

Penal welfarism ‘gone global’? Comparing international criminal justice to *The Culture of Control*

Punishment & Society

2021, Vol. 23(1) 3–23

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DOI: 10.1177/1462474520928114

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Abstract

With the consolidation of a cosmopolitan field of international criminal justice, penalty has ‘gone global’. In spite of the abundance of doctrinal legal analysis, human rights studies, and transitional justice studies, there are few analytic attempts to engage with the working assumptions, cultural commitments, and dominant mentalities that give shape to international criminal justice as a penal field. Based on ethnographic observations, interviews with key actors, and critical reading of international criminal justice scholarship, this article compares the cosmopolitan penalty of international criminal justice to that of late modern, domestic, penalty. Using David Garland’s *The Culture of Control* as an analytic yardstick, it argues that international criminal justice both resembles and departs from ‘the national’. For example, whilst the cosmopolitan penalty relies upon retributive justifications, it makes no appeal to harsh penal sanctions; nor is it concerned with the rehabilitation of prisoners. Rather, it is an expressive and humanitarian form of justice where the victim takes central stage – as the embodiment of a suffering humanity. Moreover, there is a remarkable faith in the transformative effects of international criminal justice, resembling a form of penal welfarism ‘gone global’. As national capacity building and penal development has become intrinsic to the project of international criminal justice, the article shows how the global dimension of the power to punish is based on a moralization of politics.

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Keywords

cosmopolitan penalty, David Garland, international crimes, international criminal justice, late-modern penalty, penal welfarism

Introduction

Within punishment and society scholarship, David Garland's (2001) *The Culture of Control* has become a contemporary classic. By offering an extensive diagnosis of late-modern penalty, the book is amongst the foremost contributions to a theoretically informed criminology of changing patterns of crime control in late-modern western societies (see also Christie, 2000; Feeley and Simon, 1992; O'Malley, 1999; Pratt, 2000; Simon, 2000). Against the background of *penal welfarism* – the penological project of 'civilisation' and 'rationalisation' that informed directions in crime policy in the 1960s and 1970s – Garland identifies late-modern penalty as marked by a rise of 'punitiveness' and a return to retributive rationalities. A more differentiated set of actors in crime control is moreover seen to indicate a trend towards a disentangling penal state and of penal power more generally.

Garland's analysis has been subject to a plethora of critique. Generally, these engaged readers take issue with either the theoretical scale or empirical scope of his work, such as Matthews (2002), who miss both large-scale theory as well as empirical nuance, and Feeley (2003: 114), who notes that 'the level of generality is at times frustrating'. The analytical juxtaposition of the US with the UK, and of these states as reflective of late-modern societies more broadly has been criticized for their position as being both exceptionally punitive in comparison with other western democracies, and for the implicit ethnocentric claim to 'stand for' criminological theory – both within and beyond the western hemisphere (see Aas, 2012). Should one wish to add something to the critical inventory, one might point out that Garland's analysis is deeply rooted within a nation-state outlook on crime, punishment, and society. Indeed, the critique against *The Culture of Control* largely parallel the 'number of troubling blind spots' (Bosworth, 2012: 125; Crewe, 2015) in punishment and society scholarship generally, which only attributes to the significance of the book's analysis and the engaged scholarship within punishment and society (for a response to critics, see Garland, 2004).

This article does not engage with the empirical ontology of *The Culture of Control*. Since its publication, there has also been an impressive increase in punishment and society scholarship, including comparative analysis, and, not the least, increased specificity. However, *The Culture of Control* offers large-scale analysis of shifting penal arrangements, which makes Garland's empirical project particularly useful as a point of departure for an analytical one, namely to gauge the field of criminal justice 'gone global' – that is, the normative and material system of international criminal justice established to prosecute and punish individuals for core

international crimes: war crimes, crimes against humanity, genocide, and the crime of aggression. Despite substantial criminological engagement with international criminal justice in recent decades (e.g. Smeulers and Haveman, 2008), there is a lack of critical attention to this field by punishment and society scholars (but see Lohne 2000a; Savelsberg, 2018). Moreover, and apart from significant critical international law scholarship (Heller et al., 2020), as a scholarly field, international criminal justice is saturated with legal activists as well as doctrinal and policy-based analysis where scant attention is given to the working assumptions, cultural commitments, and dominant mentalities that give shape to the field.

The aim of the article is to continue the critical concern with practices and discourses of crime and punishment from the national to the global. By applying *The Culture of Control* as a comparative yardstick, it asks, simply, how do the field of international criminal justice resemble or depart from Garland's diagnosis of late-modern penalty?¹ Building on the author's study of human rights NGOs in international criminal justice (Lohne, 2019) and continued academic research and engagement with the field, it finds that international criminal justice both echoes the national, and departs from it. For example, whilst international criminal justice relies upon retributive and expressive undertones, it makes no appeal to harsh penal sanctions. Moreover, compared to Garland's analysis of the national terrain of crime control and policy, there is a remarkable faith in the utilitarian and transformative effects of international criminal justice. Rather than being 'hard' justice, it is put forward as a form of social and humanitarian justice dressed in cosmopolitan clothing – a project of civilization and development; in short, a form of penal welfarism 'gone global'.

The field of international criminal justice as an object of study

In spite of the criminological truism that the power to punish remain in the nation state (Zedner, 2016), the recent decade has seen an incremental engagement with how issues of crime and punishment are becoming increasingly 'international', 'transnational', and 'global' (Bosworth et al., 2018). As part of this, the growing institutionalization of international criminal courts and laws have attracted the attention of criminologists and sociologists to the field (Christensen, 2015). On issues ranging from international sentencing (Holá et al., 2012), perpetrator studies (Anderson, 2017; Houge, 2015; Smeulers et al., 2019), and victims' needs in response to mass violence (McEvoy and McConnachie, 2012), a 'supranational criminology' (Smeulers and Haveman, 2008) – with overlapping links to transitional justice studies, genocide studies, and international criminal justice scholarship generally – has consolidated within criminology.

Less criminological attention however, is given to how international criminal justice represents a developing 'cosmopolitan penalty' (Lohne, 2019) – a penal field transgressing the national in its normative and material aspirations, and where 'the global', rather than the nation-state, is constituted as a site of crime, punishment, and justice (see also McMillan, 2016). The Preamble to the

International Criminal Court (ICC) declares to recognize crimes that ‘threaten the peace, security and well-being of the world’, and are ‘determined to put an end to impunity for the perpetrators of such crimes and thus to contribute to the prevention of such crimes’, the crimes being genocide, crimes against humanity, and war crimes.² Besides the permanent ICC, nine international(ized) criminal courts have been operational on an *ad hoc* basis to deal with specific situations, such as the UN tribunals for the former Yugoslavia and Rwanda (for an empirical overview see Smeulers et al., 2013).

Viewing the institutionalization of a cosmopolitan penalty in its ‘structured totality’ (Garland, 2004: 169), the ‘field’ of international criminal justice comprises its expanding legal framework in international and domestic jurisdictions alike, but also the plethora of actors and stakeholders involved in pulling and pushing international criminal justice in various directions (Mégret, 2016), such as academics, diplomats, practitioners, and NGO activists. Apart from an emerging sociology of international criminal justice (Christensen, 2015; Lohne, 2020b), there are few systematic attempts to dissect the dynamics of the field in the manner that *domestic* criminal justice is subject to by scholars of punishment and society. The inattention by punishment and society scholars is all the more significant as penal power in international criminal justice takes on a different character by being disconnected from its associations with nation state formation.

As a way of making sense of criminal justice ‘gone global’, then, the article explores how international criminal justice resembles or differs from Garland’s diagnosis of late-modern penalty by making a comparison against the indices identified in *The Culture of Control* as signifying a move away from ‘penal welfarism’. In particular, the analysis compares the ‘national’ and the ‘international’ by focusing on (i) the rehabilitative ideal, (ii) penal sanctions and expressive justice, (iii) representations of crime and criminals, (iv) the centrality of the victim, and (v) punishment and politics (2001: ch. 1).

Despite of the fact that this comparison remains an analytic exercise to capture trends and tendencies within international criminal justice, there are, of course, important caveats to such an endeavour. The analysis is intentionally general in order to identify patterns and trends, which also implies that nuances and subtleties must necessarily give way to simplification (Garland, 2001: ix). Moreover, the domestic analogy is much debated in international law scholarship (e.g. Koskenniemi, 2005), and there are a number of assumptions that render problematic the transfer of theory from the national to the international, and from ‘ordinary’ justice to the ‘extraordinary’ (e.g. Posner and Vermeule, 2004).

First, the legitimacy of an international *ius puniendi*, that is, the state’s right to punish, rests on the presumed consent of states to delegate to an international institution some of their sovereign penal powers. After all, international criminal justice’s flagship institution, the ICC, is a *treaty-based* court, meaning that states have themselves subjected their territory and their citizens to the jurisdiction of the Court. However, this delegation of penal authority does not cover all of the ICC’s penal power. ‘[T]o maintain or restore international peace and security’, the

Security Council may refer situations to the ICC under Chapter VII in the UN Charter. The ICC's judicial intervention in Sudan and Libya are both a result of such referrals, and as such, are examples of international penal power outside state consent. Moreover, legitimating penal power 'gone global' through delegated state authority misses the point that legitimacy is claimed horizontally – between and amongst states in the 'international community'; the relationship with *individuals* is not dealt with, despite the fact that it is individual responsibility that is of concern to the international penal regime (Tallgren, 2002).

Second, this emphasis on individual accountability for mass atrocity crimes is in itself problematic, as justification for international punishment is premised on the presumption of individual agency and responsibility. Whilst the individualistic element of criminal law is contested in 'ordinary' domestic criminal justice too, the contexts in which mass atrocity crimes occur make the grounding in individual agency much more problematic. Mass atrocity crimes are often committed in contexts of *collective* violence and inversions of values and norms (which may or may not be *state* sanctioned). This entails that the acts in questions may not be viewed as deviant in the contexts in which they occur, and/or are carried out by people who see themselves as conforming to a norm. Symbolic interactionist theories posit that similar dynamics are at play in domestic criminality (Becker, 1991 [1963]; Sutherland, 1949; Sykes and Matza, 1957). However, the applicability of deviance theory to explain *international* crimes is routinely questioned by critical international legal scholars, who claim that the 'liberal legalist' approach to accountability critically misses the collective engagement and societal complicity of mass atrocity crimes (Drumbl, 2007; Fletcher and Weinstein, 2002).

Third, several observers have pointed out that a domestic analogy is flawed in itself. International criminal justice *is* different from domestic criminal justice. Comparing them therefore devalues the latter, and misses out the fact that '[a]dded value is supposed to be created by the fact that international criminal justice is applied by an international institution' (Tallgren, 2002: 566). However, as international criminal justice develops from the two philosophical currents of legalism and liberalism, both firmly situated within the legal structures of Western societies (Drumbl, 2007), the domestic analogy is a useful one. Moreover, accounts of the criminal 'justice cascade' (Sikkink, 2011) – the normative shift in international politics towards criminal accountability for human rights violations – note how the criminal accountability model was 'familiar' and 'obvious' to the practitioner and diplomatic mentality of people familiar with the workings of the nation-state. As such, the cosmopolitan penalty to some extent 'relies upon measures which have already been deemed tolerable and the morality of which can be taken for granted' (Garland, 1990: 214). Thus, and precisely because the 'national' and 'ordinary' blend into the 'international' and 'extraordinary', an analytic comparison may offer valuable insight into continuities and change, dependencies and novel penal arrangements beyond the domestic culture of control (see also Chazal, 2015).

An ethnographic approach to international criminal justice

The analysis is based on the author's multi-sited ethnography of human rights NGOs in international criminal justice (Lohne, 2019), and on further academic engagement with the field since then. Generally, I followed the networks and (dis)connections of a major coalition NGO – the *Coalition for the International Criminal Court* – from its core secretariat and steering committee members, primarily in The Hague, and through its 'transnational advocacy networks' (Keck and Sikkink, 1998), including to Uganda and its northern region which is one of the sites where the ICC is involved. From June 2011, I spent almost a year in The Netherlands and The Hague, including four times conducting participatory observation at the ICC Assembly of States Parties meeting, which are annual diplomatic meetings (for an analysis, see De Hoon and Lohne, 2019). In addition, shorter research trips include both sites of 'production' and 'reception' of international criminal justice, such as Belgium, the UK, Rwanda and Uganda. The analysis also draws on data from 34 semi-structured interviews with key actors in international criminal justice, including 28 people in their capacities as NGO representatives. Whilst interviews and field observations were turned into 'hard' data through transcripts, memo-writing, and subsequent coding in Nvivo, the analysis is also based on insights and observations from being immersed in the field of international criminal justice through a decade of academic interest (see Pool, 2017).

Data and analysis are primarily focused on the ICC – rather than the other international(ized) criminal courts. As the ICC has a global reach (albeit primarily involved in Africa), this makes for a different context – and consequence – than the international(ized) courts set up to deal with specific conflicts on specific territories, such as the International Criminal Tribunals for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The volatility of international criminal justice affects the conduct of empirical investigation, but also the validity of the analysis. International criminal justice is a field in constant flux, driven by events that have the potential to change significantly the landscape in which it operates. A mass exodus from the ICC by African state parties, as feared in 2016 during a particular problematic time for the Court, would have been one such example (Rossi, 2018).

Thus, to a certain extent, the analysis is contextual – informed by specificities of space and time. Like any ethnography, the conditions of ethnographic research in international criminal justice are determined by the researcher's positionality, including paths of messiness and serendipity (Cottle, 2001). Moreover, I have followed the mobilization *for* international criminal justice, rather than its resistance. However, ethnography's grounded impulse enables a 'natural' questioning of boundaries – of the 'where', 'how', and 'who' – and thus 'objectivizes' international criminal justice as a research object by identifying the structures and conditions of international criminal justice as a social *field* (Dezalay and Garth, 1998; Eslava, 2015). As such, it is possible to tease out elements and qualities in international criminal justice that are more stable and structuring by identifying trends,

characteristics, and dynamics. With this in mind, the following analysis probes how international criminal justice resembles or differs from that of Garland's diagnosis of late-modern penalty.

From the late-modern to the cosmopolitan penalty

The rehabilitative ideal

In *The Culture of Control*, Garland (2001) observes several 'indices of change', or sets of developments signifying a move away from what he terms 'penal welfarism' – the penological project of 'civilization' and 'rationalization' that shaped the field of crime control and criminal justice from the 1890s to the 1970s. In late-modern penalty, he sees a 'fading of correctionalist and welfarist rationales for criminal justice interventions; [and] the reduced emphasis upon rehabilitation as the goal of penal institutions' (2001: 8).

Rehabilitation of convicted war criminals, or the 'international prisoner', has never been a dominant objective in international criminal justice. Although rehabilitation, or 'resocialization',³ is referred to as a factor in early release decisions of those convicted by the ICTY, ICTR, and the ICC, the conceptualization and content of rehabilitation of the "enemies of humankind" has been entirely neglected by academia and practitioners alike' (Kelder et al., 2014: 1179). The drafters of the *ad hoc* international criminal tribunals' statutes 'almost entirely neglected questions regarding the enforcement of sentences' (Holá and van Wijk, 2014: 8). Whilst there has been some improvement at the ICC (which, subject to the Court's supervision, defers to the law of the State that enforces the sentence to stipulate the conditions of imprisonment), the use of the term 'rehabilitation' in the ICC's Rome Statute is reserved for victims – not defendants.

Rehabilitation of victims in international criminal justice is part of the strengthening of victims' rights to reparations under international criminal law. Article 75 in the ICC Rome Statute requires the establishment of 'principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation'. A Trust Fund for Victims established by the ICC's Assembly of States Parties administers both court-ordered reparations and a more general assistance mandate to provide victims of international crimes with 'physical rehabilitation, psychological rehabilitation and/or material support'.⁴ Rather than mending their perpetrators, rehabilitation in international criminal justice concern the humanitarian needs of victims and their communities.

One may interpret the lack of attention to international prisoners' rehabilitation because the international penal regime emerged as a system of criminal justice in the 1990s, and thus, when the rehabilitative ethos of criminal justice were already in decline. Another reason may be the extraordinary nature of mass atrocity crimes, and the prospect of rehabilitating those committing them. There is also the collective nature of mass atrocity crimes, bringing into question the relevance of individual 'rehabilitation programmes' at all (Drumbl, 2007). As Holá and van

Wijk (2014: 15) observe in their research on the enforcement of 'international' sentences, '[d]ue to the character of international crimes, international convicts are often classified as "the worst criminals" by domestic authorities. In practice however, many of them are former politicians or military/state officials who according to our respondent [a former employee of the ICTY] pose no danger to society'.

The lack of attention to the *content* of international enforcement of sentencing is noteworthy, and together with trends outlined in the 'new penology' in late-modern societies (see Feeley and Simon, 1992). However, rather than a fading of correctionalist rationales and reduced emphasis on rehabilitation, there is an absence of a rehabilitative ideal for perpetrators in international criminal justice. Instead, rehabilitation is reserved for victims and conceptualized as a humanitarian objective 'in the global movement to end impunity for the gravest of crimes'.⁵

Penal sanctions and expressive justice

Another tendency of late-modern penalty, according to Garland, is the re-emergence of 'punitive' sanctions and expressive justice as a way of re-establishing the 'legitimacy of an explicitly retributive justice' (2001: 9). Rather than being a field shaped by expert knowledge and professional authority, crime control and criminal justice become expressions of presumed public sensibilities – often, as elaborated below, in connection with a centring of victims in the crime discourse. Herein, the 'language of condemnation and punishment has re-entered official discourse' (2001: 9) – also to the extent of returning to normative penal theory, which once again underline the communicative, expressive, and symbolic functions of punishment.

The extension of criminal justice and punishment to the 'international' and 'global' may reflect the return of retributive and expressive rationalities – both rationalities play important roles as justifications for international criminal justice (Drumbl, 2007). However, in contrast to tendencies associated with late-modern *domestic* penalty, demands for harsher sentences are absent from the field of international criminal justice and its key actors centred on The Hague. In the ICC's first sentence decision, Thomas Lubanga was sentenced to 14 years of imprisonment for the war crimes of enlisting and conscripting child soldiers in the Democratic Republic of the Congo (DRC). Commenting on the sentence, an NGO representative from the Coalition Secretariat noted that 'locking him up forever is not going to solve the problem; locking him up forever may not aid reconciliation in the country'. Another Coalition representative responded that she hadn't given the sentence much thought, that she couldn't remember how much Lubanga 'got', and 'as long as they don't get the death penalty...'. A third representative similarly responded that 'once the court cases have begun ... I tend to lose interest'. Amongst my NGO informants, the explicit penal function of the ICC seemed unimportant.

On the one hand, the lack of a punitive populist discourse demanding harsher penal sanctions can be seen as an indicator of how the cosmopolitan penalty remain embedded in expert knowledge and professional authority, and how NGOs – and especially human rights organizations – are part of this broader epistemic field. There is also a predominance of lawyers in the field, including amongst the human rights NGOs advocating for international criminal justice. The cosmopolitan penalty's human rights sensibility is particularly discernible regarding the death penalty, which is altogether abolished by the international penal regime. Indeed, the ICTR's exclusion of the death penalty was one of the reasons why the Rwandan government voted against establishing the tribunal in the UN.⁶ This demonstrates how human rights play an important role as normative bulwark against 'punitive' and severe sanctions in international criminal justice.

On the other hand, however, the language of condemnation is recurrent and resolute amongst practitioners, diplomats, and NGO activists promoting the ICC. Discourses around the ICC – and especially amongst the human rights community – reflect what Sander has called an 'anti-impunity mindset' (Sander, 2020), with written and oral statements constantly referencing the need to 'end', 'fight', and 'combat' impunity (Houge and Lohne, 2017). It is reflective of the more general turn to criminal law and penal power as a way to enforce human rights (Engle et al., 2016), and as such, operates with an expansive logic. International criminal justice is certainly driven by a will to punish – albeit, a will to punish *humanely* and in line with international human rights standards.

In this way, international criminal justice both echoes late-modern penalty, and departs from it. Although it relies upon retributive and expressive undertones, there is no appeal to severe penal sanctions. Instead, punitivism and expressive justice shape up in cosmopolitan penalty as a form of humanitarian penal sensibilities.

Representations of crime and criminals

As part of the re-emergence of punitive sensibilities, Garland observes a change in late-modern societies whereby changing images of the 'criminal' is associated with shifting notions of the crime landscape: images of 'dangerous predators' feed a 'culture of fear' (Furedi, 2002), which contribute to the rise of punitive sensibilities. The image is one of crime as 'everywhere' – random, pervasive, and ready to strike anyone at any time.⁷ This volatile imagery stand in contrast to previous times of penal welfarism when reforms were justified in a 'progressive sense of justice, an evocation of what "decency" and "humanity" required' (Garland, 2001: 10).

In international criminal justice, there is indeed an image of indicted war criminals as 'dangerous predators': being wanted or prosecuted – by the ICC especially – certainly attaches a 'special stigma' (Mégret, 2015): such people are designated *hostes humani generis* – enemies of the human race. However, rather than being in 'our midst' – ready to strike anyone at any time – the global crime landscape is

differentiated. Notwithstanding the ICC's claim to the global and universal, the Court primarily adjudicates the violence of Africa's protracted conflicts. Rather than 'unruly youth' and risky populations *within* late-modern societies, the 'ICC criminal' emerges from what Duffield (2001: 309) refers to as the 'global borderlands', the imagined geographical space where 'brutality, excess and breakdown predominate'. Consider for example Joseph Kony from the Lord's Resistance Army in Uganda, or Bosco Ntaganga (also called 'The Terminator') from the DRC. Both are infamous for their atrocities, and epitomize the image of the African *villain*, or warlord – of meaningless and barbaric brutality – of evil incarnate (Mutua, 2001).⁸ A related image of the ICC war criminal is that of the *despotic* other, most notably embodied by Sudan's former President Al Bashir for whom there has been an outstanding arrest warrant on charges including genocide since 2009.

The imagery of African villains and despots indicted by the ICC are ones of someone totally outside the cosmopolitan civilized society. They bear resemblance to Nils Christie's portrayal of 'suitable enemies' – 'a dangerous man coming from far away. He is a human being close to not being one' (1986: 26). However, rather than a 'collective anger' towards dangerous predators, the background sensibility of international justice is collective moral outcry, a humanitarian impetus to 'do something' about distant suffering caused by distant others. Resembling penal welfare justifications, international criminal justice is indeed justified in a progressive sense of justice. As Sagan (2010: 9) observes:

The clear delineation of the dichotomy between the victim who is helped by cosmopolitan criminal law, and the criminal who, through their impunity, makes cosmopolitan criminal law necessary, is a defining aspect of the court's narrative of purpose ... Representations of the criminal and the victim corroborate cosmopolitan social narratives of legitimacy and illegitimacy, justice and progress.

In this way, there is a strong commitment to socially engineered solutions, connecting the fight against impunity with a strengthening of criminal justice at the national and international levels alike. The most conspicuous example of international criminal justice's aspirations to civilize and reform is embedded in ICC's Principle of Complementarity, which stipulates that the ICC is a 'court of last resort' and as such, that cases and situations are only admissible to the Court if national jurisdictions are neither able nor willing to proceed with their own genuine criminal proceedings. Whilst it has proven difficult to enforce in practice, challenging despotic heads and criminal state structures is a manifest objective of international criminal justice. However, a question may be asked of how cosmopolitan penalty's justification in humanity's humanitarian progress become associated with objectives of *de facto* regime change. At least, this was how it seemed to members of the Ivorian diaspora following the proceedings against former Ivorian President Gbagbo at the ICC. Provocatively, they asked me why the sitting President Alassane Ouattara was not also in the dock (along with the

former colonial power, France). For them, Gbagbo was the victim of a political show trial, and the ICC nothing but a western tool to censor African governments by criminalizing ‘non-western endorsed’ political figures.

With time, the complementarity principle has also merged with rule of law development reforms that aim to make national jurisdiction more able (if not more willing) to prosecute and punish international crimes on their own. In this way, strengthening national criminal justice capacity has become a key element of the international criminal justice project (Rossi, 2018). It also shows how there is significant mission creep, and connections between international criminal justice and other fields of international intervention such as humanitarianism, development, and liberal state-building (Lohne, 2000a).

The centrality of the victim

Alongside the resurfacing of punitive sensibilities, Garland (2001: 11) notes the ‘remarkable return of the victim to centre stage in criminal justice policy’. Stories are increasingly victim-focused in crime news reporting, and victims’ interests and sensibilities are called upon in support of punitive responses.

International criminal justice resonates very well with the domestic terrain of criminal policy wherein the victim now has a much more prominent role. Indeed, the victim of international crimes is indeed the figure in whose name international criminal justice is done (Kendall and Nouwen, 2014), and international justice advocates frequently expressed the view that the ICC ‘is a victims’ court really’:

[they] are the people the hold thing stands for. If you just view it as an institution that is there to get convictions and hold a few trials, then good for you, then maybe you’re real interest or motivation is not – [you don’t] wholeheartedly believe in it.

As a result, much is written on the centrality of victims and victimhood in and for international criminal justice (e.g. Hoyle and Ullrich, 2014; Stolk, 2015). This includes the strong victims’ rights provisions stipulated in the Rome Statute system of justice (Wemmers, 2010), the disappointments of Court practices to properly enforce them (Pena and Carayon, 2013), and, more recently, critical takes on how international criminal justice is legitimated through ‘abstract victimhood’ and the promise of ‘victims’ justice’ (Clarke, 2009; Kendall and Nouwen, 2014).

However, in extension of this latter cultural approach, one may observe that the cultural representation of victims at the ICC differs radically from that of late-modern western societies. Whilst victims of crime in the global north have taken on a ‘representation character, whose experience is taken to be common and collective, rather than individual and atypical’ (Garland, 2001: 11), the victim imagery at the ICC are one of distant and powerless victims. Yet, at the same time, and resembling other humanitarian and human rights interventions, the highly publicized victim imagery remain a critical part of the humanitarian reason (Fassin,

2011) that feeds the fight against impunity in international criminal justice (see Mutua, 2001).

Thus, whilst the notion of victimhood is critical and routinely invoked in support of ‘justice’ at both the domestic and the international level, who and what are recognized within this category differ. As a result, the role of the victim at the domestic and international levels is necessarily different too. Whilst the victim in the first case is a reminder of the unpredictability of ordinary crime, the victim of extraordinary crimes represents the incredible and remote – a spectacle of humanity’s suffering.

Punishment and politics

Finally, in his diagnosis of late-modern societies, Garland (2001: 13) sees a ‘distinctly populist current in penal politics that denigrates expert and professional elites and claims the authority of “the people”, of common sense, of “getting back to basics”’. Pratt (2007) has later elaborated on this trend – *penal populism* – as penal policy driven by the pursuit of electoral votes rather than the reduction of crime and those motives associated with penal welfarism. As such, penal populism entrenches the relationship between punishment and politics through a politicization of crime control.

When evaluating how international criminal justice resembles or departs from how populist currents drive crime policy in late-modern societies, there is a need to reconsider the radically different political dynamics of domestic and international criminal justice. Crucially, international criminal justice is a criminal law without a state (Degenhardt, 2015; Mégret, 2015). There are no electoral votes to pursue. International criminal justice has no self-evident sovereign or public constituency comparable to the citizens of a state that are the subjects of domestic criminal law. In other words, international criminal justice lacks a political constituency of ‘supporting votes’. This means that the ‘sovereign’ of international criminal justice, interchangeably embodied in abstract notions of the ‘international community’ or ‘humanity’, as well as its ‘constituency’, must be actively constituted in legitimization processes that far exceed its domestic counterparts.

I have argued elsewhere that human rights NGOs play an essential role in constituting a *moral* constituency for international criminal justice (Lohne, 2019). Instead of a ‘highly charged political discourse’ of crime control (Garland, 2001: 13), international criminal justice is animated by a highly charged *moral* discourse on the humanitarian imperative to ‘do something’, this ‘something’ being to ‘end’, ‘combat’ and ‘fight’ impunity. In lieu of a politicization of crime control within the national, there is a *moralization of politics* within the global, in which the language of crime and law comes to take the place of the language of war and politics (see also Degenhardt, 2015).

There are thus significantly different political dynamics at play, if one compares international and national criminal justice. Whilst the ‘crime complex’ is

profoundly politicized at both levels, the populist current permeating the domestic crime discourses takes on the language of humanitarianism at the global level.

Penal welfarism gone global?

In *The Culture of Control*, Garland compares the trends and tendencies of late-modern penalty against the recent past – the modernizing process of ‘rationalization’ and ‘civilization’ and the institutional arrangements of ‘penal welfarism’ that characterized the criminal justice field from the 1890s to the 1970s. Using *The Culture of Control*, which by itself is a comparative analytic exercise, as a comparative yardstick for international criminal justice has teased out elements of the latter that not only resemble and differ from late-modern penalty but, crucially, also penal welfarism.

The penal imagination of international criminal justice demonstrates a remarkable faith in the utilitarian and transformative effects of international criminal law and punishment. Much like the penal-welfare ideals of social engineering, elements of ‘rationalization’ and ‘civilization’ are inherent to the entire penal project of international criminal justice. Indeed, the fight against impunity for international crimes and the ICC system of justice are used as tools for development of criminal justice systems in the global south, a type of penal aid when national justice fails. There is also significant mission creep, and international criminal justice is increasingly leveraged onto other global issues. In an email entitled ‘Six Global Challenges the ICC can Tackle’ from the NGO *Coalition for the International Criminal Court*, the ICC could: (i) enhance victims’ access to justice at the national level; (ii) tackle gender inequality and sexual violence; (iii) the refugee and displacement crisis; (iv) conflict-driven famine, (v) protect cultural heritage; and (vi) environmental destruction and land-grabbing. It demonstrates the profound faith in the ability of law to change societies in international criminal justice: that through fighting impunity, there will be social reform (see also Hagan and Levi, 2007). There are thus important continuities of penal welfarism in the civilizing project of international criminal justice.

However, crucially, the notion of penal welfarism presumes a nation state; penal welfarism is *state* welfarism (see generally Barker, 2018). Drawing on the political sociology of Loic Wacquant (2009), scholars have argued that social welfare and penal policy are interconnected through the disciplinary logic of the state (Levi, 2011). Whilst elements of demarcation and deserts are embedded in this logic, so is, according to Huntford (1971), totalitarianism. These darker sides of virtue (cf. Kennedy, 2005) are kept at bay in a delicate balance with liberalism, which in criminal justice transpire into legal liberalism and human rights with strong procedural safeguards, defendants’ rights, and respect for the liberal rule of law.

Whilst its promoters celebrate international criminal justice and the ICC as the crown of global legal liberalism, there is, however, reason to question the ‘checks and balances’ of international criminal justice. Contrary to criminal justice institutions in established democracies, international criminal justice lacks democratic

processes involving parliamentary committees, a critical media, and academic scrutiny – in short, it lacks a democratic and public constituency. Considering how institutional power is more concentrated in international criminal justice than is the case with its domestic counterparts, this is arguably all the more significant. Whilst domestic criminal justice comprises a state institutional patchwork consisting of several state institutions – courts, correctional services, health care, police, etc. – the ICC not only adjudicates crimes, but also investigates and detains, provides protection and reparations to victims and witnesses, does outreach to a variety of communities, and so on (Hoyle and Ullrich, 2014). There are, in other words, poor conditions for what in the domestic terrain is referred to as democratic restraint, and which, accordingly, lead to a skewedness in international criminal justice including elements of illiberal penal power.

International victims' justice

The centrality of victims to international criminal justice and its implications for defendants illustrate this skewedness. Whilst victims are invoked as the 'telos' of the ICC – and often in connection with the need to 'end impunity' as a foundational value of international criminal justice – scholars and practitioners alike point to how international criminal law risk violating fair trial rights and the principle of legality, including the presumption of innocence and the equality of arms (Robinson, 2008). Some even suggest that international criminal justice is inevitably illiberal, in so far as it cannot avoid producing 'show trials' wherein defendants merely serve instrumental roles for ulterior purposes – such as 'truth', 'memory', and 'justice for victims' (Koskeniemi, 2002; see also Moyn, 2016). At the same time, there is a conspicuous lack of NGO attention to the rights of the defendant in international criminal law. In The Hague, *none* of the main human rights NGOs working on ICC issues focus specifically on defence issues. A question may be asked about how this imbalance plays into the perception of fairness in international criminal justice – and the bent to identify grievances (Lohne, 2018). Human rights NGOs, who within the system of nation states is a check on *state* power, are *part* of penal power at the international level. When they are not there to speak truth to penal power, then who is? Questions must thus be asked about the consequences of penal welfare rationalities 'unleashed' from the nation-state. In this last section, I take issue with how illiberal penal power may also be reasserted by the penal state. Whilst international criminal justice entails a disembedding of penal power and the state, it does not necessarily entail a *weakening* of state power. As has been the case in Uganda, it seems that, quite the contrary, the ICC has been used to *augment* state power.

Co-opting international penal power

When the ICC issued arrest warrants only for the LRA, and none for the crimes committed by government soldiers, an initial enthusiasm for international and

external intervention rapidly cooled. A representative from a NGO in Gulu, northern Uganda explained:

When it became clear that it was *de facto* impunity for the government – that the Court would only go after the rebels – the (local) NGOs started this campaign called ‘Justice for all’. The government reply was ‘Nah, we’re not against this. If there is documentation of crimes committed by the UDPF (government soldiers), send them to us. We’ll handle the cases ourselves’. People realized that the government didn’t want justice in northern Uganda, but help from the international community – the Court – to win the war.

It illustrates not only the deeply political situations in which the ICC intervenes, but how the Court runs the risk of being instrumentalized by state actors. As much as the ICC might have legitimized President Museveni’s brutal military politics in the eyes of outsiders, who then also saw the Court as dispensing winner’s justice, such ‘use’ and subsequent criticism of the Court is inevitable as long as it relies upon cooperation with the State in question. The Court *needed* protection from the government to do its work in northern Uganda. As has been the case in most situations in which the ICC has intervened, the conflict was ongoing at the time of intervention. Thus, in most of the situations before the ICC, the Court has followed rather than opposed state power, meaning it has conducted prosecutions of political adversaries of sitting governments. As it has been argued regarding the situation in Uganda, where the government itself referred the ‘situation of the LRA’ to the Court, the ICC is being used by state power to delegitimize political adversaries, and to legitimize military interventions (Branch, 2007, 2011).

The Ugandan government thus redefined the conflict in northern Uganda in terms of international criminal law in order to use international criminal justice as another instrument to defeat its enemy. Following the Ugandan government’s previous attempts to brand the LRA as ‘irrational’, ‘religious fundamentalists’, or ‘terrorists’, the ICC could brand the LRA as internationally wanted ‘criminals’. The ICC could turn the LRA from enemies of the Ugandan government into enemies of the international community as a whole (Nouwen and Werner, 2010: 949).

In this manner, the relationship between penal power and the state is redefined through international criminal justice. In the case of Uganda, the state co-opted international penal power to exclude one’s own citizens.

Conclusion

This article has taken David Garland’s diagnosis of western late-modern penalty as a point of departure for enquiring into the sociology of international criminal justice. As also dealt with by way of introduction, there are many caveats to such an analysis. For example, there are important cultural differences between the ICC and the other international courts; the field is one in constant flux – and what critical commentators have referred to as in ‘perpetual crisis’ (Powderly, 2019).

Moreover, I have not been concerned with *The Culture of Control's* epistemological or empirical validity; yet, clearly, they matter to an evaluation between ordinary and extraordinary penalty (if one accepts that such large-scale analysis is even possible). Instead, the analysis has been intentionally general in order to map out trends and tendencies of an emerging cosmopolitan penalty – a complex of actors and institutions, discourses and processes, norms and laws that situate issues of crime, punishment, and moral order within a cosmopolitan rather than a national scale. This penal field is not concerned with rehabilitation of prisoners nor harsh penal sanctions; rather, it is an expressive and humanitarian form of justice where the victim – as the embodiment of a suffering humanity – takes central stage. National capacity building and penal development has become intrinsic to the project of international criminal justice, to the extent of resembling penal welfare rationalities where penal power is applied to ‘civilize’ and ‘rationalize’ the global borderlands. As such, the global dimension of the power to punish is based on a moralization of politics.

At the same time, this account has been concerned with the central discourses of the cosmopolitan penalty as a contemporary field. Much remains to be said about its emergence, structural conditions, social functions, and, critically, current push-back. The cosmopolitan penalty has emerged and developed in the post-Cold War context of US hegemony, in the shadow of more familiar terms from the lexicon of the liberal legal order – rule of law, human rights, liberal state-building. It is part of what Aas (2011: 411) referred to as ‘penal cosmopolitanism’ where ‘[a]spir[ing] to universality beyond the mere core of human rights [...] [c]riminal justice reform are becoming increasingly popular modes of so-called political capacity building.’ Yet instead of criminologists, penologists, and social workers, transnational legal activists, networks, and scholars – especially within human rights and the law and development movement – have been instrumental to the expansion of liberal legalism worldwide. Whilst this indeed points to a more differentiated set of actors in crime control and use of penal power, it remains to be seen how dependent the cosmopolitan penalty is on the structural conditions of the liberal world order. Alongside shifts in geopolitics and power balances within the international system, human rights sensibilities and humanitarian reason may be losing their ground as forces at the intersection of morals and politics. How the ideals of global penal welfare respond to increasing social frictions and structural ruptures is a task for scholars of punishment and global society.

Acknowledgements

This article has benefited from critical engagement in several seminars and conferences. I would especially like to thank Mark Drumbl, David Garland, Katja Franko, Heidi Mork Lomell, Peter Scharff Smith and Thomas Ugelvik for comments on previous versions of this analysis.

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Notes

1. A shorter version of a response to this question is also presented in Lohne 2019, chapter 5.
2. Since 17 July 2018, the ICC also has jurisdiction over the crime of aggression, subject to state signatories on an amendment to the Rome Statute (see Kreß, 2018).
3. Rules of Procedure and Evidence, Rule 223, b.
4. <https://www.trustfundforvictims.org/en/about/two-mandates-tfv> (accessed 8 April 2020).
5. <https://www.trustfundforvictims.org/en> (accessed 8 April 2020).
6. As lower-ranking perpetrators faced the possibility of capital punishment in Rwandan courts, the government held that this would create penal disparity, since those in leadership positions facing trial at the ICTR would not (Akhavan, 1996).
7. There is an apparent parallel to Beck's (1999) notion of *World Risk Society* here, and the view that war, too, is 'everywhere' (Gregory, 2011).
8. Whilst Kony is still at large more than 15 years after the unsealing of his arrest warrant, Ntaganga was recently sentenced to 30 years imprisonment for war crimes and crimes against humanity.

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