

**CRIMES AGAINST HUMANITY:
GLOBAL JUSTICE AND THE
HUMAN RIGHTS DISCOURSE***

**CRÍMENES CONTRA LA HUMANIDAD:
JUSTICIA GLOBAL Y EL DISCURSO
DE LOS DERECHOS HUMANOS**

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ABSTRACT

The human rights discourse has been justified by the need to move past the restraints and impunity that arose from nationalism and citizenship rights. Although international criminal law has recently been imagined as the scenario or theatre to reinforce the existence of a 'political community of justice' based on our common humanity, it has not been able to displace the concept of state sovereignty. This shows how our 'natural indifference to others' is not overcome by the simple use of language, by the subscription of covenants or by the creation of institutions and mechanisms for the adjudication of justice.

Key words: human rights; crimes against humanity; universal jurisdiction; international criminal law; cosmopolitan justice; global justice.

RESUMEN

El discurso de derechos humanos ha encontrado su justificación en la necesidad de ir más allá de las limitaciones e impunidad derivadas del nacionalismo y los derechos sujetos a los derechos ciudadanos. Aunque el derecho penal internacional ha sido imaginado recientemente como un escenario para reforzar la existencia de una 'comunidad política de justicia' basada en nuestra humanidad, no ha podido desplazar el concepto de soberanía estatal. Esto muestra cómo nuestra 'indiferencia natural hacia los otros' no se supera con el simple uso del lenguaje, la ratificación de tratados o por la creación de mecanismos e instituciones para adjudicar justicia.

Palabras clave: *derechos humanos; crímenes de lesa humanidad; jurisdicción universal; derecho penal internacional; justicia cosmopolita; justicia global.*

SUMMARY

INTRODUCTION.- I. SECTION 1: AN IMAGINED 'GLOBAL POLITICAL COMMUNITY OF JUSTICE'. THE DISCOURSE OF HUMANITY IN THE LITERATURE.- II. SECTION 2: THE RECURRENT PARADIGM: A 'POLITICAL COMMUNITY OF JUSTICE' GROUNDED IN THE MEMBERSHIP TO A NATION-STATE.- III. SECTION 3: EMPIRICAL EVIDENCE OF THE PERSISTENCE OF A STATE CENTRED 'POLITICAL COMMUNITY OF JUSTICE'.- CONCLUDING REMARKS.- BIBLIOGRAPHY.

INTRODUCTION

“A further objection lies in the fact that the laws and principles of humanity are not certain, varying with time, place, and circumstances, and according, it may be, to the conscience of the individual judge. There is no fixed and universal standard of humanity”¹

It may probably be too late to question the use of international law to secure the protection, respect and guarantee of human rights. This has been the path chosen by the international community and has provided the framework where all debates about accountability are found. Although some have questioned the restrictions of international law to address human rights abuses, the debates are still within the framework of this body of law. However, there is a particular question to be asked about the incompatibilities of international criminal law and the human rights discourse. Some clarity on these incompatibilities could not only explain why international law has proven to be insufficient to address certain phenomena, but it can also show the true dimensions of the struggle that civil society and human rights activists are facing when they use international criminal law to channel their requests for justice.

This paper has two units of analysis: the assumptions underlying the human rights discourse and the assumptions behind international criminal law. I use the concept of crimes against humanity to analyse how these two units of analysis interact because, in my opinion, this is the closest that the legal language has been to incorporating ‘humanity’ as a community of justice, and it provides a good scenario to examine whether this closing gap in language shows a trend towards a new paradigm of justice for human rights abuses based on a ‘political community of justice’ that exists beyond the territorial boundaries of the nation state.

The human rights discourse has been justified by the need to move past the restraints and impunity that arose from nationalism and citizenship rights. Mainly moving past the limitations that came with protection arising solely from belonging to a sovereign com-

1 COMMISSION ON THE RESPONSIBILITY OF THE AUTHORS OF THE WAR AND ON ENFORCEMENT OF PENALTIES, *Report Presented to the Preliminary Peace Conference*, 14 *The American Journal of International Law*, 1/2, 95-154 (1920), [Online]. Available at: <http://www.jstor.org/stable/2187841>

munity grounded on the nation-state. In this sense, it has looked to overcome the ‘natural indifference to others’ and our natural disposition of caring only for those who are close to us.² The latter by addressing the issue of membership and trying to portray a legal order that surpasses state boundaries, and is theoretically based on the existence of a political community grounded on our membership to humanity, on the equal concern and respect paradigm.³

This discourse has been materialised, amongst other, through international law. Philosophically, international human rights law was grounded on a more broad understanding of membership, which was supposed to move past territories and borders and into the domain of a common humanity.⁴ However, some have questioned the capacity of international human rights law to move past the powerful concept of state sovereignty where international law is embedded.

When international criminal law started using the concept of crimes against humanity, this seemed to be evidence of the success of the human rights discourse in shaping human rights law around the concept of humanity. By qualifying certain crimes as crimes against humanity, it has been argued that humanity acquired a clearer sense of community since it was represented as a ‘cogent interested group or party.’⁵ Nonetheless, as this paper will suggest, international criminal law may not have been able to push the human rights agenda forward, because the nation state is still the organizational principle behind its implementation as a mechanism to prosecute gross human rights violations.

Considering that the added value of the human rights discourse lies in its potential to reshape and modify borders and therefore turn

2 MICHAEL IGNATIEFF, *Human Rights as Idolatry*, in *Human Rights as Politics and Idolatry*, 53-100, 79, AMY GUTMANN, ed., Princeton University Press, Princeton (2001).

3 RONALD DWORKIN, *Rights as Trumps*, in *Theories of Rights*, 153-167, JEREMY WALDRON, ed., Oxford University Press, Oxford (1984). JACK DONNELLY, *Human Rights in Theory and Practice*, Cornell University Press, Ithaca, London (2003). GERSHON SHAFIR & ALISON BRYSK, *The Globalization of Rights: From Citizenship to Human Rights*, 10 *Citizenship Studies*, 3, 275-287 (2006), [Online]. Available from: <http://dx.doi.org/10.1080/13621020600772073>

4 DAVID HIRSH, *Law against Genocide: Cosmopolitan Trials*, 4, Cavendish/GlassHouse, London (2003).

5 HANNAH ARENDT, *Eichmann in Jerusalem: A Report on the Banality of Evil*, Penguin Books, London (1963). MARY ANN GLENDON, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*, Random House, New York (2001).

(inter)national law into ‘*intermestic law*,’⁶ and to create communities beyond nation states, the failure to find a way to move past this ‘territoriality limitation’ demonstrates a flaw in the incorporation of human rights into the (inter)national legal and political order, which greatly affects their relevance.⁷

As stated above, this paper will argue that although international criminal law has been imagined as the scenario or theatre to reinforce the existence of a ‘political community of justice’ based on our common humanity, it has not been able to displace the concept of state sovereignty. The overall question that will be addressed in this paper is if the use of international criminal law has contributed to move human rights law from ‘*international law*’ or ‘*transnational law*’ to ‘*intermestic law*’ and therefore had any impact on the existence of a ‘political community of justice’ found beyond the nation-state.

In order to answer this question, section 1 will explore the discourse surrounding crimes against humanity and the way in which it refers to humanity as an existing ‘political community of justice’ that constitutes a breakthrough and a rupture of the paradigm of sovereignty. Section 2 will show the inconsistencies in this ‘rupture of the paradigm.’ Section 3 will provide some evidence of international criminal law still serving the interest of a community of justice grounded in the nation-state. Last section will provide some concluding remarks.

First, a preliminary clarification: The object of this research is not to negate or ignore the changes in the conception of sovereignty that have come with the implementation of human rights law, nor to disqualify the value of holding individuals to account for gross human rights violations. It is merely to question whether international criminal law can succeed as a means of championing the agenda of human rights, by creating law around the existence of a global ‘political community of justice.’ This paper will also not question whether the mechanisms of ‘global criminal justice’ have

6 KATE NASH, *The Pinochet Case: Cosmopolitanism and Intermestic Human Rights*, 58 *The British Journal of Sociology*, 3, 417-435 (2007) [Online]. Available from: <http://web.ebscohost.com.gate2.library.lse.ac.uk/ehost/pdfviewer/pdfviewer?vid=3&hid=106&sid=9a3d689c-55b9-4a6e-b715-2b323fac8826%40sessionmgr115>

7 KATE NASH, *The Pinochet Case: Cosmopolitanism and Intermestic Human Rights*, 58 *The British Journal of Sociology*, 3, 417-435, 419 (2007) [Online]. Available from: <http://web.ebscohost.com.gate2.library.lse.ac.uk/ehost/pdfviewer/pdfviewer?vid=3&hid=106&sid=9a3d689c-55b9-4a6e-b715-2b323fac8826%40sessionmgr115>

obtained justice for victims or have had an impact on impunity. It is only a qualitative study that seeks to explore a topic that has not been studied in depth and produce some insights about it for further exploration.

Section 1: An imagined ‘global political community of justice’. The Discourse of Humanity in the Literature

When the ‘international community’ decided to qualify certain acts as crimes against humanity, it was reinforcing the idea of humanity as a ‘global community of justice.’⁸ Although some have argued that crimes against humanity do not presuppose the existence of humanity as a political community but merely as a group of individuals acting as an interested party, not being represented in any way by the global institutions of justice,⁹ this has not been the predominant position in the literature nor in the legal order established for the prosecution of these crimes.

In fact, the idea behind the legal category of *crimes against humanity*¹⁰ was to *prosecute gross human rights violations* that ‘shocked the conscience of humanity.’¹¹ It was grounded on the idea of *administering justice in the name of humanity*,¹² therefore appealing to a notion of ‘community’ that transcended national boundaries and that was grounded on a *cosmopolitan world view*, which implied that “[t]he ultimate units of concern are *human beings, or persons*—

8 HANNAH ARENDT, *Eichmann in Jerusalem: A Report on the Banality of Evil*, Penguin Books, London (1963).

9 DAVID LUBAN, *A Theory of Crimes against Humanity*, 29 *Yale Journal of International Law*, 1, 85-167 (2004), [Online]. Available from: <http://heinonline.org.gate2.library.lse.ac.uk/HOL/Page?handle=hein.journals/yjil29&id=95&collection=journals&index=>, <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1165&context=facpub>

10 Although there are references to crimes against humanity dating to the massacre of the Armenians by the Turkish, and the end of the First World War (ICTR, Jean-Paul Akayesu, ICTR-96-4, par. 565-566), the first reference to *crimes against humanity* as a technical term and a legal category has been traced back to their incorporation in the Charter of the International Military Tribunal of Nuremberg (ICTY, *Prosecutor v. Tadić*, par. 618).

11 LARRY MAY, *Crimes against Humanity: A Normative Account*, 6, Cambridge University Press, Cambridge (2005). ANTONIO CASSESE, GUIDO G. ACQUAVIVA, MARY DE MING FAN & ALEX A. WHITING, eds., *International Criminal Law: Cases and Commentary*, 41-42, 155, Oxford University Press, Oxford (2011).

12 DAVID HIRSH, *Law against Genocide: Cosmopolitan Trials*, 44, Cavendish/GlassHouse, London (2003).

rather than, say, family lines, tribes, or ethnic, cultural or religious communities, nations or states...”¹³

Not only did the supporters of international criminal law resort to the idea of administering justice in the name of humanity, but they also embraced the potential for community —building that surrounds criminal law, i.e. its particular ability to consolidate the identity of a group through truth telling and the recognition of common values.¹⁴ In this way, the appeal to the violation of the ‘standards of humanity’ or the ‘law of humanity’ was meant to consolidate the identity of ‘humanity’ as a group entitled to secure justice for the atrocities that had been committed.

However, in the quest to expand the bonds of solidarity and concern amongst people, and of expanding the membership, the ‘international community’ was also challenging the *relative value* of sovereignty. The incorporation of crimes against humanity into a legal framework intended to entrench the idea that those entitled to consideration in matters of justice were not only fellow citizens, but also all human beings,¹⁵ therefore challenging the boundaries of sovereign states.

It was the recognition that there was a different order of justice that had been violated, which outgrew the communities bounded by citizenship. Using Hannah Arendt’s¹⁶ words, the existence of these crimes meant that “...an altogether different order (was) broken and an altogether different community (was) violated.” Although as will be examined in the next chapter, there are reasons to be sceptical about whether the inclusion of crimes against humanity in the legal framework of international criminal law has actually been able to push aside the principle of sovereignty of the nation state, there are those who have interpreted the category of crimes

13 THOMAS POGGE, *Cosmopolitanism and Sovereignty*, in *Global Justice: Seminal Essays, Vol. 1 Global Justice*, 355-390, 356, THOMAS POGGE & DARREL MOELLENDORF, eds., Paragon House, St. Paul, Minnesota (2008).

14 MARTTI KOSKENNIEMI, *The Politics of International Law*, 179, Hart Publishing, Portland, Oregon (2011).

15 MARTTI KOSKENNIEMI, *The Politics of International Law*, 2, Hart Publishing, Portland, Oregon (2011).

16 HANNAH ARENDT, *Eichmann in Jerusalem: A Report on the Banality of Evil*, Penguin Books, London, 272 (1963).

against humanity as paradigmatic and a breaking point in history where the human being is placed before state sovereignty.¹⁷

Margaret McAuliffe deGuzman¹⁸ argues that crimes against humanity are the result of a decision to relinquish sovereignty, which "...stems from the conviction that such crimes violate not only the individual victim but all of humanity." In the same sense, Bryan Turner¹⁹ contends that "[c]rimes against humanity have led to a greater awareness and acceptance of the notion of a common humanity. Treating other human beings as members of a common humanity is thus a radical historical development." Therefore, the inclusion of crimes against humanity in the Charter of the International Military Tribunal which conducted the Nuremberg trials was, under this perspective, "...a revolutionary act that eroded the time-honored rule that civilized nations should not interfere in one another's internal affairs."²⁰

Finally, it is important to highlight the work of David Hirsh,²¹ who argues that cosmopolitan criminal law is concerned with crimes that transcend boundaries 'both spatially and conceptually.' He particularly refers to the inclusion of crimes against humanity in legal discourse as one of the innovations of cosmopolitan law, because it recognized that there are certain harms that are the business of all of humanity, and are therefore subjected to a universal jurisdiction.²² He also argues that crimes against humanity embrace cosmopolitanism by recognizing that these crimes are the business of all human beings and therefore legitimizing the emergence of global institutions to prosecute these crimes. The prosecution of

17 MARGARET MCAULIFFE DEGUZMAN, *The Road from Rome: The Developing Law of Crimes against Humanity*, 22 *Human Rights Quarterly*, 2, 335-403 (2000), [Online]. Available from: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1270602. BRYAN TURNER, *Vulnerability and Human Rights*, Pennsylvania State University Press, Pennsylvania (2006). DAVID HIRSH, *Law against Genocide: Cosmopolitan Trials*, Cavendish/GlassHouse, London (2003).

18 MARGARET MCAULIFFE DEGUZMAN, *The Road from Rome: The Developing Law of Crimes against Humanity*, 22 *Human Rights Quarterly*, 2, 335-403, 338 (2000), [Online]. Available from: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1270602

19 BRYAN TURNER, *Vulnerability and Human Rights*, Pennsylvania State University Press, Pennsylvania, 20 (2006).

20 MARGARET MCAULIFFE DEGUZMAN, *The Road from Rome: The Developing Law of Crimes against Humanity*, 22 *Human Rights Quarterly*, 2, 335-403, 345 (2000), [Online]. Available from: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1270602

21 DAVID HIRSH, *Law against Genocide: Cosmopolitan Trials*, Cavendish/GlassHouse, London (2003).

22 DAVID HIRSH, *Law against Genocide: Cosmopolitan Trials*, xvi, Cavendish/GlassHouse, London (2003).

crimes against humanity in Nuremberg was a cosmopolitan act, a recognition that the acts committed didn't fall under the jurisdiction of any state but it was the responsibility of all human beings.²³

This notion of administering justice in the name of 'humanity' informed the legal framework. In fact, "[t]he concept of 'humanity' —the belief that all humanity is one undivided and indivisible family — has ... found increasing expression in international law through the ending of slavery, the creation of 'crimes against humanity', and the advancement of human rights."²⁴ These developments in international law seek to authorize humanity to hold those who have committed these crimes responsible, for having committed an affront to humanity and to humanness.²⁵

On the one hand, a reference to humanity as a community affected by these crimes can be found in the opening statement of Justice Robert H. Jackson to the International Military Tribunal of Nuremberg, in which he stated: "The wrongs which we seek to condemn and punish have been so calculated, so malignant and so devastating, that civilization cannot tolerate their being ignored because it cannot survive their being repeated. That four great nations [United Kingdom, United States, Soviet Union and France], flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power ever has paid to Reason."

More than forty years after the Nuremberg Trials, the International Criminal Tribunal for the former Yugoslavia, ICTY, in the sentencing judgment produced in the case of the *Prosecutor v. Erdemovic*²⁶ stated that crimes against humanity "...also transcend

23 DAVID HIRSH, *Law against Genocide: Cosmopolitan Trials*, Cavendish/GlassHouse, London (2003).

24 SAM MCFARLAND, *The Slow Creation of Humanity*, 32 *Political Psychology*, 1, 1-20 (2011), [Online]. Available from: <http://onlinelibrary.wiley.com.gate2.library.lse.ac.uk/doi/10.1111/j.1467-9221.2010.00801.x/pdf>

25 DAVID LUBAN, *A Theory of Crimes against Humanity*, 29 *Yale Journal of International Law*, 1, 85-167 (2004), [Online]. Available from: <http://heinonline.org.gate2.library.lse.ac.uk/HOL/Page?handle=hein.journals/yjil29&id=95&collection=journals&index=>, <http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1165&context=facpub>

26 INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, ICTY, TRIAL CHAMBER, *Prosecutor v. Erdemovic*, Case IT-96-22-T, November 29, 1996, Sentencing Judgement, par. 28 (1996), [Online]. Available from: <http://www.icty.org/x/cases/erdemovic/tjug/en/erd-ts961129e.pdf>, <http://www.icty.org/case/erdemovic/4>

the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterizes crimes against humanity.” This same idea was presented by Kofi Annan²⁷ [the seventh Secretary-General of the United Nations from January 1997 to December 2006] while speaking of the importance of establishing an international permanent court; as well as in the International Criminal Court —ICC— Statute, which included in its preamble, as an informing principle, the grounding of criminal justice in ‘our common bonds’, in our belonging to ‘humanity’, in ‘humanity’ being a community whose conscience can be collectively shocked, and in the ‘concern of the international community as a whole’ in the persecution of these crimes.

There is also an initiative from the Washington University School of Law²⁸ that contains a proposed ‘International Convention on the Prevention and Punishment of Crimes against Humanity.’ This initiative has a steering committee that includes renowned experts in human rights (e.g. Juan E. Méndez) and in international criminal law (e.g. Cherif Bassiouni and Richard Goldstone), and in the preamble of the proposed convention they included a reference to the ‘common bonds’ and ‘common values’ that we share, to ‘humanity’ and the ‘shock to the conscience of humanity’ that these crimes imply.

This section has sought to show how crimes against humanity are based on a cosmopolitan worldview and in the existence of humanity as a ‘political community of justice.’ It has also tried to show how in the literature there are those who regard the incorporation of crimes against humanity in the legal framework of international law as a breakthrough and a rupture of the paradigm of sovereignty, and the way in which this discourse informs the legal framework and the international criminal law system.

However, despite the support found in the literature and the optimistic account on the influence of crimes against humanity in

27 KOFI ANNAN, *Statement of Secretary-General Kofi Annan to the International Bar Association in New York on 11 June, SG/SM/6257* (1997), [Online]. Available from: <http://www.un.org/News/Press/docs/1997/19970612.sgsm6257.html>

28 WASHINGTON UNIVERSITY SCHOOL OF LAW, *International Convention on the Prevention and Punishment of Crimes against Humanity* (2011), [Online]. Available from: <http://crimesagainsthumanity.wustl.edu/>

the rupture of sovereignty and in the incorporation of a ‘political community of justice’ based on our common humanity, the following section will examine the arguments against the ‘paradigm shift’ position that is so profusely used in the human rights and criminal law discourse; as well as examine the functioning of some international and domestic courts in the prosecution of crimes against humanity, in order to show how the ‘community’ that these tribunals are speaking to and acting in the name of, is still very much linked to the nation-state.

Section 2: The Recurrent Paradigm: A ‘political community of justice’ grounded in the membership to a nation-state

Even though the legitimacy and strength of the discourse that informs crimes against humanity is based on its appeal to the existence of a ‘political community of justice’ grounded on our common humanity, and on the role of criminal tribunals in adjudicating justice in the name of humanity, this does not necessarily imply that this community has effectively come into being. In fact, there is a possibility that crimes against humanity, as a means of prosecuting gross human rights violations, has not been able to move past the well-known and deeply rooted community of justice that is framed around the membership to a nation-state. This chapter will suggest that, contrary to what the discourse surrounding crimes against humanity has endeavoured to achieve, there has been no ‘shift of paradigm.’ In order to do so, some possible reasons identified by the literature will be explored, before analysing the way in which this recurrent paradigm manifests itself in the practice of the prosecution of crimes against humanity.

Firstly, the resilience of the ‘political community of justice’ grounded on the nation-state could be attributed to a structural problem which derives from seeking to prosecute gross human rights violations through legal instruments that are the product of an international community made up of states. On this issue, Kingsley Chiedu Moghalu²⁹ refers particularly to the ICC as the

29 KINGSLEY CHIEDU MOGHALU, *Global Justice: The Politics of War Crimes Trials*, Stanford Security Studies, Stanford (2008).

ultimate institution forged by the ‘international community’ to procure global justice for all. He argues that even though the creation of this institution was informed by cosmopolitan or universalist worldviews, the fact that it is created in international law and in the midst of an ‘international community’ made up of states and where sovereignty is still the organizing principle, makes the ICC a failed attempt for global justice.³⁰ In fact, the nature of the society of states that created the ICC was reaffirmed in its rules of procedure “...by making the court’s jurisdiction complementary, not supranational, to that of states.”³¹

In this sense, establishing a system of global justice for gross human rights violations is not as simple as creating institutions, legal frameworks and constructing a discourse around the existence of a ‘political community of justice’ grounded in our common humanity. There are structural issues that need to be addressed and reformed in order for global justice,³² in the way it was theoretically conceived, i.e. portraying a sense of relative deterritorialization,³³ to exist.

To provide global justice would mean to deconstruct our understanding of the ‘international community’ as we know it, which, as noted by Kingsley Chiedu Moghalu³⁴ and David Luban³⁵ is not done by appealing to the inclusion of cosmopolitan expressions in the legal framework and in the discourse surrounding the implementation of International Criminal Law —ICL. For Luban “[o]bviusly, there is no political community called ‘humanity’ that au-

30 KINGSLEY CHIEDU MOGHALU, *Global Justice: The Politics of War Crimes Trials*, 172, Stanford Security Studies, Stanford (2008).

31 KINGSLEY CHIEDU MOGHALU, *Global Justice: The Politics of War Crimes Trials*, 173, Stanford Security Studies, Stanford (2008).

32 “...establishing a pure International Criminal Law [ICL] of universal application is a momentous and radical project, equivalent in its way to the early secularists’ deflationary view of state authority as manifestation of human rather than divine will. We are not there yet. Not even the so-called ‘likeminded’ states that promote the ICL project are heretical enough to reject the religion of sovereignty. For states to call other states ‘gods that failed; is a Damoclean sword, for they themselves are nothing more than gods that have not yet failed”, DAVID LUBAN, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law*, in *The Philosophy of International Law*, 569-588, SAMANTHA BESSON & JOHN TASIOLAS, eds., Oxford University Press, Oxford, New York (2010).

33 DAVID HELD & ANTHONY McCREW, *Globalization/Anti-Globalization*, Polity, Cambridge, 4 (2002).

34 KINGSLEY CHIEDU MOGHALU, *Global Justice: The Politics of War Crimes Trials*, Stanford Security Studies, Stanford (2008).

35 DAVID LUBAN, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law*, in *The Philosophy of International Law*, 569-588, SAMANTHA BESSON & JOHN TASIOLAS, eds., Oxford University Press, Oxford, New York (2010).

thorizes the tribunals; nor are they products of anything like a world governments.”³⁶ Nonetheless, he does recognize that, despite the fact that the institutions created to procure global justice have not ruptured nationalism or statism, the fact that the ‘project’ receives the support of states (the ICC Statute has been ratified to date by 122 states³⁷) shows a ‘world-wide cosmopolitan yearning coming from below.’³⁸ Nonetheless, for now, it appears to be that the sharp criticism that Hannah Arendt³⁹ and Costas Douzinas⁴⁰ presented against the rights of man, or human rights, is still applicable. Their criticism suggests that human rights without the nation-state are void claims that cannot be enforced, because they are the product of states and therefore the discourse will not cease to reproduce power, statehood and nationalism as its grounding principles.

The idea of global justice for gross human rights violations that captivated scholars and that inspired the establishment of the ad-hoc tribunals in the 1990s, was initially presented as a ‘higher justice’, one detached from the inner politics of states. However, this idea was flawed in that it omitted the fact that justice is “...inevitably partial (domestic and contextualized).”⁴¹ In this way, criminal law cannot be expected to produce lasting effects in a community, when this ‘community’ is so ethereal and elusive to constitute a moral community.⁴²

36 DAVID LUBAN, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law*, in *The Philosophy of International Law*, 569-588, 579, SAMANTHA BESSON & JOHN TASIOLAS, eds., Oxford University Press, Oxford, New York (2010).

37 “122 countries are States Parties to the Rome Statute of the International Criminal Court. Out of them 34 are African States, 18 are Asia-Pacific States, 18 are from Eastern Europe, 27 are from Latin American and Caribbean States, and 25 are from Western European and other States.” Available from: http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx

38 DAVID LUBAN, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law*, in *The Philosophy of International Law*, 569-588, 587, SAMANTHA BESSON & JOHN TASIOLAS, eds., Oxford University Press, Oxford, New York (2010).

39 HANNAH ARENDT, *Eichmann in Jerusalem: A Report on the Banality of Evil*, Penguin Books, London (1963).

40 Referenced in DAVID HIRSH, *Law against Genocide: Cosmopolitan Trials*, Cavendish/Glass-House, London (2003).

41 JEREMY RABKIN, *Global Criminal Justice: An Idea Whose Time has Passed*, 38 *Cornell International Law Journal*, 3, 753-777, 755 (2005), [Online]. Available from: <http://heinonline.org.gate2.library.lse.ac.uk/HOL/Page?handle=hein.journals/cintl38&div=30&collection=journals>

42 JEREMY RABKIN, *Global Criminal Justice: An Idea Whose Time has Passed*, 38 *Cornell International Law Journal*, 3, 753-777, 756, 771 (2005), [Online]. Available from: <http://heinonline.org.gate2.library.lse.ac.uk/HOL/Page?handle=hein.journals/cintl38&div=30&collection=journals>. MARTTI KOSKENNIEMI, *The Politics of International Law*, 179, Hart Publishing, Portland, Oregon (2011).

After examining the arguments to sustain that the prosecution of gross human rights violations is in fact closely linked to a ‘political community of justice’ grounded in the nation-state, in the following lines I will briefly present some evidence to support my argument.

Section 3: Empirical evidence of the persistence of a state centred ‘political community of justice’

The fact that the discourse of global criminal justice for gross human rights violations in the name of humanity has not changed the paradigm of justice, which has been based on the centrality of the concepts of sovereignty, statehood and nationalism, can also be perceived in the implementation and functioning of the institutions that have been part of a complex system to prosecute crimes against humanity.

Although these are still a rare phenomenon, there have been several prosecutions of former members of the Nazi party carried out by domestic courts under universal jurisdiction (e.g. France, Israel, Belgium and Canada).⁴³ In some of these cases, the prosecutions were initially given traction by the responsibility of states to protect their own nationals, or by a need to enforce a sense of nationalism.

For example, in the Adolf Eichmann trial in Jerusalem, neither during the proceedings nor in the judgement “...did the Jerusalem trial ever mention even the possibility that extermination of whole ethnic groups —the Jews, or the Poles, or the Gypsies— might be more than a crime against the Jewish or the Polish or the Gypsy people, that the international order, and mankind in its entirety, might have been grievously hurt and endangered.”⁴⁴ In this case, the Court was more interested in using criminal law to consolidate a ‘political community’ around the existence of a new nation-state (i.e. Israel), and not in framing the discussion around the existence of a broader ‘political community’.

43 INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, ICHRP, *Hard Cases: Bringing Human Rights Violators to Justice Abroad — A Guide to Universal Jurisdiction*, 35, International Council on Human Rights Policy, ICHRP, Versoix, Switzerland (1999). Available from: http://www.ichrp.org/files/reports/5/201_report_en.pdf

44 INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, ICHRP, *Hard Cases: Bringing Human Rights Violators to Justice Abroad — A Guide to Universal Jurisdiction*, 276, International Council on Human Rights Policy, ICHRP, Versoix, Switzerland (1999). Available from: http://www.ichrp.org/files/reports/5/201_report_en.pdf

Another case that can be brought to bear in this discussion is the trial of Klaus Barbie before the Cour de Cassation Française, which was supported by a historical and didactic need to teach the French the real participation of France in the atrocities committed by the Germans. This was a trial that meant to reaffirm the values of the French as a ‘political community’ of justice; it was supposed to reaffirm the values of those belonging to this community clearly framed within the boundaries of the nation-state.⁴⁵

Up until the mid-1990s, state practice revealed “...an unwillingness of states to punish atrocities committed abroad, even more so if the crime was not committed by or against their nationals.”⁴⁶ However, there are ‘recent’ developments that have been used as examples to support the existence of humanity as a ‘political community of justice.’⁴⁷ Let’s briefly look at the appeal to universal jurisdiction by judges in the UK and Spain to prosecute crimes against humanity committed by former officials of the Chilean and Argentinean military regimes, to demonstrate how these trials were based on the responsibility of the state to protect its own nationals and not in a sense of responsibility towards humanity.

In the Pinochet trial, an emblematic case of universal jurisdiction, even the NGOs that promoted the case in the UK, in a letter sent to the Metropolitan Police Commissioner argued that “[i]n any case ... there was a sound case for bringing a prosecution here because some of Pinochet’s victims were British citizens, and some now live in the UK.”⁴⁸ In this sense, it is questionable whether the response of the House of Lords was an attempt to act in the name of humanity, or more an attempt to protect its own citizens or in any case to act on behalf of the Chilean citizens who were now UK residents.

On the other hand, in the prosecutions conducted by Spain regarding former officials of the military regimes, as Sophie Baby

45 MARTTI KOSKENNIEMI, *The Politics of International Law*, 191-192, Hart Publishing, Portland, Oregon (2011).

46 STEVEN R. RATNER, JASON ABRAMS & JAMES BISCHOFF, *Accountability for Human Rights Atrocities in International Law*, 180, Oxford University Press, Oxford (2001).

47 STEVEN R. RATNER, JASON ABRAMS & JAMES BISCHOFF, *Accountability for Human Rights Atrocities in International Law*, Oxford University Press, Oxford (2001). RUTI TEITEL, *Humanity’s Law*, Oxford University Press, Oxford (2011).

48 BBC NEWS, *UK Campaigners push for Pinochet trial*, *BBC News* (October 20, 1998), [Online]. Available from: <http://news.bbc.co.uk/1/hi/uk/197525.stm>

argues, the Spanish citizens who had been victims of atrocities played a primary role in the opening of the investigations and the proceedings.⁴⁹ Therefore, jurisdiction was mainly based not on universal jurisdiction, as officially claimed, but more so on the passive personality principle. A docket opened against perpetrators of crimes committed in Argentina, included around 600 Spanish nationals who were victims of the atrocities; and a claim filed in Spain for atrocities committed in Chile, was filed by a Spanish citizen in the name of other Spanish nationals who had been victimized, without any reference to the thousands of Chilean victims.⁵⁰

Taking these examples into account, it seems that resorting to international criminal law as a means of pursuing the cosmopolitan vision of human rights has not been able to surpass the limitations which have always grieved the human rights discourse, mainly the territorial limitation of their reach. In this sense, it is difficult to believe that “[t]he creation and development of the offense of crimes against humanity initiated at Nuremberg has been an important piece of the humanitarian historical puzzle, marking the end of the all-powerful state, critically re-framing the relationship between the state and its citizens, and furthering the recognition of individuals’ nascent role in international law.”⁵¹

49 SOPHIE BABY, *Latin America: a necessary detour? Baltasar Garzón, from Pinochet to Franco [¿Latinoamérica: un desvío necesario? Baltasar Garzón, de Pinochet a Franco]*, *Amnis* (2011), [Online]. Available from: <http://amnis.revues.org/1485>

50 SOPHIE BABY, *Latin America: a necessary detour? Baltasar Garzón, from Pinochet to Franco [¿Latinoamérica: un desvío necesario? Baltasar Garzón, de Pinochet a Franco]*, *Amnis* (2011), [Online]. Available from: <http://amnis.revues.org/1485>

51 GUENAELE METTRAUX, *Crimes against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda*, 43 *Harvard International Law Journal*, 1, 237-316, 237 (2002), [Online]. Available from: <http://heinonline.org.gate2.library.lse.ac.uk/HOL/Page?handle=hein.journals/hilj43&id=243&collection=journals&index=>

CONCLUDING REMARKS

My purpose with this account was to examine if the incorporation of crimes against humanity in a legal framework, and in the discourse of human rights and humanity, has had an impact on the coming into being of a 'political community of justice' based on our membership to humanity. In other words, if through the creation of the category 'crimes against humanity,' human rights practitioners were able to move past '*international law*' into '*intermestic law*,' and if they had been able to broaden the bonds of solidarity or overcome the 'natural indifference to others.'

In order to do so, the paper firstly reviewed whether and how the discourse of 'global justice in the name of humanity' had grounded the emergence of the category of crimes against humanity. The paper showed how the emergence of the category 'crimes against humanity' was informed by the human rights discourse, and the way in which they are both based on a cosmopolitan worldview and in an appeal to a 'political community of justice' grounded in our common humanity. In this sense, it showed how the incorporation of this category in international law was presented as a breakthrough and a rupture of the paradigm of sovereignty.

Having confirmed the latter, the paper moved to review if this new 'political community of justice' has effectively come into being, or if the communities grounded on our belonging to a nation-state are still the prevalent paradigm. In this case, reasons were presented for believing that this 'global community' has not emerged, and that this is reflected in the implementation and functioning of the mechanisms and institutions created to adjudicate justice in the name of humanity. There was particular emphasis given to some cases of universal jurisdiction.

From the analysis of the literature and some empirical evidence, it is possible to see how the emergence of a mechanism of 'global justice' is restricted by its inception in a system of international law which is steered by states and grounded on their sovereignty, and therefore at the service of power politics. Also, how justice is contextual and in this sense, the institutions in charge of administering it need to have a connection to the political, historical, social and economic conditions of the affected communities, which are

delimited not by their membership to humanity, but to different and more selective communities of justice. Finally, looking at some cases of prosecutions of crimes against humanity showed how the appeal to universal jurisdiction did not have as a starting point the need to act in the name of humanity, but rather the need to act in order to protect the nationals of the state or enforce nationalism.

I can conclude by suggesting that ‘humanity’ as a ‘political community of justice’ has not come into being, despite the incessant appeals to it by the human rights discourse. This shows how our ‘natural indifference to others’ is not overcome by the simple use of language, by the subscription of covenants or by the creation of institutions and mechanisms for the adjudication of justice. Appealing to humanity does not necessarily mean recognizing an existing community or creating one.⁵²

Bearing this in mind, I suggest, in response to the research problem initially put forth, that international criminal law as a means to address gross human rights violations, has not contributed to the endeavour of pushing human rights law further away from the nation-state by grounding them in a new ‘political community of justice’ that is not based on borders defined by state sovereignty. In fact, this international criminal law, which has presented itself as an expression of cosmopolitan justice for gross human rights violations, and as a means to move human rights closer to becoming ‘*intermestic law*’ is no different from the rest of the international law system in which it is embedded, where the nation state is the pivotal axis of the system.

This paper seeks to contribute to the analysis of one of the fundamentals of the human rights discourse, i.e. the existence of a community that transcends state boundaries and is grounded on our humanity. However, it has methodological limitations because of the time and resource constraints to review all the prosecutions of crimes against humanity. On the other hand, the perception of justice as a ‘local phenomenon’ was not verified by direct contact with victims, or interviews, but by reviewing the literature and the critiques of distant justice presented by NGOs and local communities before the ICC.

52 MARTTI KOSKENNIEMI, *The Politics of International Law*, Hart Publishing, Portland, Oregon (2011).

Bearing in mind the limitations exposed above, there is still further research that needs to be done in order to prove the main assertion, i.e. that no community grounded on our humanity has come into being through the category of crimes against humanity, which implies in depth research of the cases in which these crimes have been prosecuted, particularly the cases in which courts have appealed to universal jurisdiction.

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