

Safferling, Christoph J. M. *Towards an International Criminal Procedure*.

Oxford: Oxford University Press. 2001. Pp. 418. £60, ISBN 0199243506.

Ambos, Kai. *Der Allgemeine Teil des Völkerstrafrechts: Ansätze einer Dogmatisierung*. Berlin: Duncker und Humblot. 2002. Pp. 1058. €76/sFr 131, ISBN 3-428-10762-4.

Substantive international criminal law has developed faster than its procedural counterpart. As a consequence, the procedural law shelf in the impressive library of international criminal law materials has been slow to fill up. In *Towards an International Criminal Procedure*, Christoph Safferling makes a worthy attempt to plug that gap. The message from the title is clear — there is still a long way to go — but Safferling takes us back to the original building blocks and demonstrates how far we have come. Kai Ambos's book takes substantive international criminal law as its focus and consolidates in a comprehensive manner developments from the Nuremberg Tribunal to the present. Here the second part of the title, '*Ansätze einer Dogmatisierung*' (Attempts of Dogmatization), is a clear understatement. Taken together, these two books provide practitioners and academics with two extremely useful new instruments.

Safferling's aims are ambitious and he uses a number of tools to try to achieve them. His first tool is human rights law. Human rights provide the foundations, underlying theme and common denominator. His second tool is domestic law and, more specifically, the Anglo-American and Continental traditions of criminal procedure. One of his main aims is to 'confront [the] problem of how to reconcile the two main systems of criminal procedure in a conclusive international process order' (at 2). Safferling's domestic law focus is limited to the practice in England and Wales, the United

States and Germany, but this provides a sufficiently broad scope to support his conclusions. Practice and procedure before the International Criminal Tribunal for the Former Yugoslavia (ICTY) constitute the third tool. This tool is particularly relevant to Safferling's goal of discovering the appropriate procedural solution for the International Criminal Court (ICC) as the ad hoc Tribunal has been forced to develop its own procedural rules from scratch in a relatively short time frame. In essence therefore, by building in the requirements of human rights law, the differences between national legal systems and the unique system of the ICTY, Safferling guides the reader towards his vision of an international criminal procedural order.

Following a general introduction, Safferling describes the historical development of the Anglo-American and Continental systems of criminal procedure. It is interesting to note, in the light of the ICTY's expressly stated peace-keeping function, that in England the basic reason for having a criminal justice system from the time of William the Conqueror has been to keep the peace. Chapter 2 deals with the pre-trial inquiry and analyses the participating institutions while addressing questions that are relevant in the international sphere, such as whether the Tribunal has to be 'pre-established by law' (at 87) in the sense that it existed before the offence occurred. Chapter 3 discusses issues related to the confirmation of the indictment. It begins with the principle of legality and goes on to consider the preparation of the defence. Safferling derives three elements from human rights norms that he believes are essential for the preparation of the defence (at 189):

- (1) the accused must be given enough time to prepare his case;
- (2) documents and texts that the accused needs for a proper defence must be disclosed to him;
- (3) the accused must be given the opportunity to communicate with legal counsel.

With respect to disclosure, in particular, Safferling expresses some concern as to the

sufficiency of the proposed ICC procedure (at 203). In Chapter 4, Safferling moves on to the trial itself. He accurately describes the role of the judge before the ICTY and advocates a similar role for judges before the ICC (at 218–220). Touching on the issue of trials *in absentia*, which was raised in debates on the ICC, Safferling warns against misusing the defendant 'as a carrier for social education' (at 248), a comment which has a more general relevance. Chapters 5 and 6 focus on the post-conviction and post-trial stages. The principle of *ne bis in idem* or double jeopardy is discussed in detail. Indeed, this principle raises questions that are of particular importance for the ICC because of the complementarity principle.

Safferling concludes his analysis by restating his underlying theme, namely that an international criminal procedure needs to be based on universal human rights (which are by definition accepted by all states) and national legal systems, and by summarizing his specific results.

The book draws attention to some of the main differences between the Anglo-American and Continental legal systems which, despite these differences, 'coexist under the same human rights concept' (at 366). Safferling not only highlights the differences but also states the reasons for them. For example, when discussing the pre-trial stage, where the differences become most obvious, he describes the underlying rationale behind the use of a jury and considers whether there is a human right to trial by jury. He concludes that there is no such right and that the jury is a dubious institution which is out of the question for the ICC. Other areas of difference include the principle of objectivity, the decision to prosecute, the equality of arms principle, the separation of conviction and sentencing, questioning of witnesses, and pleas of guilty.

Safferling discovers that some aspects of ICTY practice have failed to measure up to human rights law. In particular, in a comprehensive discussion of the conditions governing pre-trial detention he finds that according to human rights law and national law (at

142–143), detention must be the exception. In respect of the early practice of the ICTY it is certainly accurate to say that there was a presumption against provisional release. However, the approach has changed over the last year in the light of improved cooperation between the Tribunal and the receiving states and more adequate guarantees from those states that the accused will appear in for trial. It could therefore be said in this respect that practice is indeed moving towards Safferling's envisioned system.

It is a general problem with texts of this kind that they very quickly become out of date; this is not a criticism of the author. *Towards an International Criminal Procedure* was concluded before the Preparatory Commission for the International Criminal Court produced its 'Finalized Draft Text of the Rules of Procedure and Evidence' on 2 November 2000. Unfortunately, therefore, these rules are not taken into account and analysed by Safferling, although he does make some reference to earlier draft rules. This means that the discussion of ICC procedure is limited and Safferling's suggestions are rather general. It cannot be said that he truly unearths a 'conclusive international process order'. Nevertheless, the book sets the foundations for future works and it can be expected that in time the word 'towards' will be dropped from the title.

The volumes by Safferling and Ambos complement rather than contrast with each other. *Der Allgemeine Teil des Völkerstrafrechts* contains more than a thousand pages of material. Part I traces the case law through Nuremberg, Tokyo, national courts, the ICTY and the Tribunal for Rwanda. Ambos makes special reference to defences in international criminal law and provides a useful overview of their development. Part II describes the codification

efforts in the International Law Commission and by other organizations and private persons. Ambos concludes this Part by considering the Rome Statute for the ICC. Part III deals with doctrine and theories of criminal law.

Ambos's book provides a wealth of material in an easily accessible format. However, the reader who looks up a particular topic expecting to find in-depth personal commentaries by the author may be disappointed. While Ambos does not draw the strands together with his own views and conclusions, his approach is extremely helpful for practitioners. The author's accurate and reliable comparative overview of the developing international criminal law makes the book an exhaustive tool for judges, prosecutors, defence counsel and scholars.

Der Allgemeine Teil des Völkerstrafrechts is the first book to provide the native German speaker with access to such a comprehensive overview of developments in the specialized area of international criminal law. While the language factor may limit the scope of the audience, it also makes the book an indispensable tool for German-speaking practitioners.

The common message of these two important works for the reader is that the time is ripe for procedural law to catch up with substantive law so that the remarkable, but at the same time irrevocable, developments in this latter field do not occur in isolation.

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