

Investigating International Welfare in the Statute of the International Criminal Court

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Abstract

By establishing an international jurisdiction for international criminal justice, punishment has become “international.” Despite numerous legal analyses in various doctrines, human rights studies, and justice studies, there is a lack of quantitative analytical efforts to engage with the working assumptions, cultural commitments, and dominant mind-sets that shape international criminal justice as an illegal field. This article compares international criminal justice punishment with recent modern domestic criminal punishment based on various studies, interviews with key actors, and critical readings of international criminal justice research. The argument makes the distinction between “national” justice and international criminal justice. For example, while national punishment is based on retribution justifications, there is no demand for severe criminal punishment and no attention to prisoner rehabilitation. Instead, it represents a humane and expressive form of justice where the victim is placed at the center stage as a representation of suffering humanity. In addition, there is a significant belief in the transformative effects of international criminal justice that resemble a kind of “internationalized” criminal welfare. As national capacity building and illegal development are inherent in the international criminal justice project, this article demonstrates how the international dimension of punishment power is based on the ethicalization of criminal policy and welfare orientation.

Keywords: Welfare, international criminal court statute, justice, government

INTRODUCTION

Within the framework of punishment and societal knowledge, David Garland’s Culture of Control has become a contemporary classic. providing a comprehensive diagnosis of modern late penalty, it is one of the most important contributions to informed theoretical criminology of changing crime control patterns in modern Western societies [1–5]. The keywords for this text are welfare, International Criminal Court statute, justice, and government.

In contrast to the background of the welfare state of punishment, which showcases projects such as “civilization” and “rationalization” for conscious direction in criminal policy in the 1960s and 1970s, Garland’s punishment of late modernity indicates a clear return to retribution with an increase in “punishment.” Additionally, it appears that a different set of actors in crime control demonstrates a tendency towards limiting the power of the criminal state and, generally, toward punitive power [1–5].

The juxtaposition of the United States and Britain as reflections of late modern societies has drawn criticism for their exceptional punishment compared with other Western democracies. This critique extends to criminological theory both domestically and internationally. One could add to the list of criticisms by noting that Garland’s

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analysis is deeply rooted in the nation-state's perspective on crime, punishment, and society [6]. In fact, criticism of the culture of control largely parallels the "alarming blind spots" in punishment and social science analysis, which only gives importance to the analysis of individuals involved [6, 7].

This article is not concerned with empirical positivist criminology [7]. The culture of control offers a comprehensive analysis of changing criminal justice arrangements, which has positioned Garland's empirical project as a departure point for analytical study, namely to measure the "internationalized" field of criminal justice—that is, the international normative and material system of criminal justice for the pursuit and punishment of individuals for major international crimes: war crimes, crimes against humanity, genocide, and aggression [8–15]. Despite significant criminological interaction with international criminal justice in recent decades [8], there is a critical lack of attention to this field by punishment and societal researchers. Furthermore, and apart from important international law research [9], as a scientific field, international criminal justice has been saturated with legal activists as well as belief-based and policy-based analyses, in which little attention is paid to assumed cultural commitments and dominant mind-sets that shape this field.

This article aims to continue critical attention to the discourses and practices of crime and punishment from national to international levels [16–20]. Using the culture of control as a comparative benchmark, it asks how the field of international criminal justice aligns with Garland's diagnosis of late modern punishment. Based on the author's study of human rights NGOs in international criminal justice [10] and continued academic research and engagement with this field, we find that international criminal justice reflects national and divergent impulses [21]. For example, while international criminal justice is rooted in retributive themes, it does not request severe criminal punishments [22]. Moreover, compared with Garland's analysis of the national field of crime control and policy, there is a notable faith in the transformative and beneficial effects of international criminal justice. Instead of being "tough," it is presented as a form of social and humanistic justice in the guise of an international citizenship project of civilization and development, which, in short, enables a form of international penal welfare [23–26].

An established normative framework that can be used to assess international legal concepts and provide recommendations for reform is lacking in the doctrine of international law [27]. Scholars argue about the adequacy of specific doctrines or rely on general principles that are rarely stated or justified in international law [28]. In this essay, it is claimed that a viable framework should include both institutional welfare and a sensible appreciation of institutional restraints [29]. In short, institutional welfare shows the benefits of the governmental system and some other essential features of international law. It presents issues with numerous reform suggestions for international law that are found in the literature [30–35].

As an example of a problem with current knowledge, the discussion about NATO intervention in Kosovo in 1999 is mentioned. Almost everyone knows that this intervention violates international law [36–40]. Both of these requirements were not met in Kosovo, which is in violation of the UN Charter, which states that military action may only be used in self-defense or with the approval of the UN Security Council [41]. The intervention also likely prevented a genocide and spared thousands of lives. But was it justified? Some interpreters condemned this intervention because it violated international law, but did not address the question of whether international laws that prevent states from preventing genocide are worth defending or not [42]. This concludes that an illegal act can be morally justified [43].

INTERNATIONAL WELFARE FROM THE PERSPECTIVE OF INTERNATIONAL LAW

International welfare requires that international law promotes the welfare of all individuals worldwide, and scholars under the influence of worldwide welfare and similar principles have supported the fundamental restructuring of international law [44]. The variability of the global population's desires, which give rise to a state system (1), is one of the restrictions on international welfare. (2)

Agency costs that create incomplete governments. And (3) collective action problems. These constraints create limitations for welfare-motivated policies and explain some of the broad features of international law that would otherwise be confusing [45]. These characteristics consist of the fundamental place of state sovereignty in international law despite moral constraints. Limitations of individual responsibility in international law, ineffectiveness of multilateral agreements, and the primary legislative focus of international organizations, and the weakness of executive and judicial institutions, and the absence of redistributive commitments in international law [11].

International welfare is a theory according to which all individuals, rather than members of a particular group or community, are considered in social welfare functioning [46]. The welfare of all individuals is considered equally important. Welfare economics generally assumes that an individual's welfare is a function of satisfaction with priorities. The best way to increase an individual's welfare is to give him something he prefers or, I should say, money that he can use to buy what he wants. Philosophers disagree with this viewpoint and present several alternatives. The welfare of an individual increases when his preferences or desires are met, according to some philosophers, but only certain preferences or desires (conscious, undistorted, etc.) count. Others argue that welfare is a function of mental states: an individual's welfare increases when his mental state is consistent with happiness or other positive emotions. Still others believe that welfare raises when an individual obtains specific tangible goods—health, friendship, education—regardless of whether he wants these goods or whether they provide a positive mental state for him [12].

In international law, international welfare may differ slightly. The fundamental cause of this is because practically everyone acknowledges that governments should take into account people's welfare in some capacity. Even if they disagree on other matters, governments that are authoritarian, religious, or liberal all agree that they should be concerned with enhancing the wellbeing of their citizens. International law can only reflect regions of agreement between states because it is founded on their permission, and thus cannot reflect areas of conflict [47]. comprehending welfare in the context of criminal law is thus a fascinating place to start when analyzing and comprehending international law.

There are two acceptable options for a welfare approach. The first perspective is that the goal of international law is to promote the welfares of states, not the people who live in them. The basis of international law is the permission of the parties, and parties will not consent to a change in international law that does not advance their interests [48]. State welfares are only structures based on the welfares and values of the people who live within them. Modern ethical theories agree that moral actors are people, not nations or other groups. To argue based on political ethics, one must appeal to the values and welfares of individuals, not the collective [11].

The second viewpoint holds that international law ought to support democratic institutions or human rights. This perspective opposes welfare in favor of social contract or rights-based alternatives, which is consistent with the premise that people, not groups, count [49]. Although I have reservations about this position, the point of criticism is not to argue against it. Governments should be concerned with the general welfare. The focus of this article is on institutional constraints on reforming international law, for the discussion, these constraints often limit reforms for welfare purposes or for proving human rights. In many cases, without affecting the argument, "welfare" can be replaced with "welfare subject to human rights limitations" [13].

CRIMINAL WELFARE IN TERMS OF CRIMINAL JUSTICE

Criminal welfare is defined by Garland [14] as a structural response to crime that consists of appropriate processes and proportional punishment, inherent to liberal ideologies, which guarantees all the rights of juvenile offenders. Proportionate punishment for the crime and the conditions of the juvenile offender are ensured [50]. Rehabilitation and welfare of the offender are approached from a reformist perspective. This requires that the punishment imposed on the offender focuses on their rehabilitation, just as specialists who work with offenders during their sentence. In summary, criminal

welfare demonstrates that restoration will be more effective if the offender has a positive motivation during their care within the criminal justice system [51]. The logic behind this action is that if the offender can progress within the criminal justice institution, they will be more inclined to continue this behavior after being released back into society [15].

The concept of criminal welfare in practical terms arises from the ideology of welfare in the criminal justice system. The idea of welfare states that policies need to be evaluated regarding their consequences [16]. This evaluation is often done using a practical approach, meaning the approach's usefulness is considered [52]. The logical application of this concept in the criminal justice system dictates that policies related to dealing with criminals must be evaluated in terms of rehabilitating them, meaning that after being released, the criminal does not repeatedly commit offenses, resulting in a safer society. The focus is on the usefulness of punishment, meaning the benefits it brings to community and improving personal conditions [53]. Therefore, criminal welfare focuses on respecting individual rights and maintaining a rehabilitation approach because this approach is considered the most beneficial for both the criminal and society.

Despite the belief in criminology that the power of punishment remains within the nation-state [17], we have witnessed in recent decades an increasing interaction with how crime and punishment are becoming more and more "international," "transnational," and "international" [18]. The institutionalization of criminal Courts and international laws has drawn the attention of criminologists and sociologists to this field [19]. Concerning various issues such as international punishment [20], studies of perpetrators [21, 22, 13], and the needs of victims in response to mass violence [23], a "transitional criminology" [8] with overlapping links to transitional justice studies, genocide studies, and the general doctrine of international criminal justice has been more widely discussed in criminology.

However, from a criminological perspective, it is less often acknowledged how international criminal justice is evolving towards a "international punishment" for the benefit of society [10]. This is a criminal field that transcends national norms and materializes in a world where the concept of nation-state is replaced by the international as the site of crime, punishment, and justice [54]. The introductory part of the International Criminal Court (ICC) recognizes crimes which "threaten the peace, security and well-being of the world" and is "determined to put an end to impunity for the perpetrators of these crimes, particularly the most serious crimes of concern to the international community as a whole, namely genocide, crimes against humanity and war crimes, and thus to contribute to the prevention of such crimes." This topic has received attention from the ICC, the International Criminal Tribunal for the former Yugoslavia, and Rwanda [24].

However, the evolution of international criminal justice towards a "international punishment" for the benefit of society [10] is often overlooked from a criminological perspective. This criminal field transcends national norms and materializes in a world where the concept of nation-state is replaced by the international as the site of crime, punishment, and justice. The ICC recognizes crimes that "threaten the peace, security and well-being of the world" and it is "determined to put an end to impunity for the perpetrators of these crimes, particularly the most serious crimes of concern to the international community as a whole, namely genocide, crimes against humanity and war crimes, and thus to contribute to the prevention of such crimes." It has also received attention from the International Criminal Tribunals for Rwanda and the former Yugoslavia [24].

The field of international criminal justice encompasses legal frameworks in both international and domestic jurisdictions, as well as a multitude of actors and stakeholders involved in pushing and pulling international criminal justice in different directions [25], such as academics, diplomats, practitioners, and non-governmental actors. Despite recent sociological efforts to systematically unpack the dynamics of this field in ways that criminal justice researchers and society are familiar with [19, 26], there remains a need for more quantitative efforts to explain the dynamics of this field. Punishment and scholars become more critical as punitive power in international criminal justice takes on another characteristic by divorcing itself from its connection with the nation-state.

Therefore, this article examines how international criminal justice differs or resembles modern late punishment accompanied by identified indicators in the culture of control as indicative of “carceral welfare.” This is a way to understand internationalized criminal justice.

CONNECTION BETWEEN CRIME AND CRIMINAL JUSTICE IN THE CONTEXT OF INTERNATIONAL WELFARE

As part of the resurgence of punitive sensitivities, Garland observes a change in modern late societies in which a mental shift from “criminal” is associated with changes in the crime perspective: images of “dangerous hunters” present a “culture of fear” [27] that helps increase punitive sensitivities. This image of crime is pervasive [14].

In international criminal justice, a picture of war criminals as “dangerous criminals” is presented: being pursued—especially by the International Criminal Court—certainly stigmatizes the individual in society [28]. Despite the International Criminal Court claim to international jurisdiction, the Court primarily judges violence resulting from prolonged conflicts in Africa, mainly in Sudan, and influences punitive welfare [55]. Another example is Uganda. Consider Joseph Kony from the Lord’s Resistance Army or Bosco Ntaganga (also known as “The Terminator”) from the Democratic Republic of Congo. Both are infamous for their crimes and represent an image of African evil, or warlord savagery [29], the most prominent of which is Al-Bashir, the former president of Sudan who has been under a prominent arrest warrant since 2009 on charges including genocide.

The images of African criminals and dictators accused by the International Criminal Court depict individuals entirely outside the civilized international community and inflict criminal suffering. They have similarities to Nils Christie’s depiction of “suitable enemies” and “dangerous men.” However, instead of “collective anger” toward dangerous criminals, the background sensitivity of international justice is considered as a collective moral [56]. There is a humanitarian motivation to take practical action against the suffering inflicted by others. International criminal justice, which is similar to the justifications of criminal welfare, is justified in the concept of progressive justice. As Sagan observes: “The clear delineation of duality between the victim who is helped by criminal law with a nationalist approach and the criminal who, due to impunity from punishment, necessitates nationalist criminal regulations, defines a determinant aspect of the Court narrative. The criminal and the victimized confirm nationalist social narratives of legitimacy and illegitimacy, affirming justice” [30].

In this way, there is a solid commitment to socially engineered solutions that link the fight against impunity with the strengthening of criminal justice at both national and international levels. The most prominent example of international criminal justice aspirations for civilization and reform is essentially included in the complementary jurisdiction of the International Criminal Court, which states that the ICC is the “last resort.” While its implementation is challenging, challenging dictators and criminal state structures is one of the explicit goals of international criminal justice. However, it may be questioned how international punishment justifications are related to progressive justice and international welfare objectives for actual regime change [57]. At least for members of the Ivorian diaspora, it seemed so after the trial against Laurent Gbagbo, the former president of Côte d’Ivoire, at the International Criminal Court. For the Court, Gbagbo was a victim of a political show trial, and the ICC was not a Western tool for censoring African governments through criminalizing “disapproved” political figures. Over time, the principle of complementarity has also been integrated with development reforms of the rule of law governance, aimed at enhancing capacities for national prosecution and punishment of international crimes. In this way, strengthening national capacities for criminal justice has become a vital element of the international criminal justice project [31]. It also shows how vital missions exist and connections between international criminal justice and other areas of international intervention, such as human rights, development, and liberal state-building, that are not disconnected from international welfare [32].

THE CENTRALITY OF THE VICTIM IN THE DISCOURSE ON JUSTICE IN THE FIELD OF INTERNATIONAL CRIMINAL LAW

Alongside the resurgence of punitive sensitivities, we can refer to the “return of the victim to the center stage of criminal justice policy.” International criminal justice is closely intertwined with the domestic sphere of criminal policy, where the victim plays a much more prominent role. In fact, the victim of international crimes is the persona for whom international criminal justice is enacted [33], and advocates for international justice repeatedly state that the International Criminal Court is truly a Court for victims [34, 35]. This is evident in the rights of victims in the Rome Statute [36]. However, in the expansion of this recent artistic approach, it can be seen that the cultural representation of victims in international criminal Courts is significantly different from late modern Western societies [58]. While victims of crime in northern countries have taken on a personal and individual representation, in which their experience is perceived as common and collective rather than unique and extraordinary [14], the mental image of the victim in international criminal Courts is distant.

However, similar to other humanitarian interventions and human rights, the photos of victims are highly propagandistic and advocate for the fight against impunity in international criminal justice, but international welfare has not been able to establish a strong foothold regarding committed crimes.

Therefore, while the concept of victimhood is critical and commonly cited in support of “justice” both domestically and internationally, the role of the victim at the domestic and international levels is not necessarily the same [59]. While the victim in the former case reminds us of the unpredictability of ordinary crimes, the victim of extraordinary crimes represents an image of human suffering and distant horizons of achieving justice and criminal welfare.

The centrality of victims in international criminal justice and its consequences for defendants demonstrate deviations from criminal justice and put criminal welfare under the spotlight. While victims are cited as a fundamental value of international criminal justice for the International Criminal Court and often about the need to “end impunity,” researchers and practitioners alike point out how international criminal law is at risk of violating the right to a fair trial, including the presumption of innocence and equality of arms [37]. Some even believe that international criminal justice is inevitably illiberal to the extent that it cannot avoid producing “show trials” in which defendants merely play instrumental roles for hidden purposes [38, 39]. Nevertheless, the neglect of non-governmental organizations of defendant’s rights in international criminal law is evident. In The Hague, no human rights NGOs working on International Criminal Court issues specifically focus on defense matters. One may ask how this imbalance in perceptions of justice in international criminal justice and the inclination to respond to complaints [40] plays a role. Human rights NGOs that control state power in national systems are part of the criminal power at the international level. Therefore, questions must be asked about the rational consequences of criminal welfare that have been “left behind” by the nation-state. While international criminal justice requires a division of criminal power and state power, it does not necessarily require a weakening of state power. As it occurred in Uganda [This topic has been discussed in past conversations.], it seems that, on the contrary, the International Criminal Court has always been misused to strengthen state powers and consequently put welfare under the spotlight in the international arena.

This not only demonstrates deeply political situations in which the International Criminal Court intervenes but also shows how the Court is at risk of being instrumentalized by state actors. While the ICC may present itself as a legitimate means of prosecuting brutal dictators in the eyes of outsiders, criticism of the Court is inevitable as long as it relies on cooperation with states. The government in question also needed the support of the Court to carry out its work in northern Uganda. In most cases where the ICC has intervened, conflict continued during the intervention. Therefore, in most cases of the International Criminal Court, instead of opposing state power, the Court has sought to prosecute political opponents of the established governments [60]. In the instance of Uganda, where the government reported the Lord's Resistance Army's predicament to the Court, this was argued. As a

result, the International Criminal Court is being used by state power to delegitimize political opponents and legitimize military interventions, which is dangerous for international welfare [41, 42].

Therefore, the government of Uganda redefined the conflict in the north of the country in terms of international criminal law to use international criminal justice as another tool to defeat its enemies. Following Uganda's previous attempts to label this armed group as "irrational," "religious fundamentalists," or "terrorists," the Court was forced to introduce them as "criminals" under international prosecution [43]. Thus, the relationship between criminal power and the state is redefined through international criminal justice.

INTERNATIONALIZATION OF WELFARE AND THE ROLE OF THE STATUTE IN IT

Garland compares the late modern trends and tendencies of criminal justice with the recent past—the modernization, rationalization, and institutional arrangements of "criminal welfare" that define the field of criminal justice. The use of control culture, which is a comparative analytical exercise, serves as a relative criterion for international criminal justice, distinguishing elements of both that not only share similarities with late modern punishments, but, more important, distinguish criminal welfare and challenge it.

The ideal of international criminal justice reflects a notable belief in the beneficial and transformative effects of international criminal laws and punishments. Like the ideal theories of welfare within the framework of social engineering, they are intrinsic elements of "rationalization" and "civilization" in the overall project of criminal justice. It means the fight against impunity for international crimes and the system of international criminal justice are used as tools for developing criminal justice systems in the international South, perceived as a form of assistance to criminal elements. There are also essential missions, and international criminal justice is increasingly imposed on other international issues. According to the Coalition for the International Criminal Court, there are six global welfare challenges listed in the International Criminal Court's statute [44]:

- Increase access to justice for victims at the national level.
- Address gender inequality and sexual violence.
- Refugee crisis and displacement.
- Famine caused by war.
- Protection of cultural heritage.
- Environmental destruction and land grabbing [35].

This indicates a deep belief in the power of laws and regulations to bring about societal change from the perspective of international criminal justice. As a result, social reforms will be carried out through the fight against impunity.

However, the concept of criminal welfare assumes a national government. Criminal welfare is state welfare [45]. Based on political sociology [46], researchers argue that social welfare and criminal policy are interconnected through the logic of state discipline [47].

While proponents of international criminal justice hail the International Criminal Court as the pinnacle of international legal liberalism, there is reason to question the "balances and controls" about international criminal justice. Unlike criminal justice institutions in established democracies, international criminal justice lacks democratic processes such as parliamentary committees, critical media, and academic reviews. In short, it lacks a democratic and public sphere. Given that institutional power in international criminal justice is more concentrated than its domestic counterparts, this is more significant. While domestic criminal justice consists of a set of governmental institutions, including Courts, correctional services, healthcare services, police, and so on, the International Criminal Court not only judges crimes but also investigates and prosecutes individuals, as well as protects victims and witnesses and provides reparations if necessary. This institution interacts with different societies to achieve criminal welfare [34]. In other words, there are unfavorable conditions for what is referred to

as democratic constraints domestically, leading to the deviation of international criminal justice, including non-liberal elements of criminal power.

CONCLUSION

This article presents an analysis of late modern Western punishment as a starting point for research of international criminal justice sociology.

A number of restrictions apply to such an analysis, nevertheless, as was mentioned in the introduction. For instance, the International Criminal Court and other international Courts have considerable cultural distinctions. Critical interpreters refer to it as a “permanent crisis.” Nonetheless, an evaluation of ordinary and extraordinary punishment is essential (if such a comprehensive analysis is even possible). Instead, the study has been general to depict the emerging trends and tendencies of international punishment, with a set of actors and institutions, discourses and processes, norms and laws constituting the subjects of crime, discipline, and moral order in an international realm. This is not about national-scale penalization or reformation of prisoners or severe criminal penalties. Instead, it is an expression of justice that places the victim—embodiment of suffering humanity—at the center stage. National capacity-building and criminal development in the project of international criminal justice are somewhat similar to the rationalities of criminal welfare, where criminal power is exerted to “civilize” and “rationalize” international territories within defined limits and boundaries. Thus, the international dimension of punitive power is based on the moralization of criminal policy.

However, this narrative has also examined the discourses of national punitive justice as a contemporary field. Nevertheless, much remains to be said about structural conditions, social functions, critically, current backlash. National corrective justice has developed in the shadow of more familiar terms from the lexicon of liberal legal order—the rule of law, human rights, liberal governance, emergence, and development. This is what is referred to as “national punitive cosmopolitanism,” where “the aspiration for an international beyond the core human rights. criminal justice reforms are becoming more politically popular ways of capacity-building.” But instead of criminologists, penologists, and social workers, extraterritorial legal actors, especially those in human rights and the rule of law movement and development, have played a role in expanding liberal legalism worldwide. The control of crimes and the use of punitive power need to be seen to what extent international punitive aspirations depend on structural conditions of the international liberal order. Alongside changes in geopolitics and power balances in the international system, human rights sensitivities and humanitarian reasons may fade away. How international punitive welfare responds to social frictions and increasing structural gaps, and how this can provide welfare within the framework of the International Criminal Court by reducing crimes, is a significant issue. The discussion of international criminal justice is precisely in parallel with international welfare. The issue with the International Criminal Court is that it forces states to give individuals, like prosecutors and judges, a lot of power. Ad hoc tribunals established in response to particular incidents, like those in Yugoslavia and Rwanda, have a better chance of succeeding since the governments that establish them can exempt their citizens from punishment. Therefore, the influence on international criminal justice in discussions of international impact is influenced by placing international welfare under scrutiny, which can be contradict to the foundations of international criminal law and the Rome Statute.

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