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BOOK REVIEW

Reviewing:

George P. Fletcher, *The Grammar of Criminal Law. Volume Two: International Criminal Law*, Oxford, 2020, 331 pp.

George Fletcher is one of the most important Anglo-American criminal law scholars. His *Rethinking Criminal Law*, published in 1978, revolutionised the debate on criminal law in the Anglo-American world, not least by drawing on German *Dogmatik*, which Fletcher – despite the dominance of the English language – still considers to be the *lingua franca* of criminal law discourse today (p. 4). Fletcher, who is both a polyglot (he speaks of the “linguistic cacophony” of his childhood, p. IX) and internationally experienced, sees the sophisticated conceptualisation and dogmatisation of the German criminal law tradition as the “German gift to international jurisprudence” (p. 87). For this reason, he considers at least a passive knowledge of the German language indispensable for an ability to participate in the transnational discourse on criminal law (pp. 88, 203).

The volume under review here forms part of a trilogy and was published more than a decade after the first volume on the foundations of the *Grammar of Criminal Law* (2007). Its publication may have come as a surprise to not a few, for although Fletcher is still a professor at New York’s renowned Columbia University (in the USA, there is no compulsory retirement for professors), he is now more than 80 years old and for a long time has lived mainly in Jerusalem. In a way, this volume thus can be seen as Fletcher’s final or at least a late work. It remains to be seen whether the trilogy will in fact be completed by a third volume.

In terms of content, the work follows the dialectical structure of Fletcher’s “Concepts” volumes (*Basic Concepts of Legal Thought*, 1996; *Basic Concepts of Criminal Law*, 1998) and focuses upon fun-

damental questions and concepts of (criminal) law such as “Substance and Procedure”, “Subject vs. Object”, “Offenses and Defenses” and “Intention vs. Negligence”. Readers of Fletcher’s earlier writings will re-encounter much familiar material here, and Fletcher himself refers extensively to his own earlier work. He adopts as his philosophical starting point a positivism “with a normative dimension” (p. 8) that constitutes a compromise of kinds between the positivisms of Kelsen and Hart and the content-focused normative orientation of Fuller and Dworkin (pp. 7 ff., 287 ff.). As already mentioned at the beginning, Fletcher still considers German *Dogmatik* to be the most important point of reference in the debate on international criminal law, citing its tripartite structure in particular (p. 11). Whether this somewhat formal approach is able to capture the core of *Dogmatik* or even the essence of criminal law is highly doubtful, however, since the structure of crime is, at best, a didactic instrument that conceals rather than clearly exposes the decisive substantial questions. To cite Günther Jakobs (in Engel, ed., *Das Proprium der Rechtswissenschaft*, 2007, pp. 103, 105–6), who sums it up aptly: the order or systematic organisation of the material – much like the order of screws and nails in a toolbox – does not answer the (scientific) question of the meaning or nature of the material, in our case the fundamental question of the legitimacy of criminal law and the ensuing imposition of (harsh) punishment.

What is more important with regard to the work’s explicit reference to international criminal law is the fact that Fletcher, as in the *Grammar*’s first volume (p. VIII), still considers there to be a lack of *Dogmatik* (pp. 4–5). With the first volume, Fletcher wanted to start a conversation “that will produce a more sophisticated literature of International Criminal Law” (p. VIII); now, more than ten years later, he finds that the necessary doctrinal discourse still is lacking. However, Fletcher overlooks a whole number of works and authors who address the doctrinal foundations of international criminal law (not least in the German language). What is more, this second volume of the *Grammar* – contrary to its subtitle – in fact deals with international criminal law only in passing, and where it does so, it unfortunately for the most part is not up to date with the current debate. To give an example: in his discussion of “Subject vs. Object” (Chapter 3), which takes up more than twenty pages, Fletcher only devotes just under a page to “Implications in the Rome Statute” (of the International Criminal Court, ICC) (pp. 96–7). In Chapter 5 on “Victims and Offenders” (pp. 123–149), merely a single page (p. 147)

comments on the crime of rape in the ICC Statute. For much of the book, Fletcher deals with US-American law (in an instructive way, for example, regarding tort law in Chapter 2), with general fundamental questions, such as the abovementioned positivism dispute (especially in Chapter 12), as well as current questions of (criminal) policy (for example, the issues raised by the racism and gender debate, especially in the USA). These general considerations sometimes are interspersed with comments on international criminal law, but current textbooks and commentaries are ignored more or less completely (for example, the fundamental commentary on the ICC Statute founded by the late Otto Triffterer is only cited in the previous edition of 2008 [p. 241 with an incorrect publication date in footnote 151]). Sometimes, claims are not sufficiently substantiated: for example, with regard to attempt under Art. 25(3)(f) ICC Statute, Fletcher criticises what he sees as a conceptual negligence on the part of the drafters, but fails to cite the *travaux préparatoires* or at least a secondary source. Elsewhere, explanations are simply misleading, for example when Fletcher claims that the form of participation of Joint Criminal Enterprise III was “deleted” in the ICC Statute (p. 18), when the origins of the crime of enforced disappearance are only attributed to the corresponding practice in Argentina (p. 44), when genocide is described as an attack on the civilian population (p. 49), or when the applicability of the *ne bis in idem* principle before the ICC with regard to appeals (pp. 101–2) is speculated on without any mention of the relevant provision (Art. 81 ICC Statute). Some explanations remain superficial (thus on the problem of the *Mauer-schützen*, East German border soldiers who shot people trying to escape at the Berlin Wall, p. 274) or do not seem to have been thought through (for example, in the context of a stimulating discussion on rights and duties [p. 287 ff.] Fletcher suddenly claims that duties are of “greater interest” in international criminal law and that this is evident particularly for acts carried out on a superior’s orders [p. 298]; I note in passing that the current German debate, especially Michael Pawlik’s position [*Unrecht des Bürgers*, 2012, p. 255 ff., 380] is missing here). Certain redundancies and repetitions also are striking, for example when the book’s structure is explained twice (pp. 7, 15) or the *voir dire* process challenging the composition of the jury is described twice almost word for word (pp. 98, 138). A further irritation is the fact that the book has been poorly edited, as is evident in numerous spelling mistakes, including in surnames and in the use of

German terms (see, for example, pp. 27, 213, 234, 238, 253, 270, 294, 315, 317).

One's overall assessment of this work probably will depend on the expectation with which the book is approached. Those hoping for further insights into international criminal law likely will be disappointed – like the present reviewer. Those expecting fundamental ideas from the rich oeuvre of one of the most important Anglo-American criminal law scholars certainly will get their money's worth, as this engagingly written book presents them with Fletcher's insights on criminal law and criminal procedure in a nutshell. With this volume, Fletcher certainly also contributes to "reinvigorated international cooperation" (p. IX) with a view to transnational reflection and research on "Core Concepts in Criminal Law and Justice" (cf. Ambos, Duff, Roberts and Weigend, 2020 and <https://www.department-ambos.uni-goettingen.de/index.php/anglo-german-dialogue>), thus ultimately living up to his universal aspirations.

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