ROUTLEDGE ADVANCES IN CRIMINOLOGY

Criminal Justice in International Society

Edited by
Willem de Lint, Marinella Marmo,
and Nerida Chazal

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Routledge
Taylor & Francis Group
NEW YORK LONDON

First published 2014
by Routledge
711 Third Avenue, New York, NY 10017

and by Routledge
2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

Routledge is an imprint of the Taylor & Francis Group, an informa business

Library of Congress Cataloging-in-Publication Data

Criminal Justice in International Society / edited by Willem de Lint, Marinella Marmo, and Nerida Chazal.
pages cm. — (Routledge advances in criminology)
Includes bibliographical references and index.
1. Criminal justice, Administration of. 2. Criminal procedure (International law) 3. International Criminal Court. 4. International criminal law. 5. International criminal courts. I. De Lint, Willem, 1959– editor of compilation. II. Marmo, Marinella, editor of compilation. III. Chazal, Nerida, 1983– editor of compilation.
K5001.C73 2014
345—dc23
2013032929

ISBN13: 978-0-415-62830-3 (hbk)
ISBN13: 978-0-203-06722-2 (ebk)

Typeset in Sabon
by IBT Global.

Criminal Justice in International Society

This book adopts a critical criminological approach to analyse the production, representation, and role of crime in the emerging international order. It analyses the role of power and its influence on the dynamics of criminalization at an international level, facilitating an examination of the geopolitics of international criminal justice. Such an approach to crime is well-developed in domestic criminology; however, this critical approach is yet to be used to explore the relationship between power, crime, and justice in an international setting. This book brings together contrasting opinions on how courts, prosecutors, judges, NGOs, and other bodies act to reflexively produce the social reality of international justice. In doing this, it bridges the gaps between the fields of sociology, criminology, international relations, political science, and international law to explore the problems and prospects of international criminal justice and to illustrate the role of crime and criminalization in a complex, evolving, and contested international society.

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To Vaughen Zeeland de Lint (1965–2012)

Your afterglow is now all that remains to light a world not big enough to keep the measure of your true-brown eyes. But in that twilight your deep compassion, clairvoyant insight, clownish humour and sacrificing courage shines on.

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Introduction

What Crime? Which Justice? What International Sociey?

Willem de Lint

The question of what constitutes *criminal justice* in *international society* involves two outsized concepts that will be largely taken for granted by most contributors to this book. But this is not to dodge the idea that there ought to be appropriate caution taken. The question of what comprises the social in an international arena is taken up by many sociologists, although we will offer a brief comment in these introductory remarks. Similarly, the concept of crime and justice or criminal justice is fraught and will embrace assumptions that are contestable; here too, we can only offer a short-hand based on widely accepted ideas within the criminological and wider communities. Our focus, as represented in the volume's organisation into five parts, embraces the siting, foundation or basis of a "system" of criminal justice beyond or above the national jurisdiction, including the authority and capacity of actors to realise what may or may not be coherent aims or objectives according to specialised or generic means of terrain evaluation and remedy implementation. In the final part, the role of the ideological and the framing of what passes for "international society" and "criminal justice" is revisited. We hope that what we think of as commonsensical—the affirmation that there is, or ought to be a rule of law that reaches across the borders of nation-states—is not in reality only an artefact of hegemony. That is to say, we hope that the paradigm or ordering principle that will come to dominate the holding to account of actors who set up international institutions and forces and what passes under the name of criminal justice at an international or transnational registration is a matter that remains alive to principles of legality under the rubric of harm reduction.

Margaret Thatcher famously argued that there is no such entity as "society," a statement that rode on the waves of the vast global efforts of neoliberalisation, also identified with trade liberalisation. Anti–civil society and trade liberalisation themes taken up by neoliberal globalisation actors have furthered the so-called Washington Consensus according to which there is an interoperability between trade and commerce and the institutional needs of civil society. Notably, the regularisation of trade has not been joined at the hip with the regularisation or globalisation of human rights protections in civil society instruments. At the national level, the neoliberalism of

Margaret Thatcher offered a disconnect between what is often referred to as social justice and imperatives of the so-called productive enterprise of the "economy".

Despite that we may not definitively point to concrete evidence of its existence as a matter of uncontested fact, we do situate societies within nation-states so that American society or Italian society encapsulates values and cultural norms that belong with and produce different institutions and expectations. This extends to the manner of common and official reaction to matters of concern such as gross malfeasance. Here, for example, there are cultural differences in the response to various kinds of theft that distinguish Scandinavian and Arabic societies. In short, the question of society, and in particular international society, cannot be asked to the exclusion of the normative dimension, particularly the hard line of crime, criminalisation, and the style, or the manner of remedy.

Herein we see the conflict. There are *many* versions and views of the sort of society that may be called international and the sort of practices that pass for justice under its rubric. This is not unlike tensions at the national or subnational level of analysis, to be sure. However, the fact that there are diverse systems of justice across nations and subnational communities does not lead to the conclusion that the global or international level has not or will not produce its own distinctive character. While there are forces of balkanisation, there are also strong forces that seek to establish infrastructures the result of which tends toward a system of international justice.

In this regard it may be useful to regard international society as a work in progress, one that is being contested by many of the same forces that clamour over how societies at the national level will or ought to be institutionalised through regulatory practices and cultural affirmations. These include economic, social, and, more explicitly, cultural movements that have as their objective the consolidation of a version of the political dimension of individual and institutional interaction. In this respect, there is still great tension between classic liberal values, communitarian or socialistic values, green economy and indigenous rights values, and neoliberal and neoconservative values in the production of that work of international society. It is important to recognise the tension in the production of international society in the conflict between these forces, even if what seems to have emerged thus far is lopsided toward the elite consolidation of global neoliberalism. As we shall see in several chapters throughout this volume the sort of society that is "hailed" by the most familiar instruments of international justice is predicated on taking a collective response in defence of shared norms and values. However, the norms, values and nature of the collectivity which emerges are imbricated with elite interests. The result is that they, for many observers at least, produce a mockery of the social of internationalism.

From a strictly criminological point of view, and perhaps a critical or post-critical criminological vantage point at that, the question of criminal

justice begins with the problem of identifying the value or norm that is invested with the presumptive first order value. Which principle or right or transaction must be protected by the weight of collective institutional resources? A simple answer has been to eschew pluralism (whatever the majority says needs protection) and speak to harm and harm reduction. And this leads naturally to questions of legality or natural justice and the extent to which such norms will be consistent with these values or, as many argue, will reinterpret them from the vantage point of elite interests according to an ordering principle that is hegemonic and, as contended in the chapter by Khoury and Whyte, largely uncontested and incontestable.

HOME AND AWAY: CRIMINAL JUSTICE AND THE INTERNATIONAL FRONTIER

Taking up the theme of the unevenness or spottiness of justice at the international level as a matter of political geography, one way of conceiving international justice is in terms of the concept of frontier. Much literature on the various subsystems of criminal justice has reviewed them in terms of their modernisation according to practices associated with norms of legality, a development that is understood to work itself out over time with the imposition or cultivation of civil society. The roguishness of the most powerful state actors and the selectivity of the "hanging judge" (standing out amongst the chaotic impulses that can be combined into international society) are easily apprehended in the frontier metaphor.

Of particular note in the imagery of the frontier are American exceptionalism and/or the articulation of law that occurs in the wake of the movement of hyper power. No adequate discussion of crime and justice in what we may call international society can afford to ignore how international legality is shaped and ignored and then redrafted by actors that are "too big to prosecute." To carry forward the frontier analogy and recall Carl Schmitt (1985), there is a sovereign on the frontier who makes the exception and whose power is determined in that lasting capacity to be exempt from the web of ties that are nevertheless recognised as necessary to produce predictive or normative action. It follows that the "global cop" must be accorded adequate discretion to assert a *de facto* authority that is perceived as required *prior* to the findings of law. To pursue this line it is perceived from the point of view of world leadership decision-making that a process that awaits an international consensus about the legality of an action is weak.

The other side is occupied by those liberal pluralists whose function appears to be mainly to subscribe to the ordering principle as basically sound, but to insist that the process of "gentrification" should be more comprehensive. At the edge of this view, there is a persuasive argument that until justice does apply to all, as per the modern convention, it can be no

more than a device of discipline used to assert the ordering principle (a hegemony of liberal capitalism enforced through post-Chicago discipline and a long war against opponents that are renamed "terrorists"). This refers to the relationship between the executive and other branches of authority that comprises our vision of justice in the West.

An illustration of the frontier-like character of justice in nascent international society is provided in several international fora, including the UN Security Council, particularly in voting by the United States and a small coterie of sycophants on resolutions that are of great moment to the assertion of legality or the belief that proper law must apply equally to all.

The U.S. voting record on questions of Palestinian and indigenous rights is illustrative. In the 2010 vote on the resolution "Committee on the Exercise of the Inalienable Rights of the Palestinian People" (see UNGA 2011a, 2010), Australia, Canada, Israel, Japan, Marshall Islands, Micronesia, Nauru, and Palau were the only UN members to vote with the United States. In another 2010 resolution, "Peaceful settlement of the question of Palestine" (see UNGA 2011b, 2010), on resolving the conflict between Israel and Palestine, voting with the United States were Australia, Israel, Marshall Islands, Micronesia, Nauru, and Palau.

In two Resolutions of the General Assembly relevant to people's right to resist oppression, Resolution 1514 (UNGA 1960) which generally recognises right to resist colonialism, and Resolution 42/159 (UNGA 1987) which is generally on measures to prevent International terrorism, the United States and Israel voted against. Paragraph 14 of Resolution 42/159 usefully states that the General assembly

> Considers that nothing in the present resolution could in any way prejudice the right to self-determination, freedom and independence, as derived from the Charter of the United Nations, of peoples forcibly deprived of that right referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial and racist regimes and foreign occupation or other forms of colonial domination, nor, in accordance with the principles of the Charter and in conformity with the abovementioned Declaration, the right of these peoples to struggle to this end and to seek and receive support. (UNGA 1987: para. 14)

The combination of institutions of justice with conventions and practices of high security in the national (and international) environment are currently addressing this dilemma of uneven application, but generally in the direction that accepts the version of sovereign necessity first articulated by Carl Schmitt and now taken on as a necessity of global ordering under U.S. leadership. We are reminded almost daily that realists and neo-realists still have the upper hand, and relative silence over U.S. drone strikes

carried out under the auspices of the CIA or the White House is only the most visible illustration.

In Part IV of this book, Bahdi and Billich take up how the application and interpretation of various international conventions in Africa and Israel/Palestine lead to the conclusion that these are, in significant measure, two sites at which the norms of natural justice in international law are set aside at the discretion of the sovereign authority (or a particular and/or expedient interest in the maintenance of state or regional counter-power). A similar counter-power is evident in the last two chapters in Part V, where we see how the nexus of state and corporate power obtrudes, depending for sustenance on liberal realist ideas of the international system to push back against what Khoury and Whyte refer to as a counter-hegemony. In this regard, and as demonstrated by Donzelot (2008), the practice of crime and justice under what he calls the logic of liberal intelligence remains clear, and we can also refer to Elias (1978), Giddens (1985), and Tilly (1985), amongst others, on this point. What these accounts tell us is that civilities are gentrified "at home" not so much because there is a qualitative difference in the observance of natural justice belonging with cultural beliefs, but as a consequence of the fortifications that maintain the city walls from the din of the "clash of civilizations," (Huntington 1993) or the tectonics of geopolitics with their ruptures and volcanoes of violence (and upon which that gentrification is built and depends).

This observation is updated with some current work that understands the thematic of the frontier not with the post-colonial reference to a lack of development or building of capacity (a theme that is explored in this volume) but with the purposive production of zones of ambiguity (Agamben 1993), brown zones (O'Donnell 1993), free trade zones, or zones of sacrifice (Hedges 2012). The connecting theme among these works is the purposive division of culture and expectation of civil society protocols into relative security or insecurity dependent on the throughput of the hegemonic ordering of capital enterprise.

Two significant questions regarding justice and the discriminating criminalisation that occurs in international society are then: do we, who gain unequal advantage from the current ordering to enjoy relative tranquillity and wealth agree that this advantage requires the relative lawlessness of the frontier; and do we acknowledge that disproportionate enforcement is a consequence of the necessity of unequal access to valued resources? What is often bothersome about liberal idealism in respect to these questions is that it very often fails to provide a satisfactory answer to the contention of necessary and even productive inequalities.

Is there an alternative path? Is it the case that frontiers are civilised or gentrified and that institutions of civil society will ultimately emerge to push back the excesses and great division of wealth and alienation from prosperity that characterises the frontier? On this question too, a library of books have been written from disciplines ranging from futurism to radical

economics (steady state economic theory). Contributors to this volume provide perhaps equal measure of hope and despair that such a process is or can take place and that even as it does so that it will result in anything approaching a standard of justice that would be passable even under, say, the Warren Court.

A SCHEMATIC OF CRIME AND JUSTICE IN INTERNATIONAL SOCIETY

Increasingly, the paradigm of international crime and justice is being used to understand and regulate international society. The move towards criminalisation and legalism on the international stage is evidenced by the growing use of legal discourse to describe and deal with war and conflict, as well as by a recent proliferation of international criminal justice mechanisms, from the ad-hoc tribunals for Rwanda and Yugoslavia to the permanent International Criminal Court in The Hague.

This nascent system of international criminal justice has been developed in piecemeal fashion with limited discussion over the philosophies, aims, and systems of power that shape the discipline of international criminal law and justify the existence and functioning of international criminal justice institutions. The underdeveloped theoretical foundation of international criminal justice is largely due to the ad-hoc advancement of international law and the reactive manner in which international criminal justice institutions have evolved in response to immediate international crises, necessitating a focus on more practical considerations (Charlesworth 2002). Accordingly, international criminal justice institutions have transplanted fundamental concepts of crime and justice (such as bedrock philosophies, rationales for punishment, and theories of crime control) from a domestic level to an international level without adequate consideration of the unique conceptual and structural issues associated with international society. Increasingly we see that domestic conceptions of criminal justice are ill-fitted to explain international crime and theoretically unable to account the myriad of factors that are unique to international criminal justice.

Despite this situation, criminology is yet to fully explore international criminal justice, with most existing research on international crime and justice taking an international law or international relations perspective. These two factors—the lack of criminological research on international justice, and the under-examined philosophical and theoretical foundations of international crime and justice—form the impetus for this volume. This book seeks at least to begin to provide a critical, criminological discussion of the aims, theories, and justifications associated with the international criminal justice paradigm in order to explore the role and rationale of crime and justice in international society.

As editors, we have adopted a critical criminological approach to analyse and explore the production, representation, and role of crime in the emerging international order. Unpacking the role of crime and criminalisation in international society sets in relief the assumptions upon which the international criminal justice system and its component institutions are based. The contributors explore the assumptions upon which international criminal justice is grounded in order to enhance understanding of the role of crime and justice at an international level, and develop a stronger theoretical foundation for the international criminal justice paradigm. This volume examines the aims and principles that underpin and justify international criminal justice institutions, challenging the applicability of traditional or domestic principles such as the Rule of Law for international institutions. Additionally, it re-examines the conception of punishment at an international level. In doing this, the book aims to develop a criminology of international crimes by using criminological approaches and expertise to re-consider the role and rationale of crime and justice in international society. In its totality, the book analyses the role of power and its influence on the dynamics of criminalisation at an international level, facilitating an examination of the geopolitics of international criminal justice. Such an approach to crime is well-developed in domestic criminology; however, this critical approach is yet to be used to explore the relationship between power, crime, and justice in "international society."

Much existing research on international crime and justice takes an international law or international relations perspective. As is well understood, institutions of law and justice develop reflexively amongst cultural, economic, and political institutions from which they draw their character and to which they contribute normativity. The volume takes a look the development of criminal justice instruments in international society as if it existed as a property more or less in the nation-state. It contributes to the analysis and exploration of the production, representation, and role of crime in the emerging international order or international society, but does not ignore the role of power in the production of this legal order. It asks the question: how are actors to be civilised, empowered, enacted, or securitised into the problem of sovereignty that is expressed at the global level?

Of course there is no right way of thinking about it, but institutions of international justice interact with cultural, political, and economic power conditions. Schematically, this may include many dimensions, but it may be useful to keep in mind at least three significant factors:

Right—or jurisdiction or the problem of reach and right—as outlined in Giddens' (1985) *The Nation State and Violence* and Tilly's (1985) "War Making and State Making as Organized Crime":

- Establishing international justice institutions
  - problem of grounding (recognition, jurisdiction, representation)
  - problem of reach, adequacy, capacity
  - problem of fact, interpretation, evidence collection;