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Sentencing and International Criminal Justice

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- A Short Introduction: Why is international sentencing important?

- Where do sentencing rules come from?

- What are the problems of international sentencing?

- What should sentencing rules accomplish?
 - First and second codes

- Conclusions

Punishment, power and violence: the problem of punishing on the international level



- Punishment is violence and therefore carries a significant stigma
- Also, the act of violent retaliation carries the risk of violent retaliation
- Superior violence (action power, Popitz) generates power over a person (however, only for the moment of exerting violence)
 - Talleyrand: Sire, bajonettes can be used for a multitude of purposes, however, you cannot sit on them
- Governance/political power must be placed on a permanent basis and that means that governance must be free of the stigma of violence and despotism
- Essentially, this requires punishment to be based on norms (that are perceived to be legitimate and accepted)
- Only under the condition of a normative basis of punishment stable and lasting governance can exist
 - » Codification
 - » **Acceptance/Legitimacy**

Codification: Where Can Sentencing Rules Come From?



- Rome Statute

- International (Treaty) Law and International Customary Law
 - Nuremberg, Tokyo Courts
 - Ad Hoc International Courts

- General legal principles derived from national justice systems
 - Comparative approach

The Rome Statute and Sentencing



- Art. 77 Applicable Penalties
 - Imprisonment with a maximum of 30 years
 - No minimum established
 - Life imprisonment
 - When justified by the extreme gravity of the offence and the individual circumstances of the offender
 - Fine
 - Forfeiture
- Art. 78
 - Gravity of the offence and individual circumstances
 - Sentencing of multiple crimes: separate sentences for each crime, from which a joint sentence is established, not less than the highest (individual) sentence and not more than 30 years or life
- Art. 80
 - National systems of penalties remain applicable
- Art. 83
 - Sentencing on appeal: „If the sentence is disproportionate to the crime“



- Preamble of the Rome Statute
 - The most serious crimes must not go unpunished
 - To put an end to impunity and to contribute to the prevention of such crimes
- Rule 145 (rules of procedure and evidence)
 - Culpability
 - Balance all relevant factors: mitigating and aggravating
 - Consider circumstances of the person and the crime
 - Inter alia: damage, harm, nature of crime, means employed, degree of participation, degree of intent etc.
 - Furthermore:
 - Diminished capacity
 - Post crime behavior: cooperation, guilty plea and compensation



- UN Konvention against torture and other cruel, inhumane or humiliating treatment and punishment
- International Covenant on Civil and Political Rights (16. 12. 1966)
- Art. 6 Right to life. The death penalty may be imposed only for the most serious crime
- Art. 7 Nobody may be subject to torture or cruel, inhumane or humiliating punishment
 - **May not be derogated in a state of emergency**
- Art. 9 1. Right to liberty. Nobody may be subject to arbitrary detention or arrest
- Art. 10 1. Prisoners and detained persons must be treated in a human way and according to human dignity



Why do People Commit Atrocities?



What are the problems?



- Providing for conventional sanctions and sentencing in cases of mass atrocities
 - Leinwand, J.: Punishing Horrific Crime: Reconciling International Prosecution With National Sentencing Practices. *Columbia Human Rights Law Review* 40(2009), pp. 799 – 803.
- Sentencing purposes (and a hierarchy), mitigating and aggravating circumstances, weighing sentencing factors
 - Nemitz, J.C.: *Strafzumessung im Völkerstrafrecht. Ein Beitrag zur Strafzwecklehre und zur Strafzumessungsmethode unter besonderer Berücksichtigung des Römischen Statuts.* Freiburg, 2002
- Disparity, inconsistencies in arguments, leniency
 - Bassett, M.R.: Defending International Sentencing: Past Criticism to the Promise of the ICC. *Human Rights Brief* 16(2009), pp. 22-28
- No empirical access (writing on sentencing is devoted to arguing cases from a normative perspective)
 - Ewald, U.: “Predictably Irrational” – International Sentencing and its Discourse against the Backdrop of Preliminary Empirical Findings on ICTY Sentencing Practices. *International Criminal Law Review* 10(2010), pp. 365-402
- Can in fact general rules of sentencing be deducted from comparative legal research?

A new question in the 20th Century: Why do people commit atrocities?



- Why do people order mass killings and why do people execute mass killings?

- Genocide
 - Holocaust, Cambodia, Srebrenica, Rwanda, Darfur

- Crime of the Powerful, crime backed up and reinforced by the state

Explaining Genocide



- Disposition
 - Obedience and authority (Milgram, Adorno)
 - Most genocidal killers and those ordering genocide are ordinary people (unlike serial killers)
 - These ordinary people have changed their moral frame (which permits
 - The prohibition to kill is transformed into an order to kill
 - Systems of justification
 - » Which exclude the victims completely from the moral frame
 - » and allow people to say: I kill but I am still a honest and good person
- Changes of the moral frame can happen rapidly
- But, why should „age, education, social and economic conditions of the convicted person“ (rule 145) be considered at all?

Literature of Interest



- Welzer, H.: Täter. Wie aus ganz normalen Menschen Massenmörder werden. Frankfurt 2005.
- Blass, Th.: Psychological Perspectives on the Perpetrators of the Holocaust. The Role of Situational Pressures, Personal Dispositions, and Their Interactions. *Holocaust and Genocide Studies* 7(1993), pp. 30-50.
- Harrower, M.: Rorschach Records of The Nazi War Criminals: An Experimental Study after Thirty Years. *Journal of Personality Assessment* 40(1976), pp. 341-351.
- Milgram, S.: Behavioral Study of Obedience. *Journal of Abnormal and Social Psychology* 67(1963), pp. 371-378.
- Burger, J.M.: Replicating Milgram. Would People Still Obey Today? *American Psychologist* 64 (2009), pp. 1–11.

What purposes for international sentencing?



- Retribution
- Deterrence
- Justice, order and reconciliation
- Proportional punishment
- Individualization of punishment (guilt)
- Rehabilitation



General Principles?



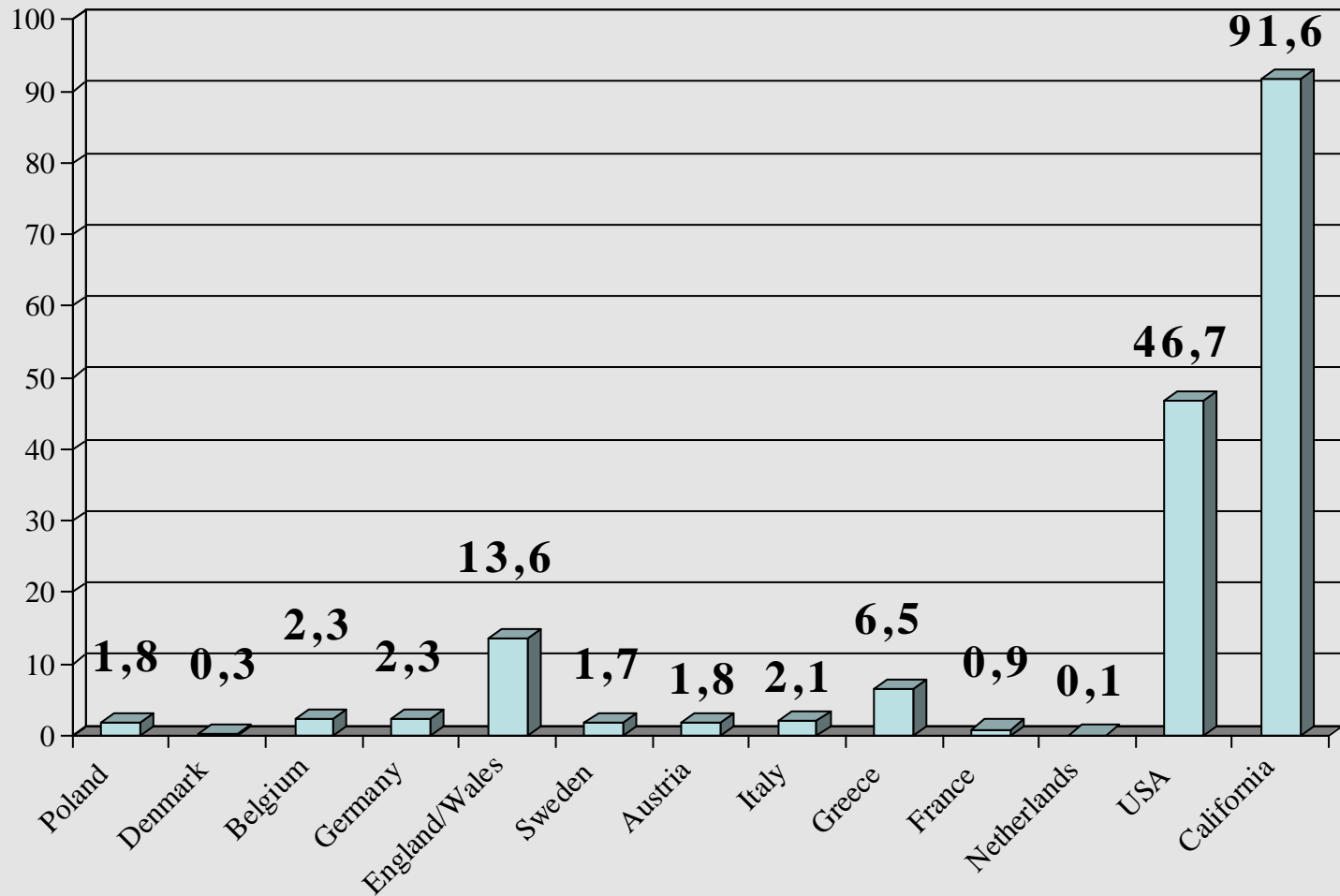
An example: life imprisonment



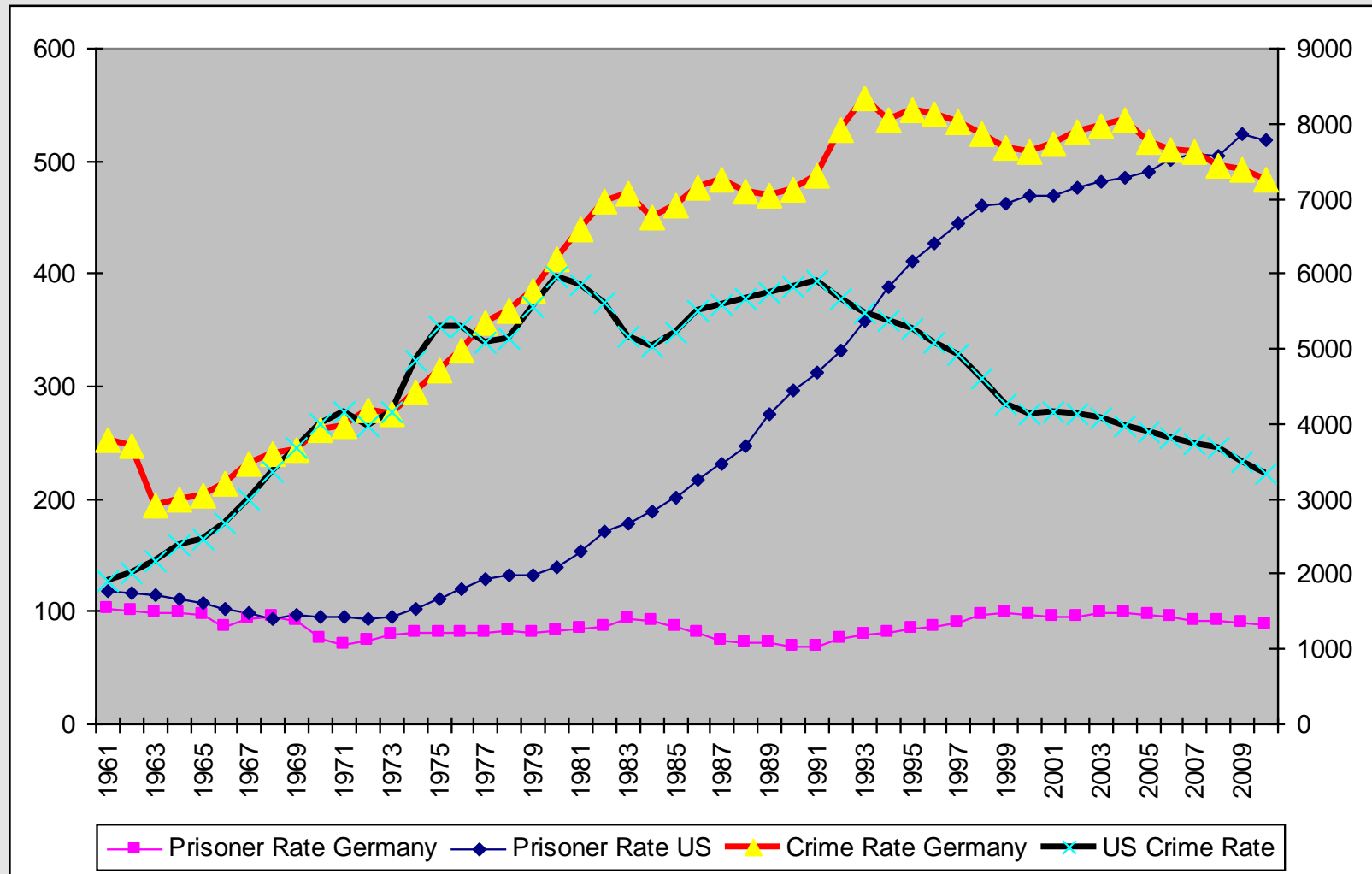
- Life imprisonment is outlawed in Portugal, Spain, Slovenija, Norway
 - The Breivik case: killing scores of young people and a maximum of 21 years imprisonment
 - However, Breivik pales before Mladic and Srebrenica
- No real life sentences
 - Germany, Scandinavian countries
- Life without parole
 - France, England, Cyprus
 - For adults
 - For juveniles? US

- And death

Prisoners Serving Life per 100.000, 2010



Another example: Crime and Prisoner Rates Germany and US 1961 - 2010



Is codification of sentencing purposes and weighing facts really the problem?



- No!

- Proportionality, guilt, deterrence, incapacitation
 - are empty concepts

 - and cannot become operational without a „second code“ which guides placement of offences within the range of penalties



How Does a System of Sentencing Work?





- German doctrine and the judiciary over the last 40 years have generated an impressive amount of literature and judicial decisions as regards purposes of punishment as well as aggravating or mitigating circumstances in sentencing decisions
- Normative discourses on sentencing center around the question of the relationship between personal guilt and positive general prevention, questions of proportionate sentencing and the range of admissible aggravating and mitigating circumstances or the weight to be attached to certain circumstances and how such weight might be expressed

A Comparative Sentencing Doctrine



- Placement of a criminal offence on the scale of penalties which are applicable
- The doctrine of the “typical” criminal offence (theft, burglary, fraud, assault etc.)
 - assumes that the typical offence is an act of less seriousness and to be placed in the lower third (or at the bottom) of the sentencing range
 - adopts a comparative view on seriousness (and related sentencing options)
 - and transforms this comparative view into a sentencing norm which creates then
 - the possibility of errors in law and appellate review

A Simple System of Comparative Sentencing



- comes with an elaborate sentencing doctrine and complex reasoning
- elaborate normative reasoning and corresponding sentencing doctrine and comparative sentencing express
- a fundamental difference between
 - presenting (or reasoning about) a sentencing decision
 - and making a sentencing decision

A Fundamental Conflict



- The comparative and empirical access is not compatible with the normative access to discussing guilt and personal responsibility and vice versa
- Individualization is not capable to identify a place in the range of sentences
 - it is symptomatic for normative discourses not to refer concrete cases or sentencing decisions
- The comparative approach is not capable to account for the complexity of arguments coming with individualization
- This conflict cannot be resolved.

Predicting Sentencing Outcomes



- The German normative framework of sentencing provides for an opportunity
 - to satisfy the need to discuss all factors relevant for individualized sentencing
 - and to achieve a decision which is carried primarily by those factors which establish the “typical case” (or establish deviations from it)
- A criminal sentence can be predicted by those arguments used in writing (and justifying the sentencing decision) which reflect those (3-4) factors established before the sentencing decision and explaining the sentencing outcome
- But, most of the reasoning in sentencing decisions is linked to arguments which do not correlate with the sentencing outcomes
- This system generates at the same time complex legal reasoning and straight forward practical and consistent/stable results





- Obstacles to establishing a second code in the sentencing practices of international criminal courts
 - Small number of cases
 - A selection of the worst of the worst

- International sentencing will not operate as are operating national systems of criminal punishment
 - Justificatory systems
 - Ordinary people and perpetrators from (more or less) conviction
 - A need for a different set of sentencing criteria

- A minimum of the sentencing range should be established (in order to provide for a contrast to ordinary criminals and crime)