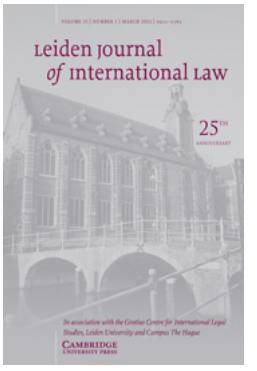

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BOOK REVIEWS

Anja Seibert-Fohr, *Prosecuting Serious Human Rights Violations*, Oxford, Oxford University Press, 2009, 326pp., ISBN 978-0-19-956932-8.
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Published shortly before UN Secretary-General Ban Ki-moon declared, at the 2010 Review Conference on the International Criminal Court in Kampala, that we are witnessing the birth of a new Age of Accountability, Dr Seibert-Fohr's *Prosecuting Serious Human Rights Violations* is a must-read for academics, policy makers, and practitioners interested in human rights, criminal law, and transitional justice. For reasons spelled out in further detail below, it is an outstanding piece of legal scholarship, the relevance of which extends beyond the legal discipline.

The central research question is clearly defined and thoroughly explored. What is the role of criminal justice in international human rights protection? Despite the wealth of literature on international criminal law and on international human rights law, the nexus between both had so far not systematically been analysed from the particular perspective adopted by the author. Following the renaissance of the idea of international prosecution of those responsible for the most serious crimes of international concern some 20 years ago, and the globalization of international criminal justice to which this has given rise, questions abound about the relevance of criminal prosecution for human rights protection. There has been a growing recognition – among diplomats, peace mediators, and non-governmental human rights organizations – that a failure to hold accountable individuals responsible for violations of human rights is detrimental to human rights protection. However, is this recognition also reflected in international human rights law, both under the global and regional conventional human rights systems and in customary international law? Is there a duty on behalf of states to prosecute individual perpetrators? If so, what are the underlying rationale and the scope of this obligation? Do states parties have a margin of appreciation to establish forms of accountability other than criminal punishment? What are the legal implications of the rationale for the permissibility of amnesties under international human rights law? Is there a trend towards a recognition of an international victim's right to criminal justice? Do the same standards apply in the particular context of post-conflict justice, namely after situations in which the violation of the human rights norm was systematic rather

than exceptional and in which the magnitude of individuals directly concerned as individuals and/or as perpetrators inevitably raises particular challenges, including the possible tension between criminal prosecution, political stability, peace, and societal reconciliation?

All of these and other questions are comprehensively studied by the author. Responses are rigorously structured, which allows for insightful comparative perspectives on the status of the duty to criminalize, investigate, prosecute, and punish under the International Covenant on Civil and Political Rights and under the American and European Convention on Human Rights. Under each human rights legal regime, *lex lata* findings are clearly separated from valuable considerations *de lege ferenda*. In Chapter 6, *Prosecuting Serious Human Rights Violations* rises far above the analytical descriptive level and offers a convincing conceptualization of the duty to prosecute under human rights treaties. One is left wondering, however, why the role of criminal prosecution of human rights violations under customary international law is not incorporated in this conceptualization and dealt with in a separate Chapter 7.

The International Covenant on Civil and Political Rights remains silent about how perpetrators of human rights violations should be dealt with. However, the duty of states parties to hold accountable and 'bring to justice' individuals responsible for violations has gradually been defined and refined by the Human Rights Committee, the Covenant's supervisory body. The author deplores an important inconsistency in the Committee's approach. While, initially, criminal prosecution was conceptualized in the context of a state party's duty to respect and ensure (Art. 2, para. 1) and to give effect to the Covenant rights (Art. 2, para. 2), there appears to be a trend to derive the duty to prosecute from the victim's right to an effective remedy (Art. 2, para. 3). Yet, the Committee has so far not accepted any of the Covenant provisions as providing the legal basis for an individual right to have perpetrators of human rights violations punished. This leads the author to a serious criticism: 'If the Human Rights Committee requires punishment as a remedy, it is inconsistent to deny a corresponding individual right' (p. 27). In accordance with her general conceptualization, she invites the Committee to lift the ambiguity and to return to its original rationale of considering investigation, prosecution, and punishment as a general measure of protection and implementation, rather than to further develop a corresponding individual right to justice in line with its emerging view of prosecution as a necessary remedy for the wrong suffered.

Context matters also for the progressive development of human rights law. Most of the jurisprudence of the Inter-American human rights system was developed in response to situations marked by large-scale de jure or de facto impunity. Furthermore, its conceptualization of the duty to prosecute came about in the context of individual complaint procedures, which makes the assumption of an individual right to justice more tempting. This political and procedural context has inevitably shaped the Inter-American institutions' position on the obligations of states to react to serious human rights violations and on the requested form of accountability of individual perpetrators. Starting with the influential *Velazquez Rodriguez* enforced-disappearance case, the Inter-American Court developed a jurisprudence

that holds a state responsible for serious human rights violations, including abuses committed by a private individual, if it fails in any of its three obligations, namely to refrain from committing violations, to prevent them, and to punish them. The author shows how the Court's legal rationale shifted from punishment as 'retrospective protection' to punishment as an integral part of a victim's remedial right to justice. She explains – and criticizes – how this individual right to justice was shaped on the basis of a conception of prosecution as a necessary element of the right to a fair trial (Art. 8 of the Convention), a legal reasoning that 'neither persuades textually nor teleologically' and 'appears to be based on a misconception (p. 63). The Court has increasingly elaborated standards for the conduct of criminal proceedings – inter alia concerning the criminal investigation, the trial hearings stage, the evaluation of evidence, the sentencing, and the post-conviction stage – in order to assess whether states parties' efforts to bring those responsible to justice suffice to ensure the victim's right to justice (and the related, additional right to truth). The author offers a unique analysis of the jurisprudence of both the Inter-American Commission and the Court on amnesties. Although she identifies some room for a margin of appreciation by states parties in separate opinions of Court judges, she concludes that, for serious human rights violations, such as torture, extrajudicial executions, or enforced disappearance, there is an absolute prohibition of amnesties. She deplores that the Commission's initial self-restraint, providing democratic governments with a margin of appreciation as long as the amnesty was democratically legitimate and provisions were made for an investigation, has developed into a position in which no room is left for a balancing act. She concludes that it is doubtful whether these standards should be adopted by other human rights bodies and advocates a context-specific and region-specific approach, such as allowing for an assessment of the peace consolidation and reconciliation potential of democratically enacted amnesty legislation as part of a balancing-of-interests exercise. Given this clearly argued position, it is very unfortunate that *Prosecuting Serious Human Rights Violations* does not pay any attention whatsoever to the regional African human rights system, or to the positions adopted by the political bodies of the African Union in the peace-versus-justice debate. If, indeed, context matters and should be taken into account by human rights law-making bodies, the African continent and its regional human rights system surely offer fertile ground for future research along the lines of the author's approach and methodology.

While the European Court of Human Rights also developed standards for the criminalization and prosecution of serious human rights violations, allowing for some interesting parallels with the Inter-American standards, the European Court has consistently refused to adopt the Inter-American 'right to justice' doctrine. In line with the position of the Human Rights Committee, an individual right of victims to have third parties criminally prosecuted has repeatedly been denied by the European Court. However, the European system did develop standards about the states parties' obligation to criminalize serious human rights offences, to establish a functioning criminal-justice system, and to conduct criminal proceedings capable of leading to identification and punishment (i.e. an obligation of means rather than of results). For the European Court, the legal rationale of these obligations is linked to the general

obligation of human rights protection, while, when it comes to the remedial rights of the victim, the Court's focus is on the duty to conduct an investigation. Like the Inter-American Court, the European Court has also gradually developed specific standards for the conduct of criminal proceedings, including on the independence and effectiveness of criminal investigations, on the evaluation of evidence, on the transparency of the investigation, on the involvement of victims in the proceedings, and on the enforcement of criminal sentences. As for the Inter-American system, the author expresses concern that the more sophisticated the Court's standards for criminal proceedings become, the more the Court will be concerned with the supervision of national criminal justice in order to ensure proper administration of justice. She wonders whether this is an appropriate role for an already overburdened human rights court and advocates more restrained attention by the Court to serious systemic deficits. The critique is not new. Similar criticisms vis-à-vis the expansive interpretation of its own powers by the Court have been voiced in other fields, including in asylum matters.

Chapter 6 ('Conceptualizing the Duty to Prosecute under Human Rights Treaties') is the cherry on the cake. It aptly summarizes the findings of the author's analysis laid down in the previous chapters; it adds interesting forward-looking elements of personal evaluation; it seeks to promote the coherence of legal theory underpinning human rights jurisprudence in order to curb the risk of continued trial and error in conceptualizing criminal prosecution as an element of human rights protection; and it suggests inspiring bridges between the legal discipline and criminological, anthropological, and political-studies perspectives on the same subject matter, thus also providing food for thought for a future research agenda that can build on the important insights offered by this book. The author starts her concluding chapters with the finding that, despite some common ground – that is, the duty to investigate human rights violations, both as a remedial measure for the victim and as a measure to prevent future violations – the legal theory of criminal justice in human rights law is (too) heterogeneous and rather incoherent. The importance and significance of a proper legal rationale go beyond the purely theoretical 'internal' coherence of human rights law. As the author rightly argues, it is a matter with important practical relevance: it determines the scope of the obligation, it informs whether punishment is strictly mandatory or can be compromised, and it has an impact on the permissibility of amnesty laws. The author's suggestions for a future, more coherent conceptualization are based on her conclusion that it is more appropriate to require prosecution as a form of general human rights protection than as a measure of satisfaction or rehabilitation owed to the individual victim. Prosecution should not be conceived as a form of retaliation but serves the prevention of future violations. While prosecution may well serve the *interests* of victims, it would be ill advised to further develop an individual *human right* to (criminal) justice. A key foundation for this utilitarian perspective on prosecution is the author's concern for the reaffirmation and restoration of the validity of the norm as an essential part of a state party's duty to respect and ensure human rights. Seen from this perspective, there is, particularly in times of political transition, no absolute obligation to punish every serious human rights abuse. The scope of the duty to prosecute depends on

the affected right and on the seriousness of the particular violation. The author also finds support for the validity of this deterrence rationale in the current practice in international criminal law of seeking to prosecute those most responsible for the most serious crimes of international concern, as evidenced, for instance, in the Statute of the Special Court for Sierra Leone. This legal rationale also leaves room for alternative accountability measures and sanctions. This begs the question of how such alternative (disciplinary, administrative) accountability measures and proceedings – including the kind of vetting measures that are frequently advocated in the transitional-justice literature – are viewed in the human rights jurisprudence of treaty supervisory bodies. She also suggests leaving room for more localized, culture-specific views of what is required in terms of deterrence, perpetrator accountability, and victim rehabilitation. Also, it should be left to social and political scientists rather than to lawyers to evaluate the potential for lasting peace – and thus more effective human rights enforcement – of conditional amnesty-cum-truth-commission formulae. Rather than an absolute amnesty prohibition, the author recommends a rebuttable presumption that amnesties are detrimental to the protection of human rights. *Prosecuting Serious Human Rights Violations* concludes that what seems to be a lacuna in human rights law, namely the absence of an explicit obligation to prosecute all serious human rights violations, is rather a necessary asset, leaving room for an adequate response in line with the specific circumstances of the particular situation and inspired by the overall objective of promoting a lasting protection of human rights.

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Christina Eckes, *EU Counter-Terrorist Policies and Fundamental Rights: The Case of Individual Sanctions*, Oxford, Oxford University Press, 2009, 512pp., ISBN-13 978-0199573769, £65.00.
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It is never an easy task to write a book on a new legal phenomenon. One needs to overcome the intimidation often accompanying the feeling of full liberty in structuring an argument afresh being independent from the heavy constraints of heaps of literature, academic writings, and legal opinions, while simultaneously one senses the sacredness of deflowering a virgin territory. It might be an even less rewarding task to write a book on a new but fast-developing field. The risk of being outdated, of taking a snapshot of a frozen moment that is about to undergo transformation, keeps hovering throughout the long process of writing.

Eckes's book invites us to dive into the depths of the individual sanctions' troubled water. Indeed, individual sanctions, since their very birth, became a spearhead in

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