

The Overall Function of International Criminal Law: Striking the Right Balance Between the *Rechtsgut* and the Harm Principles

A Second Contribution Towards a Consistent Theory of ICL

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Abstract Current International Criminal Law (‘ICL’) suffers from at least four theoretical shortcomings regarding its ‘concept and meaning’, ‘*ius puniendi*’ (supranational right to punish), ‘overall function’ and ‘purposes of punishment’ (For clarification of these basic questions, see Ambos in Oxf J Legal Stud 33:293–315, 2013b. Of course, there are many possible conceptualisations of the basic questions facing any theory of criminal law see, for example, Murphy in Columbia Law Rev 87:509–532, 1987. Yet, taking the perspective of ICL, I would argue that these are the most important conceptual questions today.). These issues are intimately interrelated; in particular, any reflection upon the last two issues without having first clarified the *ius puniendi* would not make sense. As argued elsewhere (Ambos in Oxf J Legal Stud 33:293–315, 2013b), in an initial contribution towards a consistent theory of ICL, the *ius puniendi* can be inferred from a combination of the incipient supranationality of the value-based world order and the world citizens’ fundamental human rights predicated upon a Kantian concept of human dignity. On this basis, it is now possible to examine the overall function of ICL. Given the fact that ICL has not yet achieved the status of an autonomous discipline, the inquiry must start with a discussion of national theories of criminalisation. The article focuses on the two most important theories of criminalisation, namely the theories of protection of *Rechtsgüter* (‘legal goods’) and the prevention of harm (see *infra* second section). Next, it examines whether and how these national theories can be transferred to ICL (see *infra* third section).

Keywords International criminal law · Rechtsgut-theory · Harm principle · Overall function of international criminal law

Object and Purpose of the Inquiry

I am interested here in the fundamental question of the rationale for criminal law in a *Rechtsstaat*. Why do we use criminal law? What is its overall function and purpose? My

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