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Human Rights as Penal Drivers across the World

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I. Introduction

Human rights became the dominant moral language of international politics in the late 1970s.[1] Since then, appeals to human rights have also increasingly been used to expand penal power across borders and jurisdictions. This penal expansion has a material component, with the creation of international criminal tribunals, the institution of criminal proceedings against perpetrators of human rights abuses and the inclusion of new human rights-based offences. The use of human rights to trigger the application of criminal law also occurs at the symbolic level of discourses and representations. In particular, the assumptions that effective human rights protection requires criminal accountability and that impunity is a cause of human rights violations have become ingrained in the human rights movement's thinking and practice.[2]

A number of scholars have noted this embrace of penality[3] by human rights – what Karen Engle calls the 'turn to criminal law in human rights'.[4] Most commentators, accepting this trend as uncontroversial, have advocated the deployment of penal means to enforce human rights.[5] Recently, however, growing attention has also been devoted to the limits and implications of this development, with some scholars questioning the pursuit of human rights protection through

* I am very grateful for the extensive comments of Micheál Ó Floinn, Lindsay Farmer, Peter Ramsay and Matthew Garrod on early versions of this chapter.

1 Here, I follow Samuel Moyn's genealogy of the contemporary human rights movement. See S Moyn, *The Last Utopia: Human Rights in History* (Cambridge, MA, Harvard University Press, 2010).

2 K Engle, Z Miller and DM Davis, 'Introduction' in K Engle, Z Miller and DM Davis (eds), *Anti-Impunity and the Human Rights Agenda* (Cambridge, Cambridge University Press, 2016) 1.

3 In this chapter, I use *penality* to refer to the entire penal sphere, including its laws, sanctions, institutions, practices, discourses and representations. See, eg D Garland, *Punishment and Welfare: A History of Penal Strategies* (Aldershot, Gower, 1985) x; D Garland, 'Penality and the Penal State' (2013) 51 *Criminology* 475, 476.

4 K Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (2015) 100 *Cornell Law Review* 1069; K Engle, 'A Genealogy of the Criminal Turn in Human Rights' in Engle et al, *Anti-Impunity* (n 2).

5 See, eg N Roht-Arriaza, 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law' (1990) 78 *California Law Review* 449; DF Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100 *Yale Law Journal* 2537; H Kim and K Sikkink, 'Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries' (2010) 54 *International Studies Quarterly* 939; K Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (New York, WW Norton, 2011); A Neier, *The International Human Rights Movement: A History* (Princeton, Princeton University Press, 2012).

criminalisation and punishment.[6] Yet, beyond the specific case of universal jurisdiction,[7] there is little analysis of how human rights, by acting as a driving force of penal power around the world, have had an impact on the normative content and exercise of criminal jurisdiction.[8] Aiming to fill this gap, this chapter both chronicles and critiques how human rights have contributed to *penal extraterritoriality*. The term 'penal extraterritoriality' is used here to refer both to the jurisdiction by a state over conduct occurring outside its normal territorial boundaries and to what is generally termed international jurisdiction, normally claimed by international criminal tribunals.[9]

The discussion in this chapter is divided as follows. Section II explores the historical emergence and evolution of some trends of human rights-led penal extraterritoriality:[10] (i) universal jurisdiction; (ii) passive or active personality jurisdiction; (iii) international and hybrid criminal jurisdiction; and (iv) the quasi-criminal jurisdiction of human rights bodies. Section III argues that not only do human rights contribute to fostering penal extraterritoriality, but they also entail the discursive construction of distinctly *global* forms of crime and justice.[11] Within this discursive schema, criminal jurisdiction is primarily decentralised or extraterritorial rather than territorial. Section IV highlights the adverse implications of a global penality which is normatively grounded in human rights rather than on a political order. This foundation runs the risk of casting an aura of inevitability around the operation of criminal law – thus precluding alternative, non-punitive responses to human rights violations. Another risk is that human rights, rather than moderating

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6 See, eg F Tulkens, 'The Paradoxical Relationship between Criminal Law and Human Rights' (2011) 9 *Journal of International Criminal Justice* 577; L Lazarus, 'Positive Obligations and Criminal Justice: Duties to Protect or Coerce?' in L Zedner and JV Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice* (Oxford, Oxford University Press, 2012); Engle, 'Anti-Impunity' (n 4); Engle et al, *Anti-Impunity* (n 2); M Pinto, 'Awakening the Leviathan through Human Rights Law – How Human Rights Bodies Trigger the Application of Criminal Law' (2018) 34 *Utrecht Journal of International and European Law* 161; M Pinto, 'Historical Trends of Human Rights Gone Criminal' (2020) 42 *Human Rights Quarterly* 729; H Hannum, *Rescuing Human Rights: A Radically Moderate Approach* (Cambridge, Cambridge University Press, 2019).

7 There is a large scholarship on universal jurisdiction and human rights. See, eg L Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives* (Oxford, Oxford University Press, 2004); K Roth, 'The Case for Universal Jurisdiction' (2001) 80 *Foreign Affairs* 150; M Langer, 'Universal Jurisdiction Is Not Disappearing: The Shift from "Global Enforcer" to "No Safe Haven" Universal Jurisdiction' (2015) 13 *Journal of International Criminal Justice* 245; MT Kamminga, 'Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses' (2001) 23 *Human Rights Quarterly* 940.

8 But see F Mégret, '"Do Not Do Abroad What You Would Not Do at Home?": An Exploration of the Rationales for Extraterritorial Criminal Jurisdiction over a State's Nationals' (2019) 57 *Canadian Yearbook of International Law* 1, 32–40, whose analysis is limited to active national jurisdiction; A Huneeus, 'International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts' (2013) 7 *American Journal of International Law* 1, who focuses on the 'quasi-criminal' jurisdiction of human rights bodies.

9 For a similar use of extraterritoriality, see A Chehtman, *The Philosophical Foundations of Extraterritorial Punishment* (Oxford, Oxford University Press, 2010) ch 5.

10 This section is a shorter, re-elaborated, version of Pinto, 'Historical Trends' (n 6).

11 See also N McMillan, 'Imagining the International: The Constitution of the International as a Site of Crime, Justice and Community' (2016) 25 *Social and Legal Studies* 163.

state penal policies, end up justifying the dissemination and expansion of punitive responses around the globe. Ultimately, the chapter shows that a global, human rights-driven penality does not necessarily increase the level of human rights protection, but rather it might become an instrument used by certain powerful countries to act coercively outside their territorial boundaries.

II. Trends of Human Rights-Led Penal Extraterritoriality

A. Universal Jurisdiction

In the 1970s, tens of thousands of political refugees from the authoritarian regimes in Eastern and Southern Europe and in South America arrived in Western Europe and North America.[12] The accounts of the treatments experienced by these exiles made it increasingly clear that domestic law provisions were unable to deal with systematic human rights abuses, especially when they constituted a means of maintaining and stabilising a totalitarian regime. Absent an international criminal court and in the face of the protests of international organisations and foreign governments, the solution was sought in the concept of universal jurisdiction.[13] Universal jurisdiction refers to the authority of a state to exercise its criminal jurisdiction over crimes regardless of the place of commission or any link to nationality.[14] Efforts to set out state obligations to prosecute human rights violations in the absence of links between the crime and the prosecuting state might even be dated back to the four Geneva Conventions, adopted in 1949.[15] However, the

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12 T Kelly, *This Side of Silence: Human Rights, Torture, and the Recognition of Cruelty* (Philadelphia, University of Pennsylvania Press, 2013) 8.

13 Universal jurisdiction had been used until then for crimes with a cross-border component or crimes harmful to the international order, not for human rights violations. There is a critical literature suggesting that even today the foundations and the development of universal jurisdiction are not connected with human rights. See, eg E Kontorovich, 'The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation' (2004) 45 *Harvard International Law Journal* 183; L Reydams, 'The Rise and Fall of Universal Jurisdiction' in WA Schabas and N Bernaz (eds), *Routledge Handbook of International Criminal Law* (Abingdon, Routledge, 2011); M Garrod, 'The Protective Principle of Jurisdiction over War Crimes and the Hollow Concept of Universality' (2012) 12 *International Criminal Law Review* 763; M Garrod, 'Piracy, the Protection of Vital State Interests and the False Foundations of Universal Jurisdiction in International Law' (2014) 25 *Diplomacy and Statecraft* 195; D Hovell, 'The Authority of Universal Jurisdiction' (2018) 29 *European Journal of International Law* 427. Although this chapter argues that universal jurisdiction has increasingly been used in relation to human rights violations, my discussion is not concerned with questions regarding what the foundations of universal jurisdiction are or should be, nor does it dispute its use in connection with many other factors.

14 Chehtman, *The Philosophical Foundations* (n 9) 115–16. In this chapter, I use the term *universal jurisdiction* in relation to the jurisdictional provisions in a number of treaties that appear to incentivise jurisdiction over crimes once a suspect comes within the jurisdiction of the state, regardless of eg where the crimes were committed or the residence or nationality of the suspect. For different approaches, see nn 16 and 19.

15 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva, 12 August 1949) 75 UNTS 31, Art 49; Geneva Convention for the Amelioration of the Condition

Geneva Conventions were not intended as human rights treaties: their penal provisions apply only to war crimes committed within the context of an armed conflict, and not to human rights abuses more generally.

If we focus only on those treaties that are considered and labelled as human rights conventions (including, but not limited to, the core international human rights instruments), the first obligation to exercise universal jurisdiction over human rights breaches can be found in the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid.[16] Articles 4 and 5 oblige states parties to prosecute non-nationals and non-residents for the crime of apartheid committed abroad, where the accused is physically within the jurisdiction of a state party. However, it appears that this convention was adopted more for political reasons (ie to stigmatise South Africa) than to create a legal framework for the prosecution of perpetrators, and, in fact, the universal jurisdiction provisions in this convention have never been used.[17] It was the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention), adopted in 1984, that marked the turn to universal jurisdiction as a means of addressing human rights violations in practice.[18] Pursuant to Articles 5–7, states parties must submit any case involving acts of torture to their competent authorities for the purpose of prosecution, without any regard for the place of commission of the acts, if suspects are in their territory and are not extradited. These provisions lay down the legal principle of *aut dedere aut judicare* (a duty to extradite or prosecute), the purpose of which is to ensure that no safe haven from criminal prosecution is granted to perpetrators of torture.[19]

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of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva, 12 August 1949) 75 UNTS 85, Art 50; Geneva Convention Relative to the Treatment of Prisoners of War (Geneva, 12 August 1949) 75 UNTS 135, Art 129; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949) 75 UNTS 297, Art 146.

16 International Convention on the Suppression and Punishment of the Crime of Apartheid (New York, 30 November 1973) 1015 UNTS 243. Some scholars contend that the jurisdictional provisions in this treaty form a *treaty-based jurisdiction* that is distinct from universal jurisdiction *sensu stricto*. See, eg M Garrod, 'Unraveling the Confused Relationship between Treaty Obligations to Extradite or Prosecute and "Universal Jurisdiction" in the Light of the *Habré* Case' (2018) 59 *Harvard International Law Journal* 125.

17 C Edelenbos, 'Human Rights Violations: A Duty to Prosecute?' (1994) 7 *Leiden Journal of International Law* 5, 7: 'No state has ever tried a South African citizen for involvement in the crime of apartheid.'

18 (New York, 10 December 1984) 1465 UNTS 85; M Nowak, M Birk and G Monina, 'Introduction' in M Nowak, M Birk and G Monina (eds), *The United Nations Convention against Torture and Its Optional Protocol: A Commentary*, 2nd edn (Oxford, Oxford University Press, 2019) 3–4.

19 MC Bassiouni and EM Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Dordrecht, Martinus Nijhoff, 1995). Although the Torture Convention is generally interpreted as establishing universal jurisdiction, some authors have argued that the principle of *aut dedere aut judicare* should be distinguished from the universality principle. See C Ryngaert, *Jurisdiction in International Law*, 2nd edn (Oxford, Oxford University Press, 2014) 124: 'if States premise their jurisdiction solely on the territorial presence of the perpetrator in accordance with

The Torture Convention thus represents a crucial moment in the promotion of penal extraterritoriality for the purpose of human rights protection.[20] The principle of *aut dedere aut judicare* had previously been deployed almost exclusively outside the human rights framework. The Swedish government, which proposed it, used as a model the so-called 'Hague formula', contained in Article 7 of the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft.[21] Until the Torture Convention, the Hague formula had been used only in a number of anti-terrorism conventions.[22] The transposition of this formulation into a human rights treaty seemed unusual at the time. As Malcolm Evans has noted, many states that had no difficulty in accepting jurisdictional and extradition obligations in the context of anti-terrorist conventions nevertheless did not accept them easily in a convention that they perceived to be about human rights.[23] States' initial resistance to penal extraterritoriality for torture is probably related to the fact that previous, anti-terrorism, conventions addressed crimes with transborder elements (eg hijacking aeroplanes), while the Torture Convention concerns an offence that is ordinarily committed intrastate.[24] In other words, the Torture Convention sought to elevate torture to an *international* crime for which universal

their *aut dedere aut judicare* obligations, they do not in fact exercise universal jurisdiction'. The principle of *aut dedere aut judicare* can also be used for the reciprocal protection of parallel state interests rather than the protection of fundamental values of the international community and has therefore been referred as providing 'representative universal jurisdiction' (C Kreß, 'Universal Jurisdiction over International Crimes and the *Institut de Droit international*' (2006) 4 *International Journal of Criminal Justice* 561, 567) or 'co-operative limited universality' (Reydams, *Universal Jurisdiction* (n 7) 28). Compare, however, the iteration of the *aut dedere aut judicare* principle in instruments such as the UN Convention against Transnational Organized Crime (New York, 15 November 2000) 2225 UNTS 209. Art 15(3) obliges states parties to adopt jurisdictional measures in order to implement the corresponding *aut dedere aut judicare* obligation in Art 16(10). However, Art 15(4) also incentivises wider jurisdictional measures in any case where an individual is present in a state's territory, is alleged to have committed offences covered by the Convention and the state does not extradite the individual. There is no corresponding *aut dedere aut judicare* obligation expressly tied to this jurisdictional provision (unlike Art 15(3)), so Art 15(4) looks much more like it is encouraging a form of universal jurisdiction over the crimes covered by the Convention. For a recent state interpretation of these provisions, see *In the Matter of Criminal Proceedings against Youssef Tartoussi*, Final appeal judgment, No 19672/2020, ILDC 3171 (IT 2020), 17 June 2020, where the Italian Supreme Court of Cassation found that Art 15(4) was not self-executing. See generally M Garrod, 'Extraterritorial Criminal Jurisdiction in International Law: Time for an Empirical Examination', ch 5 in the present volume.

20 MD Evans, 'The Criminalisation of Torture as a Part of the Human Right Framework' (2014) *CRIMEN: Casopis za Krivicne Nauke* 136, 137.

21 Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 16 December 1970) 860 UNTS 105, Art 7 stipulates: 'The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution.' See JH Burgers and H Danelius, *The United Nations Convention against Torture: A Handbook on the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment* (Dordrecht, Martinus Nijhoff, 1988) 35.

22 Convention for the Suppression of Unlawful Seizure of Aircraft (n 21); Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (Montreal, 23 September 1971) 974 UNTS 177; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents (New York, 14 December 1973) 1035 UNTS 167; International Convention against the Taking of Hostages (New York, 17 December 1979) 1316 UNTS 205.

23 Evans (n 20) 137.

24 Roht-Arriaza, 'State Responsibility' (n 5) 465.

jurisdiction exists (like war crimes and piracy) by relying on the heinous nature of the practice rather than the necessary presence of international or transnational elements.[25] Since the Torture Convention, several other treaties have sought to make prosecution of gross human rights violations legally obligatory.[26] While many of them do not contain provisions for universal jurisdiction,[27] some do. These include the Inter-American Convention to Prevent and Punish Torture (1985),[28] the Inter-American Convention on Forced Disappearance of Persons (1994),[29] the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2000)[30] and the International Convention for the Protection of All Persons from Enforced Disappearances (2006).[31]

All these treaties *oblige* states parties to assert universal jurisdiction if they do not extradite suspects who are present in their territory. Yet it is also generally agreed that international customary law *allows* the use of universal jurisdiction with regard to crimes considered particularly heinous by the international community, such as crimes against humanity and genocide.[32] The commitment to protect human rights plays a key role in the extraterritorial prosecution of such crimes. Although national legislation enabling universal jurisdiction for atrocity crimes is technically not the result of human rights law, it is undisputed that it serves to some extent a human rights cause.[33] An example is the adoption of universal jurisdiction provisions as part of the domestic implementation of the Rome Statute of the International Criminal Court (ICC).[34] The ICC states parties are

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25 ibid 466. For a critique, see Garrod, 'Unraveling the Confused Relationship' (n 16).

26 Roht-Arriaza, 'State Responsibility' (n 5) 499.

27 See n 19 for the argument that the principle of *aut dedere aut judicare* should be distinguished from the universality principle.

28 Inter-American Convention to Prevent and Punish Torture (Cartagena de Indias, 12 September 1985) OASTS 67, Art 12.

29 Inter-American Convention on Forced Disappearance of Persons (Belem do Para, 9 September 1994) OASTS 60, Art 4.

30 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (New York, 25 May 2000) 2171 UNTS 227, Art 4.

31 International Convention for the Protection of All Persons from Enforced Disappearances (New York, 20 December 2006) 2716 UNTS 3, Art 9.

32 Chehtman, *The Philosophical Foundations* (n 9) 117–18.

33 A Clapham, 'Human Rights and International Criminal Law' in WA Schabas (ed), *The Cambridge Companion to International Criminal Law* (Cambridge, Cambridge University Press, 2016).

34 Rome Statute of the International Criminal Court (Rome, 17 July 1998) 2187 UNTS 3.

encouraged to adopt universal jurisdiction statutes to facilitate co-operation with the Court in the struggle to hold human rights violators accountable.[35]

In practice, the use of universal jurisdiction for human rights abuses remained a dead letter until the late 1990s. Foreign human rights prosecutions were legally possible, but few believed that they were politically possible.[36] However, with the turn of the century, individual criminal accountability by reference to human rights gained momentum and several states began prosecutions against foreign perpetrators for wrongdoings committed abroad.[37] The general perception was that a 'new age of accountability' was replacing an 'old era of impunity'.[38] One event in particular that has been described as a trigger moment was the arrest of Chilean general and dictator Augusto Pinochet in London on a Spanish extradition warrant for torture and other human rights violations.[39] For Noemi Roht-Arriaza, this event represented the most significant move towards a global fight for accountability, whereby leaders who committed gross abuses could no longer escape from prosecution and punishment for their actions.[40] The Pinochet case gave practical effect to the Torture Convention and revitalised universal jurisdiction for human rights abuses.

In the early 2000s, human rights obligations were often invoked in the prosecution of various high-ranking politicians allegedly responsible for mass abuses. Belgium and Spain, in particular, were at the forefront of this trend, with their domestic law providing for the unconditional application of universal jurisdiction (no link with the prosecuting country was required). Yet, a series of diplomatic incidents led the two countries to amend their laws in 2003 (Belgium) and in 2009 and

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35 See M Langer, 'The Archipelago and the Wheel: The Universal Jurisdiction and the International Criminal Court Regimes' in M Minow, CC True-Frost and A Whiting (eds), *The First Global Prosecutor: Promise and Constraints* (Ann Arbor, University of Michigan Press, 2015) 224, which mentions Loi 2010-930 du 9 août 2010 portant adaptation du droit pénal à l'institution de la Cour pénale internationale, 10 August 2010, Art 8 (France); Völkerstrafgesetzbuch, 26 June 2002, s 1 (Germany).

36 K Sikkink, 'The Age of Accountability: The Global Rise of Individual Criminal Accountability' in F Lessa and LA Payne (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (Cambridge, Cambridge University Press, 2012) 36.

37 This trend has been described as a 'justice cascade' in Sikkink, *The Justice Cascade* (n 5) and as 'a revolution in accountability' in CL Sriram, 'Revolutions in Accountability: New Approaches to Past Abuses' (2003) 19 *American University International Law Review* 301.

38 Ban Ki-moon, 'At ICC Review Conference, Ban Declares End to "Era of Impunity"' (*UN News*, 31 May 2010) www.news.un.org/en/story/2010/05/340252.

39 Sikkink, 'The Age of Accountability' (n 36) 37.

40 N Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (Philadelphia, University of Pennsylvania Press, 2005).

2014 (Spain).[41] Despite criticism and claims that it was doomed to disappear,[42] universal jurisdiction today appears to be a common jurisdictional basis for prosecuting human rights abuses to prevent impunity for human rights abuses – especially if committed by mid-level perpetrators.[43] As a jurisdictional claim, the exercise of universal jurisdiction entails a *claim to authority*. Yet, universal jurisdiction itself increasingly *claims authority* and gains legitimacy by relying on human rights and by being presented as a mechanism through which victims of serious human rights violations can have access to justice.[44] A recent study reports that universal jurisdiction has been endorsed by 109 states and that the number of prosecutions is growing, with 18 prosecuting countries and about 60 cases in 2020.[45] While state policies play a decisive role in the selection of the cases (eg Germany prioritises trials against Syrians; France and Belgium prioritise crimes committed in their former colonies), it appears that there has been a diversification of both the prosecuting countries and the countries where the crimes were committed.[46]

B. Passive and Active Personality Jurisdiction

Human rights are also at the basis of other claims of extraterritorial criminal jurisdiction, including those based on the principles of passive and active personality. Both of these grounds of extraterritorial jurisdiction appear to be expanding, although their underlying normative justifications remain uncertain and contested by many commentators.[47]

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41 Complaints against high-ranking politicians (eg Ariel Sharon, George HW Bush and Jiang Zemin) led to direct pressure from powerful states to repeal the laws. See, eg I de la Rasilla del Moral, 'The Swan Song of Universal Jurisdiction in Spain' (2009) 9 *International Criminal Law Review* 777; S Lefranc, 'A Tale of Many Jurisdictions: How Universal Jurisdiction Is Creating a Transnational Judicial Space' (2021) 48 *Journal of Law and Society* 573, 575.

42 Reydams, 'The Rise and Fall' (n 13); H Kissinger, 'The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny' (2001) 80 *Foreign Affairs* 86.

43 M Langer and M Eason, 'The Quiet Expansion of Universal Jurisdiction' (2019) 30 *European Journal of International Law* 779.

44 Similarly, Hovell (n 13).

45 Lefranc (n 41) 576; see also Langer and Eason (n 43). Both Lefranc's and Langer and Eason's studies rely on a broad notion of universal jurisdiction. By adopting a narrower understanding of the universality principle, other studies have disputed the widespread application of universal jurisdiction. See L Reydams, 'The Application of Universal Jurisdiction in the Fight against Impunity' (European Parliament, 2016) papers.ssrn.com/sol3/papers.cfm?abstract_id=2929013; M Garrod, 'The Emergence of "Universal Jurisdiction" in Response to Somali Piracy: An Empirically Informed Critique of International Law's "Paradigmatic" Universal Jurisdiction Crime' (2019) 18 *Chinese Journal of International Law* 551.

46 Lefranc (n 41) 576.

47 Chehtman, *The Philosophical Foundations* (n 9) 59–71; D Ireland-Piper, 'Extraterritorial Criminal Jurisdiction: Does the Long Arm of the Law Undermine the Rule of Law?' (2012) 13 *Melbourne Journal of International Law* 1, 12–13; Garrod, 'Extraterritorial Criminal Jurisdiction' (n 19).

Passive personality refers to the jurisdiction over an act committed abroad where the victim is a national of the prosecuting state. Foreign trials through passive personality have been conducted since the 1990s for human rights violations occurring in Latin America, for example.[48] Several activists, unable to have investigations launched in their own countries, have strategically pressured prosecutors in Spain, Italy and France to start criminal proceedings domestically, with the aim of addressing human rights violations which occurred in Argentina, Chile or Uruguay against citizens with Spanish, Italian or French passports.[49] For instance, in 2021, the Italian Court of Cassation confirmed sentences of life imprisonment for 14 high-ranking officials from the Southern Cone for the torture and murder of several Italian citizens in the 1970s and 1980s during the so-called 'Operation Condor'.[50] Cases that are described in the press or even by some governments as involving universal jurisdiction are sometimes based on passive personality, because they involve nationals of the state undertaking the prosecution as the victims of the alleged crimes.[51] Significantly, passive personality appears to provide the basis of many criminal proceedings involving senior African officials before European courts.[52] In 2005, for example, Belgium relied on passive personality when it started criminal proceedings against former Chad president Hissène Habré.[53] Similarly, the French arrest warrant issued in 2006 in respect of nine Rwandan officials, allegedly involved in the plane attack that killed former Rwandan President Habyarimana, was based on a complaint filed by the daughter of the French co-pilot.[54] Passive personality was also central in Spain's decision, in 2008, to charge 40 members of the Rwanda Defence Forces in connection to the killing and disappearance of Spanish nationals in Rwanda during the 1990s.[55]

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48 K Sikkink and CB Walling, 'The Impact of Human Rights Trials in Latin America' (2007) 44 *Journal of Peace Research* 427.

49 F Lessa, 'Operation Condor on Trial: Justice for Transnational Human Rights Crimes in South America' (2019) 51 *Journal of Latin American Studies* 409, 435.

50 J César, 'Processo Condor: condannati all'ergastolo 14 ex militari sudamericani' (*Osservatorio Diritti*, 14 July 2021) www.osservatoriodiritti.it/2021/07/14/processo-condor-roma-italia-operazione-condor.

51 Amnesty International, 'Ending Impunity: Developing and Implementing a Global Action Plan Using Universal Jurisdiction' (London, Amnesty International Publications, 2009) 26, www.amnesty.org/en/wp-content/uploads/2021/07/ior530052009en.pdf.

52 L Arimatsu, 'Universal Jurisdiction for International Crimes: Africa's Hope for Justice?' (Royal Institute of International Affairs, 2010) Chatham House Briefing Paper 2010/01, 8, www.chathamhouse.org/sites/default/files/public/Research/International%20Law/bp0410arimatsu.pdf.

53 ibid. Hissène Habré was eventually tried and convicted by the Extraordinary African Chambers.

54 Arimatsu (n 52) 8. The arrest warrant was lifted in 2009. See H Holland, 'Rwanda Says France Drops Kabuye Arrest Warrant' (*Reuters*, 1 April 2009) www.reuters.com/article/ozatp-rwanda-france-kabuye-20090401-idAFJOE53001S20090401.

55 Arimatsu (n 52) 8. The case was then dismissed in 2015. See 'Spain Dismisses Rwanda War Crimes Case against 40 Officials' (*BBC News*, 8 October 2015) www.bbc.co.uk/news/world-africa-34477883.

Active personality, on the other hand, is the exercise of criminal jurisdiction by states over their nationals for crimes committed abroad. This form of extraterritorial jurisdiction is not much discussed in human rights and international criminal law literature.[56] Yet states, when it comes to serious human rights violations, seem more likely to rely on the nationality of the alleged offender than to invoke universal jurisdiction.[57] According to Frédéric Mégret, when it comes to the gravest international crimes, 'active nationality jurisdiction does more work, in the background, than the aesthetically striking, but practically exceptional, principle of universal jurisdiction'.[58] All the treaties containing *aut dedere aut judicare* provisions in fact also enable states parties to establish their jurisdiction when the defendant is one of their nationals.[59] In addition, a number of scholars believe that when universal jurisdiction is not available (eg for violations of the right to life), there is a self-standing human rights obligation to assert active personality jurisdiction, even absent a specific treaty provision to that effect.[60] With the rise of prosecutorial obligations under human rights law,[61] the assumption is that if a state does not investigate violations which have occurred in its territory, other states which are involved through their nationals are encouraged – if not mandated – to conduct the prosecutions themselves.

An example of the growing importance of the active nationality principle as an instrument to ensure that national borders are not barriers to human rights-driven prosecutions is the Irish Criminal Law (Extraterritorial Jurisdiction) Act 2019.[62] While the primary purpose of this Act was to enable the ratification of the Council of Europe's Istanbul Convention on Preventing and Combating Violence against Women and Domestic Violence, its measures go well beyond the requirements of the treaty.[63] The Act, which is explicitly motivated by human rights considerations,[64] extends the extraterritorial jurisdiction of a range of offences in Ireland regardless

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56 Mégret, 'Do Not Do Abroad' (n 8).

57 ibid 4.

58 ibid 38.

59 See, eg Torture Convention, Art 5(1)(b); Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (n 30) Art 4(2)(a); International Convention for the Protection of All Persons from Enforced Disappearances (n 31) Art 9(1)(b).

60 Mégret, 'Do Not Do Abroad' (n 8) 33.

61 Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UNGA Res 40/34 (29 November 1985).

62 Criminal Law (Extraterritorial Jurisdiction) Act 2019 (Ireland).

63 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul, 11 May 2011) (European Treaty Series No 210).

64 The Istanbul Convention is reproduced in full in the Schedule of the Act, with all its references to the European Convention of Human Rights, the case law of the European Court of Human Rights and the human rights of women and girls.

of whether they entail violence against women or domestic violence.[65] Significantly, it confers jurisdiction over conduct occurring outside the state by reference to the Irish citizenship or ordinary residence in Ireland of the alleged offender.[66]

C. International(ised) Jurisdiction

Human rights have also contributed to the institution of new forms of criminal jurisdiction which can be described as 'deterritorialised'[67] because they do not involve a sovereign state exercising its penal powers over conduct which occurred within its territory. One example is the creation of international criminal tribunals. The history of these tribunals is often narrated as a triumphant story of human rights protection. However, international criminal justice has not always been concerned with human rights. The Nuremberg Trials, for instance, were primarily focused on aggression, while the Holocaust and other atrocities remained marginal.[68] It was only in the 1990s that international criminal adjudication was reinvented as part of the human rights project and shifted its attention to accountability for human rights violations.[69]

In 1993, the atrocities that occurred in the Balkans prompted the United Nations Security Council (UNSC) to establish the International Criminal Tribunal for the former Yugoslavia (ICTY).[70] The following year, the UNSC created the International Criminal Tribunals for Rwanda (ICTR) as a response to the genocide and other atrocities which occurred in the country.[71] Albeit primarily violations of the Geneva and Genocide Conventions, the mass atrocities committed in the Balkans and Central-East Africa were also read in terms of human rights violations due to their universal moral repugnance. Until their functions were transferred to the International Residual Mechanism for Criminal Tribunals between 2015 and 2017, the ICTY and ICTR exercised direct criminal jurisdiction over the international crimes committed in the former Yugoslavia and Rwanda.[72] They

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65 For a critical comment, see A Shieber, 'Irish Extraterritorial Jurisdiction' (*Criminal Justice Notes*, 2 April 2019) www.blogs.kent.ac.uk/criminaljusticenotes/2019/04/02/irish-extraterritorial-jurisdiction/.

66 Criminal Law (Extraterritorial Jurisdiction) Act 2019 (Ireland), s 3.

67 For the use of the term *deterritorialised*, see J Cockayne, 'On the Cosmopolitanization of Criminal Jurisdiction' (2005) 3 *Journal of International Criminal Justice* 514, 515.

68 S Moyn, 'From Aggression to Atrocity: Rethinking the History of International Criminal Law' in KJ Heller et al (eds), *The Oxford Handbook of International Criminal Law* (Oxford, Oxford University Press, 2020).

69 ibid; F Mégret, 'International Criminal Justice as a Peace Project' (2018) 29 *European Journal of International Law* 835.

70 UNSC Res 827 (25 May 1993).

71 UNSC Res 955 (8 November 1994).

72 Huneeus (n 8) 28.

had legal authority to open and conduct prosecutions from abroad, regardless of the consent of the state with territorial jurisdiction. These ad hoc tribunals had both concurrent jurisdiction and primacy over national courts.[73] If they claimed a case, national courts had to relinquish jurisdiction in their favour. The national justice systems still had to assist the international tribunals by identifying, apprehending and surrendering suspects, by collecting documents and by taking testimony.[74]

The institutionalisation of the ad hoc tribunals led to the creation of a permanent international criminal court. The Rome Statute was eventually adopted in 1998 and entered into force in 2002. The ICC was applauded as 'a gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law'.[75] Since then, the Court has been presented as the cornerstone of a broad human rights agenda, namely the 'fight against impunity'.[76] The connection between human rights and international criminal law is rarely contested. Academics, practitioners and non-governmental organisations (NGOs) overwhelmingly agree that human rights are sources and *raisons d'être* of international criminal justice.[77] The ICC appears to fulfil a dual human rights mandate. It promotes fair trial and high standards of detention as models for national systems and it employs the preventive, retributive and expressive functions of criminal sentences to promote human rights standards.[78]

So far, 123 states have ratified the Rome Statute and accepted the jurisdiction of the ICC over war crimes, crimes against humanity and genocide committed in their territory or by their nationals.[79] Moreover, the ICC can have jurisdiction over an offence irrespective of where it was committed or of the nationality link in the case of a referral by the UNSC acting under chapter VII of the UN

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73 Updated Statute of the International Criminal Tribunal for the Former Yugoslavia (September 2009), Art 9; Statute of the International Criminal Tribunal for Rwanda (31 January 2010), Art 8.

74 Huneeus (n 8) 28.

75 K Annan, 'Secretary-General Says Establishment of International Criminal Court Is Gift of Hope to Future Generations' (*UN Meetings Coverage and Press Releases*, 20 July 1998) Press Release SG/SM/6643 L/2891, www.un.org/press/en/1998/19980720.sgsm6643.html.

76 R Roth and F Tulkens, 'Introduction' (2011) 9 *Journal of International Criminal Justice* 571, 571.

77 K Lohne, 'NGOs for International Justice – Criminal or Victims' Justice?' in A Follesdal and G Ulfstein (eds), *The Judicialization of International Law: A Mixed Blessing?* (Oxford, Oxford University Press, 2018) 127; T Meron, *The Making of International Criminal Justice: The View from the Bench: Selected Speeches* (Oxford, Oxford University Press, 2011) ch 17.

78 There is a large debate on the purposes and objectives of international criminal law. See, eg MA Drumbl, *Atrocity, Punishment, and International Law* (Cambridge, Cambridge University Press, 2007)

79 Rome Statute, Art 12. In addition 44, states have also accepted the jurisdiction of the ICC over the crime of aggression.

Charter.[80] However, the fight to end impunity is not limited to prosecution in international fora. International criminal law purports to pervade the domestic level by encouraging national prosecution and the implementation of criminal law mechanisms against serious human rights violations. For this reason, the jurisdiction of the ICC is based on the principle of complementarity.[81] The Court has jurisdiction over international crimes when states are 'unwilling or unable genuinely to carry out the investigation or prosecution'.[82] While national justice systems have priority (as long as they prosecute), it is the ICC that makes the determination of whether national prosecutions are adequate.[83] In this way, states are induced to undertake effective criminal investigations and trials if they want to avoid the intervention of the ICC (positive complementarity).[84] Complementarity appears to encourage 'heterogeneity in terms of the number of institutions adjudicating international crimes, but homogeneity in terms of the process they follow and the punishment they mete out'.[85]

In general, the creation of international or deterritorialised forms of criminal jurisdiction is to be seen as an attempt to lift the obligations to punish human rights violations out of the politics and injustice associated with the national sphere.[86] International bodies are supposed to provide a neutral and apolitical response to chaotic local politics.[87] They administer criminal justice in external settings (eg in The Hague) and in a supposedly impartial manner, through universal rules and procedures.[88] They are also opposed to domestic political powers, which are seen as incapable of managing complex social problems, including the protection of human rights.[89] The assumption of the inadequacy of domestic justice has long remained unchallenged, especially throughout the 1990s.[90] However, in more recent years, critiques and limitations of trials on the international stage

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80 ibid Art 13.

81 ibid Art 1; C Stahn and MM El Zeidy, *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge, Cambridge University Press, 2011).

82 Rome Statute, Art 17.

83 ibid.

84 International Criminal Court Assembly of States Parties, 'Report of the Bureau on Stocktaking: Complementarity. Taking Stock of the Principle of Complementarity: Bridging the Impunity Gap' (18 March 2010) ICC-ASP/8/51, para 16.

85 Drumbl (n 78) 143.

86 McMillan, 'Imagining the International' (n 11) 166.

87 Engle et al, *Anti-Impunity* (n 2) 5–6.

88 Z Miller, 'Anti-Impunity Politics in Post-Genocide Rwanda' in ibid 150–51.

89 ibid 159–62.

90 C Stahn, *A Critical Introduction to International Criminal Law* (Cambridge, Cambridge University Press, 2019) 164–65.

have fostered the creation of tribunals that exercise a hybrid criminal jurisdiction, by integrating both domestic and international structures.[91] Hybrid and internationalised institutions include the Sierra Leone Special Court; the Extraordinary Chambers in the Courts of Cambodia; the Special Crimes Panels in Kosovo, followed by the Kosovo Specialist Chambers and Specialist Prosecutor's Office; the Special Panels and Serious Crimes Unit in East Timor; the Special Tribunal for Lebanon; the War Crimes Chamber in Bosnia and Herzegovina; the Special Court in the Central African Republic; and the Extraordinary African Chamber.[92] While each of these tribunals is uniquely structured, they are all staffed by both domestic and international actors, and use domestic and international resources to prosecute international crimes. Generally, these institutions have primacy over national courts. Yet the territorial state retains some of its jurisdiction, by participating in the prosecutions as an equal partner.[93]

D. The Quasi-criminal Jurisdiction of Human Rights Bodies

During the last three decades, the Inter-American Court of Human Rights (IACtHR), the European Court of Human Rights (ECtHR), the UN Human Rights Committee (UNHRC) and other human rights bodies have interpreted their mandates to monitor compliance with international conventions as to enable the imposition of obligations on states in criminal matters.[94] These institutions increasingly rely upon human rights law to supervise national prosecutions: they order states to ensure criminal accountability at the domestic level and to co-operate with other states in transnational criminal investigations, in a process that Alexandra Huneeus has named the 'quasi-criminal jurisdiction' of human rights bodies.[95] These bodies are not criminal courts and cannot find individual responsibility. Nevertheless, they influence how national justice systems exercise criminal jurisdiction over serious human rights violations and intervene when states appear unable or unwilling to act as required. While criminal jurisdiction is formally exercised in accordance with the territorial principle, national trials are triggered, guided and closely monitored

91 F Mégret, 'In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice' (2005) 38 *Cornell International Law Journal* 725.

92 Stahn (n 90) 197–210.

93 Huneeus (n 8) 30.

94 Pinto, 'Awakening the Leviathan' (n 6); A Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (Oxford, Oxford University Press, 2009).

95 Huneeus (n 8).

from *above*. In this sense, not only do human rights bodies impact states' exercise of criminal jurisdiction, but they themselves take on a partially internationalised criminal jurisdiction.

First, human rights bodies impose obligations on states to criminalise serious human rights violations. The ECtHR, for instance, has developed a significant body of case law in this matter.[96] The seminal case is *X and Y v Netherlands*.[97] Here, the European judges held that the 'effective deterrence [that] is indispensable' to protect sexual integrity 'can be achieved only by criminal-law provisions'.[98] Following this decision, the state duty to criminalise human rights abuses has been reiterated in the sphere of sexual life,[99] but also with respect to the right to life,[100] for cases of torture and other ill-treatment,[101] for other offences against the person,[102] as well as for forced labour and human trafficking.[103] The IACtHR has also had an influence on the enactment of criminal legislation. In *Goiburú et al v Paraguay*, the Inter-American Court stated that the duty to protect the right to life, human treatment and personal liberty includes an obligation to criminalise serious violations of those rights.[104] Through their case law on criminalisation, human rights bodies require states to exercise prescriptive criminal jurisdiction, that is, to legislate in respect of persons and conduct within their territory. Strictly speaking, this jurisdiction remains territorial, but it is influenced by the decisions of an international human rights institution. These human rights-driven obligations to criminalise have had an impact insofar as states have been encouraged to introduce new offences in their domestic legal systems. In Italy, following an ECtHR decision, Parliament approved a Bill which introduced the crime of torture as a distinct offence in the Italian Criminal Code.[105] In the UK, ECtHR case law on state obligations to criminalise labour exploitation had an

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96 L Lavrysen and N Mavronicola (eds), *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR* (Oxford, Hart Publishing, 2020); K Kamber, *Prosecuting Human Rights Offences: Rethinking the Sword Function of Human Rights Law* (Leiden, Brill, 2017); S Malby, *Criminal Theory and International Human Rights Law* (Abingdon, Routledge, 2020).

97 *X and Y v Netherlands* [1985] App No 8978/80 (ECtHR).

98 ibid 27.

99 *MC v Bulgaria* [2003] App No 39272/98 (ECtHR) [150].

100 *Kiliç v Turkey* [2000] App No 22492/93 (ECtHR) [62].

101 *MC v Bulgaria* (n 99) [174].

102 *KU v Finland* [2008] App No 2872/02 (ECtHR) [46].

103 *Rantsev v Cyprus and Russia* [2010] App No 25965/04 (ECtHR) [285].

104 *Goiburú et al v Paraguay* [2006] Series C No 153 (IACtHR) [84].

105 D Carolei, 'Cestaro v. Italy: The European Court of Human Rights on the Duty to Criminalise Torture and Italy's Structural Problem' (2017) 17 *International Criminal Law Review* 567.

important role in the adoption of the Modern Slavery Act 2015 and related efforts to increase prosecution and conviction rates for human trafficking.[106]

Second, human rights bodies impose obligations on states to investigate, prosecute and, if appropriate, punish serious human rights violations. In the context of the Organisation of American States (OAS), *Velàsquez Rodríguez v Honduras* is not only the first IACtHR decision in a contentious case, but also the leading case on the Court's invocation of criminal accountability.[107] The IACtHR found that states have a dual duty, namely to refrain from violations, but also to prevent, investigate and punish them, regardless of whether state authorities are directly involved in the abuse.[108] Yet, the OAS institution did not order Honduras to adopt criminal sanctions as a remedy and acknowledged that 'The objective of international human rights law is not to punish those individuals who are guilty of violations'.[109] However, the authority of this statement did not last long. In the mid-1990s, the Inter-American Court started ordering states to effectively prosecute and punish individual perpetrators.[110] Today, the IACtHR case law refers to the failure to initiate criminal investigations and deploy criminal sanctions as a violation of human rights per se. In cases of torture and enforced disappearance, the duty to punish has even attained the status of *jus cogens*.[111]

The ECtHR also orders states to enforce their criminal law through 'thorough and effective investigation capable of leading to the identification and punishment of those responsible'.[112] In addition, the Council of Europe's Committee of Ministers, which is charged with monitoring that states comply with ECtHR rulings, has frequently declared that successful prosecution of individual cases is a prerequisite to a finding of compliance.[113] The UNHRC, for its part, has developed similar case law concerning the duty to institute criminal proceedings for the defence of human rights, including for arbitrary killing, enforced disappearance, torture and ill-treatment, sexual and domestic violence and human trafficking.[114] The UN Committee Against Torture is

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106 M Pinto, 'Sowing a "Culture of Conviction": What Shall Domestic Criminal Justice Systems Reap from Coercive Human Rights?' in Lavrysen and Mavronicola (n 96).

107 *Velásquez Rodríguez v Honduras* [1988] Series C No 4 (IACtHR).

108 ibid [166].

109 ibid [134].

110 *Caballero-Delgado and Santana v Colombia* [1995] Series C No 22 (IACtHR) [72(5)].

111 *Goiburú* (n 104).

112 *Kaya v Turkey* [1998] App Nos 158/1996/777/978 (ECtHR) [107].

113 Huneeus (n 8) 24–25.

114 *General Comment No 31* [2004] CCPR/C/21/Rev1/Add13 (UN Human Rights Committee) [18].

another human rights body which has consistently ordered states to investigate and punish acts of torture and ill-treatment.[115] Finally, it is worth noting the ongoing efforts to imbue the African Court on Human and Peoples' Rights with a fully fledged criminal jurisdiction through the Malabo Protocol.[116]

Insofar as human rights bodies mandate investigations, prosecutions and criminal sanctions, they also require states to exercise enforcement jurisdiction, which refers to the capacity of a state to enforce compliance with its laws or punishment for breach. Again, criminal jurisdiction remains territorial, although it is triggered and guided by an international body. Pursuant to human rights bodies' decisions, states have started new criminal investigations and prosecutions, overturned amnesties and created new institutions to facilitate criminal accountability.[117] In *Simón, Julio Héctor y Otros*, for instance, the Argentinian Supreme Court relied on the IACtHR case law to exclude the application of amnesty, statutory limitations and the principle of non-retroactivity.[118]

Third, the ECtHR has recently developed a duty on states to co-operate in the context of transnational criminal investigations of human rights violations. In *Güzelyurtlu and Others v Cyprus and Turkey*, Turkey was found in violation of the right to life due to its failure to co-operate with Cyprus and, in particular, for not providing a reasoned reply to the extradition requests submitted by Cypriot authorities.[119] The case concerned the investigation into the murder of three people which occurred in Cyprus when the main suspects had fled to the Turkish Republic of Northern Cyprus (TRNC). The European judges did not specify which jurisdiction would have been most appropriate for a criminal trial. However, while the Court held that Cyprus could refuse to waive its criminal jurisdiction in favour of TRNC, it found that Turkey had not complied with its obligation to co-operate – which would seem to support the principle of *aut dedere aut judicare*.[120] The ECtHR applied the same reasoning in *Romeo Castaño v Belgium*, where a murder suspect had fled from Spain to Belgium.[121] In that case, Belgian authorities were found to have violated the

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115 *Communication No 353/2008 (decision on Ukraine)* [2011] UN Doc CAT/C/47/D/353/2008 (UN Committee against Torture).

116 S Nimigan, 'The Malabo Protocol, the ICC, and the Idea of "Regional Complementarity"' (2019) 17 *Journal of International Criminal Justice* 1005.

117 Huneeus (n 8) 2; BD Tittemore, 'Ending Impunity in the Americas: The Role of the Inter-American Human Rights System in Advancing Accountability for Serious Crimes under International Law' (2005) 12 *Southwestern Journal of Law and Trade in The Americas* 429, 449–60.

118 *Simón, Julio Héctor y Otros* [2005] Supreme Court of Argentina 17.768, S1767XXXVIII.

119 *Güzelyurtlu and Others v Cyprus and Turkey* [2019] App No 36925/07 [ECtHR (GC)].

120 S Malby, 'Deciding the Criminal Forum – Can the ECHR Contribute?' (presentation at the WG Hart Legal Workshop, 26–28 April 2021; unpublished paper on file with the author).

121 *Romeo Castaño v Belgium* [2019] App No 8351/17 [ECtHR].

right to life as they failed to co-operate with their Spanish counterparts, who had sought to prosecute the suspect in Spain.[122]

Finally, it is worth mentioning that, besides through the impositions of state obligations in criminal matters, human rights bodies have impacted or may impact criminal jurisdiction in a number of other ways. An example is through the right to a fair trial. In the context of transnational criminal cases involving cross-border co-operation, case law on the right to a fair trial may be expected to influence the choice of the criminal forum, especially when such a choice may affect the principle of equality of arms or the procedural and evidential fairness of the proceedings.[123] Another example concerns the principle of *ne bis in idem* (the right not to be tried or punished twice). By preventing a defendant from being tried more than once for the same criminal conduct in different states, case law on this principle could have a role in supporting the settling of conflicts of criminal jurisdiction. However, current interpretations of the *ne bis in idem* principle by both the ECtHR and the UNHRC prevent a person from being tried and punished again only by courts of the same state, and thus do not preclude a second prosecution and punishment for the same conduct in another state.[124] As a result, the case law on the *ne bis in idem* principle of these two human rights bodies may somehow offer a green light to extraterritorial trials (or, at least, fail to shine a red light), despite previous prosecutions of the same offences in other states.[125]

III. The Creation of Global Crime and Justice

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122 For a critical comment, see M Pinto, 'Romeo Castaño: "Meticulously Elaborated Interpretations" for the Sake of Prosecution' (*Strasbourg Observers*, 10 September 2019) www.strasbourgobservers.com/2019/09/10/romeo-castano-meticulously-elaborated-interpretations-for-the-sake-of-prosecution/.

123 See Malby (n 120). Malby argues that the ECtHR is yet to develop a clear jurisprudence around the right to fair trial capable of influencing the choice of criminal forum.

124 *Krombach v France* [2018] App No 67521/14 [ECtHR (dec)]; *General Comment No 32* [2007] CCPR/C/GC/32 (UN Human Rights Committee) [57]. See Malby (n 120). However, the *ne bis in idem* principle operates between states in the context of the European Union (Convention implementing the Schengen Agreement of 14 June 1985 [2000] OJ L239/19, Art 54; Charter of Fundamental Rights of the European Union [2000] OJ C364/1, Art 50). On the other hand, US law condones re-prosecutions under the dual sovereignty theory. See, eg AJ Colangelo, 'Double Jeopardy and Multiple Sovereigns: A Jurisdictional Theory' (2009) 86 *Washington University Law Review* 769; AJ Colangelo, '*Gamble*, Dual Sovereignty, and Due Process' (2019) *Cato Supreme Court Review* 189 (discussing the Supreme Court case of *Gamble*).

125 For a critique of some of the case law of the ECtHR (and the Court of Justice of the European Union) on the principle of *ne bis in idem* in relation to issues of criminal jurisdiction, see M Ó Floinn, 'The Concept of Idem in the European Courts: Extricating the Inextricable Link in European Double Jeopardy Law' (2017) 24 *Columbian Journal of European Law* 75, 100–01: '[The principle of *ne bis in idem*] arbitrarily operates on a first-come first-served basis in the context of multijurisdictional offending, which may prevent prosecutions of individuals by states that have stronger normative claims.' See also G Lasagni and S Mirandola, 'The European ne bis in idem at the Crossroads of Administrative and Criminal Law' (2019) 2 *Eurocrim* 126.

Outside the case of universal jurisdiction, human rights are seldom mentioned as one of the reasons behind the growth of extraterritorial criminal jurisdiction in recent years. In fact, penal extraterritoriality is sometimes treated as a potential threat to human rights (especially defendants' rights) rather than one of their by-products.[126] However, in the last few decades, human rights have not only made criminal law one of the main instruments for their promotion, but have also allowed it to move across and beyond borders and have shaped how criminal jurisdiction is exercised to address human rights abuses. The use of human rights to trigger the application of criminal law transcends territorial boundaries because of potential detachments between the sites where proceedings are held, the nationality of the victims and offenders, and the location of the wrongdoings. It also transcends territorial boundaries because of the widespread belief that the universal conception of human rights mandates global justice – generally translated as the need for criminal accountability regardless of the context, implications and practicability.[127]

Since the 1970s, the rise of human rights has led to the emergence of a supposedly global sensibility for certain values deemed universal – in terms of their nature (as concerning every human being) and prescribed recognition (their being non-negotiable). In the most serious cases, conduct that infringes these values has been read in terms of legally proscribed crime rather than simply injustices and wrongdoings.[128] However, this is not ordinary crime: given the universality of the breached values, crime against human rights is discursively produced as *global* crime. Unlike transnational organised crime or cybercrime, for example, where it is the conduct that is supposedly of global reach, here it is the norm that is of global concern.[129] Yet, rather than being conceived as a product of human rights sensibilities and institutions, global crime is seen to pre-exist the former and authorise the existence of the latter.[130] The story goes that human rights violations were left unaddressed for centuries because they hid behind the shield of state sovereignty.[131] They were the most serious crimes, but were not punished as no system of justice to prosecute them existed. This system – the story continues – was first created in 1945, then halted, but resumed in the early 1990s. Since then, the international community has managed to

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126 See, eg Ireland-Piper (n 47).

127 LA Payne, 'The Justice Paradox?' in TC Halliday and G Shaffer (eds), *Transnational Legal Orders* (Cambridge, Cambridge University Press, 2015) 440–41.

128 McMillan, 'Imagining the International' (n 11) 165.

129 N McMillan, *Imagining the International: Crime, Justice, and the Promise of Community* (Stanford, Stanford University Press, 2020) 2.

130 Similarly, in the context of international criminal law, McMillan, 'Imagining the International' (n 11) 168.

131 A Cassese, 'Reflections on International Criminal Justice' (2011) 9 *Journal of International Criminal Justice* 271, 272.

penetrate 'that powerful and historically impervious fortress – state sovereignty – to reach out to all those who live within the fortress'.[132]

Insofar as human rights abuses are framed as global crime, the most appropriate response to advance the human rights regime appears to be a system of global criminal justice – albeit still dependent to a very large extent on the coercive and legal machinery of (some) states – rather than large-scale redistribution or a profound transformation of society.[133] Criminal law and legal processes that can penetrate the borders and the boundaries of territorial sovereignty are positioned as best able to defend human rights values wherever and whenever they are threatened. This has led to the de facto creation of a decentralised system of global criminal justice.[134] As seen in section II, it comprises national courts exercising universal jurisdiction and passive or active personality jurisdiction; ad hoc international and hybrid tribunals; a permanent international court; and human rights bodies which order states to undertake criminal prosecutions. These institutions – and the individuals, NGOs and trans-governmental networks that push them to act – promote a global norm of criminal accountability for human rights violations.[135] This system is not completely settled. As Leigh Payne has observed, 'Although the duty to prosecute gross violations of human rights seems to be a clear mandate in international law, its application soon reveals its ambiguity'.[136] Trials for human rights violations are held at the national and supranational levels; yet most perpetrators do not face prosecution. Nonetheless, the fact that impunity for human rights abuses is still widespread around the world seems to be related to deficiency in effectiveness or power politics and less to an (open) rejection of the underlying norms and values.

The creation of a global system of crime and justice has not simply facilitated penal extraterritoriality. It is arguably affecting the normative foundations of criminal jurisdiction, albeit mainly for those crimes which are serious human rights violations.[137] Conventionally, criminal

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132 ibid 273.

133 R Meister, *After Evil: A Politics of Human Rights* (New York, Columbia University Press, 2011) 1. See also McMillan, *Imagining the International* (n 129).

134 J Savelsberg, 'The Anti-Impunity Transnational Legal Order for Human Rights: Formation, Institutionalization, Consequences, and the Case of Darfur' in G Shaffer and E Aaronson (eds), *Transnational Legal Ordering of Criminal Justice* (Cambridge, Cambridge University Press, 2020) 208.

135 On global governance through a complex web of 'government networks' comprising, for example, police investigators, financial regulators, judges and legislators, see AM Slaughter, *A New World Order* (Princeton, Princeton University Press, 2005). On the internationalisation of crime control beyond the case of human rights prosecutions and international criminal law, see P Andreas and E Nadelmann, *Policing the Globe: Criminalization and Crime Control in International Relations* (Oxford, Oxford University Press, 2008).

136 Payne (n 127) 446.

137 See also Mégret, 'Do Not Do Abroad' (n 8) 39–40.

jurisdiction emanates from sovereign statehood. On the one hand, each state has a monopoly over the legitimate use of violence on its territory[138] and is prima facie prevented from intervening in matters that are essentially under another state's sovereignty.[139] On the other hand, international law envisages that states may prosecute conduct occurring outside their territorial boundaries in certain exceptional circumstances.[140] The conventional perspective may appear overturned when it comes to the global system of crime and justice founded on human rights values. Rather than resting on sovereignty, the right to punish – and the related right to assert jurisdiction – may be said to derive from the global commitment to protect 'universal, indivisible and interculturally recognised human rights'.[141] This commitment, in turn, enables states to exercise penal functions to uphold and defend universal values not only on their territory, but also abroad. It also gives normative legitimacy to international courts and tribunals to adjudicate in place of national courts.[142] In the words of Mégret, here 'international law comes first and, looking downward as it were, mandates that the criminal law be used for … the protection of basic human rights'.[143]

In a context where the principle of sovereignty is subordinated to that of humanity and human rights,[144] territorial jurisdiction may no longer be the rule and extraterritorial jurisdiction the exception. Rather, all states can be seen as having the same right to exercise jurisdiction over serious human rights abuses. They merely stand as proxies enforcing universal values on behalf of the international community.[145] If priority is given to the territorial state or otherwise, it is due to practical, rather than normative, considerations. For instance, proximity to crime may be an

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138 M Weber, 'Politics as a Vocation' in HH Gerth and CW Mills (eds), *From Max Weber: Essays in Sociology* (Abingdon, Routledge, 1948) 78.

139 AL Parrish, 'The Effects Test: Extraterritoriality's Fifth Business' (2008) 61 *Vanderbilt Law Review* 1455, 1463–64.

140 See A Chehtman, 'The Presumption against Extraterritorial Criminal Jurisdiction', ch 1 in the present volume; Garrod, 'Extraterritorial Criminal Jurisdiction' (n 19).

141 K Ambos, 'Punishment without a Sovereign? The *Ius Puniendi* Issue of International Criminal Law: A First Contribution towards a Consistent Theory of International Criminal Law' (2013) 33 *OJLS* 293, 308.

142 LDA Corrias and GM Gordon, 'Judging in the Name of Humanity: International Criminal Tribunals and the Representation of a Global Public' (2015) 13 *Journal of International Criminal Justice* 97.

143 Mégret, 'Do Not Do Abroad' (n 8) 40.

144 S Adelman, 'Cosmopolitan Sovereignty' in C Bailliet and K Franko (eds), *Cosmopolitan Justice and Its Discontents* (Abingdon, Routledge, 2011) 11.

145 Cockayne (n 67) 520; S Graf, *The Humanity of Universal Crime: Inclusion, Inequality, and Intervention in International Political Thought* (Oxford, Oxford University Press, 2021) 3; McMillan, *Imagining the International* (n 129) 31. Roger Cotterrell argues that references to an 'international community' remain for the most part purely rhetorical because it is not grounded in any sociological inquiry about what 'community' might mean and what kind of existence it might have: see R Cotterrell, 'The Concept of Crime and Transnational Networks of Community' in V Mitsilegas, P Alldridge and L Cheliotis (eds), *Globalisation, Criminal Law and Criminal Justice: Theoretical, Comparative and Transnational Perspectives* (Oxford, Hart Publishing, 2015) 17.

important factor for having domestic prosecutions, while the presence of the accused in another state or political pressures at the national level may be crucial in triggering the intervention of foreign or international courts.

IV. The Risks of a Value-Based Extraterritorial Penality

The expansion of extraterritorial jurisdiction in the last few decades has not been without controversy. Several commentators have argued that penal extraterritoriality has to be heavily restricted as it may lead to diplomatic tensions;[146] it is often normatively unjustified;[147] and it runs the risk of undermining procedural fairness for defendants.[148] With regard to extraterritorial prosecutions of human rights violations, realist scholars in international relations have criticised universal jurisdiction for interfering with transitions to democracy and to peace,[149] or impinging upon other states' sovereignty.[150] Given the number of proceedings involving African leaders, some African governments have also argued that universal jurisdiction is a form of neocolonialism.[151] The same criticism has also been directed towards international criminal adjudication and, in particular, the ICC.[152] Yet the large majority of international organisations, NGOs, practitioners and commentators working in the area of human rights strongly favour assertions of penal extraterritoriality as an effective means of responding to human rights violations. They have become accustomed to requiring penal action for human rights abuses without interrogating what is involved in this process. While a global, human rights-driven penality may appear as the 'the most civilized response' to human rights violations,[153] it is nonetheless important to critically reflect on the risks it may entail.

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146 JA Zerk, 'Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas' (2010) Corporate Social Responsibility Initiative Working Paper No 59, 1, 12.

147 Chehtman, *The Philosophical Foundations* (n 9) 59.

148 Ireland-Piper (n 47); M Farbiarz, 'Accuracy and Adjudication: The Promise of Extraterritorial Due Process' (2016) 116 *Columbia Law Review* 625, 627.

149 J Snyder and L Vinjamuri, 'Trials and Errors: Principle and Pragmatism in Strategies of International Justice' (2004) 28 *International Security* 5.

150 Kissinger (n 42).

151 CC Jalloh, 'Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction' (2010) 21 *Criminal Law Forum* 1.

152 KM Clarke, *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge, Cambridge University Press, 2009).

153 Cassese (n 131) 271.

In political theory, criminalisation and punishment are among the most salient manifestations of state authority.[154] Criminal law contributes to one of the ultimate aims of the state, that is, the provision of security and order.[155] Accordingly, the questions of what, when and how much a state should criminalise and punish primarily invite political answers related to how a state has to fulfil its security obligations. The boundaries of crime and the form of sanctions vary in different states according to their underlying political order. However, this construction staggers when criminalisation and punishment are made global endeavours. In the absence of a *world* state, the operation of global penality cannot rest on a political order. Rather, normative order is created by appeal to universal human rights values. Global, human rights-driven penality is grounded on a value-based order, which appears as universally recognised by, and adaptable to, all political contexts.[156] Here, resort to criminal law is no longer a political *decision* but a moral *obligation*. It is not dependent upon the choices of a political community; rather, it springs spontaneously and boundlessly from universal moral values. The more sorts of behaviours come to be regarded as gross violations of human rights with the passage of time, the more criminal law grows and expands on the global stage. The fact, for instance, that business corruption and environmental damage have increasingly been considered human rights violations seems to have encouraged efforts to punish them on an extraterritorial basis.[157] Examples are the attempts to make 'ecocide' a crime subjected to international adjudication[158] or the efforts to extend the model of the UK Bribery Act 2010, which applies extraterritorially, to other business-related human rights abuses.[159]

Ironically, human rights-driven developments risk undermining sovereign protections based on the rule of law. In fact, a value-based global penality lacks the checks and balances of the

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154 L Zedner, 'Penal Subversions: When Is a Punishment Not Punishment, Who Decides and on What Grounds?' (2016) 20 *Theoretical Criminology* 3, 10.

155 See, eg T Hobbes, *Leviathan* (Oxford, Oxford University Press, 1996); C Beccaria, *Dei Delitti e Delle Pene* (Milan, Mursia, 1973); L Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (Oxford, Oxford University Press, 2016).

156 Ambos (n 141) 309.

157 Similarly, Mégret, 'Do Not Do Abroad' (n 8) 35.

158 See P Higgins, D Short and N South, 'Protecting the Planet: A Proposal for a Law of Ecocide' (2013) 59 *Crime, Law and Social Change* 251; 'Making Ecocide a Crime' (*Stop Ecocide International*) www.stopecocide.earth/making-ecocide-a-crime.

159 Joint Committee on Human Rights, *Human Rights and Business 2017: Promoting Responsibility and Ensuring Accountability (sixth report)* (2016–17, HL 153, HC 443); D McMullan, 'Briefing: Is the UK Living Up to Its Business & Human Rights Commitments' (Business and Human Rights Resource Centre, 2015) www.media.business-humanrights.org/media/documents/files/UK_Briefing_-_FINAL.pdf: 'Given that the government has already seen the merit in pursuing criminal sanctions for bribery abroad (and given how closely related bribery & human rights abuses often are), there would appear to be a clear opportunity to extend this model to human rights abuses.'

democratic process that are present when criminal law is grounded in a political order.[160] Its foundation on human rights would in theory require that penal power be exercised *humanely* and in line with international human rights standards.[161] Yet the theory is one thing; how international and domestic courts operate in practice is another matter. The danger, far from being hypothetical, is that they may embrace illiberal criminal doctrine to ensure the punishment of human rights violations at all costs.[162] Even if due process standards were consistently observed, the reins of this value-based penality would remain very much loosened. As a moral obligation, the prosecution of the gravest human rights abuses is required in every circumstance.[163] This means that amnesties, pardons or statutes of limitations are unacceptable if they cover genocide, war crimes, crimes against humanity (including disappearances) or torture.[164] Any approach that would even imply a laxity towards the responsibility of human rights violators is rejected as it would question the seriousness of the wrong committed and jeopardise the universality of the values breached.[165] However, this assumption prevents important countervailing interests from being taken into account, even where they may militate against criminal prosecutions.[166] These may include political stability and peace, economic justice, reconciliation, the uncovering of historical truth and institutional reform.[167] The political community where human rights violations have occurred is also deprived of the opportunity to decide for itself how to deal with situations of serious wrongdoings – perhaps pursuing unconventional avenues to justice. For instance, in 1995, South Africa established a Truth and Reconciliation Commission (TRC), whose purpose was, amongst others, to grant amnesty and waive criminal and civil liability for those who disclosed their

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160 Similarly, in relation to the ICC, K Lohne, *Advocates of Humanity: Human Rights NGOs in International Criminal Justic*e (Oxford, Oxford University Press, 2019) 12

161 K Lohne, 'Penal Welfarism "Gone Global"? Comparing International Criminal Justice to *The Culture of Control*' (2021) 23 *Punishment and Society* 3, 11.

162 D Robinson, 'The Identity Crisis of Criminal Law' (2008) 21 *Leiden Journal of International Law* 925; GP Fletcher and JD Ohlin, 'Reclaiming Fundamental Principles of Criminal Law in the Darfur Case' (2005) 3 *Journal of International Criminal Justice* 539; Pinto, 'Awakening the Leviathan' (n 6); Pinto 'Sowing a "Culture of Conviction"' (n 106).

163 M Jackson, 'Amnesties in Strasbourg' (2018) 38 *OJLS* 451.

164 JE Méndez, 'Foreword' in Lessa and Payne (n 36) xxiii.

165 Similarly, D Celermajer, *The Prevention of Torture: An Ecological Approach* (Cambridge, Cambridge University Press, 2018) 13.

166 CS Nino, 'The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina' (1991) 100 *Yale Law Journal* 2619; J Zalaquett, 'Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints' in Aspen Institute (ed), *State Crimes: Punishment or Pardon* (Queenstown, Aspen Institute, 1989).

167 Jackson (n 163) 17.

wrongdoings during the apartheid period, if associated with a political objective.[168] Yet, the South African TRC experience is no longer regarded as a legitimate model of justice. According to Juan Méndez, today the South African-style 'conditional amnesty' would be unacceptable if it covered the gravest human rights abuses.[169]

In addition, criminal law, albeit grounded in human rights in normative terms, never loses its penal character, notably its reliance on police control and incarceration, as well as its potential to be enforced disproportionately and arbitrarily.[170] While criminal prescription and adjudication can become global and extraterritorial, criminal enforcement is always very much rooted in the state system.[171] Both international and national courts rely on states' police forces to identify and arrest alleged perpetrators of human rights abuses. If their trials conclude with a guilty verdict, they need states' prisons where those convicted and sentenced can be sent.[172] The context of police brutality, harsh prison conditions and mass incarceration across many regions of the world would be expected to advise reflexivity and caution in invocations of global penality. However, the human rights discourse tends to move these concerns into the shadows. When justified in human rights terms, prosecutions and trials are generally portrayed as humanitarian, rather than punitive, endeavours.[173] In other words, human rights run the risk of conferring legitimacy to punitiveness by covering it up with a moral gloss. Punitiveness led by human rights arrives in a progressive and enlightened guise, and is thus readily welcomed into the system, raising only minor criticism. While human rights actors have generally condemned overreliance on criminal justice led by populist rhetoric, such an expansion is instead demanded when criminal law is used in the name of human rights. The same individuals who criticise harsh conditions of imprisonment and overcriminalisation in the context of 'tough-on-crime' policies gladly accept extensive penal control to stop human rights violations around the world.

In so doing – and this is what is more concerning – human rights become a key vehicle both for the transnationalisation of punitive projects and for lending some states the opportunity to expand

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168 Promotion of National Unity and Reconciliation Act 1995, Art 3(1)(b) (SA).

169 Méndez, 'Foreword' (n 164) xxiii.

170 Similarly, McMillan, *Imagining the International* (n 129) 35.

171 K Lohne, 'Penal Humanitarianism beyond the Nation State: An Analysis of International Criminal Justice' (2020) 24 *Theoretical Criminology* 145, 154.

172 K Grady, 'Towards a Carceral Geography of International Law' in S Chalmers and S Pahuja (eds), *Routledge Handbook of International Law and the Humanities* (Abingdon, Routledge, 2021) 360.

173 Similarly, in the context of international criminal law, McMillan, *Imagining the International* (n 129) 31.

their coercive power beyond their borders.[174] Recent criminological contributions have shown how penal power already travels across national borders and geographic regions, especially from the Global North to the Global South.[175] Western intervention into southern countries' penal sectors is justified on humanitarian grounds and usually takes the form of 'penal aid' aimed at state-building efforts and migration control.[176] Penal extraterritoriality in the name of human rights may be seen as another example of this trend – a trend towards 'the expansion of sovereign power over familiar, racialized, subjects and places', with the aim of 'reasserting control, or at the very least, reimagining it, in places where' Western states once ruled.[177] Far from promoting social justice in every region of the world, human rights-led penal extraterritoriality ultimately risks perpetuating unequal global power structures.

V. Conclusion

Human rights are a driving force of penal extraterritoriality. They are at the basis of the growing importance of universal jurisdiction, whose purpose is to ensure that perpetrators of the most serious human rights abuses do not escape justice, and of the increased reliance on the passive and active personality principles. Human rights considerations have also underpinned the institution of new forms of jurisdiction which are, in one sense or another, deterritorialised or internationalised. One example is the creation of international criminal tribunals, which, since the early 1990s, have exercised direct or complementary criminal jurisdiction when state justice systems have failed to prosecute international crimes committed on their territory. Another example is the 'quasi-criminal jurisdiction' of human rights bodies, which have begun to order and supervise national prosecutions when states are unable or unwilling to act.

While several explanations have been provided for the increased importance of extraterritorial criminal jurisdiction in recent years,[178] there is still scarce attention to the role of human rights in

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174 Similarly, in relation to crimes against humanity, Graf (n 145) 3; in the context of the ICC, Lohne, *Advocates of Humanity* (n 160) ch 7.

175 M Bosworth, 'Penal Humanitarianism? Sovereign Power in an Era of Mass Migration' (2017) 20 *New Criminal Law Review* 39; Lohne, 'Penal Humanitarianism beyond the Nation State' (n 171); EM Stambøl, 'Neo-Colonial Penality? Travelling Penal Power and Contingent Sovereignty' (2021) 23 *Punishment and Society* 536.

176 K Brisson-Boivin and D O'Connor, 'The Rule of Law, Security-Development and Penal Aid: The Case of Detention in Haiti' (2013) 15 *Punishment and Society* 515; Bosworth (n 175).

177 Bosworth (n 175) 15.

178 See, eg Ireland-Piper (n 47) 6, which mentions the internationalisation of institutions, finance and criminal activity due to globalisation.

fostering this trend. Yet, not only have they affected the issue of jurisdiction in several ways, but they have done so without this development being accompanied by adequate reflection on its normative foundations and potential adverse implications. Human rights do not merely foster penal extraterritoriality; they discursively produce the idea of *global* crime – namely crime against human rights values – which naturally requires a decentralised system of *global* justice to address it. In this context, criminal jurisdiction no longer appears to emanate from national sovereignty, but from the values of the international community. Hence, the focus shifts from territorial to extraterritorial jurisdiction.

However, a global, human rights-driven penality is not necessarily more benign and less problematic. Penality – whatever its source of legitimacy and jurisdictional reach – ultimately remains the exercise of the state's coercive power. Yet, when penality operates extraterritorially in the name of human rights, it may run free of the legal and political constraints that are present when jurisdiction is primarily territorial. It may also become a tool for expanding the coercive power of states – in particular, of certain states – beyond their borders that is readily welcomed into the system, raising only minor criticism.