness of their crimes, which can in turn reduce the risk of re-engaging in past harmful behavioural patterns post-release and prompt them towards ameliorating the consequences of their crimes (e.g. through reparative actions).

Finally, cooperation in enforcement should be established with justice institutions in the post-conflict countries. This especially concerns the domestic control over conditions for provisional release of international prisoners (e.g., prohibition to hold a public office or to socialize with a radical social milieu). Cooperation would also allow more transparency in terms of supervision over the enforcement that would subsequently

counter any attempts from the parties in conflict to depict the enforcement as either cruel and inhuman treatment or a 'country club prison'. Also, transparency in enforcement is seen as opening new ways towards reconciliation between perpetrators, victims and groups they represent. Seeing the treatment as a legitimate punishment can influence both perpetrators and victim groups to enter a restorative dialogue about the past and about how to proceed in the future (for preliminary considerations on the adoption of restorative principles in this regard, see Vojta 2014).

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INTENSIVE BEWÄHRUNGSHILFE UND JUNGE INTENSIVTÄTER: EINE EMPIRISCHE ANALYSE DES EINFLUSSES VON INTENSIVBEWÄHRUNGSHILFE AUF DIE KRIMINELLE KARRIERE JUNGER MEHRFACHAUFFÄLLIGER IN BAYERN

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Diese Dissertation befindet sich u.a. in folgenden Bibliotheken: Freiburg, Max-Planck-Institut für Ausländisches und Internationales Strafrecht; Leipzig, Universitätsbibliothek; Heidelberg, Universität Heidelberg

ZUSAMMENFASSUNG DER DISSERTATION

HINTERGRUND

Der vorliegende Beitrag fasst die Ergebnisse der Dissertation ‚Intensive Bewährungshilfe und junge Intensivtäter. Eine empirische Analyse des Einflusses von Intensivbewährungshilfe auf die kriminelle Karriere junger Mehrfachauffälliger in Bayern' überblicksartig zusammen und diskutiert sie. Die Gesamtergebnisse der Untersuchung sind 2018 als kriminologischer Forschungsbericht bei Duncker & Humblot erschienen (vgl. Walsh 2018).[1] Die Untersuchung war Teil der Begleitforschung des Intensivbewährungshilfeprojekts RUBIKON, die im Auftrag und mit Unterstützung des Bayerischen Staatsministeriums der Justiz und für Verbraucherschutz durch das Max-Planck-Institut für ausländisches und internationales Strafrecht, Freiburg, durchgeführt wurde. Die Begleitforschung wurde im Oktober 2011 aufgenommen.

Die Untersuchung verfolgte verschiedene Zielsetzungen. Sie befasste sich mit der Implementierung sowie der Wirkung des Münchner Modellprojekts RUBIKON und stellt damit eine Prozess- und Wirkungsevaluation der Maßnahme bereit. Dabei wurde ein Schwerpunkt auf Bedingungen für den Abbruch bzw. die Weiterführung von kriminellen Karrieren (Karriereabbruch/*Persistance*) gelegt. Im Zentrum der Untersuchung stand die Frage: Führt die Teilnahme an einem Intensivbewährungshilfeprojekt zum

[1] https://www.mpicc.de/de/publikationen/intensive-bewahrungshilfe-und-junge-intensivtater/ (26.05.2019).

Abbruch der kriminellen Karriere jugendlicher und heranwachsender Intensiv- und Mehrfachtäter? Diese Forschungsfrage wiederum wurde unterteilt in zwei Teilfragen: Wirkt sich Intensivbewährungshilfe stärker auf den Karriereabbruchsprozess jugendlicher und heranwachsender Intensiv- und Mehrfachtäter aus als andere jugendstrafrechtliche Sanktionen? Lassen sich bei Abbrechern, also Personen, die im Untersuchungszeitraum kein strafrechtlich relevantes Verhalten zeigen, mögliche Wendepunkte identifizieren, die einen Karriereabbruchsprozess eingeleitet haben könnten? Die Forschungsfragen wurden theoriegeleitet und anhand des erhobenen quantitativen und qualitativen Datenmaterials beantwortet. Tabelle 1 zeigt die durchgeführten Datenerhebungen im Überblick.

Tabelle 1: Datenerhebungen

	Datenerhebung 1	**Datenerhebung 2**	**Datenerhebung 3**	**Datenerhebung 4**
EEG	Aktenanalyse (n = 97)			BZR-/ER-Auszüge (n = 91)
IG[2]1	Leitfadengestützte Interviews (n = 23)			
IG2	Leitfadengestützte Interviews (n = 16)	Leitfadengestützte Interviews (n = 16)	Leitfadengestützte Interviews (n = 12)	
IKG1		Kontrollgruppenziehung	Aktenanalyse	BZR-/ER-Auszüge (n = 51)
KKG2		Kontrollgruppenziehung	Aktenanalyse	BZR-/ER-Auszüge (n = 94)
KKG3		Kontrollgruppenziehung	Aktenanalyse	BZR-/ER-Auszüge (n=101)

Das Modellprojekt

Im Februar 2010 begann die zweijährige Modellphase des Projekts RUBIKON bei der Bewährungshilfe am Landgericht München I. Mit dem Modellprojekt wurde eine Intensivbewährungshilfe für jugendliche und heranwachsende Intensiv- und Mehrfachtäter bereitgestellt. Die Implementierung des Modellprojekts RUBIKON erfolgte, nachdem einige aufsehenerregende Fälle im Münchner Verkehrsnetz eine öffentliche Kontroverse zum Thema Jugendgewalt verursacht hatten.

Die Fallzahlen von vier Bewährungshelfern des Landgerichts München I wurden von 104 auf 52 Probanden reduziert, um für die Mehrfachtäter eine intensivere Betreuung bereitstellen zu können. Dadurch konnte jeder der zuständigen Bewährungshelfer zusätzlich bis zu fünf RUBIKON-Probanden annehmen. Die Betreuung im Rahmen des

[2] IG: Interviewgruppe.

Modellprojekts sah mehrere Kontakte pro Woche sowie die Unterstützung bei Ausbildungsfragen, Wohnungssuche oder der Einleitung notwendiger Therapien und Maßnahmen vor. Hierbei war eine enge Vernetzung mit anderen, für die jungen Menschen zuständigen Einrichtungen vorgesehen, um eine unmittelbare Bedarfsdeckung gewährleisten und auf eventuell auftretendes Fehlverhalten zeitnah reagieren zu können. Die Dauer der Intensivbetreuung wurde auf sechs Monate festgesetzt, jedoch konnte eine bedarfsgeleitete Anpassung vorgenommen werden (vgl. auch Haverkamp & Walsh 2014a; 2014b).

Die Zielsetzungen des Modellprojekts waren die Vermeidung bzw. Reduzierung erneuter Straffälligkeit sowie der Aufbau eines konformen sozialen Netzwerks. Darüber hinaus wurde ein Schwerpunkt auf die persönliche Entwicklung sowie die Kompetenzerweiterung der Projektteilnehmer gelegt. Methodisch stützt sich das Projekt ebenso wie die reguläre Bewährungshilfe auf die intensive Einzelfallhilfe und das Case Management. Den wesentlichen Unterschied zwischen der Intensivbetreuung im Rahmen des Modellprojekts und der regulären Bewährungsbetreuung bildeten die erhöhten zeitlichen Ressourcen und die damit einhergehende höhere Betreuungsintensität (vgl. auch Walsh et al. 2016).

Die Betreuung innerhalb des Projekts hatte keine Auswirkungen auf die Sanktionierung eines jungen Straftäters, sondern stellte eine ergänzende Maßnahme im Rahmen einer primären oder sekundären Jugendstrafaussetzung dar. Die Aufnahme eines Probanden in das Projekt erfolgte nach Klärung von Betreuungsbedarf und Mitwirkungsbereitschaft bei einem Erstgespräch mit den zuständigen Bewährungshelfern. Innerhalb der Modellphase lag die Aufnahmequote von vorgeschlagenen Personen bei 54 % (n = 103). Die häufigsten Gründe für eine Ablehnung stellten ein zu geringer Betreuungsbedarf der Probanden sowie nicht vorhandene Kapazitäten aufseiten der Bewährungshilfe dar. Die Probanden wurden vor allem durch Jugendgerichtshilfe und Jugendgericht vorgeschlagen. Bei 58 der 190 in der Modellphase vorgeschlagenen Personen handelte es sich um polizeilich geführte Intensivtäter.

Von den Projektteilnahmen wurden 55 % regulär beendet, es erfolgte also ein Betreuungsübergang in die reguläre Bewährungshilfe. In 27 % der Fälle wurde das Projekt durch einen Widerruf bzw. eine Inhaftierung beendet. Die überwiegende Anzahl der Bewährungsverstöße bestand aus neuen Straftaten sowie dem Entzug aus der Aufsicht und Leitung des Bewährungshelfers. Die durchschnittliche Projektdauer betrug bei erheblicher Variation 7,5 Monate.

Objektive Einflussfaktoren auf einen Karriereabbruchsprozess
Gruppenvergleich

Für die Legalbewährungsuntersuchung wurden drei Kontrollgruppen gebildet. Der Kontrollgruppenbildung lagen die Intensivtäterlisten aus München, Nürnberg und Augsburg zugrunde. Probanden der regulären Bewährungshilfe (KG1: n = 51), Personen, die zu einer unbedingten Jugendstrafe verurteilt worden waren (KG2: n = 94) und Personen mit anderen jugendstrafrechtlichen Sanktionen (KG3: n = 101) wurden mit 91 Probanden der Experimentalgruppe verglichen. Kontrollgruppe 3 bildeten dabei Personen mit Verurteilungen zu Jugendarrest (n = 56), jugendrichterlicher Weisung (n = 21), Erbringung von Arbeitsleistungen (n = 11), Geldauflage (n = 2), Verwarnung (n = 1) und Diversion (n = 10).

Für die Untersuchung wurde ein Beobachtungszeitraum von zwei Jahren festgesetzt,[3] der sich an der jeweiligen Aufnahme eines Probanden in das Modellprojekt bemisst. Für die Probanden in den Kontrollgruppen wurde aus forschungspraktischen Gründen der jeweilige Verurteilungszeitpunkt als Beginn des Beobachtungszeitraums herangezogen. Diese Vorgehensweise musste auch für die Personen aus dem Jugendstrafvollzug angewandt werden, da keine Haftentlassungsdaten vorlagen. Die Möglichkeit zur Begehung von Straftaten sowie das Anzeigeverhalten und Entdeckungsrisiko innerhalb von Haftanstalten weichen jedoch stark von den Bedingungen in Freiheit ab (vgl. Heinz 2014: 80 f.) Dies wirkte sich auf die Rückfalldaten der KG2 aus. Im Rahmen der Survivalanalysen wurde der Beobachtungszeitraum deshalb erweitert. Dabei wurde sowohl die Rückfälligkeit innerhalb von zwei Jahren betrachtet als auch in einem weiteren Analyseschritt von jedem Untersuchungsteilnehmer der maximale Beobachtungszeitraum innerhalb von vier Jahren herangezogen.

Beim Vergleich des Alters der vier verschiedenen Gruppen zeigte sich, dass die KG3 signifikant jünger war als die übrigen Gruppen, obwohl sich die Gruppen hinsichtlich des Durchschnittsalters kaum unterschieden. Der Altersunterschied der KG3 dürfte durch Gründe der Strafzumessung bedingt sein. Diese richtet sich überwiegend nach den bisherigen Sanktionen und Vorstrafen des Verurteilten (Albrecht 2003: 226 f.; Höfer 2003: 134 ff.).

Auch in anderen Bereichen ergaben sich signifikante Gruppenunterschiede, die überwiegend auf die kürzere kriminelle Karriere der KG3 zurückzuführen waren. So zeigten sich Unterschiede hinsichtlich der Anzahl der den bisherigen Verurteilungen zugrunde liegenden Straftaten, der Begehung bestimmter Straftaten sowie spezifischer Vorsanktionierungen. Weiterhin handelte es sich bei den Kontrollgruppenteilnehmern durchweg um polizeilich geführte Intensivtäter. Die Experimentalgruppe hingegen bestand nur zu etwa einem Drittel aus polizeilich geführten Intensivtätern.

Legalbewährungsvergleich

Rückfallquote

Die Rückfälligkeit der Untersuchungsteilnehmer wurde mittels Eintragungen im Bundeszentral- und Erziehungsregister betrachtet. Die Rückfallquote war in KG3 und EG mit 78 % bzw. 55 % am höchsten. Die Gruppenunterschiede hinsichtlich der Rückfallquote erwiesen sich als signifikant (Pearsons Chi² (3) = 35.53 (p = 0.000)).

Weiterhin wurde eine logistische Regression unter Verwendung verschiedener Kontrollvariablen (verschiedene Vorsanktionierungen sowie das Alter der Probanden) durchgeführt. Sie zeigte ebenfalls signifikante Gruppenunterschiede zwischen EG und KG2 bzw. KG3 in der Rückfallquote. So wiesen die Untersuchungsteilnehmer der KG3 eine um den Faktor 3.67 höhere Wahrscheinlichkeit auf, rückfällig zu werden. Hingegen sank diese Wahrscheinlichkeit in der KG2 um den Faktor 0.39. Entsprechend wurden die Unterschiede in der Rückfallquote der Gruppen durch die Kontrolle weiterer Einflussfaktoren nicht reduziert.

[3] Um für jeden der Projektteilnehmer einem zweijährigen Beobachtungszeitraum möglichst nahe zu kommen, wurden die Bundeszentralregisterauszüge auf dem Stand von Nov./Dez. 2014 gezogen. Im November 2012 wurden die letzten Probanden innerhalb der Modellphase in das Projekt aufgenommen.

Im nächsten Schritt wurde die Wirksamkeit der Unterstellung unter Intensivbewährungshilfe im Vergleich zu anderen Sanktionen überprüft. Hierzu wurde die Gruppenzugehörigkeit rekodiert und die Experimentalgruppe mit allen Kontrollgruppenteilnehmern verglichen. Hier zeigte sich, dass die Wahrscheinlichkeit der Kontrollgruppen, rückfällig zu werden, um den Faktor 0.95 sinkt. Dieser Unterschied erwies sich als nicht signifikant ($p = 0.85$). Auch bei Nichtberücksichtigung der KG2 blieb das Ergebnis nicht signifikant ($p = 0.08$).

Anzahl der Rückfälle

Die Untersuchung der Gruppenunterschiede hinsichtlich der Anzahl von Rückfällen zeigte wiederum signifikante Gruppenunterschiede (Pearsons Chi^2 (18) = 53.82 ($p = 0.000$)). Zur genaueren Überprüfung der Gruppenunterschiede wurde eine *Poisson Regression* durchgeführt. Diese ergab, dass die Anzahl der Rückfälle in KG3 unter Konstanthaltung der oben angeführten Kontrollvariablen signifikant höher war als in der EG ($p = 0.000$), wohingegen sie in der KG2 signifikant niedriger war ($p = 0.002$).

Wiederum wurde die Unterstellung unter Intensivbewährungshilfe in Vergleich zu den anderen Sanktionen gesetzt. Die Rückfallfrequenz erwies sich hier als signifikant höher in den Kontrollgruppen ($p = 0.027$). Bei Nichtberücksichtigung der KG2 jedoch zeigte sich, dass die Rückfallfrequenz von KG1 und KG3 geringer war als die der EG. Dieses Ergebnis war nicht signifikant ($p = 0.257$).

Rückfallschwere

Auch die Rückfallschwere, zu deren Betrachtung die Strafschwere der ersten im Beobachtungszeitraum erfolgten Sanktion untersucht wurde, wies signifikante Gruppenunterschiede auf (Pearsons Chi^2 (27) = 66.39 ($p = 0.000$)). Bei der durchgeführten ordinalen logistischen Regression ergaben sich signifikante Unterschiede zwischen EG und KG2. Die Strafschwere erwies sich in der EG als deutlich höher. Dies dürfte wiederum durch die Inhaftierungszeit der KG2 zu erklären sein. Der alleinige Vergleich zwischen EG und den drei Kontrollgruppen zeigte keine signifikanten Unterschiede ($p = 0.258$); ebenso wenig wie der Vergleich von EG mit KG1 und KG3 ($p = 0.733$).

Survivalanalysen

Zur Darstellung der Zeitdauer bis zum ersten Rückfall im Gruppenvergleich wurde eine Kaplan-Meier-Überlebensfunktion erstellt. Der Legalbewährungsverlauf der KG2 erweist sich hier als deutlich niedriger als in den anderen Gruppen. Dies ist in Anbetracht der Inhaftierungszeit dieser Gruppe erwartungskonform. Die Verläufe von EG und KG1 überschneiden sich in den ersten vier Monaten mehrfach. Anschließend weist die KG1 eine geringere Rückfälligkeit auf als die EG. Der Verlauf der KG3 dagegen weist deren durchgängig höhere Rückfälligkeit nach.

Um die in vielen Fällen vorliegenden längeren Rückfallzeiträume für die Analyse nutzbar zu machen, wurde in einer weiteren Überlebensfunktion der Beobachtungszeitraum auf vier Jahre erweitert. Hierzu wurde der individuelle Maximalbeobachtungszeitraum herangezogen, in dem für die Untersuchungsteilnehmer Legalbewährungsdaten vorlagen. Durch diesen Schritt sollte insbesondere der Einfluss der Haftzeit in KG2 relativiert werden. Erwartungsgemäß nähert sich der Legalbewährungsverlauf der KG2 nach etwa zwei Jahren deutlich an EG und KG1 an. Demgemäß war die positivere Le-

galbewährung dieser Gruppe durch die Inhaftierungszeit bedingt. Die Zahl der Haftentlassungen steigt mit Erweiterung des Beobachtungszeitraums. Damit kommt es zu einer Erhöhung der Registrierungen innerhalb dieser Gruppe. Die Unterschiede zwischen EG und KG1 werden im Zeitverlauf zunehmend schwächer. Der Unterschied zwischen KG3 und den übrigen Gruppen wächst hingegen im Zeitverlauf.

Schließlich wurde eine Cox-Regression durchgeführt. Hierbei wird das unmittelbare Risiko erneuter Registrierungen für die Untersuchungsteilnehmer unter Berücksichtigung der Gruppenzugehörigkeit und der Kontrollvariablen geschätzt (vgl. Ziegler et al. 2007: e42; Dohoo et al. 2012: 519 ff.). In diesem Analyseschritt wurde das Datenformat geändert, um die Anzahl der weiteren Straftaten einbeziehen zu können. Die Anzahl der Beobachtungen änderte sich dabei von 337 rückfälligen Personen zu 502 begangenen Straftaten. Die Ergebnisse zeigen, dass eine Person der KG3 ein um den Faktor 1.74 höheres Risiko erneuter Registrierung hat als eine Person der EG. Dabei erwiesen sich die Registrierungsrisiken von KG2 und KG3 als signifikant unterschiedlich zur EG. Das Modell zeigte weiterhin, dass das Registrierungsrisiko mit jedem zusätzlichen Lebensjahr um den Faktor 0.93 sinkt.

Einflussfaktoren auf einen Karriereabbruchsprozess

Beim Abbruch krimineller Karrieren handelt es sich um einen Prozess, in dessen Verlauf subjektive Faktoren eine wesentliche Bedeutung einnehmen und es noch zu strafrechtlich relevantem Verhalten kommen kann. Daher wurde auch der Einfluss subjektiver Faktoren auf den Karriereabbruch untersucht.

Legalbewährung der Interviewteilnehmer in Hell- und Dunkelfeld

Bei der Erfassung der Legalbewährung der interviewten Personen erfolgte eine Differenzierung nach schwerer und leichter Delinquenz. Im Hellfeld diente hierbei die Sanktionierung des Gerichts als Maßstab. Wurde ein Proband wieder zu einer bedingten oder unbedingten Jugend- oder Freiheitsstrafe verurteilt, so wurde er der schweren Delinquenz zugeordnet. Lag hingegen eine Verurteilung zu einer leichteren Sanktion vor, so wurde der Interviewteilnehmer der leichten Delinquenz zugerechnet. Im Dunkelfeld wurden eher bagatellhafte Delikte als leichte Delinquenz gewertet, während schwerwiegendere Delikte und eine große Anzahl an begangenen Delikten der schweren Delinquenz zugeordnet wurden.

Offiziell wurden zweiundzwanzig der interviewten Personen im Untersuchungszeitraum registriert, sechzehn davon mit schwerer Delinquenz. Bei neunzehn Probanden erfolgte keine neue Registrierung. Die Daten der offiziellen Registrierungen der interviewten Personen wurden durch deren selbstberichtete Delinquenz ergänzt. Dieser Selbstbericht stützte sich im Fall der zu verschiedenen Zeitpunkten interviewten Probanden sowohl auf deren narrative Angaben als auch auf eine Fragebogenerhebung. Bei den einmal Interviewten hingegen basierten die Selbstberichte lediglich auf der mündlichen Befragung.

Bei Ergänzung der offiziellen Registrierungen durch die selbstberichtete Delinquenz der interviewten Personen stieg die Zahl der Personen mit negativer Legalbewährung auf dreiunddreißig Probanden an. vierundzwanzig interviewte Personen wiesen schwere Delinquenz auf, während neun der leichten Delinquenz zugeordnet wurden. Keine Delinquenz in Hell- und Dunkelfeld zeigte sich bei acht Probanden.

Mögliche Turning Points

Vom Vorliegen von bis zu fünf Ereignissen, die ihr Leben zum Positiven verändert hätten, sprachen sechsunddreißig Interviewte. Diese Schlüsselereignisse wurden in nicht institutionelle und institutionelle unterteilt. Als nicht institutionelle Schlüsselereignisse wurden Partnerschaft (n = 10), der (Aus)Bildungs- und Arbeitsbereich (n = 16) sowie Änderungen des persönlichen Umfelds (n = 27) genannt. Die institutionellen Schlüsselereignisse beinhalteten Inhaftierungen und freiheitsentziehende Maßnahmen (n = 17), die Bewährungshilfe (n = 13) und den Wunsch nach einem Ende des Kontakts zu justiziellen Organen (n = 8).

Im Rahmen der Interviewanalyse stellte sich heraus, dass nicht alle genannten Schlüsselereignisse eine gleichwertige Stellung in den Narrationen der Probanden einnahmen. So wurden insbesondere Veränderungen des persönlichen Umfelds und die Reduzierung des Substanzmittelkonsums als durch andere Ereignisse ausgelöste Modifikationen dargestellt, denen dennoch eine wesentliche Bedeutung zur Änderung der Lebenssituation zukam.

Um den eigentlichen Antrieb für den Karriereabbruchsprozess zu finden, wurde in einem nächsten Schritt das den anderen offenbar vorgelagerte Ereignis identifiziert. Hierbei wurden institutionelle Schlüsselereignisse (n = 23) häufiger angegeben als nicht institutionelle (n = 13). Zur Legalbewährung der interviewten Personen wurde festgestellt, dass bei beiden Schlüsselereigniskategorien keine, leichte und schwere Delinquenz zu verzeichnen war. Drei Probanden nannten kein Schlüsselereignis als ausschlaggebend für Verhaltensmodifikationen, sondern identifizierten eine intrinsische Motivation als Antrieb. In diesen Fällen, in denen eine positive Legalbewährung zu verzeichnen war, könnte *Personal Agency*[4] als Anstoß des Karriereabbruchs fungiert haben.

Im Zusammenhang mit Schlüsselereignissen wurden in siebzehn Fällen Einstellungsänderungen, zumeist in Form eines kognitiven Wandels und/oder einer beginnenden Selbstbildveränderung, kommuniziert. Diese Einstellungsänderungen wurden als dem jeweiligen Schlüsselereignis nachgelagert berichtet, werden also als durch dieses ausgelöst betrachtet. Im Folgenden kam es offenbar zu einer wechselseitigen Beeinflussung von Schlüsselereignis und innerem Wandel, wodurch die jeweilige Person dazu befähigt wurde, sich von dem früheren Lebenswandel zu distanzieren. Diese Distanzierung scheint einem Stufenverlauf gleichzukommen.

Schlussfolgerungen für den Karriereabbruchsprozess

Die Legalbewährungsuntersuchung wies nicht auf einen signifikant positiven Einfluss der Teilnahme am Intensivbewährungshilfeprojekt hin. Die EG zeigte weder bezüglich Rückfallquote noch -anzahl, -schwere oder -geschwindigkeit eine positivere Entwicklung als die anderen Gruppen. Dementsprechend gab es keine positivere Beeinflussung des Karriereabbruchs durch das Intensivbewährungshilfeprojekt.Eine eindeutige Zuordnung der Gruppenunterschiede auf die jeweiligen Sanktionen und Maßnahmen ist jedoch

[4] Die 'Personal Agency' einer Person ist deren kognitive Bewertung der eigenen Leistungen sowie der Handlungs- und Entscheidungsfähigkeit (Bandura 1989: 1175 ff.; King 2014: 49 f.). Weiterhin kann Agency als die Fähigkeit beschrieben werden, zwischen verschiedenen Handlungen zu wählen, sodass die Handlung als solche zielgerichtet wird. Die Bedeutung von Agency für den Karriereabbruchsprozess liegt auf der individuellen Offenheit gegenüber Veränderungen sowie der Fähigkeit, Veränderungsmöglichkeiten zu erkennen (Giordano et al. 2002: 992 ff.; Healy 2010: 113 ff.; King 2014: 49 ff.).

nicht möglich. Es kann nicht ausgeschlossen werden, dass die Gruppenunterschiede durch andere Faktoren ausgelöst wurden. Zum einen wiesen die Gruppen Unterschiede in rückfallrelevanten Variablen auf. Zum anderen könnten weitere Variablen, die hier nicht berücksichtigt werden konnten, einen erheblichen Einfluss ausüben. Darüber hinaus könnte sich das höhere Maß an Kontrolle innerhalb der Intensivbewährungshilfe auf die Registrierungswahrscheinlichkeit ausgewirkt haben.

Die wesentlich höhere Rückfälligkeit der KG3 dürfte sich durch das jüngere Alter erklären. Zudem könnten die Dauer und Intensität der erfolgten Sanktionen und Maßnahmen einen Erklärungsansatz bilden. Die Legalbewährung der KG3, die mit kurzzeitigen Interventionen sanktioniert wurde, erwies sich als deutlich negativer. Dieser Effekt blieb auch in den Regressionsmodellen erhalten, in denen das Alter kontrolliert wurde. Vor dem Hintergrund des prozesshaften Abbruchs krimineller Karrieren könnten mittel- und längerfristig angesetzte Behandlungsmaßnahmen einen positiveren Einfluss ausüben.

Neben dem Alter der Probanden erwiesen sich bestimmte Vorsanktionierungen als signifikant positive Einflussfaktoren auf kriminelles Verhalten. Die bundesweite Rückfalluntersuchung weist diesen Einfluss auf Rückfälligkeit regelmäßig nach (Jehle et al. 2010: 54 ff.; 2013: 54 ff.). Hier könnte geschlussfolgert werden, dass der justizielle Umgang mit jungen Mehrfachauffälligen den Karriereabbruch nicht fördert, sondern deren Selbstbild im Sinne eines Labelings negativ beeinflusst. Bei der vorliegenden Tätergruppe könnte diese Negativbeeinflussung der eigentlichen gerichtlichen Intervention jedoch auch vorgelagert sein. Ein stigmatisierender Umgang mit den jungen Menschen könnte positive Effekte justizieller Interventionen verzögern (vgl. Farrall et al. 2014: 155).

Im Hinblick auf subjektive Einflussfaktoren kann angenommen werden, dass Schlüsselereignisse Karriereabbruchsprozesse dann auslösen, wenn sie einen inneren Wandel beim Individuum in Gang setzen. Die sich anschließende wechselseitige Beeinflussung äußerer und innerer Faktoren könnte dann Veränderungen in verschiedenen anderen Lebensbereichen bedingen und schließlich in einen Selbstbildwandel münden. In diesem Verlauf kann es jedoch auch zu Rückschlägen und Beeinträchtigungen kommen.[5] Die Frage, was zuerst kommen muss um einen Karriereabbruch anzustoßen – der innere oder der äußere Wandel – lässt sich durch die vorliegenden Ergebnisse nicht beantworten. In Anlehnung an Boers und Herlth wird jedoch davon ausgegangen, dass diese Frage nicht eindeutig beantwortet werden kann oder muss (Boers & Herlth 2016). Es kann jedoch festgehalten werden, dass sowohl äußere als auch innere Faktoren gegeben sein müssen, um eine kriminelle Karriere zu beenden.

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THE ICC AND CHINA: THE PRINCIPLE OF COMPLEMENTARITY AND NATIONAL IMPLEMENTATION OF INTERNATIONAL CRIMINAL LAW

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DISSERTATION SUMMARY

THE ROME STATUTE AND THE PRINCIPLE OF COMPLEMENTARITY

The Rome Statute of the International Criminal Court (hereinafter: the ICC) was adopted by a majority vote at a six-week UN Diplomatic Conference held in Rome on 17 July 1998. The ICC was the first permanent international institution to investigate and prosecute core international crimes. Following the 60th ratification with unexpected rapidity, the Statute entered into force on 1 July 2002, and the Court was set up shortly after. The advent of the ICC represents a milestone in the history of international criminal law, which has led the international community into a new era of relationships between international institutions and national jurisdictions. In comparison to the former international criminal tribunals, which have primary jurisdiction over national jurisdictions, the Preamble and article 1 of the Rome Statute specify that the ICC shall be complementary to national jurisdictions. In doing so, complementarity strikes a delicate balance between the competing interests of national sovereignty and judicial independence. This adoption of complementarity is a historical choice based on the experiences with former international tribunals and a result of compromises between sovereignty concerns and the need for an independent international criminal court. Traditionally speaking, international criminal law and national sovereignty are necessarily in conflict with each other (Benzing 2008: 23). Therefore, the goal of ensuring an agreement between states made it necessary to provide national jurisdictions with primary responsibility for preventing and punishing atrocities in their own courts. With this design, the ICC plays a complementary role and intervenes only where national jurisdictions fail to conduct investigations or prosecutions or are supposed to do so but are unwilling or unable to

genuinely carry out national proceedings with regard to the crimes named in the Rome Statute.[1] Eventually, this was supported by most of the states in the Rome Conference.

China and the ICC

The People's Republic of China was actively involved in the negotiations of establishing an international criminal court and made great contributions to it; however, when the Rome Statute was signed by an overwhelming majority of states, China was unexpectedly one out of only seven countries to cast a vote against it.[2] Today, the ICC has developed into a fully functioning institution with 123 state parties by April 2015.[3] Following state referrals by the Democratic Republic of the Congo (DRC), Uganda, the Central African Republic, and Mali, UN Security Council referrals to the Court of the situation of Darfur, Sudan, and Libya, as well as the authorization by ICC judges to open on the Prosecutor's initiative an investigation into the situation of Kenya and Côte d'Ivoire, the Office of the Prosecutor (OTP) is, at the time of writing this summary, conducting nine investigations.[4] Against such broad membership and the robust development of the ICC, however, China and some other major states such as the USA, Russia and India are still outside of the ICC family.[5] This provokes the question: Does this imply that there is no interplay between the ICC and non-party states? Under certain circumstances, the ICC could also exercise its jurisdictions over nationals of non-party states or crimes committed on their territories. Therefore, the relationship between the ICC and non-party states is also organized by the principle of complementarity. Thus, the theory and practice of complementarity will also have important implications for and impacts on non-party states.

The Development of the Theory and Practice of the Complementarity Principle

Passive Complementarity

The concept of complementarity has been subject to a dynamic development in its theorization. At its inception, complementarity was conceived primarily as a means to determine the forum that would assume jurisdiction over a particular case. The assumption of complementarity's impact is that national states will feel 'forced' to investigate or prosecute cases involving core international crimes so as to avoid any intrusion by the ICC into situations involving their nationals and territory. This threat-based dimension of complementarity is conceived to have a 'catalyst effect' on the national implementation of international criminal law (Kleffner 2008: 309-339). That means that state parties began to partially implement the Rome Statute in their domestic legislations and to show the influence of this catalyst impact. However, in the last decade, complementari-

[1] Article 17 of the Rome Statute of the International Criminal Court.

[2] The other six countries were the USA, Libya, Yemen, Iraq, Qatar, and Israel.

[3] ICC at a glance; http://www.icc-cpi.int/en_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/icc%20at%20a%20glance.aspx [24/04/2015].

[4] See Situations and Cases [26/04/2015]: http://www.icccpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx.

[5] At the Rome Conference, both China and the USA voted against the Rome Statute despite their active and important role in the negotiations that had led to its adoption. However, India actually abstained and Russia signed the Rome Statute. During the Review Conference of the Rome Statute held in Kampala, Uganda, from 31 May to 11 June 2010, all of these four countries attended as observer states. The prospects of these four countries actually ratifying the Statute are still doubtful.

ty has witnessed a dynamic development in both theory and practice. It has far broader implications than the regulation of concurrent jurisdiction under the Rome Statute. It shapes various dimensions of the ICC and national practice, ranging from prosecutorial strategy and criminal policy to the national implementation of international criminal law and compliance. Complementarity has set up a Rome Statute system of international criminal justice in which international and national actors work not only competitively but also cooperatively. Due to the limited judicial resources, the complementary function of the ICC is also restricted. This means that although in an ideal situation, the ICC could investigate and prosecute all the cases that the national jurisdictions are unwilling or unable to deal with, the reality is that it is a permanent international criminal court without any police or other enforcement instruments. Therefore, complementarity as a catalyst for national jurisdictions to investigate and prosecute core international crimes under the threat of ICC intervention cannot be as effective as conceived by the drafters of the Rome Statute.

Positive Complementarity

The Prosecutor has pointed out that the greatest success that the ICC can achieve is not to have a highest possible number of cases, but rather to have no cases brought before it at all.[6] This leads us to the question of how this success could be achieved by applying complementarity in practice. Since national courts have the primary jurisdiction to investigate and prosecute core international crimes, their willingness and ability to do so are the crucial factors for the success of the ICC. The Prosecutor also acknowledged that an effective struggle against impunity goes way beyond the intervention of the ICC whose possibilities of prosecution remain confined to a small number of cases. In other words, the most important role of complementarity is not to take over cases from and thus compete with national jurisdictions in an antagonistic manner, but to encourage and help national states to regain their willingness and ability to investigate or prosecute crimes committed by their nationals or on their territories. The difficulties that states have with fulfilling their role under the ICC's complementarity regime have given impetus to the pursuit of a burden-sharing dimension of complementarity, namely, positive complementarity. There is an old saying that reads: 'give a man a fish – feed him for a day, teach him how to fish feed him for a lifetime' The ICC's offer to the national courts of a forum for prosecution cannot solve the problem – the long-lasting effective way is to equip them with the ability to do their own jobs. Against this background, a positive complementarity approach was firstly adopted by the Prosecutor as a prosecutorial policy in practice, meaning that the ICC encourages genuine national proceedings where possible; relies on national and international networks; and participates in a system of international cooperation.[7] The main emphasis of positive complementarity is on the construction of national abilities, which makes it possible for the ICC and national states to cooperate with each other in order to enhance their capacity and willingness to fulfil their role within the complementarity regime.

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[6] See the statement made by Mr. *Luis Moreno Ocampo*, Chief Prosecutor, Ceremony for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court (16 June 2003); http://www.iccnow.org/documents/MorenoOcampo16June03.pdf [09/09/2012].

[7] ICC – Office of the Prosecutor, Report on Prosecutorial Strategy (2006).

The Interpretation of a Two – Dimensional Concept of Complementarity and Its Impact on China

The progressive development of the understanding of complementarity indicates the cognitive process of this concept. Most recently, a two-dimensional concept consisting of passive and positive complementarity has been constructed. This concept plays multiple roles: not only as a jurisdiction-allocation mechanism, but also as a burden-sharing system between the ICC and states. However, common consensus on the meaning, content, and potentials of this two-dimensional complementarity has not yet been reached. The Rome Statute only sets out the general contours of complementarity in several provisions, thus its text leaves a considerable degree of ambiguity and space for further interpretation. The general meaning of complementarity is still open to interpretations, and the full range of its theoretical and operational implications is still unclear. The first years of practice by the ICC have provided opportunities to further understand the practical application and judicial interpretations of the statutory provisions on complementarity. It functions as guidance for the whole legal work of the ICC and organizes its relationship to states in different litigation phases. Therefore, the interpretation of complementarity in theory and practice has a potentially significant impact on the states' attitudes towards the ICC. From the perspective especially of non-party states, the ambiguity of the complementarity concept raises a critical question here: which kind of national prosecution satisfies the principle of complementarity? In particular, as a non-party state of the Rome Statute, which has neither signed nor ratified it, China cannot dissociate itself from the influences of the ICC or shirk responsibility for the suppression of core international crimes. Precisely the opposite is the case. Being a non-party state to the ICC, China has ratified the genocide, torture, and other international conventions and is obliged to prosecute these international crimes by implementing these international conventions into national law. However, the core crimes have thus by far not been incorporated into Chinese criminal law. Questions arise as to whether China is willing and able to prosecute core crimes – and if so, on which legal basis.

With this background in mind, the thesis first introduces the historical background of the emergence and development of complementarity. Then, it identifies and analyses the meaning, scope, and potentials of complementarity in theory and practice in order to clarify some ambiguities and misuses of complementarity. By shedding some light on what complementarity is, how it works, which deficiencies it has, and which impact it has on the national prosecution of core international crimes, this work aims at contributing to the discourse on complementarity for both scholars and practitioners. Furthermore, it puts a special focus on the possible impact of the principle of complementarity on the implementation of international criminal law in China as a third-party state and the prospect of the relationship between China and the ICC.

This work can be split into several core issues and central questions: What is the meaning of complementarity? How does complementarity affect the identity of the ICC and its role with respect to domestic jurisdictions? What is the relationship between the ICC and third-party states under the principle of complementarity? What is the status of prosecution of core international crimes in China? Which obstacles and problems of this status occur, and what are their causes? Does the Chinese status in the implementation of international criminal law satisfy the complementarity requirements, and which reforms should be carried out? How can China take advantage of the principle of com-

plementarity in order to protect its sovereignty? Which prospect does the relationship between China and the ICC have?

The Structure of the Thesis

The research questions will mainly be discussed and analysed in six parts:

Chapter one is a brief introduction of the whole thesis, outlining the research questions, aims, scope, and methodology of the work. This part serves as a navigation tool for the whole work.

Chapter two analyses the historical foundations that led to the adoption of the Rome Statute. It is of the nature of an international treaty that the interpretations of treaties could always refer to their drafting history. After examining the jurisdictional features of the former international tribunals and their relationship with national courts, the drafting history of the Rome Statute is summarized in order to provide the basis for understanding how the main provisions on complementarity were negotiated and why it was accepted as a compromise at the end of the Rome Conference.

Chapter three first discusses the nature and normative embedding of complementarity in the Rome Statute, then uncovers that it serves not only as a dispute-settlement mechanism, but also as a burden-sharing system. A two-dimensional concept of complementarity consisting of passive complementarity and positive complementarity is constructed. Subsequently, the concepts, assumptions, and legal basis of both dimensions are analysed in depth. Besides the normative analysis of the legal framework and the interpretation of relevant statutory provisions, the jurisprudence of the ICC case law on complementarity is also reviewed. The comparison of the theoretical understanding of complementarity with the case law of the ICC on complementarity as well as the potential misuse and misunderstanding of positive complementarity in practice are determined, and helpful suggestions which could make up for the deficiencies of the ICC practice are also proposed. Finally, the author argues that there is a distinction between situation- and case-admissibility criteria. Since these admissibility determinations are the main reflection of complementarity requirements, passive complementarity is case-based and positive complementarity is situation-based.

Chapter four examines the status of the national implementation of international criminal law in China, including the historical experiences with and conceptions of international criminal law, as well as the legal basis, and the practice of national prosecution of international crimes in China. Due to the lack of definitions of core international crimes in the Rome Statute in Chinese domestic legislations, China now adopts an ordinary crime approach in order to deal with the investigation and prosecution of horrific international crimes which shock the conscience of the whole international community.

Chapter five focuses on whether the Chinese ordinary crime approach could satisfy the complementarity criteria. Based on the legal framework of the Rome Statute, the ordinary crime approach is permissible. If national states investigate and prosecute the substantial conducts genuinely, even prosecution for ordinary crimes such as murder, rape, and so on could generally fulfil the complementarity requirement substantially and procedurally. Only in the case of states using national proceedings in order to shield the perpetrators from accountability, or if there is resistance to investigation or prosecution, the ICC will step in. With regard to the issue of an ordinary crime approach under the test of complementarity, there are three main academic positions: the international-

charge-based thesis, the revised-charge-based thesis, and the sentence-based thesis. The author of this work contends that these three theses indicate different compliance levels and that the Chinese ordinary crime approach fulfils at least the minimum standard and is permitted by the complementarity. The relationship between the ICC and China also refers to cooperation between them. Under the positive complementarity dimension, the cooperation system between states and the ICC plays an important role. Various potential issues with respect to cooperation between China and the ICC are analysed, such as China's obligation to cooperate with the ICC under Security Council referrals, the acceptance of cooperation requests from the ICC, the cooperation with the ICC and immunities of heads of non-party states, the possible judicial assistance by the ICC in favour of non-party states – and so on.

Chapter six concludes the whole work with a potential future prospect of the relationship between the ICC and China. Based on the analysis, there is no immediate threat by the ICC to Chinese sovereignty. Although Chinese national legislations did not have any definitions of core international crimes, the current Chinese national legal system could fulfil the complementarity requirements. The case-based passive and situation-based positive complementarity further guarantee the intervention of the ICC in very few exceptional situations. The discretionary positive complementarity exercised by the Prosecutor in the context of a situation is based on the burden-sharing function, and many measures could be provided to national states to encourage them to regain their willingness and ability to prosecute the conducts constituting core international crimes. Thus, as long as China would like to investigate and prosecute in a situation phase, it could still keep the cases within national jurisdictions by promising to prosecute the potential cases that the Prosecutor would like to investigate otherwise. Only in cases in which China refuses to investigate and prosecute the potential cases or uses national proceedings to shield the perpetrators from accountability, the ICC will take over the case. Even at a case stage, if the person and the substantial conduct of the perpetrators are prosecuted as a conduct of ordinary crimes, the ICC will still step back as long as the national proceedings are impartial and independent. Thus, the author of this work argues that from a legal perspective, there are no real difficulties for China to accede to the Rome Statute, and national sovereignty could also be respected and protected by the complementarity principle. The positive complementarity dimension even provides technical help for states to develop their capacity to investigate and prosecute core international crimes. The international cooperation and assistance system established within the Rome Statute justice system could also be a good chance for China to enhance its international criminal cooperation and assistance with state parties. However, China's attitude towards the ICC is also affected by many political factors which may still constitute the main obstacles to join the ICC in the future.

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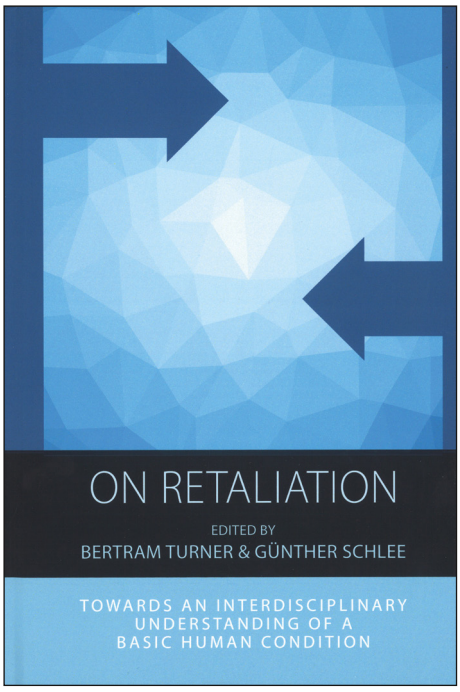

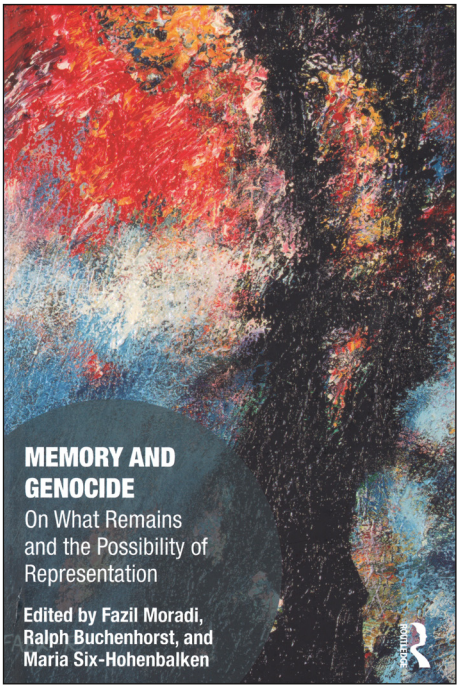

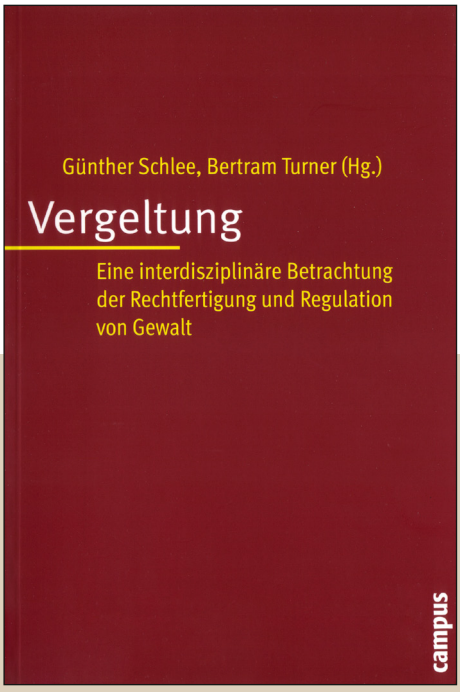

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