Book Review – Christina Möller's, *Völkerstrafrecht und Internationaler Strafgerichtshof – kriminologische, straftheoretische und rechtspolitische Aspekte*

By Christian Maierhöfer[*]

[Christina Möller, *Völkerstrafrecht und Internationaler Strafgerichtshof – kriminologische, straftheoretische und rechtspolitische Aspekte* (Münster, Hamburg, London: LIT, 2003); Univ. Diss. Münster, ISBN 3-8258-6533-9]

For ten years, International Criminal Law has developed at an unpredicted speed, probably more than any other field of International Law. The world has seen the rise of the first international criminal tribunals since the days of Nuremberg and Tokyo. Some months ago, the election of the judges and the prosecutor of the International Criminal Court (ICC) marked the beginning of the first ever permanent international judicial institution for the prosecution of large-scale human rights violations. While much has been written about the law installing these Courts and the law applied by them, surprisingly little has been thought about their "why." The answer seemed much too obvious with the atrocious black and white pictures of Auschwitz and the more recent coloured ones of Srebrenica in mind. Yet justified moral outrage cannot be a substitute for an academically elaborated theory on the purpose of International Criminal Law; a theory that must prove in the light of the experience of past inhumanities that the ICC is indeed the appropriate means for combating future ones. This is what Christina Möller made her task.[1]

The basis for Möller's research is set forth in the first part of the book,[2] where she gives an account of several events which would today be considered international crimes, going back as far as the crusades and finishing with Rwanda. She analyses these events in two parts; the first is criminologically, and the second under the

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[1] CHRISTINA MÖLLER, VÖLKERSTRAFRECHT UND INTERNATIONALER STRAFGERICHTSHOF – KRIMINOLOGISCHE, STRAFTHEORETISCHE UND RECHTSPOLITISCHE ASPEKTE 3 (2003).

[2] *Id*. at 17 – 217.

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aspect of the purposes of the punishment "human rights criminals." This approach, which compares different atrocities in a search for common traits, promises precious insights into the structure of barbarity, despite the often claimed "singularity" and "incomparability" of the Holocaust. Möller denies this claim without giving rise to the slightest doubt that she intends to minimize the terrible suffering of its victims.[3] Nevertheless, it is doubtful whether there is any point in going back a thousand years, to a time long before a modern concept of International Criminal Law was thought about.

A closer look at the two main parts of Möller's thesis reveals that she uses almost exclusively the 20th century atrocities to draw a criminological picture of "mega-crimes" and to develop the purposes International Criminal Law can serve by punishing their authors. Going back further probably does not contribute much to a better understanding of contemporary large-scale crimes and the modern legal response to these crimes. It could be of a certain historical interest, but this would require willingness to leave the viewpoint of today's human rights activist for the more "neutral" role of the historian trying to explain, not condemn, our ancestors' behaviour. This step is not taken by Möller, instead she, as she admits herself in her introduction,[4] subsumes historical events under norms which came into effect several hundred years later. This "conviction" of the crusaders for not complying with today's human rights standards is only one example of the deplorable political, sometimes even "ideological", influence which is widespread in her work.

It is most obvious where she leaves the field of Criminal Law and speaks about general International Law. There is nothing wrong in principle with dealing with aspects of general International Law in such a thesis. As Möller admits herself, International Criminal Law is both Criminal and International Law.[5] It is Criminal Law by its content, but International Law in structure, for it is part of the legal system of the latter. That is what authorises the critic, coming from the side of Public International Law, to write a review about the book, and that is where he has to criticise it.

The concept of the international legal order underlying Möller's work is highly controversial, a controversy scarcely reflected in her argumentation. She obviously advocates a kind of "world community ideology." She believes that International Law is heading from a legal order helping sovereign, independent states coordinate

[3] *Id*. at 232 – 237.

[4] *Id*. at 15.

[5] *Id*. at 12.

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and cooperate on terms they have chosen themselves towards some sort of constitution of a cosmopolitan, universal "community of the citizens of the world." Those scholars who defend the "classical" world order are branded as "conservative," as opposed to the "modern thinkers," who acknowledge that the era of the *Menschheitsstaat* (State of mankind) is about to begin.[6] States, the major actors in classical International Law, and their interests are most often regarded with suspicion, while a positive light is shed in general on the action of NGO's, which according to the author proves that cosmopolitan thinking and behaviour are a reality nowadays.[7] The problems caused by such a legal concept are not dealt with by Möller. In the end, replacing the consensus of equal, independent and sovereign States as the basis of International Law for a "universal common good of mankind" defined by an intellectual elite of NGO activists endangers the legitimacy of the whole international legal order. States are, notwithstanding the deplorable lack of democracy in many countries, the only actors on the international scene which can at least in their majority retrace their power back to the will of their respective peoples. NGO's are neither democratically authorised nor responsible to citizens in a way similar to governments.

The "traditional" world order based on the equality and sovereignty of every state needs to be defended fiercely against all tendencies claiming that the pursuit of certain goals, be it the punishment of human rights violations or the defeat of international terrorism, are far too important to be restricted by the "formalistic" requirement of consensus among states. The events of the last months have shown that it is neither always the "good cause" of human rights for which this paramount importance is claimed nor the "conservatives" (an expression that seems always to be used with a slightly pejorative connotation in Möller's book) defending the "traditional", consensus-based system. This weakness would not be worth mentioning if it had only a theoretical character. A dissertation about International Criminal Law does not need to discuss in depth fundamental questions of the character of International Law. But, sadly, the concept chosen by Möller has its implications on her methodological approach. It causes a certain confusion within the classical trias of sources of International Law, treaty, custom and general principles all essentially consensus-based, by playing down the role of state-consensus without being very precise about what should replace it. One consequence is vagueness in terminology. Möller uses several times, for example, the expression *internationale Menschenrechtscharta* (international human rights charter) without specifying which of the several, in many respects differing,

[6] *Id*. at 420.

[7] *Id*. at 422 to cite the most obvious example.

human rights instruments she means.[8] Is she referring to the the non-binding Universal Declaration of Human Rights, the International Convent on Civil and Political Rights, regional human rights agreements like the ECHR, or the customary "minimum human rights standard," which is a kind of lowest common denominator of the aforementioned texts. Another consequence is a sometimes too prominent place for the legally non-binding findings of expert committees or NGO's compared to state practice or international jurisdiction. For example, the author extensively cites UN studies involving the right of victims of human rights violations to a fair and effective remedy of seeing the perpetrator punished.[9] In contrast, the jurisdiction of the European Court on Human rights, according to which Article 6 of the ECHR does not grant the victim a right to demand prosecution of the offender, is not even mentioned.[10]

These "deviations" are really a pity, because Möller reaches very interesting, convincing and valuable conclusions when she sticks to a more traditional methodological approach: Her analysis of the judgements of international tribunals from the IMT (spell out the first time you use it) to the ICTY (spell out the first time you use it) and ICTR (spell out the first time you use it) in respect to the purposes of international criminal sanctions is of great value for anyone thinking about the sense of International Criminal Law.[11] It reveals that retaliation and reconciliation are considered by these tribunals to be their primary goal.[12] Möller's own critical reflection of this jurisprudence is also of great value. Her finding that traditional purposes of deterrence and reintergration of national Criminal Law cannot be of great importance in International Criminal Law is convincingly based on the profound analysis of examples of crimes against humanity from the Armenian genocide to Rwanda, passing by the Holocaust and the Khmer Rouge regime.[13] Her suggestion that International Criminal Law is a means to reconcile societies torn apart by atrocious crimes by identifying individuals rather than whole peoples or ethnic groups as the criminals and by fulfilling the victims desire for justice, and to make clear that the world will not accept such heinous crimes any longer seems to be a sound concept of International Criminal Law.[14] The stress on its "pacifying"

[8] *Id*.

[9] *Id*. at 550 -560.

[10] Meyer-Ladewig, Hk-EMRK, Baden-Baden 2003, Art. 6 § 27. Just to be complete: such a right can under the ECHR in fact be deduced from provision safeguarding the right violated by the crime, e. g. the right to life, Art. 2 of theECHR, in the case of murder, but not from the right to an effective remedy.

[11] *Supra*, note 1 at 440 – 447, 456, 462 – 464, 468 – 470, 479 – 482, 487 – 491, 509 – 511.

[12] *Id*. at 447.

[13] *Id*. at 611.

[14] *Id*. at 610.

function matches with the approach of the UN Security Council, which installed the ICTY and the ICTR under Chapter VII of the UN Charter as a measure to restore peace in Yugoslavia and Rwanda, respectively. Möller combines this impassioned justification of International Criminal Law with a wise reference to its limits. On one hand, the factual limits of International Criminal Law, due to law enforcement institutions that will never have the financial and personal resources to prosecute every single one of the sometimes tens of thousands soldiers, policemen or prison guards involved in such large-scale crimes.[15] On the other hand the structural limits; the punishment of individuals is an important step, but cannot replace a more comprehensive historical, political and social response to "mega-crimes."[16] Möller's call for conclusive criteria for the choice of whom to prosecute and whom not, given the limited resources, should be heard by the ICC in order to avoid the reproach of arbitrariness.[17]

The author's conclusion that other means of dealing with *Vergangenheitsbewältigung* (the past), such as "truth commissions" for example, still have their role to play in the transition from a barbarous regime to democracy merits approval as well.[18] The only slight criticism referring to this part of the work is her rejection of "retaliation" as a purpose of International Criminal Law.[19] It is questionable if this motive of criminal punishments, which as Möller shows is predominant in the judgements of existing international tribunals, can be set aside. Is the wish of the victims "to see justice done," a wish acknowledged by the author, not in the end "retaliation?"[20] It seems as if in Möller's view, "retaliation" and "revenge" are synonyms, both with an equally negative connotation.

Besides the definition of valid purposes of International Criminal Law, the second task approached by Möller is a criminological analysis of large scale human rights criminality. Common "excuses" for those involved in large-scale human rights violations, first of all the theory of the small, personally not accountable "cog in the big criminal machine," are disclosed and confronted primarily with the factual findings of the historical analysis, to a lesser degree also with existing norms of

[15] *Id*. at 313.

[16] *Id*. at 329.

[17] *Id*. at 314.

[18] *Id*. at 622.

[19] *Id*. at 455.

[20] *Id*. at 610.

positive International Law.[21] This closer look proves that neither from the criminological nor from the positivist point of view is the "*Rädchentheorie*" (cog theory) tenable, at least not in the majority of cases.[22] The biographies of the ICTY's first convicts are cited as an example that only few "human rights criminals" belong to the category of people being forced to their crimes by a brutal machinery.[23] Absolutely no objection is possible to Möller's contention that, setting aside the criminological debate about "personal accountability" of those serving a barbarous regime, at least positive International Law assumes them to be personally accountable in criminal courts. From the "grave breaches" provisions of the Geneva Conventions to the abounding state practice with respect to Nazi criminals, she cites many such examples.[24]

What words impose themselves to sum up the impressions after reading this voluminous PhD thesis? Firstly, the impression of an interesting work on the theory of International Criminal Law, result of scrupulous research in the facts of many "mega-crimes" and in the jurisprudence of international criminal tribunals. Secondly, a useful theory legitimating International Criminal Law and at the same time pointing to its limits. But, sadly, also the impression of a book not always written with the same understanding it shows for Criminal Law as far as International Law is concerned. A book that needs a bit less of the impetus of a human rights activist, which is honourable, but belongs rather to the field of politics than to the field of legal research. To put it in a nutshell: A book that needs more methodological strictness with regard to general International Law.

[21] *Id*. at 315-350.

[22] *Id*. at 347.

[23] *Id*. at 333.

[24] *Id* .at 321 – 327. Shows (involuntarily) that an international legal system based on state consensus is actually able to ensure the respect of basic human rights, despite the sharp criticism it receives from "cosmopolitans".