

Penal humanitarianism beyond the nation state: an analysis of international criminal justice

Abstract

In a recent account of border control, Mary Bosworth introduces the notion of ‘penal humanitarianism’ to describe how humanitarianism enables penal power to move beyond the nation state. Based on a study of international criminal justice, this article applies and develops the notion of penal humanitarianism, and argues that that power to punish is particularly driven by humanitarian reason when punishment is disembedded from the nation state altogether. Disguising the fact of situatedness through claims to the global and universal, international criminal justice is not only a product of situated relations of power, but also constitutes new geographies of penal power. By complicating notions of humanitarianism, penal power, and the state, international criminal justice raises interesting questions about the epistemological privilege of the nation state framework in sociology of punishment.

Keywords

Sociology of punishment, international criminal justice, humanitarianism, globalization, epistemology

Introduction

International criminal justice is the normative and material system of international criminal laws and tribunals established to ensure individual criminal accountability for extreme forms of violence generally referred to as core international crimes: war crimes, crimes against humanity, genocide, and the crime of aggression. While the international exchange of penological ideas has been part of the criminological discipline as both theory and practice since the birth of the prison, the establishment of certain crimes as issues to be addressed at the global level is a relatively new development (Savelsberg, 2010).ⁱ By ‘elevating’ crime and punishment beyond the nation state, international criminal justice disrupts the ‘truism in political theory that the power to punish is the prerogative of the state’ (Zedner, 2016: 10). Questions may thus be asked about the significance of international criminal justice for central ‘epistemes’, or ways of knowing, within sociology of punishment. Who drives punishment ‘gone global’, and what is the role of penal sensibilities when there are no electoral votes to pursue? Generally, how does international criminal justice challenge conventional ideas of sovereignty, the penal state, and of penal power in a globalizing context?

In criminology, there is a thematic move towards how western and domestic penalty is impacted by global and transnational flows of crime (Aas, 2013a), terrorism (Zedner, 2007), and migration (Melossi, 2015). However, there is less theoretical engagement with how globalization plays into the epistemology of sociology of punishment itself (but see Aas, 2012; Bosworth, 2012; Bosworth et al., 2018; Zedner, 2016: and this journal's 2012 special issue on 'theorizing punishment's boundaries'). Notwithstanding the burgeoning literature on ‘supranational criminology’ (Smeulers and Haveman, 2008), the field of international criminal justice has yet to attract the attention of sociology of punishment (but see Findlay, 2008; Savelsberg, 2018). This lack of engagement contributes to criminology’s increasing fragmentation (Bosworth and Hoyle, 2011) instead of being viewed as an

indicator of how, under conditions of globalization, ‘penal power has not only expanded but has changed, at least in part, in its justification and its effect’ (Bosworth, 2012: 125).

In a recent contribution, Mary Bosworth introduces the notion of ‘penal humanitarianism’ to describe how ‘humanitarianism allows penal power to move beyond the nation state’ (2017: 1). Based on case studies of UK engagement in Nigeria and Jamaica where the British government funds prison building programs, mandatory prisoner transfer agreements and the like, Bosworth maps out a policy trend at the crossroad of criminal justice, migration control, and foreign policy in a manner that is both novel yet hopelessly familiar in its postcolonial manifestation. As such, it connects with postcolonial work in criminology (Agozino, 2003), albeit with specific attention to how the geographical spread of penal power (Aas, 2013b) animates important questions regarding punishment and sovereignty. For all its strengths however, Bosworth’s notion of penal humanitarianism remains embedded in a nation state outlook on how punishment shapes up; it is *state* policies – criminal, migration, humanitarian, or otherwise – that is the referent object of analysis.

The aim of this article is to provide an empirically grounded analysis of penalty when the power to punish is disembedded from the nation state altogether. Based on an ethnographic study of international criminal justice (Lohne, forthcoming) including interviews with diplomats, legal practitioners, and NGO activists especially in The Netherlands and Uganda, the article applies and develops the notion of penal humanitarianism to international criminal justice. It argues that the power to punish is particularly driven by humanitarian reason (Fassin, 2011) when punishment is delinked from its association with the national. This entails recognizing humanitarianism as both a ‘transnational concern to help people in exceptional distress’ (Forsythe, 2006: 234), and its potent force as a moral discourse and social imaginary in contemporary governance (Calhoun, 2010; Fassin, 2011); in short, to the determinative capacities of cosmopolitan sensibilities.

In demonstrating how penal power operates through humanitarian reason, the analysis first outlines how international criminal justice is animated by a humanitarian impetus to ‘do something’ about the suffering of distant others. However, international criminal justice obscures its situatedness through claims to the global, i.e. to the worldwide and universal, while remaining structurally embedded in relations of power, particularly between the global north and south. Through a revamping of space and time, international criminal justice also constitutes new geographies of penal power as it converts simultaneous differences into a single linear trajectory of humanitarian progress. The final section thus turns attention to what happens when criminal justice becomes part of development and humanitarian governance, as exemplified by the International Criminal Court’s (ICC) Trust Fund for Victims. In sum, the article shows that by complicating notions of humanitarianism, penal power, and the state, international criminal justice raises interesting questions about the epistemological privilege of the nation state framework in the sociology of punishment.

Conceptualizing international criminal justice

The creation of the international military tribunals in Nuremberg and Tokyo following World War 2 marks the birth of the international criminal justice system. Since then, another seven international criminal courts have been established, including the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) set up by the UN in 1993 and 1994, respectively (for an empirical overview, see Smeulers et al., 2013). In 2002, the Rome Statute entered into effect after a necessary 60 state ratifications, which established the permanent ICC. The Court is based in The Hague in The Netherlands. Today, 123 states have ratified the statute, and thus subjected their territories and citizens to the jurisdiction of the Court over war crimes, crimes against humanity and genocide.ⁱⁱ The Court has so far opened 26 cases – all against African nationals - in eleven situations under investigation. Until now, there has been three convictions and two acquittals. Most of the defendants remain at large, or have had their charges vacated, withdrawn, or

not confirmed by the Pre-Trial Chambers because of, among other things, lack of access to evidence or due to their passing.

Following a period of relatively widespread support and enthusiasm for the ICC to end impunity for ‘the most serious crimes of international concern’ (the Rome Statute’s Preamble), the Court has been subject to increasing criticism in recent years (e.g. Nouwen and Werner, 2010; Mégret, 2016). The most potent point of critique has been accusations of the ICC ‘targeting Africa’, which culminated in the threat of a mass exodus of African member states from the Court in late 2016. The legitimacy crisis for the Court, charged as it is with colonialism and imperialism (Clarke et al., 2016), must be seen alongside a changing geopolitical landscape, where the ‘transformationist rhetoric about “post-Westphalia”’ (Hurrell, 2007: 9) is losing traction in the face of the emergence of a multipolar world order, that is, ‘a world of renewed sovereignty, resurgent religion, globalized markets, and the stagnation or rollback of universal norms about human rights’ (Hopgood, 2013: 166). Despite its limits however, international criminal justice has become a dominant global framework for ‘thinking about the world and the relations between people within it’ (McMillan, 2016: 165). The language of crime and individual criminal responsibility are invoked to delegitimize violence globally, reflecting an important normative development ripe for increased critical attention.ⁱⁱⁱ

Previously the domain of international legal and relations scholars, international criminal justice has attracted growing attention by criminologists this past decade. This body of scholarship is interchangeably referred to as ‘supranational criminology’ (Smeulers and Haveman, 2008) and the ‘criminology of international crimes’ (Parmentier and Weitekamp, 2007). Thematically, it overlaps with criminological approaches to genocide (Hagan and Raymond-Richmond, 2009), transitional justice (McEvoy, 2007), state crime (Cohen, 2001), and international criminal court practices (Hoyle and Ullrich, 2014; Houge, 2015). However, contrary to the increasingly ‘artificial distinction between the domestic and the international’ (Loader and Percy, 2012: 213) that still characterizes much of this

scholarship, the analytical focus of this article is situated in sociology of punishment while being empirically concerned with the ‘supranational’. This means that international criminal justice is not only considered relevant ‘to itself’, but also to those seeking to understand how penal politics and sensibilities today are shaped transnationally, i.e. *across* nation state borders as well as internationally, i.e. between and among nation states. Today, certain acts are codified as crimes of universal concern, becoming matters of cosmopolitan rather than nation state responsibility in a ‘perceived shared sense of humanitarian consciousness’ (Aas, 2013a: 219). Such analysis thus requires taking the ‘international’, ‘global’, and ‘universal’ as scale of analysis, as international criminal justice becomes central to their constitution as particular sites of crime, punishment, and justice (see also Christensen, 2015; McMillan, 2016). In the classic sociology of punishment literature, ‘[c]hanges of laws and legal institutions were seen not only as precisely illuminating the process of modernization, but also as active forces that shaped the process itself’ (Karstedt, 2007: 53). Thus, from the perspective of sociology of punishment, the emergence of international criminal justice is not only a result of increased global connectedness, but a force of globalization processes itself – in short, of what makes ‘the global’.

Penal humanitarianism beyond the nation state

In addition to the legacy of Nuremberg, the advance of international criminal justice is regularly interpreted and presented as signifying a development towards ‘humanity’s law’ (Teitel, 2011) – the law of persons and peoples, rather than that of states. Studies in international relations have approached the creation of the ICC as a ‘global civil society achievement’ (Glasius, 2006), the result of concerted efforts by ‘transnational advocacy networks’ (Keck and Sikkink, 1998) in promoting a ‘justice cascade’ (Sikkink, 2011) for the enforcement of human rights worldwide. Indeed, human rights NGOs have been at the forefront of the ‘fight against impunity’ for core international crimes (Engle et al., 2016; Houge and Lohne, 2017), and as such, carry with them particular conceptions of

justice and punishment, making it eminently reasonable to approach them as penal actors for a criminology that travels (Aas, 2011).

Enquiring into the role of human rights NGOs' engagement with the ICC, I found that they fulfil a number of functions that would be inconceivable at the national level of criminal justice (cf. Tomczak, 2016). For instance, they identify victims and represent them to the Court; provide evidence and submit *amicus curia* briefs; do outreach to explain the Court's mandate vis-à-vis affected communities; lobby states for financial and political support of the Court; and draft penal codes and promote the implementation of the 'Rome Statute system of justice' in domestic systems of criminal justice. Crucially, they also serve a legitimacy function for the Court, conferring moral authority upon the system of international criminal justice through their claims to universality and disinterest in an ultimately state-centric world order (Lohne, 2017).

However, the embrace of the criminal justice system by the human rights movement has required a significant shift, because in its early days it associated criminal justice with repression (Engle, 2012). Vis-à-vis state power, human rights organizations have predominantly focused on the rights of defendants, epitomized by Amnesty International's emphasis on 'prisoners of conscience' as its founding human rights victim in 1961. Formerly sceptical, human rights NGOs have come to embrace the criminal justice system as a tool for the work of liberation and emancipation *from* repression. As explained by a representative from an international human rights NGO working on international justice:

There is a proliferation of proceedings, which vary greatly in quality, and what they are accomplishing, but it really is a phenomenon! There is not sufficient awareness, or each point in the constellation is being looked at in isolation, as opposed to

realizing that we are witnessing this really exciting period of potentially having new ways to enforce the rule of law and new ways to protect human rights.

In interviews with representatives from The Hague-based secretariat of the NGO *Coalition for the International Criminal Court* (CICC), a network of over 2,500 civil society organizations advocating for the ICC, questions about sentencing and characterizations of the ICC as a ‘penal institution’ generally seemed to startle informants. My assumptions were somewhat contested by responses such as the following:

At the end of the day, it is punishing, but if you put it like that then you reverse it, and you can almost say that the ICC is an institution to punish. It is not...Punishment is a consequence, but it is more so than a penal institution. It is an institution for justice. That is its core mandate.

Such statements illustrate the issue of what kind of justice international criminal justice is imagined to provide by those who advocate it (Lohne, 2018). As Hoyle and Ullrich (2014: 690) note, ‘the speeches and statements by various ICC stakeholders about the kind of justice the Court aims to deliver make for a curious reading’, with ‘transformative justice’, ‘restorative justice’ ‘social justice’, and even ‘gender justice’ being part of the ICC’s portfolio of justice deliverables. Informants often associated their motivation for working in the sector with social justice, albeit driven by cosmopolitan rather than national sensibilities. Above all though, *victims* are invoked as the *raison d’être* and telos of the work of ICC by academics, practitioners, and promoters of international criminal justice alike (Kendall and Nouwen, 2014). As aptly put by an NGO representative: ‘This isn’t for the perpetrator. It’s for the victims!’

Of the ten central NGOs advocating international criminal justice vis-à-vis the ICC and diplomats in The Hague, only one speaks for the defendant (the International Bar Association, which is a legal

professionals association more so than a human rights NGO). When pushed on the matter, informants explained that defence rights simply are not that sexy to advocate for – or to get funding for. Being wanted or prosecuted by an international criminal court attaches a ‘special stigma’ (Mégret, 2013): such people are *hostes humani generis* – enemies of the human kind, and thus the quintessential ‘other’. Donor and public support alike flow in the direction of victims of humanity’s suffering, rather than towards those charged with violating it. For international criminal justice, legalism is not enough: one also needs moral outrage (Bass, 2000; Sandvik, 2012).

Anchored on a tripolar metaphor of ‘savages-victims-saviors’ (Mutua, 2001), international criminal justice taps into and is animated by a humanitarian impetus to ‘do something’ about the suffering of distant others, and about violence against what is considered the most sacred thing of all: humanity itself.^{iv} Through the articulation of moral outrage, humanitarian sensibilities have found their expression in a call for criminal punishment to end impunity for violence against distant others. Disembedded from the nation state, connections between penal power and humanitarianism become particularly prominent. In what follows, this connection is further explored as I argue that penal humanitarianism beyond the nation state is not only a product of situated relations of power, but also constitutive of new geographies of penal power.

Situated relations of power

In approaching international criminal justice from the perspective of sociology of punishment, norms and values, morals and sensibilities must be ‘located within the grid of social interests and positions in a way which reflects the complex realities of cultural life’ (Garland, 1990b: 198). For these reasons, it becomes important to consider whose convictions and ideas become part of global governance, as ‘it is not the institutions as such, the ICs [international courts], that govern the world but the transnational power elites constituting and instituting them’ (Madsen, 2014: 334). Who speaks for the universal; who are the penal humanitarians?

During the author's research in The Hague in 2013, there was only one person with an African background doing human rights advocacy at the ICC. Most were EU citizens. This imbalance in geographical representation was mirrored at the ICC: in 2012, the five countries with the highest number of professionals working at the ICC were France (45), the United Kingdom (27), the Netherlands (17), Canada (15), and Germany (13). By comparison, Côte d'Ivoire, the Democratic Republic of the Congo, Mali, and Uganda - countries wherein the ICC had opened investigations - had two professionals each at the Court.^v While not necessarily global elites as such, those advocating and working on international justice in The Hague certainly belong to a particular segment of the globally stratified order. Generally, they are highly educated, often from top-end universities such as Yale or Sciences Po; hold European or North American passports, have lived and studied in multiple countries; and have enough financial means to start their careers by taking on unpaid internships in an expensive part of the world. Such simple stocktaking puts weight behind politically scorning nicknames of the ICC as designating the 'International Caucasian Court'.^{vi} It also indicates that cosmopolitanism, in addition to being a philosophical worldview transcending national boundaries, might just as well be the 'class consciousness of frequent travellers' (Calhoun, 2002). Although penal humanitarianism is shaped by dispositions detached from the nation state framework, penal agency remains situated in spatial relations of power between the global north and south. As such, it calls for further reflection on the constitution of the 'penal state' too.

In his 2012 Sutherland address, Garland (2013: 495) calls for sociology of punishment to pay more attention to the 'penal state', which he defines as 'those aspects of the state that determine penal law and direct the deployment of the power to punish'. In evaluating states' internal autonomy, he recognizes the presence of supranational factors such as human rights treaties, because 'these rules will constrain penal policy in various respects, setting minimum standards and enabling inmates to make rights claims' (2013: 499). I suggest that supranational factors – international criminal justice

and human rights sensibilities – not only constrain but also drive penal policy, including penal rationalities.

The ICC is known as a ‘court of last resort’. What this means is that a situation or case is only admissible to the Court if a member state is ‘unwilling or unable genuinely’ to carry out investigations and prosecutions itself (Article 17, Rome Statute). Central NGOs initially opposed this Principle of Complementarity in the drafting processes, because it was considered a sovereign shield for powerful states against ICC intervention. ‘But’, a key NGO figure explains, ‘we were wrong! And we realized it after Rome [the treaty-making conference]. I mean, I realized it before, but Amnesty and Human Rights Watch realized it after Rome: “Oh my God, that was genius!” What he refers to is a reframing of the complementarity principle into a policy of ‘positive’ or ‘proactive’ complementarity, which stands for a shift towards assisting and improving prosecutions at the domestic level (Rossi, 2018). Another NGO informant explained: ‘This is one of the things we’re using the Rome Statute and the ICC for. It’s not only a tool to fight impunity in itself, but also to – and this is positive complementarity, as we call it here in The Hague – but a tool to strengthen national jurisdictions’.

In this manner, positive complementarity has become a vehicle for delivering various forms of ‘penal aid’ (Brisson-Boivin and O’Connor, 2013) to ‘flawed’ domestic criminal justice systems in the global south. As actors with transnational expertise, international NGOs draft and lobby for the implementation of revised penal codes in domestic systems of justice, ‘giving complementarity a meaning beyond that of an admissibility rule in the Rome Statute’ (Nouwen, 2012: 6). The Rome Statute system of justice thus signifies not only the Court in The Hague but also efforts to implement or mainstream the Rome Statute system in criminal justice systems at the national level, becoming part of what Aas (2011: 411) refers to as ‘penal cosmopolitanism’ where, ‘[a]spir[ing] to universality beyond the mere core of human rights... [c]rime control and criminal justice reform are becoming increasingly popular modes of so-called political capacity building’. It illustrates how the ICC is not

reflected in a single global geography, but constituted, as Sassen (2007: 2) observes, in ‘thick social environments which mix national and non-national elements’, unsettling the delineation of international and national criminal justice as, respectively, ‘extraordinary’ or ‘ordinary’ penalty and shows how, albeit in uneven ways, they blend into one another.

Importantly though, rule of law development and capacity-building are precisely state-building projects. A question must be asked, however, about what kind of penal states are built, and where, and by whom. For example, when Norway strengthened its contribution to penal aid, the then-Minister of Justice announced that Norwegian justice personnel are ‘good Norwegian export goods’ (Hansen, 2006) indicating a merger of the nation’s brand as a ‘humanitarian’ superpower (de Carvalho and Neumann, 2015) and ‘humane’ penal state (Pratt, 2008) – a good, in the word’s dual sense, punisher. In exploring how ‘humanitarianism allows penal power to move beyond the nation state’ (Bosworth, 2017: 40), there is a need to (re)consider the direction of movement, and to what extent one can talk about ‘penal import states’ and ‘penal export states’. While the nation state continues to operate as an essential territorial site of punishment, the power to punish has become increasingly complex.

Global geographies of penal power

With the emergence of international criminal justice, the power to punish is constituted by a set of actors and processes often left out in sociology of punishment. However, punishment, albeit framed in humanitarian discourses, ‘raises awkward problems of violence and its legitimacy’ (Garland, 1990a: 11). In this section, these ‘problems’ are unpacked through an exploration of how penal power today is reshaped through a revamping of ‘space’ and ‘time’ under conditions of globalization, and specifically, how it has become entangled in popular imaginations of global universals – of development, progress, and universalized (criminal) justice. That globalization somehow alters the nature of space and time, and people’s experiences of them, remains the most important philosophical

couplet in making sense of the global condition (Jones, 2010). To be aware of a global sense of space, and the power of some places over others, can enable insight into emerging or reconfigured geographies of penal power; for example, of how ‘The Hague’ is not only a European metropole but also a ‘hub’ for global justice-making.

As a global institution, the ICC epitomizes the ‘lifting out’ of social relations from bounded social systems. Whether they are local contexts of interaction or the nation state system, the Court adjudicates over events and individuals ‘at a distance’ (Giddens, 1990). Conflict and mass violence in one part of the world are transported into the courtrooms in another. Here, they are rendered intelligible through law and legal experts who, with reason and logic, search for justice in the form of individual criminal accountability. This trajectory of global justice-making is imagined to come full circle once the deliberations are over, when blame has been attributed, and ‘justice’ dispersed back to the place of conflict and mass violence.

However, it may be asked whether international criminal justice is too distant from the sites where crimes took place. In contrast to domestic criminal courts, the ICC intervenes in precarious situations, often characterized by ongoing-armed conflict. For example, in the Central African Republic and in Côte d’Ivoire, unstable security situations have prevented the full establishment and operation of local ICC field offices.^{vii} In Sudan, the lack of cooperation by the Sudanese government (President Al-Bashir and others in office have been indicted by the Court), including lack of access to Sudanese territory, has meant that no Court activities in ‘the field’ of Sudan were reported from the ICC last year.^{viii} Yet even in post-conflict situations where security conditions are relatively stable, as was the case for my fieldwork in northern Uganda (2014), the ICC’s field office was located in the capital Kampala instead of in the affected northern regions of the country. A local human rights activist expressed disappointment with how this affected the Court’s involvement and its perception of the conflict, saying: ‘I don’t expect people to risk being killed in order to work with human rights. I

understand, but still! The ICC stayed in Kampala and read the newspapers – they based their understanding of the conflict on news they believed was independent of the government'. His frustration illustrates a critical disconnection: The ICC was not there. Rather, it was represented at best by an ephemeral presence in the localities and lives of those in whose name justice is pursued.

One might point out, however, that international criminal justice is supposed to be transient and distant – an international recourse when national justice fails. Yet, the emergence of individual criminal responsibility at the global level should not cloud the fact that there remains a lack of political space for the individual at the global level. In the move to 'the global', Christie's (1977) thoughts on how the criminal justice system 'steals' conflicts take on an additional dimension as the conflict is not only appropriated by the state, but by the 'international community' embodied in the ICC. In this 'elevation' of conflict appropriation, victims are further removed from their conflicts, physically *and* politically, because the international order still reflects the relationship between states (Clarke, 2009).

However, in deepening the analysis of how social systems are reconfigured by time-space distancing, 'there is more than a simple expansion in the capability of social systems to span time and space. We must look in some depth at how modern institutions become "situated" in time and space to identify some of the distinctive traits of modernity as a whole' (Giddens, 1990: 14). When approaching social institutions such as the ICC, their temporal and spatial arrangements matter, since they reflect the social and political relations in which they are embedded.

Temporality is inserted into criminal justice as both theory and practice – of making right for the future some wrong of the past. The trial orchestrates a symbolic break from the violations of the past to the moral community of the future (Robinson, 2003). Although this is just as much part of domestic criminal justice, I suggest that what distinguishes international criminal justice is the appeal to humanitarian progress. It invokes a historical narrative generally beginning with Nuremberg,

continuing via *ad hoc* tribunals and national prosecutions of human rights violations to the present day ICC, including the Rome Statute's domestication in national justice systems. The dimension of time as the dynamic dimension of development, progress, and humanitarianism is explicit in international criminal justice – as in *making* global justice.

By contrast, space is the dimension that is left behind; a 'flat' surface that global justice-making passes through (Massey, 1992). Through claims to 'international' and 'global' justice, penal humanitarianism projects an image of being elevated beyond the singularity of space, of the local and the specific. Although the ICC's jurisdiction and enforcement is rooted in the state system, its claims to universality imply a type of 'spaceless' justice, as if speaking to and from nowhere in particular. In addition to recognizing the physical absence of ICC in places of mass violence, one may also consider what location in Europe makes for the everyday administration and perception of international criminal justice. The Court's locality in the midst of the European heartland makes it difficult for journalists from the affected countries, victims, and interested parties to observe the proceedings. Indeed, The Hague is not only an expensive city; it is also guarded by strong visa regulations for people visiting from countries situated in the global south, where nearly all ICC situation countries are located.

In considering penal power, we might therefore also direct our attention to the language of penal transfers from developed to *underdeveloped* criminal justice systems, and more generally, to how globalization processes turn space into time by converting contemporaneous differences into a single linear trajectory (Massey, 1992). For international criminal justice there is an assumption that there is only one way forward – one type of 'penal progress'; namely that represented by the Rome Statute system of justice.

Penal humanitarianism revisited

In Stanley Cohen's (1985) *Visions of Social Control*, he describes the notion of 'net widening' to illustrate how the criminal justice system spreads through community-based social control mechanisms, frequently enforced in the name of the good, and as a more social, humanitarian form of assistance than the criminal justice system situated at the core of state power. Aas (2011: 407) brings Cohen's vision into the transnational area, asking whether criminology is 'in danger of re-entering the complex and paradoxical terrain defined by terms such as "reform", "progress", "doing good", "benevolence" and "humanitarianism", only this time on the transnational level?' Humanitarian sensibilities, in other words, are no stranger to criminological scholarship (see e.g. Elias, 1978 [1939]; Aas and Gundhus, 2015). As this article demonstrates, the associations between punishment and humanitarianism are not only prominent in a globalizing context but appear particularly strong when punishment is disembedded from the nation state framework. Indeed, the connections between criminal justice and humanitarianism have become so blurred in the Rome Statute system of justice that it explains why informants were startled by questions on the ICC being a penal institution. Humanitarianism disguises the penal nature of international criminal justice. In this final section, I want to turn attention to what happens when criminal law and justice become part of humanitarian governance.^{ix}

As Hoyle and Ullrich (2014) observe, the ICC's far-reaching provisions for victims have 'unsettled' the retributive paradigm. The Rome Statute and Rules of Procedure and Evidence recognize and outline principles of victim participation in court proceedings, protection of victims and witnesses during proceedings, and rights to compensation or reparations made from a Trust Fund for Victims (TFV). In addition to court-ordered reparations, the TFV has an assistance mandate, which enables it to award reparations to victims of crimes under the jurisdiction of the Court.

During my research in Uganda, the TFV had been involved in implementing its assistance mandate despite the criminal cases being at a standstill. Some of my informants saw the role of the TFV as a way of building momentum for the ICC amongst victim communities: ‘If you want to get people in affected communities to really accept the Court, we need to pay more attention to the work of the Trust Fund for Victims. Victims want perpetrators held accountable, but they are also concerned about the greater and broader issues’. By ‘greater and broader issues’ he means access to basic needs such as food and healthcare. The TFV certainly represents a more victim-centred approach to justice. However, a question can be asked whether, or when, ‘reparations’ and ‘assistance’ merge into development and humanitarianism.

As the TFV consists of voluntary contributions from states (and private entities), it has become an opportunity for states (and non-state actors) to show dedication and support for ‘ICC justice’ as an expression of humanitarian concern. Such was the case at an Assembly of States Parties meeting in The Hague, where Sweden held a reception together with the NGO *Women’s Initiative for Gender Justice* to commemorate their donation. It was held in conjunction with the Women’s Initiative because the funds were earmarked for victims of sexual and gender-based crimes. Earmarked contributions constitute the bulk of TFV funding: out of approximately 19 million Euros of total donations, over 5 million had been earmarked for sexual and gender-based violence. At the time of my research, the UK was the TFV’s biggest donor (overlapping with the UK’s high-level ‘Preventing Sexual Violence Initiative’, (overlapping with the UK’s high-level ‘Preventing Sexual Violence Initiative’, see Houge and Lohne, 2017), with Norway in second place (TFV, 2014). A Norwegian state representative told me that funding to the TFV is earmarked because a consequence of the government having money in the aid sector needing to be channelled. Earmarking funds for sexual and gender-based crimes is unproblematic; by comparison, he says, ‘earmarking funds to child soldiers is harder because they are both victims *and* perpetrators’. Independent of whatever

contribution the TFV makes to alleviate victims' suffering, it has become part of humanitarian funding flows, including their hierarchies of victimhood.

However, the way that international criminal justice blur with development and humanitarianism is not a popular subject for discussion by practitioners in the field. They emphasize that the ICC has a *legal* mandate, but *development* may result. For example, one informant explains that 'This is not development, it is reparation'. She elaborates 'You need to make that link between responsibility and harm... You can't just run and say "I'm building a school". You need to say, "I'm building a school out of a recognition that the kids in this specific village have suffered this or the other". Building a school necessitates an apparent link between the beneficiaries of the school and a categorization of suffering resulting from a particular type of harm spelled out by the Rome Statute. In the hypothetical case of two identical villages without schools, in which the inhabitants of one were victims of international crimes, the reparations scheme can assist one village but not the other. On the one hand, one might say that one school is better than no school at all. On the other, this illustrates how global inequalities come to be 'juridified' and depoliticized through the blurring of criminal justice and humanitarianism. By not building two schools, the reparation scheme fosters the illusion that one type of harm – international crimes – is remediable and worse than general poverty and structural inequality, which are just facts of life. In this way, penal humanitarianism not only juridifies complex humanitarian emergencies but also cements the international crime victim on top of the global hierarchy of humanitarian suffering.

Conclusion

The sociology of punishment has primarily been concerned with state punishment and national society on the conceptual, empirical and analytical levels (see generally Simon and Sparks, 2012).

Without undermining the contribution of this scholarship, nor the role of punishment as embedded in

nation state formation, this article suggest that more critical thinking is needed in conceptualizing how questions of criminal law and justice are increasingly disembedding from their associations with national justice. While there is an upsurge of empirical and theoretical work of bits and parts of a globalizing penalty, such as transnational policing (Bowling and Sheptycki, 2012), comparative (Nelken, 2011), post-colonial (Agozino, 2003) and ‘southern’ (Carrington et al., 2015) criminologies, the study of punishment in a globalized context remains a fragmented field of research. Perhaps in response to this increasing sense of fragmentation, there is growing interest in the ‘boundaries of penalty’ (Zedner, 2016: 3). This interest is particularly strong within the ‘criminology of mobility’ literature. This body of work enquires into what happens conceptually and spatially at the ‘borders of punishment’ (Aas and Bosworth, 2013) by taking issue with penalty’s scope and scale, asking, simply, what is, or ‘counts’, as punishment, and at what level of analysis ‘what is’ is, or should be, analytically relevant (Valverde, 2012). Bosworth’s concept of penal humanitarianism demonstrates the value of such epistemological questioning, revealing a form of governance crafted at the intersection of development, migration, and punishment, ‘in which the penal state radiates well beyond the confines of the nation’ (2017: 2).

While these questions have inspired the epistemological claims of this article too, the criminology of mobility literature is nonetheless empirically concerned with ‘bordered penalty’ directed at non-citizens, and penal differentiation produced along lines of membership and non-membership to bounded communities of nation states (Aas, 2014; Bosworth et al., 2018). By probing characteristics of penalty when it is analytically and empirically disembedded from the nation state, I have argued that penal power is profoundly driven by humanitarian reason, by what Didier Fassin refers to as the ‘morally driven, politically ambiguous, and deeply paradoxical strength of the weak’ (2011: xii).

Two elements may shed further light on this assemblage. First, international politics, interventions and institution-building are predominantly legitimated by non-democratic claims to efficiency,

economics, rationality – and humanitarianism (Madsen, 2014), rather than articulated claims to ‘order’ and ‘governance’. International criminal law is, essentially, criminal law without a state (Mégret, 2015). This means not only that its constituency must be actively constituted, but also that it is done so in the name of the ‘conscience of humanity’ (the Rome Statute’s Preamble). Second and relatedly, removed from the checks and balances of democratic institutions, penal policies may be more reliant on categorical representations of good and evil, civilisation and barbarity, humanity and *hostis humani generis* – the enemy of humanity. Such representational dichotomies seem particularly apt to delineate ‘the boundaries and norms of cosmopolitan community’ (Sagan, 2010: 4).

Following this analysis, and in tandem with insights on how the criminal justice system reduces social complexities and consolidates juridified understandings, international criminal justice reproduces representations and relations alike between the global north and the south. While this may resonate with accounts of associations between ‘domestic’ penalty – US mass incarceration in particular – with neoliberalism (Wacquant, 2009), and racial social control (Alexander, 2011), it underscores the value of penal humanitarianism as a concept that facilitates the expansion of penal power over ‘familiar, racialized, subjects and places, reasserting control, or at the very least, reimagining it’ (Bosworth, 2017: 15).

However, as Garland (2017) has recently argued, while functionalist accounts do important political work, one should be careful about inferring causes from functions: that the project of international criminal justice is today imbued with neo-colonialism and global inequalities does not mean it was intended as such. What it does mean, however, is something to consider, and, one hopes, an impetus to analyse which aspects of penalty fade and which become more lucid when the ontological and epistemological privilege of the nation state is challenged. Treating modern punishment as an index of civilization makes for uncritical sociology at the domestic level of analysis. The same is true for the global level. Decades of research on the social functions and meanings of punishment at the

national level have revealed it as a practice ingrained in the rationalities and techniques of power and government. It would be naïve to think that these processes and insights bear no relevance to the study of punishment at the global level. Indeed, much of criminology and sociology of punishment's distinctiveness is found in its critical engagement with notions of crime and justice, in its critical engagement with abstract and universal claims by the criminal justice system. It is vital that these perspectives are also brought to bear on transnational and global penal developments.

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ⁱ On the historical emergence and institutionalization of crime as an international issue, see Knepper (2009); (2011)

ⁱⁱ As of 17 July 2018, the ICC will also have jurisdiction over the crime of aggression (see Kreß, 2018).

ⁱⁱⁱ There is a considerable critical legal literature on international criminal law (e.g. Koskenniemi, 2002; Tallgren, 2002; Drumbl, 2007; see generally Schwöbel, 2014)

^{iv} Although scholars and practitioners generally consider human rights and humanitarian relief organizations to belong to two separate fields of transnational practice (cf. Nelson and Dorsey, 2008), these distinctions fade in international criminal justice.

^v ICC-ASP. 2013. Report of the Committee on Budget and Finance on the work of its twentieth session. In ICC-ASP/12/5/Rev.1. The Hague: International Criminal Court -Assembly of States Parties

^{vi} See <https://www.rt.com/news/364136-gambia-leaves-icc-africa/>

^{vii} International Criminal Court, 'Report on activities and programme performance of the International Criminal Court for the year 2013' Assembly of States Parties, Thirteenth session, New York, 8-17 December 2014, ICC-ASP/13/19; International Criminal Court, 'Report on the activities of the International Criminal Court', Assembly of States Parties, Fourteenth session, The Hague, 18-26 November 2015, ICC-ASP/14/29; International Criminal Court, 'Report on activities and programme performance of the International Criminal Court for the year 2017', Assembly of States Parties, Seventh session, The Hague, 5-12 December 2018, ICC-ASP/17/2.

^{viii} International Criminal Court, ‘Report on the activities of the International Criminal Court’, Assembly of States Parties, Fourteenth session, The Hague, 18-26 November 2015, ICC-ASP/14/29.

^{ix} On ‘humanitarian governance’ (Barnett, 2013), and the role of law therein (Lohne and Sandvik, 2017).