Crime, justice and the legitimacy of military power in the international sphere

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Abstract

This article examines how a discourse of crime and justice is beginning to play a significant role in justifying international military operations. It suggests that although the coupling of war with crime and justice is not a new phenomenon, its present manifestations invite careful consideration of the connection between crime and political theory. It starts by reviewing the notion of sovereignty to then look at the history of the criminalisation of war and the emergence of new norms to constraint sovereign states. In this context, it examines the three ways in which military force has recently been authorised: in Iraq; in Libya and through drones in Yemen, Pakistan and Somalia. It argues the contemporary coupling of military technology with notions of crime and justice allows the reiteration of the perpetration of crimes by the powerful and the representation of violence as pertaining to specific dangerous populations in the space of the international. It further suggests that this authorises new architectures of authority, fundamentally based on military power as a source of social power.

Keywords: military intervention, crime, human rights, international criminal justice, sovereignty, drones.

Introduction

While in office, US President George W Bush and UK Prime Minister Tony Blair described the military operations in Afghanistan and Iraq as a way to enforce justice, saying:

"Terrorists will be brought to justice"; "They are guilty and they will face justice"; "Saddam is a murderous tyrant", etc. (Bush, 2001; 2002; Blair, 2001; 2003). By the same token, on May 2, 2011, US President Barak Obama announced Osama bin Laden had been killed during a US military raid in Pakistan, describing the operation as "pursuing justice" (Obama, 2011). The recent intervention in Libya was heralded by the UN as a way to "stop the crimes against humanity committed by Colonel Gaddafi" (UN Resolution 1973/2011). Similar language has been used to define the situation in Syria, with UN officials claiming "crimes against humanity are being committed in Syria" (Borger and Boumont, 2012) and suggesting the international community was contemplating a "punitive strike".

Discourses around military operations increasingly describe armed violence in terms embedded in the discourse of crime and justice, implying the existence of an international criminal justice system. Officially, military force can legitimately be used for self-defence purposes outside the state; typically its use is authorised by a sovereign power to avert external threats, usually another state's army or internal militia groups. But military might is increasingly becoming disentangled from the notion of state defence and legitimated as a tool to enforce international law (Shaw, 2003; Mueller, 2004), particularly international criminal law (ICL). The umbrella term "international criminal justice" has been widely used to refer to a plurality of responses by the international community to mass atrocities and crimes since the early 1990s, culminating in the recent establishment of the International Criminal Court (Boas, 2012). Even so, this cannot be called a system, especially as no cluster of effective supranational institutions exists to *enforce* international criminal law (Damaska, 2008). Nevertheless, the establishment of *ad hoc* courts or public indictments by the Office of the Prosecutor are often paired with military interventions, giving the semblance of an officially recognised justice process.

These practices demand a criminological understanding as they bring crime and justice to the international level; in addition, they touch on issues of crime control, coercion and state violence both in and outside the parameters of punishment (Lazarus, Goold and Goss, 2013). They point to elements of the penal and its reconstitution within the international, through mechanisms that cannot clearly be subsumed to state punishment.

Criminologists have criticised the use of the military to control crime, noting the deleterious effects in respect to democratic principles and the rule of law (Kraska, 2001). Similarly, the "war on terrorism" is criticised for disregarding democratic principles, using fear to construct and fight a racialised other (Huq and Muller, 2008; Mégret, 2002; Delmas-Marty, 2007; Krasmann, 2007; Simon, 2007: 259). Whilst important, these analyses are mostly conducted within what Ulrich Beck calls "methodological nationalism" (Beck, 2002). They are limited to single state contexts and, thus, do not consider that crime and justice enacted through military means across various political and structural spaces may have more complex effects. In what follows, I argue they must be analysed in a broader context as they act at a global level and involve actors who cannot be restricted to the national field.

At the international level, scholars have interpreted current practices of violence as state crimes, stressing the level of destruction and demanding some sort of sanctioning (Green and Ward, 2004; Ruggiero, 2005; 2007; Kramer and Michalowski, 2005). Others say these practices are aimed at the production of global governance, global policing or the re-location of sovereignty (Sparks, 2006; Deflem, 2006; Krasmann, 2007; Findlay, 2008). Scholars of international justice tend to follow the lead of international lawyers, seeing this as a move to making the powerful accountable for actions committed by taking advantage of state resources and institutions, such as the military (Hagan and Greer, 2002: 240; Kramer and Michalowski, 2005; Rothe and Mullins, 2006; Savelsberg, 2010; for early examples, see Glueck, 1944, 1946; Kirchheimer, 1961; Turk, 1969). In this view, international sanctions

provide necessary aid to the powerless in specific situations (Hagan and Rymon Richmond, 2010). Yet such renditions do not consider how these processes may contribute to changing the social and political landscape beyond the notion of the state.

Admittedly, there is division among the ranks of legal experts. Some international lawyers welcome the political use of crime and justice in this context, as they see the advent of a global order in the name of humanity (Slaughter and White, 2002 Teitel, 2011 Schabas, 2012). Others relate these practices to modern forms of colonialism and hegemony (Koskeniemmi, 2012). Still others attempt to make sense of the difficulties of reconciling different normative orders and jurisdictions (Delmas-Marty, 2009) and point to novel assemblages of authority (Sassen, 2008). My analysis falls roughly into the latter category, as I seek to overcome the strict national lenses we usually deploy and reach out to connect the national and the international dimension of security (Aas, 2013) in relation to the ways the external mechanism of defence is often used in conjunction with punitive aims and with reference to crime and justice. To this end, I ask the following questions: What are these practices doing? Are they truly disciplining sovereign states and announcing the advent of a more democratic global society? Are they addressing the crimes of the powerful? How is the notion of crime operating beyond state borders? How is that changing the political landscape?[2]

Over 40 years ago, Matza (1969) highlighted the need to connect the study of crime to the study of political theory. For example, he warns of the ability of the state – or any organised authority – to produce its own legitimation and "appearance of legality, even if it goes to war and massively perpetrates activities it has allegedly banned from the world" (Matza, 1969: 197). The state (called "Leviathan" in his work) has a crucial role in casting a person as a criminal and in, convincing that person of his/her status through the actions of

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[2] Such investigations aim to recover some critical questions on the relationship between crime and politics well elaborated upon by David Matza (1969) and attempt at addressing them in a different geographical and political space.

organized authority (police and courts). Importantly, the criminal is employed as a regular suspect. Police forces are allowed to systematically direct their "attention" towards anyone resembling the criminal and to impose "order" through violence and harassment; at the same time, they act lawfully towards the rest of the population, hence, producing legitimacy. Courts concur to this tremendous display of authority in convincing the subject of its role and in "producing him as a convict", thus the public can be persuaded that violence resides in a specific dangerous population (163). To Matza, this process legitimates the state (the Leviathan) as an authority, and creates that unity of meaning necessary to the Sovereign to maintain order. Organised authority is seen as "doing good" whilst a specific population is produced as strikingly different from the rest and as the unique cause of violence.

Building on Matza's dynamic relation between the casting of the criminal and legitimising the authority, in this article I will trace the effects of the use of military force in conjunction with notion of crime and justice in what are considered the three prevalent modalities of the use of force in the international arena (Alston, 2012). I will argue that the notions of crime and justice within that particular political space that is the international[3] inaugurate a new architecture and rationality of power, one by which the military is increasingly the source of social power. My goal is to provide an additional framework of interpretation for some important recent research on the criminogenic effects of the war in Afghanistan (Braithwaite and Wardak, 2013) and to bring a critical perspective to bear on some admittedly idealistic views on the re-location of criminal justice within the international space. I begin by briefly discussing the notion of sovereignty and its power to use force legitimately and go on to review the process of regulation and criminalisation of war which has partly transformed our understanding of sovereignty. This framework will provide a theoretical and historical background for an analysis of the current exercise of force within

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[3] This understanding of the international as a political space draws on my reading of RBJ Walker (1992). In his work he challenges the view of the sovereign-nation as the only horizon of political imagination, in light of the complexities of contemporary times.

the international sphere. At this point, I turn to three case studies: the military interventions in Iraq; the operations in Libya; and the use of targeted killing of "terrorists" and "suspected terrorists" in the context of the "war on terror". My conclusion is that recent military practices are reproducing the problem of the crimes of the powerful and the designation of dangerous populations at the international level but in a new geography of power.

The emergence of norms to regulate war and violence in the international sphere

The concept of sovereignty usually refers to an ultimate political authority able to use rules and force to control activities within a given territory (Weber, 1946). According to traditional political theory, citizens relinquish part of their freedom to receive protection and live securely; they understand they may be coerced if they violate this pact. The sovereign is the maximum authority; it translates people's ideas and customs into law and makes them effective. Authority is legitimated by the existence of a democratic process which ostensibly enables the population to be in control of the state. Thus, the state is allowed to exercise violence to control and protect the population from inside threats and defend the community from outside enemies. Violence is legitimate when/if it is exercised through the military outside the state, and through the police and the court system inside it. Obviously, these are granted different degree of force and are subjected to different rules and rationalities. Fundamentally, the state is seen as constituted by a sufficiently homogeneous community sharing a basic understanding of what is right or wrong, one which can translate the idea of justice into law without major conflicts. Even if this was never the case – and it is certainly not the case now when many states have resorted to exceptionalism as a mode of governance- in sociology, criminology and law, scholars still refer to sovereignty as the best model able to peacefully mediate the link between authority and its population.

Instead, I would like to suggest that sovereignty should be seen as a specific historical type of authoritative relationship; the answer to questions on the articulation of political life at "a time of tension between the universalist claims of Christianity and Empire and the competing claims arising from participation in a particularistic statist community" (Walker, 1992: 61). Through the idea of the Leviathan, Hobbes reconciled authority and community using universalist claims of Christian theology. Yet, the ethics of the sovereign state are based on absolute exclusion, prioritising citizens over a common humanity (60-63). The life inside the state is shaped on a clear demarcation between the life inside and the life outside, the citizen and the enemy, identity and difference (66); and on similar processes of distinction between the same and the other, the law-abiding citizen and the dangerous one. Thus, the universal ethic the sovereign sometimes projects is constrained by the particular configuration the political community takes as a state.

Here, the military and the criminal justice system play a crucial role, both in providing citizens protection through what Tilly calls a successful racket business (Tilly, 1985) and in shaping the community and the individuals (Foucault, 2003). The criminal justice system works as a mechanism of inclusion and exclusion by which certain people are made into self-governing and productive citizens (Melossi, 2008) while others are selected to represent the dangerous classes. In this framework, the military and criminal justice processes are crucial instruments to produce the specific social and power relationships inside the state and in producing the outside of the state, by defining its borders (Aas, 2013).

Today, however, the idea of sovereignty scarcely represents the real processes of governance (Koskeniemmi, 2011). States are increasingly decoupled from their sovereign capacity by pressures from economic neoliberal processes, the growing importance of transnational political and legal institutions and the movement of people (Brown, 2010). The fact that we keep interpreting political life in relation to sovereignty limits our universalist

claims to the working of the state and its conformation as an exclusive formation. It seems that we are unable to expand our imagination to devise processes of political negotiation able to capture diversity and to regulate the very forces which are aimed at the production of order as much as the exploitative economic powers who increasingly control our lives.

In a traditional sense, there is no single sovereign at a global level. The international sphere has been characterised as an "anarchic society" (Bull, 1966), a plurality of independent and autonomous sovereign powers. Even if the UN has come to be recognised as an international authority, able to decide on the collective use of military force, its structure makes it possible for some states to dictate the agenda. The more powerful countries, namely the permanent members of the UN Security Council (US, Russia, China, UK, France) have veto power to decide matters on the basis of their economic interests and geopolitical concerns rather than for the common good. For this reason, the UN has often been criticised for its lack of democratic structure (Zolo, 2006; Monbiot, 2003), and discourses on crime and justice may produce different effects in this context.

Relatively recently, humanitarian ideals have impacted on our understanding of sovereignty, as a number of Treaties were signed to regulate war. For example, the codification of the Geneva and Hague Conventions in 1864 and 1899 respectively (Savelsberg, 2010: 26; Rothe and Mullins, 2006), established principles for the protection of civilians in war in the name of a common humanity (Cryer, et al, 2008). Later, attempts moved towards either discouraging war or sanctioning it: the League of the Nation and the Brandt Kellog Pact for instance. Tellingly, none of these prevented the two World Wars.

World Wars I and II and the unprecedented destruction they caused reinforced aversion to military conflict and strengthened the determination to criminalise war, inspiring many nations to sign the UN Charter. Member nations agreed to limit the use of force (Art 2,4) to two cases: first, individual or collective self-defence in the case of an armed attack

(Art 51, Chapter VII, UN Charter); second, Security Council authorisation (art 42, Chapter VII, UN Charter). Contextually, the UN aimed at promoting and encouraging respect for human rights and fundamental freedoms for all, without distinction of race, sex, language or religion (Art 1, UN Charter) establishing new rules for the sovereign.[4] The UN was meant to begin a new phase in international relations, one in which the Kantian dream of cosmopolitan peace (Kant, 1970) could be achieved as sovereign states agreed to limit the use of military power and devolve authorisation to a collective organisation. To inaugurate this new world order, the Nuremberg and Tokyo Tribunals were established with the aim of sanctioning war crimes, crimes against peace and crimes against humanity committed during the Second World War.

The tribunals triggered controversy. Some saw them as representing the establishment of the rule of law at the international level, with others describing them as "victor's justice". Prestigious supporters such as Glueck and Kelsen argued for the necessity of establishing justice in view of the utter destruction and inhumanity manifested in WWII (Glueck, 1944; 1946; Kelsen, 1944). Others said the criminalisation of war would culminate in the criminalisation of defeat (Pal, 1955: 3-14). As there was no tradition of common norms and culture in the international community to justify such a project, the attempt to ban war became simply a mechanism to stabilise the status quo, as this was defined by the most powerful states. In effect, some said, banning war could end up banning liberation movements[5] (Pal, 1955). In other words, war was not only the instrument of the sovereign but also a tool used to change power relations.

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[4] The Human Rights Declaration was signed in 1948 under UN auspices. This did not have binding force but was to be followed by numerous binding human rights treaties, including 1966 ICCPR (International Covenant on Civil and Political Rights) and ICESCR (International Convenant on Economic, Social and Cultural Rights). The UN Declaration of Human Rights was not extended to colonies (Travaux Preparatoires).
[5] The UN Declaration on Friendly Relations later declared that "people's right" to self-determination may not be stopped through the use of force.

Among the more vocal critics was Carl Schmitt, German political and legal theorist and former supporter of the Nazi Regime. He astutely stated that the criminalisation of war stemmed from the post-World War II US domination of Europe and the concomitant political and spatial changes in the form of order (Schmitt, 2006; 2003). In his view, the development of universalistic forms of justice implemented in the name of "humanity" was aimed at re-defining the principles of international law that had dominated Europe from the 15th to the 19th centuries, under which, sovereign states were equal entities with the right to wage war. With the development of universal forms of justice, the concept of war would become either a crime or a legal sanction, thereby totally transforming the concept. Although Schmitt's criticism of the US was instrumental in supporting the Nazi regime and delegitimising the Allies and was not entirely correct, as Churchill and Roosevelt cooperated to establish the UN, his point about discriminatory wars and changes in the structure of power is pertinent. The emergence of issues of justice and punishment in relation to war required a change in the form of order, namely, a movement from state-based political communities to an order based on the prominence of the individual. In this perspective, human rights norms can disrupt state formations and legitimise imperialistic projects, as the protection of individuals may legitimate the violation of the principle of non-interference in sovereign affairs.

On a similar note, but with a very different political objective, David Luban (1987) pointed to a fundamental contradiction within the project of international criminal justice: on one side was the wish to protect the individual by banning crimes against humanity, thereby eroding the principle of absolutism of sovereignty; on the other side was the attempt to criminalise war, thereby committing international criminal justice to the principle of sovereignty. This contradiction, he said, precluded the creation of a true international justice. And this contradiction remains relevant today: there is still a fundamental ambiguity about the role of sovereignty, especially as international law is formed through state participation. If

human beings are the objects of protection, the state remains the power which mediates between the individual and the international, even though the notion of absolute exclusion on which it is based translates the language of humanity into an exclusive enterprise. States are willing to participate in international justice ventures only when it matters to their constituencies and their interests.

Despite its limitations and inherent contradictions, a humanitarian ideology has dominated our post WWII world. A vast number of civil society organisations, such as Amnesty International, Oxfam, Medicines Sans Frontiers, along with many UN-based agencies, are playing a crucial role in supporting both the expansion of human rights in non-western countries (Chandler, 2001) and the advent of the first International Criminal Court in 2002. The latter has sought to establish a proper international criminal code so that "the most serious crimes of the international community as a whole must not go unpunished", including *war crimes*, *crimes against humanity*, the crime of *genocide and the crime of aggression*[6]. Commentators have recently explained this as the establishment of some sort of a *jus puniendi* without a sovereign (Ambos, 2013), whereby the international community can enforce its universal norms through reference to a universal jurisdiction. As I argue later, this is problematic. What does it really mean to have a *jus puniendi* without a sovereign? What function does it perform?

The project of international criminal justice made a more recent advance when the General Assembly endorsed the Responsibility to Protect (R2P) in 2005; then, in 2010, an agreement was reached on the inclusion of the *crime of aggression* in the Rome Statute at the Kampala Review Conference[7], thus, potentially even more constraining sovereignty to human rights principles. The notion of R2P is extremely interesting as it establishes a principle by

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[6]The crime of aggression is not yet included in the ICC's area of competence, but it does appear in the Statute. Some scholars include torture and terrorism as crimes of aggression (Cassese, 2008).
[7] This is the first Review Conference of the Rome Statute which took place in Kampala, Uganda from the 31st of May to the 10th of June 2010. The objective was that of discussing and proposing amendments to the Statute as well as taking stock of its impact.

which it is possible to determine whether a sovereign is legitimate on the basis of its practices of protection or not protection. That demonstrates the urgent need to articulate the principle of legitimate authority differently, but as I will show below, it is also quite dangerous.

Critical comments on the working of these new institutions highlight the complexities and the selectivity involved. It is well known that only states willing to sign the Rome Treaty are subjected to the ruling of the Court in the absence of a Security Council authorisation. Accordingly, once again, some states are beyond prosecution while others are easily indicted. Additionally, as it is repeatedly noted international criminal justice relies on state forces to provide assistance with arrests and evidence gathering, while States decide on and participate in criminal justice ventures only on the basis of clear economic or geopolitical interests. Recently, it has also become evident that some less powerful states are using international justice for their own national political games, self referring the country to the court as a way of eliminating political competitors (Osiel, 2014).

Attempts to regulate the international are caught between the need to protect individuals independently from the state of reference, and the constant recourse to sovereignty as the best existing principle of political life because of its ostensible ability to mediate people's will in a democratic way. In the midst of this seemingly impossible puzzle, military forces are increasingly used within and without reference to criminal justice as a way to protect some populations re-articulating the relationship between a community and authority in new ways.

Practices of regulation through the military

Despite the international community's aspiration to limit war and the use of state force in the name of humanity, military forces have increasingly been called on to stop or prevent humanitarian disasters and to counteract the threat of terrorism (Aradau and Van Munster,

2009; Lazarus, Goold and Goss, 2013). At this point, lawyers are debating the possibility of establishing rules for the exercise of military practice beyond the limits of the existing law. For example, the "Kosovo crisis" encouraged scholars to consider humanitarian interventions as cases where force may be used to "maintain peace and security" outside the UN framework (Slaughter, 2003; Cassese, 1999). Meanwhile, the threat of terrorism and the case of Iraq have caused many to support pre-emptive self-defence which does not strictly conform to UN Article 51. Even more recently, the standards of humanitarian law have been called obsolete in the face of terrorism and chemical weapons (Koh, 2013). Such discourses attempt to rationalise current practices of violence within some sort of legal framework, despite their clear violation of it, showing what Derrida calls "the mysticism of law" (Derrida, 1992). Put otherwise, the establishment of authority and of a new legal system stand on the violation of the existing law, so practices which are clearly outside the existing law *de facto* establish new norms and can also be framed as enactment of law.

Matza's argument of a dynamic relationship best illustrates how these processes operate on the ground in the following three modalities of the use of force (Alston, 2012): first, war or the threat of it against dangerous states or regimes; second, humanitarian interventions with the aim of protecting civilians from human rights violations and massive violence; third, direct military action against individuals, and non-state actors authorised in the context of the global conflict against terrorism. In this section, I explain these three rationalities using three case studies: Iraq, Libya, and the targeted killing of suspected terrorists in Pakistan, Yemen and Somalia.

Policing dangerous states: enforcing international law and order

In Iraq in 2003, force was justified as a modality for policing dangerous states. Danger was related to the possession of Weapons of Mass Destruction (WMD) and the

murderous nature of the country's dictator, Saddam Hussein. The Security Council's approval was difficult to obtain, as the French and Russians were opposed to the use of force. In the end, an *ad hoc* coalition was formed by the US, UK and Spain (led by the US); these countries intervened militarily, allegedly to enforce UN Resolution 1441 on WMD and *prevent* a possible threat, notwithstanding the clear violation of international law (Sands, 2005).

In this case, international law was invoked by three powerful countries as a legitimating tool; they portrayed their military forces as "doing good" against a dangerous regime. The so-called preventive policing operations were carried out via bombing and ground force attacks. The primary objective was to remove the dictator, as he was deemed a murderer and considered dangerous internationally. The US-led coalition captured Saddam Hussein; with the aid of a Special Tribunal authorised by the Coalition Provisional Authority and supported by foreign states, they tried and executed him, thus providing some semblance of a justice process, additionally legitimated by the use of Iraqi laws and judges (Alvarez, 2004). They also banned the Baath party; as the ruling group, it must be equally criminal, or so the thinking went.

The previously favoured Sunni population, to which Saddam belonged, was targeted as dangerous; the Sunni city of Fallujah was portrayed as a stronghold of resistance, with possible links to Al Qaeda. During a peaceful demonstration, US Marines killed 15 people; the population responded by killing four American contractors. This prompted the US to launch Operation Phantom Fury, with US troops entering the city and using indiscriminate violence and white phosphorus to destroy it (Human Rights Watch, 2003; RaiNews24, 2005). Many other cities in Sunni Al Anbar province were attacked and suffered similarly heavy civilian losses (Amnesty International, 2004). The identification of a global foe (Saddam) evolved into the depiction of a local population as a dangerous terrorist group. This, in turn,

justified the use of violence. This signification then allowed the selection of a local authority on the basis of local enmities: more specifically, the previously oppressed Shia Muslims and Kurds were supported in their bid to govern after the invasion.

Following Matza, it is possible to see that the casting of Hussain as global foe allowed for military mission in Iraq to be portrayed as "doing good" (Matza, 1969). Yet the operations were violent and brutal especially against that segment of the population seen as closely allied with the tyrant: Sunni (and the Baath party). Hence, lethal force and destruction were legitimated as a way to establish democratic order. Contextually, the groups previously victimised were legitimated to govern by an agglomerate of outside states and agencies. In this fashion, legal distinction between the criminal and the victim became *de facto* political legitimacy.[8] The set up of the Iraqi Special Tribunal assured that the military invasion could be portrayed as a way of bringing about justice.

Humanitarian intervention: stopping human rights violations

As noted, military intervention is increasingly framed as humanitarian intervention, or the use of force to stop crimes against humanity and human rights violations, implicitly – or explicitly – carrying out the punishment in anticipation of the sentence but with the aim of preventing a humanitarian catastrophe. In Libya in February 2011, following the Libyan population's uprising and Gaddafi's military violence against them, a large proportion of the international community felt compelled to intervene. Within a month, UN Resolution 1973 was passed, authorising "all necessary measures" to "protect civilians and civilian populated areas under attack" under the newly established Responsibility to Protect (R2P) mentioned earlier.

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[8] The result of depicting the Sunni population as outcasts can arguably be seen now in Iraq with the emergence of ISIS (Islamic State in Iraq and Syria).

Briefly stated, R2P outlines a *collective responsibility* to assist populations under threat of, or actually experiencing, mass violence in situations where the host state fails to do so (art 138-139). The doctrine was designed to prevent such cases as the genocide in Rwanda or Srebrenica, with the well being of the population the basic principle behind the recognition of authority (Evans and Sahnoun, 2002; Deng, 1996). But it introduces a potentially dangerous element into the international: it legitimises an authority, potentially one with no connection to the local situation, to intervene[9] (Oreford, 2011). This challenges the common notion that political authority has a specific relationship with the community it represents, attesting to the need to re-articulate what constitutes legitimate authority and the place of justice within it (Oreford, 2011).

Military intervention in Libya under R2P was accepted in an historic vote in the UN Security Council (with no veto but several abstentions), including the support of the Arab League and the African States, as the ruthless dictator enjoyed little popularity in the region.[10] In short, Muhammad Al Gaddafi was easily represented as a murderous dictator.

What started as a "no flight zone" operation, endorsed by a wide international coalition with the aim of protecting the population, was soon handed over to NATO forces. This move was contested, as NATO was apparently responsible for re-defining the objective of the mission from one of plain humanitarianism (exemplified by the no flight zone) to a military one seeking regime change (Keeler, 2011). The result of operation Unified Protector was, in fact, the ousting of the previous government by killing the dictator and several members of his family. This raised important questions, as missiles fired by French and US forces may have contributed to the dictator's killing (Al Jazeera, 2011; Cronogue, 2013)[11].

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[9] In the R2P version approved by the General Assembly, the crucial role of the Security Council in authorising force remains unchanged (Chomsky, 2012)

[10] The Syrian case and the failure of the intervention in Libya – still unsettled – seem to have led to different outcomes, recalling the importance of national interests and power politics.

[11] It appears that French warplanes and US drones bombed the Gaddafi convoy while he was fleeing, de facto enabling his capture by the rebels (Al Jazeera, 2011).

Further, reports of fighting on the ground made it clear that the allies supported dubious groups of militias which may have been involved in war crimes and crimes against humanity similar to those perpetrated by the Gaddafi regime; these included the killing of Gaddafi's followers and alleged African mercenaries, the harassment of minorities, imprisonment without trial, extrajudicial killings and armed confrontations (Amnesty, 2013; Report of the Independent Civil Society Fact Finding Mission to Libya, 2012). Analysts raised concerns about the scope of R2P (Welsh, 2011; Bellamy, 2011; Chesterman, 2011) and the possibility of Coalition forces being held directly responsible for crimes committed by local groups (Cronogue, 2013).

The criminal justice intent of the operation was epitomised by the ICC arrest warrants issued for Gaddafi, Saif al-Islam and Abuallah Al-Senussi.[12] These publicly denounced to a global audience the criminal status of the Libyan political elite. Yet Libyan authorities refused to hand over Salif al-Islam to the ICC; instead, they arrested and detained four ICC staff members for more than three weeks for alleged espionage and smuggling documents to the accused. As the case suggests, jurisidictional conflicts may arise when international justice steps in; the results are not always the predicted ones.

Again following Matza's lead, it is possible to see how international military intervention had the effect of enabling various local groups to seize power simply because they were fighting against Gaddafi. In effect, the fight against an international foe concealed a praxis of crime and destruction. Even today, various militias still refuse to cease military engagement and to stop bombing embassies and consulates, demonstrating how the legitimacy assigned to some groups on the basis of their previous status as victims can be misguided, even disastrous. Rather than leading to democratisation, such practices authorise local groups as authorities on the basis of political and military expediency. In a final

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[12]These include the Libyan Head of State, his son and acting Prime Minister, and his former Intelligence Chief.

analysis, military intervention did not lead to the subjection of the Libyan state to international justice institutions. Rather, it led to a violent overturning of the power relations on the ground and a de-facto legitimation of military force as the tool to establish order.

Fighting international terrorists: targeted killing as prevention

In a more covert dimension of the global war against terrorism, unmanned vehicles – familiarly known as drones – are employed to monitor and kill terrorist suspects in countries not necessarily at war with the US, notably Pakistan, Yemen and Somalia, but also elsewhere. This sophisticated technology enables killing at a distance with a precision that was previously unavailable. The goal is to *prevent* imminent attacks on Americans, by eliminating senior Al Qaeda leaders and their associated forces (US DOJ, 2013). To date, the total number of people killed by drone operations allegedly amounts to 2800, of whom 400 are said to be civilians (Woods, 2013). These include: unidentified individuals, described as "foreign fighters" or "other militants" of the Haqqani network, in Pakistan (Landay, 2013); two former British citizens in Somalia, after their passports were revoked by the British Home Office due to allegations of ties with Al Shabaab (Wood and Ross, 2013);[13] and some American citizens, including Anwar Al-Aulaqi, Samir Khan, and Al-Aulaqi's 16-year-old son, Abdulrahman Al-Aulaqi in Yemen in 2011, due to alleged ties with Al Qaeda (Mazzetti, Savage, Shane, 2013).

Some contest the legality of these operations. The US administration (US DOJ, 2013) claims any Al Qaeda leader or associate poses an imminent threat to US citizens and the government has the right to act in self-defence. It also says this is lawful when the nation is either consenting to, or unable or unwilling to deal with the threat. But critics demand limits and regulations, noting that killing could be lawful in some battlefield circumstances, but

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[13] This is a militant group with allegedly links to Al Qaeda.

here, the battlefield covers the whole globe; it could also be lawful in law enforcement cases, in situations where lives need to be saved *immediately*, but this scenario is incompatible with a technology that targets its victims from a distance or in cases where there is no evidence of a specific plot to attack Americans (Alston, 2010; Shah, 2013; Amnesty International Report, 2013; Human Rights Watch, 2013; Shamsi, 2013). Importantly, Krasmann notes how these preventive practices constitute a new security *dispositif* by which international law is being reconstituted in relation to a fundamentally unknown threat (Krasmann, 2012:674). Some commentators see these operations as highly violent, coercive practices that demand engagement insofar as they are enacted within and outside the realm of conventional notions of punishment (Lazarus, Goold and Goss, 2013: 467). Essentially, these practices skilfully combine elements of the penal with military practices as mechanisms of protection, with reference to a possible threat, while using technological devices to make these operations appear riskless, surgical and effective. Technology is a prop used by some sovereign states to maintain the fiction of control (Garland, 1996) outside their borders.

Clearly, the precision of the technology is masquerading as the precision of the results. Precision in killing at a distance depends on intelligence. To some extent, the power to define subjects as *especially dangerous* lies at a high level with the US executive and its agencies, which are also compiling the lists and, in most cases, executing the operations. The CIA and a special unit called JSOC are involved, subject to the scrutiny of the US President alone. Yet they refuse to reveal how they assess suspicion (American Civil Liberties Union, 2013). Questions should rightly be asked about the authority of the US President or of the CIA to define subjects as dangerous and target them wherever they are. Deploying lethal violence in countries not at war with the US is problematic, especially as this violence is not subject to any sort of judicial/democratic authorisation and/or control – not even within the

US. At the same time, considerable thought should be given to the strategies allowing other groups to seize power in this process.

Some reports say intelligence on terrorism is often gathered through uneasy alliances with militia groups who may have an interest in having their personal enemies killed (Shah, 2013). If true, the fight against international terrorism not only enables the US executive to be an authority beyond its borders but also authorises US allies and some local groups to become *de facto* authorities in specific local contexts, allowing them to identify their personal enemies as "global foes". It is not just that situated local populations are clumped together, abstracted from their local and political context (Wall and Monahan, 2011), and produced as dangerous; others are allowed to seize power in the process.

It has recently been revealed that these operations are being carried out with the contribution, logistical or otherwise, of other states, thus making the architecture of authority and accountability even harder to trace. In al-Majalah in Yemen's Abyan province, one strike killed as many as 41 people, including 21 children and 14 women. Initially, the Yemen authorities claimed responsibility, but a subsequent wikileaks cable revealed, the US had launched the bomb from a submarine, and the Yemenite government agreed to cover this up (American Civil Liberties Union, 2012). Former Pakistani President Musharraf allegedly allowed the extrajudicial killing of Pakistani citizens by Americans and is now called to stand trial (Abbasi, 2013).

As these cases demonstrate, the contradictions produced by the project of exporting crime within the international continue to mount. The traditional political principle by which the state is autonomous and in control of its territory or dedicated to protect the life of its citizens is under great pressure. Practices of military intervention, authorised by powerful states and their agents with the aim of protecting their own citizens, interfere and overlap with other practices of protection or defence of weaker states and their local structures. In

effect, the war against terrorism has authorised the erosion of the fundamental rights of some citizens which the sovereign state is traditionally expected to safeguard.

Tracing Matza's dynamic in this context shows us how the casting of the dangerous populations authorises the use of lethal force by different groups despite the underlying praxis of destruction and violence. New assemblages of power now link global and local forces across borders, despite the fact that territories are often reconstituted as states. The ensuing practices of violence are legitimated as "doing good". These practices articulate a new rationality of power at the global level, with an enormous impact on our understanding of what constitutes authority within the international.

Weaving the threads together: crime and justice in the global arena

Using Matza's suggestion to trace the relationship of crime and politics allows us to take a critical look at manifestations of military power. Matza says that in the national context, "the Leviathan" (the state) signals the criminal as emblematic of a dangerous population which must be punished. Problematically, this is operationalised as violence against that population as a way to bring about law and order, with the violence both denied and legitimated by the production of criminality to a collective audience. As the case studies show, military interventions are similarly framed as mechanisms of protection from either murderous and dangerous regimes or subjects. In this case, however, they signal and produce criminals in front of a global audience, not a national one.

That being said, the dynamic works slightly differently in the latter context: as there is no Leviathan in the international, the production of global foes establishes new authorities, while their representation as extremely threatening authorises violent reaction/coercion. Thus, the traditional understanding of what crime actually is becomes inverted. In the international,

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the ability to exercise coercion and violence allows some groups to be presented to the global audience as legitimate, while solidifying a specific understanding of criminality.

As there is no sovereign in the international field, the criminal or the dangerous population is selected by a plurality of actors, often led by the most powerful states at the international level, and in very general terms (i.e. areas to be targeted), in relation to their own specific geopolitical and economic interests and following targeted media and NGOs campaigns. Selection always also involves some local groups, who are authorised to take the lead in a specific context, frequently on the basis of local rivalries on the ground. These newly chosen local authorities contribute to either the selection of the outcasts or the enactment of violent practices, or both. In any case, the result is their projection to the global audience as legitimate authorities.

The selection of these powerful new groups follows various rationalities, at times originating at a global level, at times originating locally. Many different coalitions have intervened militarily in the case studies discussed here, and even if often led by the US, these have included states, international organisations (NATO, UN, African Union or Arab League) and a complex mix of US-based agencies (the President, CIA, and JSOC). These groups connect their global power to various groups encouraged to take power locally. In Iraq, for example, Shia and Kurds became trustworthy allies against Sunnis (i.e., the previous regime) on the basis of the principle of previous victimhood. In Libya, various rebel groups were supported, largely because they were already fighting against the regime, and, thus, their local aims coincided with the international community's objectives. Finally, in the drone campaign, certain subjects were placed in a position of authority because of their strategic position at a local level or their ability to portray themselves as trustworthy.

In such examples, we see a new architecture of power being built on the projection of global criminality into the international sphere, one which rests on the use of military power

and political convenience (Braithwaite and Wardak, 2013). But the ensuing structures cannot be reduced to the reconstruction of either sovereign states or empire. It is important to note that not only global powers initiate these ventures: in some cases, local groups call global powers to intervene, as in Mali[14]. Rather than producing democratisation through the establishment of sovereign states, the identification of crime within the international legitimates the establishing of order through violent means by military forces acting as policing agents on the ground, as highlighted by Matza. Implicitly, this establishes a new rationale on which authority is founded: the exercise of military force. Far from seeing the arrival of a cosmopolitan, peaceful world, we are assisting at the resurgence of military power as a source of social power.

Many feel that the establishment of international criminal justice will bring about a more democratic world, sanctioning the more powerful who act violently against the weak. Yet if international justice mirrors the national context, these processes will inevitably stigmatise those local powerful actors named as global foes because of their violent practices and make them outcasts in the global community. Additionally, as those selected are usually representative of wider groups and of collectively shared systems of thoughts, the violence against them will disenfranchise their sympathisers. In the eyes of the global audience, they will all be seen as equally dangerous.

Instead of working towards a common world, then, these practices are creating new lines of demarcation, opening up the ways for new conflicts to emerge, within and without state borders. In the process, the intervening actors will be legitimated as new authorities, but as we have seen, this does not preclude them from committing crimes. International criminal justice will not necessarily democratise the international; it will simply substitute some powerful groups for others.

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[14] In 2013 the Mali Government plead for help against the Islamists in the North. The French Government, supported by the UN, militarily intervened and managed to end the Tuareg Rebellion and disperse the Islamist, allowing the Government to re-gain control of the country.

Further, crime, even at the international level, is usually the product of complex material and social processes. Subjects may be responsible for taking part in atrocities but responsibility cannot solely be understood in terms of crime and punishment. Seeing things through the lens of crime means translating complex circumstances into a simple right or wrong, and the wrong has to be imputed to an individual's action. The issue of individual responsibility on which criminal law is based fails to account for the fact that responsibility is always constituted by and embedded in wider social, historical and ideological processes. This must be at least equally true at the international level, where the ideologies which support mass killings are often shared systems of thoughts. If the project of making individuals responsible for their deeds is understandable, and possibly inevitable, international punitive practices should attempt to include these considerations. The will to stop and sanction massacres should go beyond reproducing the ritual of justice we have already devised at the national level. Instead, we should attempt to see it as a way to come to terms with tragedy and death in ways that acknowledge both the individual and the social component, and possibly devise new rituals.

What should be made of this political project of transplanting crime and justice into the international sphere? If invoking crime is a way of arguing about the "meaning of ideas such as justice, authority, community, order, and the priority we should accord each of them, and how we should settle conflicts between them" (Loader, and Sparks, 2010: 123), this problematically justifies coercion and the distinction between safe and unsafe populations (Loader and Sparks, 2010). Critical criminologists have long pointed out that legal scholars should go beyond evaluating law in relation to its general validity: they must look at the concrete human experiences it helps to produce (Baratta, 1982). Crime is never a good substitute for politics, despite its legitimating function. Invoking crime may have a didactic expressivist function, signalling new norms, or a political strategic one, aiming to discipline

criminal states (Schabas, 2011), but unfortunately it does not necessarily design a good way to deal with complex social and political situations. It mostly calls for an authority, sometimes *any* authority endowed with enough force to exercise violence as *jus puniendi*. In the absence of strict limits, its enactment is problematically left to military forces acting as policing agents who are legitimated to use unchecked violence against populations defined as unsafe (Matza, 1969). Thus, if the call to sanction crime in the international sphere does represent an increasingly popular desire/intention to produce global governance and stop the crimes of the powerful (Findlay, 2008; Teitel, 2011), its articulation within the international can activate any *de facto* authority willing to intervene, opening up the space, unfortunately, for brute force to be recognised as the only means of achieving justice and social power.

It appears clear that crime is linked to politics (Matza, 1969), making it an appealing instrument to mobilise people, yet its operationalisation divides the population in that one group is identified as dangerous and cast as at the originator of violence; this group will eventually take up the role of the outcast in the political community, and those who act against it will appear as legitimate authorities even if they use brutality and violence.[15]

In sum, criminal justice is not a good way to define political communities. The power to punish is a political act, but one whose effects should not be disentangled from its justification (Baratta, 1982; Lacey, 1999; Pavarini, 2008; Zaffaroni, 2009). If crime and the criminal justice apparatus are represented as good ways to establish justice, promising equality and fairness to people, critical criminologists know their exercise, in fact, produces the opposite: inequality, exclusion and suffering.

Concluding remarks

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[15] Matza, building on Becker, suggests casting some populations as criminal causes them to see themselves as outsiders (Becker, 1963; Matza, 1969). Individuals start to believe their role as outcasts and, thus, help to legitimate a specific view of order. They are stigmatised as different, so they perceive themselves to be different.

The above cases show how the international efforts to stop human rights violations and produce a cosmopolitan world have opened the space for both the criminalisation of some acts of war and the emergence of elements of penalty within the international. This process has not produced democratisation of states, but rather a new rationality and geography of power and authority. Some groups are identified as extremely dangerous and are killed or ostracised, while others are seen as legitimate as long as they are involved in the process of coercing those perceived as criminal. Following the dynamic relationship between crime and politics in the international allows us to see how the relocation of crime is increasingly legitimating the use of military violence as a source of social power inside and outside state borders, and within and without reference to law.

If critical criminologists were to ask themselves – yet again – whether they should be "the defenders of order or guardians of human rights" (Schwendinger and Schwendinger, 1975), the answer is not so straightforward. The criminalisation of war has not brought about more humane forms of social organisations but, paradoxically, has increased support of violence as a way to intervene in complex social and political circumstances. If it is imperative to scrutinise the criminogenic social conditions not defined as criminal by the state and its institutions, it is also crucial that we consider how the process by which we address these situations or sanction them may contribute to the reproduction of these very conditions.

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