RIGHTS-DRIVEN GLOBAL PENALITY

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Abstract

This paper examines and evaluates the role of human rights in enhancing and expanding penal powers across the globe. It discusses various aspects of this phenomenon, such as the exercise of extraterritorial jurisdiction by national courts to prosecute human rights violations, the establishment of international courts and tribunals, and the imposition of penal obligations on states by international human rights bodies. The paper argues that the advancement of human rights has resulted in the discursive construction of global forms of crime and justice. In this discursive framework, certain wrongdoings that are considered to be of universal concern automatically trigger calls for criminalisation and punishment, regardless of context, consequences or feasibility. However, as the paper contends, when penality operates globally under the banner of human rights, it may escape the constitutional and political constraints that apply when the power to punish is based on constitutional sovereignty. It may also become a tool for powerful countries to exert coercion beyond their borders.

1 Introduction

Human rights became the dominant moral language of international politics in the late 1970s.[1] Since then, appeals to human rights have increasingly been used to enlarge the reach of penal powers around the world. This expansion has entailed the creation of international criminal tribunals, the institution of criminal proceedings against human rights violators and the introduction of new human rights-based offences. The use of human rights to strengthen penality also occurs at the level of discourse. In particular, the twin assumptions that effective human rights protection requires criminal accountability and that impunity causes further human rights violations have become essential parts of the ways we generally think and speak about human rights.

The embrace of penality by human rights – what Karen Engle calls the 'turn to criminal law in human rights'[2] – has been subject to growing attention in recent years. This development has generally been welcomed as largely uncontroversial among legal practitioners, human rights advocates and many scholars. In some circumstances, for instance when gross abuses are committed, the assumption that human rights require criminalisation and punishment has been internalised to the point that it is deemed self-evident. Individual criminal accountability is viewed as an essential element of human rights protection: it would provide redress for victims of abuses, prevent future

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[1] Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press 2010).

[2] Karen Engle, 'Anti-Impunity and the Turn to Criminal Law in Human Rights' (2015) 100 Cornell Law Review 1069.

violations through deterrence and affirm respect for human rights law and values.[3] For Kathryn Sikkink, for example, this 'new' trend of holding perpetrators of serious human rights violations criminally accountable fostered a 'justice cascade' and led to an improvement in human rights and democracy, because the occurrence of prosecutions has reduced the general level of repression.[4] Recently, however, a growing body of critical scholarship has questioned the pursuit of human rights protection through criminalisation and punishment.[5] Engle, in particular, has identified four main concerns regarding the embrace of criminal law in human rights.[6] She argues that criminal law individualises and decontextualises abuses;[7] it displaces conceptions of economic harms and related remedies;[8] it demands alignment with the carceral state;[9] and it distorts how historical materials are collected and history is narrated.[10]

Building upon this line of critical studies, this paper delves into how human rights have contributed to strengthening and expanding penal powers around the world. It both illustrates and questions this trend. Section II explores different aspects of this development, such as the use of extraterritorial jurisdiction to prosecute human rights abuses in national courts, the creation of international courts and tribunals, and the imposition of penal obligations on states by international human rights bodies. Section III argues that the promotion of human rights has led to the discursive construction of distinctly *global* forms of crime and justice.[11] Within this discursive schema, certain wrongdoings deemed to be of universal concern automatically elicit demands for criminalization and punishment, irrespective of context, implications or feasibility. Section IV highlights the adverse implications of a global penality that 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, thereby precluding alternative, non-punitive responses to human rights violations. Moreover, human rights may end up justifying the dissemination and expansion of punitive responses around the globe, rather than moderating state penal policies. Ultimately, the

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[3] Christoph JM Safferling, 'Can Criminal Prosecution Be the Answer to Massive Human Rights Violations?' (2004) 5 German Law Journal 1469, 1482.

[4] Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (WW Norton 2011).

[5] see, eg, Françoise Tulkens, 'The Paradoxical Relationship between Criminal Law and Human Rights' (2011) 9 Journal of International Criminal Justice 577; Engle (n 2); Mattia Pinto, 'Historical Trends of Human Rights Gone Criminal' (2020) 42 Human Rights Quarterly 729.

[6] Engle (n 2).

[7] ibid 1120–1122.

[8] ibid 1122–1124.

[9] ibid 1124–1126.

[10] ibid 1126–1127.

[11] The discussion in sections III and IV also appear in Mattia Pinto, 'Human Rights as Penal Drivers across the World' in Micheál Ó Floinn and others (eds), *Transformations in Criminal Jurisdiction: Extraterritoriality and Enforcement* (Hart Publishing 2023) (but with specific reference to the issue of extraterritorial criminal jurisdiction).

paper argues that a global, human rights-driven penality does not necessarily enhance human rights protection, but instead can be used by powerful countries to act coercively beyond their territorial boundaries.

2 Trends

2.1 Extraterritorial Jurisdiction

During the 1970s, many political refugees from authoritarian regimes in Eastern and Southern Europe and South America fled to Western Europe and North America. It was evident that domestic laws and institutions were inadequate in addressing the systematic human rights abuses that these exiles experienced, particularly when such abuses were used to sustain a totalitarian regime. With no international criminal court, the concept of universal jurisdiction was employed as a solution. 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. It was the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention),[12] adopted in 1984, that marked the turn to universal jurisdiction as a means of addressing human rights violations.[13] Under 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.

The Torture Convention represents a watershed in the promotion of criminal law for the purpose of human rights protection. Since this convention, several other treaties have sought to make prosecution of gross human rights violations legally obligatory.[14] While many of them do not contain provisions for universal jurisdiction, some do. These include the Inter-American Convention to Prevent and Punish Torture (1985),[15] the Inter-American Convention on Forced Disappearance of Persons (1994),[16] the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2000)[17] and the International Convention

[12] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (1465 UNTS 85).

[13] Manfred Nowak, Moritz Birk and Giuliana Monina, 'Introduction' in Manfred Nowak, Moritz Birk and Giuliana Monina (eds), *The United Nations Convention Against Torture and its Optional Protocol: A Commentary* (2nd edn, Oxford University Press 2019) 3–4.

[14] Naomi Roht-Arriaza, 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law' (1990) 78 California Law Review 449, 499.

[15] Inter-American Convention to Prevent and Punish Torture 1985 (OASTS 67) art 12.

[16] Inter-American Convention on Forced Disappearance of Persons 1994 (OASTS 60) art 4.

[17] Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography 2000 (2171 UNTS 227) art 4.

for the Protection of All Persons from Enforced Disappearances (2006).[18] All these treaties *oblige* states parties to assert universal jurisdiction if they do not extradite suspects who are present in their territory. In addition, 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.[19] 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.[20]

In practice, universal jurisdiction for human rights abuses remained a dead letter until the late 1990s. However, with the turn of the century, individual criminal accountability by reference to human rights gained momentum and several states began prosecuting foreign perpetrators for abuses committed abroad.[21] The general perception was that a 'new age of accountability' was replacing an 'old era of impunity'.[22] The arrest of Chilean dictator Augusto Pinochet in London, following a Spanish extradition warrant for torture and human rights violations, is viewed by many as a turning point.[23] For Noemi Roht-Arriaza, this event represented the most significant step towards global accountability for leaders who committed gross abuses.[24] In recent years, human rights obligations have been invoked in the prosecution and punishment of individuals responsible for mass abuses. The Pinochet case gave practical effect to the Torture Convention and revitalised universal jurisdiction for human rights abuses. Despite criticism,[25] universal jurisdiction today appears to be a common jurisdictional basis for preventing impunity for human rights abuses, especially for mid-level perpetrators.[26] A 2021 study shows that universal jurisdiction has been endorsed by 109 states and that the number of prosecutions is growing, with eighteen prosecuting countries and about sixty cases in 2020.[27]

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[18] International Convention for the Protection of All Persons from Enforced Disappearances 2006 (2716 UNTS 3) art 9.

[19] Alejandro Chehtman, *The Philosophical Foundations of Extraterritorial Punishment* (Oxford University Press 2010) 117–118.

[20] Andrew Clapham, 'Human Rights and International Criminal Law' in William A Schabas (ed), *The Cambridge Companion to International Criminal Law* (Cambridge University Press 2016).

[21] Sikkink (n 4).

[22] Ban Ki-moon, 'At ICC Review Conference, Ban Declares End to "Era of Impunity"' (*UN News*, 31 May 2010) <news.un.org/en/story/2010/05/340252> accessed 11 July 2023.

[23] Sikkink (n 4).

[24] Naomi Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (University of Pennsylvania Press 2005).

[25] Luc Reydams, 'The Rise and Fall of Universal Jurisdiction' in William A Schabas and Nadia Bernaz (eds), *Routledge Handbook of International Criminal Law* (Routledge 2011).

[26] Máximo Langer and Mackenzie Eason, 'The Quiet Expansion of Universal Jurisdiction' (2019) 30 European Journal of International Law 779.

[27] Sandrine Lefranc, 'A Tale of Many Jurisdictions: How Universal Jurisdiction Is Creating a Transnational Judicial Space' (2021) 48 Journal of Law and Society 573, 576.

In addition to universal jurisdiction, states have increasingly used other jurisdictional bases to prosecute human rights abuses committed abroad. Foreign trials through passive personality jurisdiction[28] have been conducted since the 1990s for human rights violations in Latin America.[29] Several activists, unable to have investigations launched in their own countries, have strategically pressured prosecutors in Spain, Italy and France to start criminal proceedings against violations that occurred in Argentina, Chile or Uruguay against citizens with Spanish, Italian or French passports.[30] Passive personality also appears to provide the basis of many criminal proceedings involving senior African officials before European courts.[31] Active personality[32] is also widely used. 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'.[33] All the treaties containing *aut dedere aut judicare* provisions in fact enable states parties to establish their jurisdiction when the defendant is one of their nationals.[34] In addition, a number of scholars believe that when universal jurisdiction is not available, there is a self-standing human rights obligation to assert active personality jurisdiction, even absent a specific treaty provision to that effect.[35] The assumption is that if a state fails to investigate violations which have occurred in its territory, other states involved through their nationals are encouraged, if not mandated, to conduct the prosecutions themselves.

2.2 International Criminal Law

The history of international criminal tribunals is often celebrated as a triumphant story of human rights protection. However, international criminal law has not always been concerned with human rights. For instance, the Nuremberg Trials focused mainly on

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[28] Passive personality refers to the jurisdiction over an act committed abroad where the victim is a national of the prosecuting state.

[29] Kathryn Sikkink and Carrie Booth Walling, 'The Impact of Human Rights Trials in Latin America' (2007) 44 Journal of Peace Research 427.

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

[31] Louise Arimatsu, 'Universal Jurisdiction for International Crimes: Africa's Hope for Justice?' (Chatham House 2010) Briefing Paper IL BP 2010/01 <www.chathamhouse.org/sites/default/files/public/Research/International%20Law/bp0410arimatsu.pdf > accessed 11 July 2023.

[32] Active personality is the exercise of criminal jurisdiction by states over their nationals for crimes committed abroad.

[33] Frédéric 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, 38.

[34] 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 art 4(2)(a); International Convention for the Protection of All Persons from Enforced Disappearances art 9(1)(b).

[35] Mégret (n 33) 33.

aggression, while the Holocaust and other atrocities remained secondary.[36] Only in the 1990s did international criminal adjudication become part of the human rights agenda and shifted its attention to accountability for human rights violations.[37] In 1993, the atrocities in the Balkans prompted the United Nations Security Council (UNSC) to establish the International Criminal Tribunal for the former Yugoslavia (ICTY).[38] The following year, the UNSC created the International Criminal Tribunals for Rwanda (ICTR) in response to the genocide and other atrocities committed in the country.[39] Though these acts were primarily violations of the Geneva and Genocide Conventions, they were also regarded as human rights violations due to their universal moral repugnance. The ICTY and ICTR exercised direct criminal jurisdiction over the international crimes committed in the former Yugoslavia and Rwanda until their functions were transferred to the International Residual Mechanism for Criminal Tribunals between 2015 and 2017.

The institutionalisation of the *ad hoc* tribunals led to the creation of a permanent international criminal court. The Rome Statute was adopted in 1998 and entered into force in 2002.[40] The ICC was hailed 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'.[41] Since then, the Court has been considered the cornerstone of a broad human rights agenda: the 'fight against impunity'. The connection between human rights and international criminal law is hardly disputed, as scholars, practitioners and non-governmental organisations (NGOs) overwhelmingly concur that human rights are sources and *raisons d'être* of international criminal justice.[42] The ICC appears to fulfil a dual human rights mandate by promoting fair trial and high standards of detention as models for national systems and utilising the preventive, retributive and expressive functions of criminal sentences to advance human rights standards.

The fight against impunity in international criminal law extends beyond prosecution in international fora. International criminal law also aims to penetrate the domestic level by promoting national prosecution and the implementation of penal mechanisms for

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[36] Samuel Moyn, 'From Aggression to Atrocity Rethinking the History of International Criminal Law' in Kevin Jon Heller and others (eds), *The Oxford Handbook of International Criminal Law* (Oxford University Press 2020).

[37] ibid.

[38] UNSC Res 827 1993.

[39] UNSC Res 955 1994.

[40] Rome Statute of the International Criminal Court 1998 (A/CONF183/9) (So far, 123 states have ratified the Rome Statute and accepted the jurisdiction of the ICC over war crimes, crimes against humanity and genocide, while 45 have also accepted the jurisdiction of the Court over the crime of aggression).

[41] Kofi Annan, 'Secretary-General Says Establishment of International Criminal Court Is Gift of Hope to Future Generations | Meetings Coverage and Press Releases' (1998) <www.un.org/press/en/1998/19980720.sgsm6643.html> accessed 11 July 2023.

[42] Kjersti Lohne, 'NGOs for International Justice - Criminal or Victims' Justice?' in Andreas Follesdal and Geir Ulfstein (eds), *The Judicialization of International Law: A Mixed Blessing?* (Oxford University Press 2018).

serious human rights violations. The ICC's jurisdiction, for instance, is based on the principle of complementarity.[43] On the one hand, the Court has jurisdiction over international crimes when states are unwilling or unable to prosecute.[44] On the other, states are compelled to conduct effective criminal investigations and trials if they wish to avoid the intervention of the ICC (positive complementarity).[45] In this way, complementarity fosters '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'.[46]

The creation of international criminal institutions is often an attempt to lift the obligations to punish human rights violations out of the politics and injustice associated with the national sphere.[47] International bodies supposedly provide a neutral and apolitical response to chaotic local politics and administer criminal justice in external settings through universal rules and procedures.[48] They are opposed to domestic political powers, which are seen as incapable of managing complex social problems, including the protection of human rights.[49] The assumption of the inadequacy of domestic justice has long remained unchallenged, especially throughout the 1990s. However, in more recent years, critiques and limitations of trials on the international stage have led to the creation of hybrid criminal tribunals that integrate both domestic and international structures.[50] Examples of these institutions include the Sierra Leone Special Court, the Extraordinary Chambers in the Courts of Cambodia, the Kosovo Specialist Chambers and Specialist Prosecutor's Office, the Special Tribunal for Lebanon and the Extraordinary African Chamber.[51]

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[43] Carsten Stahn and Mohamed M El Zeidy, *The International Criminal Court and Complementarity: From Theory to Practice* (Cambridge University Press 2011).

[44] Rome Statute arts 1, 17.

[45] ICC Assembly of States Parties, 'Report of the Bureau on Stocktaking: Complementarity. Taking Stock of the Principle of Complementarity: Bridging the Impunity Gap' (International Criminal Court 2010) ICC-ASP/8/51 para 16 <asp.icc-cpi.int/sites/asp/files/asp_docs/ASP8R/ICC-ASP-8-51-ENG.pdf> accessed 11 July 2023.

[46] Mark A Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press 2007) 143.

[47] Nesam McMillan, 'Imagining the International: The Constitution of the International as a Site of Crime, Justice and Community' (2016) 25 Social & Legal Studies 163, 166.

[48] Zinaida Miller, 'Anti-Impunity Politics in Post-Genocide Rwanda' in Karen Engle, Zinaida Miller and Dennis M Davis (eds), *Anti-Impunity and the Human Rights Agenda* (Cambridge University Press 2016) 150–151.

[49] ibid 159–162.

[50] Frédéric Mégret, 'In Defense of Hybridity: Towards a Representational Theory of International Criminal Justice' (2005) 38 Cornell International Law Journal 725.

[51] Carsten Stahn, *A Critical Introduction to International Criminal Law* (Cambridge University Press 2019) 197–210.

2.3 Penal Obligations by 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.[52] These institutions increasingly rely upon human rights law to supervise national prosecutions and order states to ensure criminal accountability at the domestic level.[53] These bodies are not criminal courts and cannot find individual responsibility. Nevertheless, they influence how national systems exercise criminal jurisdiction over serious human rights violations and intervene when states appear unable or unwilling to act as required.

In the context of the Organisation of American States (OAS), the first IACtHR decision in a contentious case, *Velàsquez Rodríguez v Honduras* (1988), is also the leading case of the Court's invocation of criminal accountability.[54] The IACtHR ruled that states have a dual duty to refrain from violations and to prevent, investigate and punish them, even if state authorities are not directly involved in the abuse.[55] Although, in that case, the IACtHR did not order Honduras to adopt penal measures as a remedy, in the mid-1990s it started prescribing such measures, instructing states to effectively prosecute and punish individual perpetrators.[56] Today, the IACtHR considers the failure to deploy criminal sanctions as a violation of human rights per se, and in cases of torture and enforced disappearance, the duty to punish has even attained the status of *jus cogens*.[57]

The ECtHR has also developed a body of case law on state obligations in criminal matters.[58] The seminal case is *X and Y v Netherlands* (1985), where the Court held that the 'effective deterrence' for protecting sexual integrity 'can be achieved only by criminal-law provisions'.[59] Following this decision, the state's obligation to criminalise human rights abuses has also been restated with respect to the right to life,[60] torture

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[52] Mattia 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; Anja Seibert-Fohr, *Prosecuting Serious Human Rights Violations* (Oxford University Press 2009).

[53] Alexandra Huneeus, 'International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts' (2013) 7 American Journal of International Law 1.

[54] *Velásquez Rodríguez v Honduras* [1988] Series C No 4 (Inter-American Court of Human Rights).

[55] ibid 166.

[56] *Caballero-Delgado and Santana v Colombia* [1995] Series C No 22 (Inter-American Court of Human Rights) [72(5)].

[57] *Goiburú et al v Paraguay* [2006] Series C No 153 (Inter-American Court of Human Rights) [84].

[58] Laurens Lavrysen and Natasa Mavronicola (eds), *Coercive Human Rights: Positive Duties to Mobilise the Criminal Law under the ECHR* (Hart Publishing 2020).

[59] *X and Y v Netherlands* [1985] App No 8978/80 (European Court of Human Rights) [27].

[60] *Kiliç v Turkey* [2000] App No 22492/93 (European Court of Human Rights) [62].

and other ill-treatment,[61] forced labour and human trafficking.[62] Additionally, the ECtHR orders states to enforce their criminal law through 'thorough and effective investigation capable of leading to the identification and punishment of those responsible'.[63] The UNHRC has also developed similar case law on the duty to prosecute human rights violations, including arbitrary killing, enforced disappearance, torture and ill-treatment, sexual and domestic violence and human trafficking.[64] The UN Committee Against Torture is another body that has consistently ordered states to investigate and punish acts of torture and ill-treatment.[65] Finally, it is worth noting the ongoing equip the African Court on Human and Peoples' Rights with a fully-fledged criminal jurisdiction through the Malabo Protocol.[66]

The case law on state obligations in criminal matters has had a significant impact on domestic legal systems. Pursuant to human rights bodies' decisions, states have started new criminal investigations and prosecutions, overturned amnesties, introduced new offences and created new institutions to facilitate criminal accountability.[67] For instance, in *Simón, Julio Héctor y Otros* (2005), the Argentinian Supreme Court relied on the IACtHR case law to exclude the application of amnesty, statutory limitations and the principle of non-retroactivity.[68] Italy introduced the crime of torture in the Italian Criminal Code following an ECtHR decision,[69] and in the United Kingdom, the adoption of the Modern Slavery Act 2015 was influenced by ECtHR case law on state obligations to criminalize labour exploitation.[70]

3 The Discursive Construction of Global Crime and Justice

As we have seen in the previous section, 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. The use of human rights to trigger the application of criminal law transcends national borders 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 national

[61] *MC v Bulgaria* [2003] App No 39272/98 (European Court of Human Rights) [174].
[62] *Rantsev v Cyprus and Russia* [2010] App No 25965/04 (European Court of Human Rights) [258].
[63] *Kaya v Turkey* [1998] App Nos 158/1996/777/978 (European Court of Human Rights) [107].
[64] UNHRC, 'General Comment No 31 [80], The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (UN Human Rights Committee 2004) CCPR/C/21/Rev.1/Add. 13 para 18.
[65] *Communication No 353/2008 (decision on Ukraine)* [2011] CAT/C/47/D/353/2008 (UN Committee against Torture).
[66] Sarah Nimigan, 'The Malabo Protocol, the ICC, and the Idea of "Regional Complementarity"' (2019) 17 Journal of International Criminal Justice 1005.
[67] Huneeus (n 53) 2.
[68] *Simón, Julio Héctor y Otros* [2005] Supreme Court of Argentina 17.768, S1767XXXVIII.
[69] Domenico 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.
[70] Mattia Pinto, 'Sowing a "Culture of Conviction": What Shall Domestic Criminal Justice Systems Reap from Coercive Human Rights?' in Lavrysen and Mavronicola (n 58).

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.[71]

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.[72] 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.[73] 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.[74] The story goes that human rights violations were left unaddressed for centuries because they hid behind the shield of state sovereignty.[75] 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 penetrate 'that powerful and historically impervious fortress – state sovereignty – to reach out to all those who live within the fortress'.[76]

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.[77] 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.[78] As seen in

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[71] Leigh A Payne, 'The Justice Paradox? Transnational Legal Orders and Accountability for Past Human Rights Violations' in Terence C Halliday and Gregory Shaffer (eds), *Transnational Legal Orders* (Cambridge University Press 2015) 440–441.

[72] McMillan (n 47) 165.

[73] ibid.

[74] Similarly, in the context of international criminal law, ibid 168.

[75] Antonio Cassese, 'Reflections on International Criminal Justice' (2011) 9 Journal of International Criminal Justice 271, 272.

[76] ibid 273.

[77] Robert Meister, *After Evil: A Politics of Human Rights* (Columbia University Press 2011) 1.

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

section II, it comprises national courts exercising extraterritorial jurisdiction; *ad hoc* international and hybrid tribunals; a permanent international court; and human rights bodies which order states to undertake criminal prosecutions. Altogether, 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. This system is not completely settled. As Leigh Payne has observed, '[a]lthough the duty to prosecute gross violations of human rights seems to be a clear mandate in international law, its application soon reveals its ambiguity'.[79] 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 a 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 global penality. It is arguably affecting the normative foundations of criminalisation, albeit mainly for those crimes which are serious human rights violations. Conventionally, criminalisation emanates from sovereign statehood and is based on the idea that the state has a monopoly over the legitimate use of violence.[80] This perspective is challenged 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 may be said to derive from the global commitment to protect 'universal, indivisible and interculturally recognised human rights'.[81] 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.[82] 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'.[83]

In a context where the principle of sovereignty is subordinated to that of humanity and human rights,[84] all states can be seen as having the same right to criminally adjudicate serious human rights abuses. They merely stand as proxies enforcing universal values

[79] Payne (n 71) 446.

[80] Max Weber, 'Politics as a Vocation' in Hans Heinrich Gerth and C Wright Mills (eds), *From Max Weber: Essays in Sociology* (Routledge 1948) 78.

[81] Kai 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 Oxford Journal of Legal Studies 293, 308.

[82] Luigi DA Corrias and Geoffrey M 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.

[83] Mégret (n 33) 40.

[84] Sam Adelman, 'Cosmopolitan Sovereignty' in Cecilia Bailliet and Katja Franko (eds), *Cosmopolitan Justice and its Discontents* (Routledge 2011) 11.

on behalf of the international community.[85] If priority is given to national institutions or otherwise, it is due to practical, rather than normative, considerations. For instance, proximity to crime may be an 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.

4 The Limits of Value-Based Global Penality

The creation of a system of global penality in the last few decades has not been without controversy. 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 peace,[86] or impinging upon other states' sovereignty.[87] Given the number of proceedings involving African leaders, some African governments have also argued that universal jurisdiction is a form of neo-colonialism.[88] The same criticism has also been directed towards international criminal adjudication and, in particular, the ICC.[89] Yet the large majority of international organisations, NGOs, practitioners and commentators working in the area of human rights strongly favour global penality 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,[90] it is nonetheless important to critically reflect on the risks it may entail.

In political theory, criminalisation and punishment are among the most salient manifestations of state authority.[91] Criminal law contributes to one of the ultimate aims of the state, that is, the provision of security and order.[92] 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

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[85] Sinja Graf, *The Humanity of Universal Crime: Inclusion, Inequality, and Intervention in International Political Thought* (Oxford University Press 2021) 3; McMillan (n 47).

[86] Jack Snyder and Leslie Vinjamuri, 'Trials and Errors: Principle and Pragmatism in Strategies of International Justice' (2004) 28 International Security 5.

[87] Henry Kissinger, 'The Pitfalls of Universal Jurisdiction: Risking Judicial Tyranny' (2001) 80 Foreign Affairs 86.

[88] Charles C Jalloh, 'Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction' (2010) 21 Criminal Law Forum 1.

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

[90] Cassese (n 75) 271.

[91] Lucia Zedner, 'Penal Subversions: When Is a Punishment Not Punishment, Who Decides and on What Grounds?' (2016) 20 Theoretical Criminology 3, 10.

[92] Thomas Hobbes, *Leviathan* (InteLex Corporation 1995); Cesare Beccaria, *Dei Delitti e Delle Pene* (Mursia 1973).

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.[93] Here, the 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, criminalisation and punishment spring spontaneously and boundlessly from universal moral values. The more sorts of behaviours come to be regarded as serious human rights violations with the passage of time, the more penality grows and expands on the global stages. The fact, for instance, that environmental damage or business corruption have increasingly been considered human rights violations seems to have encouraged an expansion of their penalisation. Examples are the attempts to make 'ecocide' a crime subjected to international adjudications[94] or the efforts to prosecute the real import of bribery on an extraterritorial basis.[95]

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 democratic process that are present when criminal law is grounded in a constitutional political order. Its foundation on human rights would in theory require that penal power be exercised *humanely* and in line with international human rights standards.[96] Yet the theory is one thing; another matter is how international and domestic courts operate in practice. 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.[97] 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.[98] This means that amnesties, pardons or statutes of limitations are unacceptable if they cover genocide, war crimes, crimes against humanity (including disappearances) or torture.[99] 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.

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[93] Ambos (n 81) 309.

[94] Polly Higgins, Damien Short and Nigel 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> accessed 11 July 2023.

[95] Mégret (n 33) 35.

[96] Kjersti Lohne, 'Penal Welfarism "Gone Global"? Comparing International Criminal Justice to The Culture of Control' (2021) 23 Punishment & Society 3, 11.

[97] Darryl Robinson, 'The Identity Crisis of International Criminal Law' (2008) 21 Leiden Journal of International Law 925; Pinto (n 52).

[98] Miles Jackson, 'Amnesties in Strasbourg' (2018) 38 Oxford Journal of Legal Studies 451.

[99] Juan E Méndez, 'Foreword' in Francesca Lessa and Leigh A Payne (eds), *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives* (Cambridge University Press 2012) xxiii.

However, this assumption prevents important countervailing interests from being taken into account, even where they may militate against criminal prosecutions.[100] These may include political stability and peace, economic justice, reconciliation, the uncovering of historical truth and institutional reform.[101] 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 wrongdoings during the apartheid period, if associated with a political objective.[102] 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.[103]

In addition, criminal law, albeit grounded in human rights in normative terms, is not deprived of its penal character, notably its reliance on police control and incarceration as well as its potential to be enforced disproportionately and arbitrarily. While criminal prescription and adjudication can become global, criminal enforcement is always very much rooted in the state system.[104] Both international and national courts rely on states' police forces to identify and arrest alleged human rights violators. If their trials conclude with a guilty verdict, they need prisons where those convicted and sentenced can be sent. The context of discriminatory criminalisation, 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 concerns about the inequality, prejudice and violence that stem from penality into the shadows. When justified in human rights terms, prosecutions and trials are generally portrayed as humanitarian, rather than punitive, endeavours. In other words, human rights run the risk of conferring legitimacy to punitiveness by covering it up with a moral gloss. Led by the human rights discourse, penality arrives in a progressive and enlightened guise and is easily 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 prison conditions and over-criminalisation in the context of 'tough-on-crime' policies gladly accept extensive penal control to promote universal values around the world.

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[100] Carlos S Nino, 'The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina' (1991) 100 The Yale Law Journal 2619.

[101] Jackson (n 98) 17.

[102] SA Promotion of National Unity and Reconciliation Act 1995.

[103] Méndez (n 99) xxiii.

[104] Kjersti Lohne, 'Penal Humanitarianism beyond the Nation State: An Analysis of International Criminal Justice' (2020) 24 Theoretical Criminology 145, 154.

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 their coercive power beyond their borders.[105] 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.[106] 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.[107] Global penality 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.[108] Far from promoting social justice in every region of the world, human rights-driven global penality ultimately risks perpetuating unequal global power structures.

5 Conclusion

Human rights are a driving force of penality across the world. They are at the basis of the use of extraterritorial criminal jurisdiction to ensure that perpetrators of the most serious human rights abuses do not escape justice. Human rights considerations have also underpinned the institution of international and hybrid criminal tribunals, which appear as the cornerstones of the 'fight against impunity'. Human rights bodies have also imposed positive obligations in criminal matters. Pursuant to these bodies' decisions, states have introduced new offences, started new investigations, overturned amnesties and created new institutions to facilitate prosecution. Human rights do not merely foster penal power across the world, they also 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, criminalisation no longer appears to emanate from sovereignty, but from the values of the international community. However, a global, human rights-driven penality is not necessarily more benign and less problematic. Penality, whatever its source of legitimacy, ultimately remains the exercise of the state's coercive power. Yet, when penality operates globally in the name of human rights, it may run free of the constitutional and political constraints that are present when the power to punish finds its foundations in constitutional sovereignty. Penality may also become a tool for expanding the coercive

[105] Similarly, in relation to crimes against humanity, Graf (n 85) 3.
[106] Mary Bosworth, 'Penal Humanitarianism? Sovereign Power in an Era of Mass Migration' (2017) 20 New Criminal Law Review 39; Eva Magdalena Stambøl, 'Neo-Colonial Penality? Travelling Penal Power and Contingent Sovereignty' (2021) 23 Punishment & Society 536.
[107] Kara Brisson-Boivin and Daniel O'Connor, 'The Rule of Law, Security-Development and Penal Aid: The Case of Detention in Haiti' (2013) 15 Punishment & Society 515; Bosworth (n 106).
[108] Bosworth (n 106) 15.

power of states – in particular, of certain states – beyond their borders that is readily welcomed into the system, raising only minor criticism.

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